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Trial Strategy: Calling the Defendant as Your First Witness in a Divorce Case

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At the outset of trial, plaintiff's counsel should make the strategic decision as to whether or not to call the opposing party as the first witness. There are several reasons to employ this tactic.

First, calling the defendant as the first witness may be used to distress and surprise the witness and opposing counsel when they least expect it. At the start of the trial, the defendant will likely not be on guard or ready to testify, as he/she may expect to have the luxury of watching the plaintiff's entire case before having to endure the stress of testifying in the matter. Calling the defendant as your first witness may catch him/her off guard and might put that witness under tremendous stress and anxiety. Since matrimonial trials in New Jersey are

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often fragmented (rather than with continuous trial time), jolting the opposing party on the first day of trial may serve to jump start settlement negotiations that have stalled along the way. Since the opposing party-witness has already gotten a shock on the first day of trial and will have to return to the stand later in trial to resume testimony, he/she may have a new motivation to settle in order to avoid reliving the uncomfortable experience. This may give you a new opportunity to settle the case before the next trial date.

Second, calling the opposing party as your first witness gives you the opportunity to impeach him/her and portray the witness in a poor light when the judge's attention is fresh right at the start of the trial. This is particularly helpful if you have damaged the witness in a pre-trial deposition. You can use portions of the deposition transcript to highlight the witness's scandalous or otherwise corrupt or improper conduct. For example, if you have obtained evidence regarding a witness's dissipation of marital assets or the incurring of unreasonable debt, leading off with that information can set the theme for the entire trial. This can be a very effective strategy in the appropriate case.

Third, calling the opposing party as your first witness can be used to obtain

necessary information that has not been provided during the discovery process. In *Lerman v. Lerman*, 245 N.J. Super. 312 (Ch. Div. 1990), Judge Kraft noted that it is not only acceptable, but often necessary to call the adverse party in order to fully explore the financial aspects of the matter. The court stated:

The present state of matrimonial law in New Jersey calls for the parties to disclose complete and considerable information regarding income and assets in order to either arrive at an equitable property settlement agreement which eventually becomes part of the judgment of divorce, or to place each party in a position where they have full knowledge of the other's financial posture for trial purposes. It is frequently the case that the proof behind such disclosures are clandestine, or at least covert, and not easily evoked, even through discovery.

In the *Lerman* matter, the plaintiff-wife called the defendant-husband as her witness. The court declared the husband to be a hostile witness, thereby allowing the wife's attorney to cross-examine the husband. The husband's attorney ob-

jected, asserting that by calling the husband as her witness, the wife was bound by the husband's testimony. The judge, who was very experienced in matrimonial matters, rendered the following decision regarding "hostile" witnesses: "This Court takes judicial notice of the fact that, if litigants in a matrimonial action are at a point whereby the only means of reaching a final judgment is in having a judge determine the issues, there is no doubt the parties are antagonistic. There is no need to wait and see if the adverse party is an uncooperative witness when called. Rather, it would better serve judicial economy to declare the witness hostile at the commencement of the questioning and proceed accordingly."

The court's final conclusion was:

Under such circumstances, in a divorce action a court may declare the adverse party witness "hostile per se" and may grant the other party the "broad latitude" to examine the witness through the use of cross-examination, and, as such, will not be

bound by such testimony.

Since the opposing party is deemed "hostile per se," you can ask leading questions as if you are cross-examining the witness, even though it is technically direct examination. Moreover, unlike typical direct examination, you will not be bound by the testimony.

Finally, if you intend to call the opposing party as your first witness, take advantage of the subpoenas described in Court Rule 1:9-1 and 1:9-2. In a matrimonial case, testimony of a party who could be subpoenaed may be compelled by a Notice In Lieu of Subpoena served upon the party's attorney, demanding that the attorney produce the client at trial. R. 1:9-1. The notice must be served in accordance with R. 1:5-2 at least five days before trial. This Notice In Lieu of Subpoena will assure that the opposing party is present on the first day of trial so that you may call them as a witness.

Pursuant to R. 1:9-2, a Notice In Lieu of Subpoena may require the production of books, papers, documents, electronically stored information or other objects designated therein. Therefore, if through-

out the lengthy divorce case the opposing party has not complied with discovery or has not provided specific documents that have been repeatedly requested, it would be wise to serve the Notice In Lieu of Subpoena pursuant to R. 1:9-2, itemizing the documents to be produced at trial. Then, when you call the opposing witness as the first witness in the case, you can show the witness the Notice In Lieu of Subpoena and go through each and every request, on the record, so that if that witness has not produced the documents yet again, he/she will be doing so in front of a judge at the beginning of a trial. This will likely infuriate a trial judge, especially since the matter was likely pending for more than a year before the trial actually started. This will burn an indelible image in the mind of the judge and the judge may form negative opinions of the opposing party that may carry throughout the entire trial.

Calling the defendant as your first witness can be a useful strategy, but it is not for every case. When you are preparing for trial, recall the points I described in this article to help determine if this is the right strategy for your case. ■