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Chair's Column

The Trial Binder: A Systemic Approach to Preparing for Court

By Megan S. Murray

The theme of this edition of *New Jersey Family Lawyer* is "trial." The majority of family law cases should settle for a variety of reasons, including the uncertainty involved with trial, the emotional toll extended litigation can take, and the significant time and expense involved with extended litigation. Notwithstanding, settlement is not the appropriate outcome in every case, especially if settling would result in a wildly inequitable outcome to one party. When litigation is necessary, practitioners must have the skills necessary to effectively try a case from start to finish.

Trials require a detailed and systematic preparation technique, without which, the attorney is left floundering in the courtroom. Any attorney who has tried a case through to conclusion understands the significant amount of time and energy required to ensure a finely tuned and easily understandable presentation of the case. As a rule of thumb, trial preparation requires one hour of out-of-court preparation for every hour in the courtroom. Given the hours involved, finding a methodology to most efficiently organize the case for presentation to the factfinder is crucial.

Early on in my family law career, I learned a key to perfecting this detailed and systematic approach to trial preparation: the trial binder. The use of trial binders provides a multitude of benefits to the attorney trying the case, the client and the court. As further addressed below, trial binders assist in multiple areas of trial preparation, including but not limited to: 1) helping the attorney to thoroughly learn the file; 2) helping the attorney to organize the presentation of testimony and the introduction of exhibits; 3) helping to streamline trial presentation with easy-to-access exhibits; and 4) providing a practical methodology for tracking exhibits which are marked or admitted into evidence for use and reference in ongoing testimony and trial summations.

The following are suggested procedures for organizing and using trial binders. I have also highlighted the benefits trial binders provide practitioners in leading their case through trial:

1. **Preparing trial binders should start with a thorough review of the entire file.** Especially in complex cases, by the time trial approaches, the size of the file can be overwhelming. Certain cases can be litigated for many months, if not years, before the case is scheduled for trial, and certain smaller issues and relevant supporting documentation could be forgotten along the way.

   In connection with the preparation of trial binders, attorneys should make it their responsibility to review the entire file from top to bottom. Care should be taken to ensure that each subfolder in the file is labeled appropriately. If a document in a file cannot be identified or is not recollected, time should be taken to place the document in the context of the case for relevance and potential evidential value as to issues in dispute. Consolidate the file by removing unnecessary duplicates and/or drafts of documents.

   Reviewing the entire file will help practitioners identify issues in dispute that may have otherwise been forgotten. During the course of litigation, a case can become so largely focused on the biggest issue in dispute that other, minor issues get lost. If these issues are not presented at trial and decided, attorneys face the potential for extended post-judgment litigation, which will result in more fees and frustration to the client.

2. **Trial binders should be limited to exhibits relevant to issues in dispute.** One of the primary benefits to trial binders is their ability to allow practitioners to clearly organize their case. Trial binders should not be used to provide the adversary and the court with a duplicate copy of the entire file. Documents that are not relevant to a specific issue in dispute should be excluded from the trial binder. When selecting what to include and what to exclude from the binder, practitioners should continuously refer to their ongoing list of issues in dispute and ask: 1) Is this document relevant to an issue in dispute? 2) Is this document evidential? 3) What testimony or other means will be necessary to have this document admitted into evidence?

   Not only should practitioners be thinking of whether a document in the file should be included in the binder as relevant material with regard to an issue in dispute, they need to decide whether additional documents are needed from the client, a witness or another source to effectively present an issue in dispute. A list should be made of any documents that need to be obtained and added to the binder well in advance of trial to allow time to obtain and then to organize the documents in the binder prior to trial.

3. **Trial binders should be organized in order of the practitioner's presentation of the case.** Once an attorney has a firm grasp on each issue in dispute and has gathered all documents from the file relevant to these issues, the time comes to decide on the best presentation of the case. Certain attorneys prefer to present the case as a chronological story line. This can lead to an inability to clearly identify, segregate and present the specific issues in dispute. A better approach may be to present the judge with brief and relevant background information through testimony of the witness, followed by testimony designed to address each issue in dispute. Significant topic areas, such as custody, alimony and equitable distribution should be further sub-divided into narrower issues within each category. For example, equitable distribution should separately and clearly address each asset in dispute. In deciding the order in which to present issues, attorneys should also be mindful not to bury the lead. Present the more complex issues first (when the witness and the court may be more alert) and leave minor items for later.

4. **Have binders prepared in a way to best assist counsel, witnesses and the court.** Practitioners should prepare an outline that combines testimony of the relevant witness with the presentation of the exhibits. Preferably, a separate, tabbed binder should be prepared for each witness. When the witness takes the stand, presenting counsel, the witness, the adversary and the court should each have a copy of the binder, such that everyone can easily follow along with the presentation of exhibits. Having copies of all exhibits organized and pre-marked in a binder momentously cuts down on trial time and allows for a significantly more coherent and streamlined presentation. The attorney's outline for testimony of the witness should highlight where a specific exhibit will be introduced and include the relevant exhibit tab label for ease of reference.

The front of each binder should include an index of each exhibit in the binder. During testimony, counsel (or a second chair if possible) can note when an exhibit has been identified and/or admitted into evidence. The court clerk should be provided with a copy of each exhibit list so that they may also make note of which exhibits are identified or admitted. If possible, counsel should coordinate with the clerk at the end of each day of trial to confirm that counsel's list matches the list maintained by the clerk.

The takeaway: Trial binders provide numerous benefits to counsel in connection with the preparation and presentation of a case for trial. They nearly guarantee a more streamlined and effective presentation of the case. To that end, they also show a respect for the court, its time and the need for efficient adjudication of cases. ■

**Portions of this column originally appeared in the 2020 Hot Tips in Family Law materials.*

Inside this issue

Executive Editor's Column

Trial Matters: Prepare, Prepare, Prepare

By Ronald G. Lieberman

There is never too much preparation. Preparation should start at your first meeting with your client. Counsel should constantly be assessing the possibility of a case going to trial from the outset. Counsel should be identifying the risk of the case going to trial and repeatedly identify the possible issues for trial, the level of conflict, the nature of the clients or spouses and the history of the case. Trial planning and preparation are not very different from good file planning and management. If you are well prepared, you will perform better and there will be less stress during the trial and this may affect the results of the trial. Judges and opposing counsel can tell if a lawyer is not properly prepared. Know the other lawyer and know the judge. Use technology to research other cases they have been involved in.

Know the Facts

Determine the facts that matter, the facts that are necessary to prove your case. The facts will change and grow throughout the case. Most family law cases revolve around the facts. If you cannot prove your facts, you will lose. Do not get distracted by the legal issues involved in the case. The facts are more important. You cannot even get to the legal issues in the case if you do not successfully prove the facts in your favor and minimize the impact of those facts that will hurt you. Your job is to collect the facts, clarify the facts, organize the facts and understand the facts.

Know the Law

Know the applicable statutory legislation, the most relevant case law, and the rules of evidence. Determine who has the burden of proof on each issue. Read the Court Rules, particularly if you do not do trials frequently.

Be Organized

The need to be organized applies to every aspect of the case. Organize the documents, the witnesses, the pleadings. Make lists. Use a checklist for trial. At the end of this article is a sample checklist for trial based on how far in advance the trial is.

Schedule regular trial planning meetings with the staff working on the trial. Every trial planning meeting should produce a written "to do" list with the task, the person assigned the task and a completion date.

The Theory of Your Case

The theory of the case is the story of your client's case. Developing and understanding the theory of the case is the most important part of preparation. It is the statement of what you intend to prove at trial. If you don't know where you are going you can't get there. You need to start working on the theory of the case from the outset. The theory of the case may change as more information becomes available and as the facts change. Counsel should be constantly evaluating the merits of the case, the likelihood of success and the range of possible outcomes. What are your client's goals and objectives? What result does your client want? How do you get your client there? The theory of the case is a framework to hang the evidence on and a structure for the evidence. Draft everything for use at the trial with one purpose to support the theory of your case.

Read the Pleadings

Read all the pleadings. The pleadings are what the trial judge will read first. The certifications filed on the motions are the evidence. Make sure that the pleadings are complete and that your pleadings support your theory of the case. Make sure that your pleadings contain a claim for every specific thing you are claiming at trial. If not, consider seeking leave to amend the pleadings before trial. Check the opposing side's pleadings. It is surprising how often pleadings are no longer consistent with the case the other side is trying to prove at trial. Either the other side is not permitted to pursue a claim that has not been pleaded or they must seek leave to amend the pleadings. Consider that an adjournment may be required if this issue is only raised at the outset of the trial.

Statement of Agreed Facts

A statement of agreed facts is a list or summary of evidence of the trial that the parties have agreed upon. There is no need to prove these facts at trial. It is a statement of evidence. A statement of agreed facts can shorten a trial considerably and consider using it. Take the initiative in drafting a detailed statement of agreed facts for the trial. If the other side cannot agree to some of the facts, they can delete these facts. Whether or not the opposing party agrees, the effort is worth the time as it can be used in your opening and closing trial statement.

Offers to Settle

You should make an offer to settle in all cases. You should never go to trial without a valid and outstanding offer to settle. Do not make an offer to settle to please your client: the purpose of the offer is to try to settle the case. Make sure the terms of the offer are clear and straightforward. Be aware of the jurisdiction of the court; do not offer things that are outside of the jurisdiction of the court to order. Consider making the terms of the offer severable. Consider not including any specific amount with respect to costs and simply state that if costs are not agreed upon, costs will be determined by the trial judge. Ensure the offer to settle complies with the rules of the court. Use the court form and have your client sign the offer. Keep all offers to settle organized and accessible.

Disclosure

All disclosure issues should have been completed before trial. But this disclosure does not always happen. If you do not have complete disclosure at trial, make sure this is clearly stated as part of your theory of the case and that the judge knows this. Be organized about the disclosure, about seeking it, collecting it, saving it, storing it and presenting it at trial. Prepare a brief with the documents you will be relying on at trial. Serve and file it at trial. Prepare an extra copy for the judge. If the disclosure is complicated use more than one brief. You may need to retain separate copies to file as exhibits. Be clear with respect to the admissibility of your documents: either by consent or admissible pursuant to the rules of evidence. Be clear about the information in the documents that you will be relying upon.

Request for Admissions

The party serving the request for admissions is asking the other side to admit or deny specific facts in a formal way or to admit the authenticity of specific documents. It is a valuable tool that is frequently underused in family law litigation. A request for admissions can be done at any time but the earlier the better. A request for admissions can narrow the issues in dispute, focus the case and be helpful for trial preparation. If a respondent fails to respond, the respondent is deemed to have admitted the fact or the authenticity of the specific document. Care should be taken in drafting a request to admit. The best approach is to put only one fact in each sentence. Admitted facts can then be listed in a statement of agreed facts. The obvious facts are facts such as important dates, marital history, addresses, job histories, incomes, litigation history, in short anything that is an uncontroverted fact. When facts are admitted or not denied, counsel may wish to consider whether a summary judgment motion may be appropriate.

Opening Trial Statement

Make an oral opening trial statement, but it is also worthwhile to provide a written trial opening statement. Do not underestimate the value of the trial judge having in writing your statement of the issues in dispute and your version of how those issues should be resolved. If you are the respondent, consider the advantage of making your opening statement at the outset and not waiting until the start of your own case.

A written opening trial statement should contain at least the following:

- The theory of the case;
- A statement of the essential facts (including those background facts set out in the statement of agreed facts);
- The facts the party intends to prove;
- The witnesses who will prove it;
- The legal issue raised; and
- The orders the party is seeking to enforce.

Memorandum of Argument

Consider preparing a memorandum of argument on the legal issues that you wish to raise or those you suspect will be at issue during the trial. For example, admissibility of children's statements, admissibility of

business records, police records, medical reports, or expert reports. At the very least, prepare a statement of authorities regarding those legal issues you anticipate will arise during the trial.

Brief of Authorities

Prepare a brief of authorities including the cases you intend to rely upon at trial. Highlight the passages that you will be referring to at trial. Where you anticipate an evidentiary objection, prepare a brief of the cases you intend to rely on.

Direct Examination of Witnesses

Your case will be won or lost in direct examination of your witnesses. It is essential that your own witnesses are prepared and organized and that you are prepared and organized. Prepare a witness plan for each witness. Despite the best preparation, the evidence will not unfold as you planned and you need to be able to change direction in the middle of the trial. If time and money permit, take your client through a sample examination and cross-examination. Make sure that your client knows everything about the case, how to address the judge, how to behave in court, how to dress and how to behave with the opposing side and opposing counsel.

Make sure your witnesses are properly served with the necessary summons and witness fees, as needed. The earlier you interview your potential witnesses the better as you may learn information that will impact on the theory of your case. You may even learn that you should not be going to trial at all. Interview the witnesses directly, even if only by telephone. Obtain a written statement from the witnesses. This will help in your trial preparation, in preparing the theory of your case and will preserve the integrity of the evidence. If time and money permit, take your key witnesses through a sample examination in chief and cross-examination.

Tell all your witnesses, especially your professional witnesses, the theory of your case, how their evidence fits into the theory and how their evidence is intended to support your theory of the case. Give your witnesses a copy of your opening trial statement and a tip sheet. Ask all of your witnesses if there is any question they are afraid of being asked.

Expert Witnesses

Ensure that you meet the rules of court for serving, filing and the contents of expert reports. Ensure the opposing side has met the timelines also. Prepare separate report briefs for each expert. Obtain the expert's curriculum vitae and obtain an updated version before the trial. Read it as part of your trial preparation for your witness plan for the expert. You would be surprised as to how often the witness's expertise is something other than what they have been called upon to give evidence about. For your own experts confirm the details of the retainer in writing. Do not put anything in the retainer letter that you would not be comfortable with the judge seeing. Ask your own experts what questions they want to be asked, what questions they are afraid of being asked and, if appropriate, what questions to ask the other side's experts. Refresh yourself with the law regarding the admissibility of expert evidence before the trial. Specify the areas of expertise that you wish to qualify your expert in.

Cross-examination

Determine your cross-examination strategy in advance. Cross-examine in ways that support your theory of the case. If you do not have a theory of your case, how can you ensure the evidence you produce in chief and cross will support your case? Do not go on a fishing expedition with any witness but especially with an expert witness. Do a witness plan for each witness but especially with any expert witness. Determine the strategy and chronology of your questions. There are many methods of cross-examination. Some counsel simply write out the general areas of the cross-examination and set out the propositions they want to establish. Some counsel only set out the answers they hope to get. Some counsel write out the questions and answers. The danger with this method is that counsel can become too wedded to their script and do not have the flexibility to go after unanticipated helpful lines of questioning that may present themselves. If you are more comfortable drafting your questions in advance, do so, but you should still set out the answers you want to get from the witness.

Be organized. If you are going to refer to any documents, put them aside in the order that you plan on using them and use post-it notes on them for quick identification if you lose track. The flow of your cross-examination

and your control over the witness is lost when you are shuffling through papers looking for documents you need. To say nothing of the message to the judge that you are not prepared and not organized. Do not ask open-ended questions. With rare exceptions you should only ask leading questions so that you control the witness. An open-ended question allows the witness to tell their story on their terms rather than on your terms. Make the witness answer your question. Wait for the witness to finish their answer and then repeat your question. Ask short, simple declarative questions that use plain language. Each question should contain only one new fact and gets the witness used to answering "yes" so that you are framing the evidence, not the witness. Lengthy or complicated questions gives the witness different ways to answer and can later be open to interpretation. Begin and end your cross-examination with your best points. Order the questions so the witness does not get too comfortable or confident. Do not go chronologically or in exactly the same order as the narrative in the examination in chief. Jump around so the witness does not know what is coming next. Don't be afraid to ask no questions.

If you can't advance your theory of the case or attack your opponent's theory in some way, ask nothing. It also sends a message to the judge that the witness has not damaged your theory of the case. This also applies to witnesses that have hurt you but you have no chance of scoring any points. All that your cross-examination will do is give the witness an opportunity to repeat the same damaging evidence, come up with new damaging testimony, distract from your theory of the case and try the patience of the judge.

Don't let objections from opposing counsel rattle you. Often counsel will withdraw a question if there is an objection. If the question was important enough for you to ask, defend it. Do not be condescending, sarcastic or overly aggressive with a witness. Stay calm, polite, courteous and professional at all times. Being tough does not mean being mean. If you obtain an admission, move on do not ask more questions as often the witness will then clarify or explain the answer away. If you obtain an unfavorable answer, move on quickly to your next question. Do not show that your case has been hurt.

At the end of cross-examination do not lean over and ask your client whether they have any other questions they want you to ask. This weakens your cross-examination and usually, the question your client wants asked is irrelevant or an inane question.

Closing Argument

Similar to your opening statement, you will make an oral closing statement but it is also worthwhile to prepare a written closing statement along with a draft order. The closing statement should include the following:

- A statement of the essential facts that were proven (and only those that were proven);
- The legal issues raised; and
- The orders the party is seeking

The closing argument is developed as the trial unfolds but it will have to be revised and refined at the end of the trial. In closing argument, answer the judge's questions directly and do not say that you will deal with the question later. This distracts the judge who will be thinking about when the answer is coming instead of focusing on your argument. If the judge is asking the question, it is important to the judge, and you are learning something about your case.

Try to focus on the issues raised by the judge and then deal with the ones you wish to present. You are making the judge's job easier. Make sure that you give the judge everything that is needed in order for the trial to proceed smoothly and effectively. Ask if the trial judge wishes to have copies of the opening and closing statements, draft order or any other document in electronic format. Use lists or charts to summarize evidence, for example for the presentation of child support history or income history particularly where there is a retroactive claim for support. Use of a chart to present each issue and each side's position such as details of a parenting plan can be very helpful to the judge.

Conclusion

There is no substitute for trial experience. Every time you try a case, you become a better lawyer and learn something important from the trial. You will make mistakes. If you cannot get trial experience through your own practice, connect with a senior lawyer and offer to help for free or at a reduced rate. Watch as many trials as you can. You can learn as much from watching bad counsel as from watching good counsel. ■

TRIAL PREPARATION TIMELINE

100-60 Days Before Trial:

- Complete remaining discovery.
- Review depositions, interrogatories, and case documents/evidence.
- Pursue unresponsive discovery and gather new information.
- Research potential areas of expert testimony.
- Meet with experts and clients.
- Identify required expert testimony and prepare for opposing expert contentions.
- Analyze key trial issues and file motions *in limine*.
- Secure trial witnesses.
- Plan for demonstrative evidence, charts, and graphs.
- Confirm witness availability.
- Depose problematic witnesses if necessary.
- Finalize discovery (documents, trial witnesses, experts).
- Conduct client meetings.

60-45 Days Before Trial:

- Prepare for pretrial conferences.
- Issue subpoenas to all trial witnesses.
- Serve specific notices for witness appearances and document production.
- Compile a trial notebook.
- Develop witness presentation strategies.
- Create key witness examination outlines and determine necessary exhibits.

45-30 Days Before Trial:

- Outline elements of proof for each factor (alimony, child custody, equitable distribution, counsel fees).
- Conduct client meetings.
- Provide clients with prior discovery responses and deposition transcripts.
- Prepare witness deposition testimony for trial.
- Ready non-expert witnesses.
- Issue "On Call" letters to witnesses and maintain scheduling.
- Serve all witness subpoenas.
- Prepare a Trial Brief.

30-Final Days:

- Draft opening statement and closing argument.
- Address legal issues on each factor (alimony, child custody, equitable distribution, counsel fees).
- Attempt settlement one last time.
- Finalize witness examinations and coordinate exhibits with examinations.
- Anticipate legal challenges to questions.

Editor-in-Chief's Column

Navigating the Complexities of Family Law Trials

By Charles F. Vuotto, Jr.

It is with great pleasure that I welcome you to the latest issue of *New Jersey Family Lawyer*. As Editor-in-Chief, I am honored to present a diverse collection of articles focusing on an important aspect of family law practice – trial procedures.

In today's complex world, family law trials and hearings often involve an intricate balancing act of rules, strategies, storytelling skills, showmanship, and emotional challenges, all with the goal of preserving the best interest of all parties involved with special emphasis on the children. Our aim with this issue is to provide invaluable insights, guidance, and expertise to navigate family law trials and hearings effectively, ensuring that justice is upheld, and families find resolution.

To kick-start this edition, we have a thought-provoking column by our Family Law Section Chair, Megan S. Murray. Her column begins with noting the importance of settlement but the understanding that not all cases can be settled. For those cases that need to be tried, the column explores the importance and use of trial binders. Trial binders (1) help the attorney learn the file; (2) organize testimony and exhibits; (3) streamline trial preparation; and (4) provide a methodology to track the presentation of evidence.

Our Executive Editor, Ron Lieberman, has written an article entitled "Trial Matters: Prepare, Prepare, Prepare." It stresses the importance of preparation: knowing the facts, knowing the law, being organized, developing your theory of your case and knowing your pleadings. The article points out the value of a statement of agreed facts, offers of settlement and requests for admissions in advance of trial. The article sets forth the importance of preparing an opening statement, specific memorandum(s) of law for important legal issues, and brief(s) of legal authorities to be relied upon at the time of trial. Lieberman concludes with advice on direct and cross-examination, expert witness testimony and, finally, the significance of a closing argument.

Next, we have a detailed feature article by Matheu D. Nunn and Robert A. Epstein entitled "Effective Cross Examination and Use of Evidence Rules in Family Law Cases." This article starts by explaining that cross-examination is both an art and a science. In their first point, Nunn and Epstein explain it is important to develop a theme and to build discovery around that theme. They explore the use of cross-examination in developing your case and impeaching a witness using style and substance. This requires knowledge of your witness and what you need to prove to develop your client's case. The next section of the article explores numerous cross-examination techniques and provides useful examples (showing the witness their own words, start strong/end strong, visual aids, and repeating important themes/testimony). Finally, Nunn and Epstein provide an excellent overview of the critical rules of evidence that arise in family law cases.

Mark Sobel and Barry Sobel have co-authored an article entitled "Cross-Examination Techniques for Financial Experts." This insightful article begins by noting the subjectivity inherent in business valuations and the value of highlighting the inexact science of such expert reports when cross-examining the financial expert. Sobel and Sobel break down the essential components of an expert valuation report and the significance of understanding those areas that are most susceptible to effective cross-examination. Next, the article explores the value of preparation and use of pretrial discovery to maximize the impact of cross-examination at trial including but not limited to the deposition of said expert. The article concludes with practical insight on the best ways to illustrate to the trier of fact the weaknesses in the adversary expert's opinion and buttress your client's position.

Our next article by Alexandra Freed,. entitled "Can Summary Judgment Procedure Resolve Family Law-Related Issues?" addresses the under-used tool of Motions for Summary Judgment. As an overview, Freed discusses the use of summary judgment in family law and dispels the notion that summary judgment is reserved for civil matters. The first portion of the article is devoted to what

summary judgment is, the key cases that support its application and the procedure for the application. Freed concludes with summaries of family law cases where summary judgment has been sought and then chancery division cases where summary judgment has been applied.

Gregory Grossman and Tamira Olivera have authored an article entitled "10 Tips for Your First Family Law Trial." As the title suggests, the article sets forth 10 practical suggestions for the first-time family law litigator. The tips are: (1) know your file; (2) be prepared; (3) what is the burden and who has it; (4) importance of your trial brief; (5) how to get your exhibits in as evidence; (6) use of trial subpoenas; (7) identify the possible evidential objections; (8) what to ask at the pretrial conference; (9) listen to your gut and to other family law practitioners that you trust; and (10) a rundown of what to remember as you start your first trial day (i.e. ask to approach your witness, stand when speaking, etc.). This piece is tailored for the younger attorneys who have tried few if any trials/hearings.

I would like to extend my heartfelt gratitude to our talented contributors whose expertise and dedication have made this issue possible. Their collective wisdom and passion for family law have enriched our publication and will undoubtedly provide you, our cherished readers, with the knowledge and understanding you need.

As we embark on the journey through the intricacies of trial procedures and practice in family law, I encourage you to approach each article with an open mind and willingness to learn. Our hope is that this issue demystifies the trial process and reduces normal anxieties associated with same; and that it will be kept close by for future reference. ■

Effective Cross-Examination and Use of Evidence Rules in Family Law Cases

By Matheu D. Nunn and Robert A. Epstein

Cross-examination can be described as both an art *and* a science. It is typically the part of a litigated matter that advocates enjoy the most—perhaps the closest thing we as lawyers get to the "*You can't handle the truth*"[1] moments we see on television or in the movies. The excitement. The thrills. Perhaps even a "smoking gun"-type answer where you walk back to counsel table trying to hide your smile and sense of fulfillment. Ultimately, how are we as family law practitioners expected to get to the truth of a matter and persuade a trial court judge in our client's favor without this very fundamental trial skill? The last time we checked, each litigant always enters a courtroom with their own version of the truth. Developing and arriving at the version you need a judge to find in a trial decision is, as a result, a product of strategy, preparation, and performance.

Indeed, it is very difficult to conduct a great, *case-defining* cross-examination of a witness. It is far easier and within our reasonable grasp as lawyers to conduct a very good, *effective* cross-examination—it merely requires knowledge and preparation. Preparation in this context, however, requires an understanding of the *Rules of Evidence*; an encyclopedic knowledge of the "file;" and at least a modicum of knowledge about psychology. Although attorneys should know every *Rule of Evidence*, the purpose of this article is to highlight key evidence rules for use at trial, as well as helpful cross-examination tips.

I. Creating a Theme and Using Discovery as the Building Block of an Effective Cross-Examination

Before we get to the *Rules of Evidence*, it is important that we discuss fundamental cross-examination principles. Indeed, without those principles, the *Rules of Evidence* are nothing more than a chronological series of rules that may help you *admit* certain evidence at trial if you know how to properly apply them. This is, of course, only half the battle (and not the "fun" half).

As Francis L. Wellman opined in *The Art of Cross-Examination*, "There is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success . . . Success in the art, as someone has said, comes more often to the happy possessor of a genius for it."[2] The authors of this article learned and developed their cross-examination skills by observing others (the "what to do and not do" approach), reading trial and cross-examination literature, creating their own voice and style to their examinations, knowing the law, knowing the case, and more. Every lawyer who performs a cross-examination has their own style. Every lawyer walks out of a cross-examination thinking it went well in some respects and could have been better in others. We are lawyers after all, and a mix of confidence and second-guessing is in our DNA. Where, ultimately, do the building blocks of an effective cross-examination begin? The simple answer: long before the cross-examination ever occurs.

i. Developing a Theme and Determining a Desired Outcome for Your Case and for Each Witness

From the outset of your case, think about what you are trying to prove and what result you want from the trial judge. By way of examples:

- How do I prove that my client should be awarded primary physical custody?
- How do I persuade the judge that my client should receive a certain amount of alimony for a specified length of time?
- What information do I need to procure my client's desired equitable distribution of the subject business in dispute?

In a similar vein, all cases—including non-jury, Family Part cases—should have a "theme" (or a story you wish to tell) during cross-examination. You can break the themes down into sections or "chapters"[3] to assist the court. For example, you may have a section or "theme" during cross-examination about the other party's inability to co-parent. You may have a theme about the witness's poor decision-making vis-à-vis medical care. You should think about that theme from the consultation,

through summation, and develop each of your sections or "chapters" with those themes in mind.

Also think about what you are trying to procure from each adverse witness – are you trying to procure information from the witness to develop your factual narrative? Are you trying to discredit the witness? Are you cross-examining the witness with some other goal in mind? Each witness has its own purpose, whether testifying for your client or for the adverse party. Using adverse witnesses to develop your overall case theme and achieve your desired outcome is a critical component of case strategy that you should consider at all times during your matter.

With a desired outcome and narrative theme, the next step in developing your cross-examination is to procure discovery that will aid you in achieving your desired result.

ii. Discovery

Preparing an effective cross-examination actually starts with the discovery process. The goal of cross-examination is to elicit responses you want (i.e., the "right" answer) to, as indicated above, craft your client's narrative and persuade of its truth. Use discovery to build the foundations for the "right" answer you will seek to elicit on cross-examination. Obtain the information you need for your trial and closing summation—and use that information on cross-examination to get you *to that summation*.

Use of traditional and non-traditional discovery techniques will help you achieve your goal if you know how to properly procure and apply the information received from the opposing party. The techniques can be as general as issuing written discovery in the form of Interrogatories[4] and a Request for Documents,[5] or be as specific as ensuring you have the right forensic accountant to investigate your case and help determine/obtain the information necessary to craft your examination (and perhaps even aid in preparing that examination).

During a divorce most family law practitioners issue a similar form of traditional discovery requests, which include Interrogatories and a Request for Documents. There may be several types of interrogatories to address finances, custody and parenting time, employability, lifestyle, and more. The requests typically cast a very broad net to ensure no stone goes unturned. Some cases may merit the issuance of a Request for Admissions or the taking of a deposition to pinpoint an opposing litigant's point of view.

What if your case involves a business and the opposing party is the business owner where a valuation of the marital business interest is required for equitable distribution? Starting with discovery may be somewhat daunting because the information you may need to build your cross-examination could fall beyond what is covered by the more traditional Interrogatories and Request for Documents. Once you receive the information, you may also not be able to interpret the information like your expert can. Working with your forensic accountant to develop a list of tailored document and information requests, decipher the information received, prepare the valuation, understand the targeted points for inquiry, and, ultimately, working with the expert to prepare specific questions to ask the opposing party/opposing expert/other relevant third parties could make or break an outcome on issues involving the value of the marital interest in a business, an opposing party/business owner's cash flow and more. These steps can be both valuable during an information-gathering or cross-examination type deposition, or at a future cross-examination at trial.

Upon collecting the responses and (often inevitably) addressing deficiencies, it is then incumbent upon the attorney to use the information to start building that future cross-examination. In fact, it is better to start envisioning what the future examination may look like rather than waiting until the eve of trial to start formulating your approach. Moreover, you are not just using the information/documentation procured to build your cross-examination, but also to procure more information to support your theme. You are developing your set of facts and your examination roadmap one building block at a time.

II. Developing Your Cross-Examination Style to Tell Your Client's Story and Impeach Testimony and Discredit a Witness

i. Style *and* Substance

We all have our own examination style in litigation. We also all have our own examination skill sets. No one style or skill set can be used as a blanket in questioning a witness. Each examination depends, in part, on the witness, the theme, the discovery, the adversary, the judge and so much more. No one cross-examination, as a result, can mimic the next if it is done correctly.

You are not just merely confronting the witness. You are, more importantly, examining the witness. Too many practitioners relish only in the former and undervalue the latter. Cross-examination is not merely an opportunity

for you to impeach the witness's testimony and discredit the witness in the eyes of the jurist presiding over your case. In fact, the best cross-examiners use the "credibility" component of cross-examination as an ancillary (though important) benefit. Rather, cross-examination is the opportunity for you to *tell your client's story* through the words of an adverse party, expert or third-party witness. When you can achieve that end—and master it (which no one will ever do since we will all be "practicing" until we decide to step away) —there is nothing more powerful or persuasive in a trial. This relates to the next principle.

ii. Know Your Witness from the Inside/Out

Proper and effective cross-examination of a witness also requires you to know the witness to the extent possible since a large part of any cross-examination, or any examination for that matter, is psychology. Who is your witness? What is their personality? How will they react to a more tough-minded/confrontational approach compared to a friendlier approach? What is the person's backstory? What will resonate with the witness?

It may sound obvious, or even pointless, but pinpointing what resonates with your witness may (if not "should") aid you in getting to the testimony you want to hear. For instance, what are your witness's interests and hobbies – innocuous questions to comfort the witness may make them more willing to talk. A more serious approach may require you to know or understand a difficult time the witness had in their life. In some ways it is not entirely unlike the adverse witness lying on the therapy couch and you as the therapist knowing what opening you can use to get the patient to start talking.

As expected, most adverse witnesses already dislike the attorney conducting the cross-examination. There is immediate skepticism, frustration, perhaps even anger toward the opposing attorney. If the witness sees or hears that you as the cross-examiner understand them and perhaps can even relate on a human level, which, quite frankly, is not always easy as an attorney, you may more easily get the witness to say what you want said. The old "you catch more flies with honey" expression comes to mind. Of course, as discussed below, it is imperative that once you get the witness talking on cross that you know what the person is actually going to say – cross-examiners generally do not like surprises so framing your questions and how you get your witness to settle in also requires precision.

On the flip side, many adverse witnesses are like a block of ice that simply cannot be thawed with charm or a transparent attempt at bonding. In those cases, adjusting to the tenor of the witness from the outset and simply diving right into a sharp examination may be your only effective approach.

iii. What are Your Client's Goals with the Cross-Examination of an Adverse Party or Witness?

As difficult as it may be to comprehend on occasion, we also must consider what our client wants out of a particular cross-examination. What story do they want told? What facts do they want you to elicit to build on what was addressed during your direct examination? What tone do they want you to take? Will they only accept a tough-minded approach, or will they accept you attempting to coax answers from the witness by being more "friend than foe"? To that end, does your client even care if your examination results in the right story being told, or do they simply want you to hold the witness's feet to the fire? What makes the cross-examination a success or worthwhile in the client's eyes?

At the most basic level, for example, how we cross-examine a party witness as compared to a third-party or expert is vastly different. While the cross-examination of a party is far more expansive based on the entirety of facts and circumstances involved, the cross-examination of a third-party or witness is commonly a far more focused endeavor.

As a threshold matter, for example, a third-party witness customarily has a more limited knowledge of the case as compared to a party witness and is presented by opposing counsel with a specific focus in mind. A few examples include, but are not limited to: (i) a third-party parent of the opposing spouse may testify as to whether money provided to purchase the marital home was provided only to the opposing spouse or to both parties, and/or whether the money was a loan or gift; (ii) a third-party cohabitant testifying as to the nature of their relationship with the payee spouse; (iii) a third-party business partner of the opposing spouse testifying regarding details of the business subject to equitable distribution; and (iv) a third-party co-respondent testifying about monies spent on them by the opposing spouse in connection with a dissipation claim. When the authors of this article draft a third-party cross-examination, we use our more expansive knowledge of the case to devalue/discredit the witness's direct testimony. Cross-examination here may also be ripe to explore the witness's poten-

tial bias, especially if they are a family member, friend or significant other of the opposing party.

The authors of this article also find that cross-examining an expert not only requires a detailed knowledge of the entire case and the expert's area of claimed expertise, but also a knowledge and understanding of how to effectively question the expert and ideally discredit the subject report. For instance, many of us have read forensic accounting business valuations and cash flow reports, but how many of us really understand their contents and conclusions to the point that we know how to develop a cross-examination calling said contents, methodologies and conclusions into question. Doing so is not just about having your own expert (if you have one) develop for you your cross-examination, but being able to – while on your feet – address the expert's answers, adjust to answers that may differ from what you expect, and ultimately elicit testimony that will persuade the trial judge to favor your own expert's report over that of the opposing party.

iv. Credibility – Impeach the Testimony, Discredit the Witness

It is well-known that trial courts, especially in the Family Part, are owed substantial deference in their findings when supported by "adequate, substantial, credible evidence."[6] Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility."[7] "Because a trial court hears the case, sees and observes the witnesses, [and] hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses."[8]

There is no question that credibility is at the heart of almost every family law matter. Establishing and impeaching credibility, as a result, is a critical component of any litigation, especially in this practice where so much of what we do is dependent on "he said/she said" allegations. There are five generally acceptable modes of attack upon the credibility of witness: prior inconsistent statements; partiality (or bias); defective character, subject to N.J.R.E. 608; defective capacity of witness to observe, remember, or recount matters; and proof by others that material facts are otherwise than as testified to by witness under attack.[9] There is perhaps no better example of how the impeachment of testimony and discrediting of a witness can result in success than during hearing for a Final Restraining Order where the practitioner has minimal access to the traditional discovery tools referenced above.

If you have studied trial practice or attended any CLE courses regarding cross-examination, you know that most attorneys agree: "*do not ask a question on cross-examination to which you do not know the answer.*" While that is true 99% of the time, we would add: "do not ask a question on cross-examination to which you do not know the answer*(s)*." Meaning, you may face a difficult witness who could theoretically provide one of two different answers based on the evidence in the case (and either answer is helpful for you). You should know how to deal with *both* answers—and have impeachment[10] material prepared and ready regardless of which path the witness takes.

To that end, Wellman sagely comments about how we as litigators should not only be prepared with how to address *both* answers, but also how to physically react when the answer is not necessarily as we anticipated:

> A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face how the answer hurt, you may lose your case on that one point alone . . . With the really experienced trial lawyer, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?"[11]

On a related point, do not ask a question on cross-examination for which you do not have impeachment material. As noted above, while we want the adverse witness to tell your client's story, we also want answers that we know are coming, perhaps only in "yes" or "no" form as needed, and not a narrative that allows the witness to escape or do an end-run around what our ultimate goal is in both cross-examining the witness and in the case as a whole. Moreover, consider the value of your intended line of questions designed to impeach. In other words, what answer are you trying to discredit? Is there real value in doing so, what issue does it help you prove, is it just designed to make the witness look bad and, by focusing on such impeachment is the trial judge going to side with your desired view of the opposing witness? You want to elicit your desired response. You want to effectuate your desired impeachment. Most importantly, you want to persuade the trial judge of in support of your theme.

v. Effective Cross-Examination Techniques and Examples

a. Showing a Witness Their Own Words.

You are probably not one of the 1% (or less) of individuals with eidetic memories. Accordingly, you should prepare an outline — one that corresponds with your developed themes. Your outline should have the locations, in the record, of deposition testimony you may use to impeach an "incorrect" answer.[12] After all, it is during the deposition when you often asked more open-ended questions now opening the door to the very impeachment you seek to effectuate. And by this we mean: exhibit numbers, as well as page and line numbers, which you will provide to the court, the court reporter, and the witness. This same principle applies to Certifications you may use, emails, and any other material you may use to impeach. Rest assured, if you confront witnesses three or four times with conflicting testimony from a transcript (or Certification) inclusive of the page, line, and place in the record — before the witnesses even have a moment to catch their breath — you may break their will very early on in the cross-examination.

Consider the famous philosophical saying, "*Tell me and I will forget; show me and I may remember; involve me and I will understand*."[13] If you confront a witness with "didn't you say . . .[,]" the witness may very well say "I don't know." This may be a proverbial "death knell" for an entire line of questioning. If you show witnesses their words, they are more likely to remember. But if you convince the witnesses that you are working with them, you will have them testifying on your behalf in no time. Take this real-world excerpt from a cross-examination by one of the authors (Nunn) regarding PTSD, disability, collateral information, and forensic guidelines, all of which stemmed from a payor's attempt to avoid alimony:

- He told you that his accountant made an error that caused him to take a lot of money out of savings to give to the IRS? [*Yes.*]
- And you've opined that financial stress is a contributing factor to his disability; correct? [*Contributing factor, yes.*]
- Did you speak to his accountant? [*Nope.*]
- Did you speak to anyone from the IRS? [*No.*]
- Did you review any records that would corroborate that statement about the accountant making a mistake? [*I did not.*]
- **Because they weren't provided to you; correct?** [*Correct.*]
- He's worried about his financial situation? [*Correct.*]
- Worried about losing his home? [*Correct.*]
- Over the course of your four reports, you did not review a single financial record of Mr. _____? [*Correct.*]
- **Because none were provided to you; correct?** [*Correct.*]

. . . .

- Where in your report do you have any details about the traumatic events he allegedly suffered? [*He asked me not to put it in, but I will state – say that he was abused at summer camp.*]
- According to him? [*According to him.*]
- He's the ***lone source*** of that information? [*Absolutely.*]
- You reviewed his therapists' notes? [*Yes.*]
- Nothing about this abuse in those notes? [*Correct.*]

. . . .

- You're familiar with the "Specialty Guidelines for Forensic Psychology"? [*I am.*]
- Do you believe you followed them? [*I believe that I asked for the records that were available. I believe that, you know, I had sufficient sources of information on which to base my opinion. So, yes.*]
- Look at guideline 8.03 on Page 14. [*Ok.*]
- You believe you complied with this guideline? [*I would have liked to have seen the relevant discovery. That's the one part that I wish I had seen.*][14]
- Can you also turn to guideline 9.02? [*Yep.*]
- Would you agree with me that that guideline is titled "Use of Multiple Sources of Information"? [*Yes.*]
- It reads: "Forensic practitioners ordinarily avoid relying solely on one source of data and corroborate important data whenever feasible," and then there are citations; correct? [*And I would argue that I utilized batteries of psychological and neuropsychological tests in order to meet that standard.*]
- And Mr. _____is the one who took the tests? [*Correct.*]
  And gave you the information in the interviews. [*Yes.*]
- And you didn't speak to anyone else? [*Correct.*]
- **And so your opinion was limited by what was provided to you?** [*Yes.*]

Through this examination the witness believed the examiner was "helping" him or giving him a "way out." In other words, the examiner "involved" the witness in the examination as opposed to just impeaching him with documents. The consistent theme of the examination was

to lay blame at the feet of the litigant who was less than candid with his expert.

b. Primacy and Recency.

Next, remember the principles of primacy and recency (or "start strong" and "end strong"). These principles are based on, respectively, the well-accepted notion that factfinders, even judges, will believe the credible or impactful testimony they hear first and remember that which they hear last. You can use this to your advantage in the "middle" of your cross-examination to throw the witness off the "scent" of your overall theme. It is essential in planning cross-examination to ensure a strong opening and stronger finish (hopefully, with your best point or points). Take this real-world excerpt from a cross-examination by one of the authors (Nunn) in which the expert's report included a recommendation that the child (age 3 at the time of trial), who had been living *pendente lite* with both parents, should be in the mother's primary custody because it was important to form the primary attachment with his mother through ***age 4***:

- Now, the third phase of the formation of attachments is referred to as the attachment phase? [*Yes.*]
- This occurs between seven months and two years? [*Yes.*]
- And the final phase is referred to as the Goal Corrected Partnership Phase? [*All right.*]
- **And this from the ages of 2 to 4?15 [*All right. Correct.*]**
- We then moved on, for approximately an hour-and-a-half, to other subjects. When the witness appeared tired, I circled back:
- You cited to an article from Lamb and Kelly? [*Kelly and Lamb, yes.*]
- Now can you go to page 44 of your report? [*Yes.*]
- I asked you earlier about the final attachment phase, correct? [*You did.*]
- And you agreed with me that this occurs between . . . [*Two and four.*]
- Two and four? [*Mm-hmm.*]

The witness was then confronted with the first page of the (updated) article from Kelly and Lamb.

- Would you agree this is the article that you are referring to in the referenced at Page 44 of your report? [*Yes.*]
- Turn to page 4. What are the last words at the bottom of page? [*Goal Corrected Partnerships.*]
- Can you turn the page? Can you read the first sentence? ["*Finally, the Goal of Corrected Partnerships phase occurs between 24 and 36 months of age.*"]
- **Not 48 months of age, correct? [*Thirty-six months, correct.*]**
- **So, you mis-cited this article, correct? [*I did.*]**
- So, we've already established that _____is attached to both parents, correct? [*Yes.*]
- He's thriving? [*That's my opinion, yes.*]
- Spending equal time with the parents? [*Hour-wise, yes.*]
- And in both your report and your testimony today, you misrepresented, the final phase is from 24 months to 4 years, correct? [*I am I stand corrected, correct.*]
- **You believe Ms. _____ is the Primary attachment figure, correct? [*No.*]**
- **No? [*She said she was. I didn't say she was.*]**

As you can see, the expert, who previously identified the mother as the primary attachment figure in his report, changed his opinion on the stand. The examiner did not further impeach the witness with the report—the damage was done, which leads to another tip: *do not ask one question too many.*[16]

c. Visual Aids

Another useful approach is to use visual aids when appropriate. This may not only provide a level of comfort for the opposing witness, but also simplify matters for a trial judge who is attempting to make sense of it all. The authors of this article find the use of visual aids to be of particular potential value when examining an expert witness. In the below example taken from the testimony of an opposing custody expert, one author (Epstein) challenged the expert's ultimate conclusions, especially as to the recommended parenting time schedule, by presenting the expert with a blank piece of paper and marker and asking her to draw a calendar of her recommended schedule. At the conclusion of this line of questioning – which the author designed to coincide with the end of that day's testimony – the expert discredited her own primary custody and parenting time recommendation:

- You make a [ ] recommendation that mom should be designated as the parent of primary residence, correct? [*Yes*].
- And that the children should really only be at one residence, right? [*Yes*].
- I want you to do me a favor . . . I want you to write out for me just so I have an understanding of what your recommended parenting time schedule is. [Attorney approaches with piece of paper to have

expert draw a calendar of her recommended schedule for both children at issue].

- [Approximately five minutes of silence pass while the expert attempts to write out her recommended schedule. The delay only further highlighted counsel's effort to discredit the expert's recommendation.]
- How's it going? [*I made a mistake. I'll explain what I did.*] [Attorney approaches to retrieve the drafted schedule after which expert attempts with difficulty to explain the schedule broken down for each child and her admitted mistake.]

. . .

- Just to reiterate my question, you just made an indication that you recommended the children should also spend time together with one parent. [*Yes.*]
- Can you let me know as to the regular parenting time schedule, where in your report it says that? [Long pause follows.] The parenting time schedule is detailed on pages 45 and 46. [*Right.*] [Long pause follows.] [*Okay, I was leaving that up to the, um, parents' discretion . . .*]

. . .

- Let's take a step back. You just made an indication before you started going into that calendar again that you were leaving it up to the discretion of the parties. Where in your report as to the parenting time does it indicate that you are leaving anything to discretion of these parties with respect to these children being together? [*I don't see it in the report.*]

. . .

- Upon further being questioned about her recommended parenting time schedule and the hand drawn calendar she drew during her testimony, the expert further backtracked. [*I'm sorry, I misspoke. And I also made a mistake in this chart here too.*]
- What do you mean? [*It wouldn't work out because I separated them too much.*]

. . .

- [Attorney then approaches with his own hand drawn schedule based on his understanding of the expert's recommended parenting time.] Based on your recommendation, doesn't that confirm that the only day the children are together is on Monday? [*Yes.*]
- If I told you that both parties agree that the children should not be separated during their parenting time, would that impact upon your determination and recommendations here? [*That would effect it, yes.*]
- And isn't it fair to say that if the children are only together, because they're in school for most of the day, they're only together one day a week, that their relationship will essentially be non-existent? [*Yes. Yes.*]
- And that would not be in their best interests, correct? [*Right, right.*]
- [At this point in the time the expert asks to stop testimony for the day.]

Thus, even the simple presentation of a visual aid – handcrafted by the expert under cross-examination scrutiny – helped in discrediting the expert's core recommendation upon which the entirety of a substantial report was based.

d. Looping

An effective cross-examination almost always includes "looping," which is the practice of repeating important answers or themes elicited in the testimony through follow-up questions (i.e., the examiner keeps "looping" back to prior answers).[17] Arguably, the use of looping implicates N.J.R.E. 403 and N.J.R.E. 611. Though certainly not the most important substantive evidence rules, a trial attorney must understand those two rules. These rules serve as bedrocks of *how* the court will conduct trial. While many family law attorneys know N.J.R.E. 611 as the "leading question" rule and N.J.R.E. 403 as the "exclusion" rule, their importance goes far beyond those issues.

If you watch enough *Law and Order*, you will hear "asked and answered;" you will not find that phrase in the *Rules of Evidence*. Indeed, when you hear that phrase, what the objecting attorney really means is "Judge, the question calls for the needless presentation of cumulative evidence,[18] it is harassing in nature,[19] and/or it is a waste of the court's time."[20] Simply expressing by rote use of "asked and answered" fails to inform the court (or the Appellate Division) as to the specific evidence-based objection. The key, therefore, to avoid a sustained objection on those grounds is to add additional facts to subsequent questions—the practice of looping:

- Where did you go to college? [*I attended Rutgers University.*]
- When did you graduate from Rutgers? [*In 1997.*]
- After your graduation from Rutgers in 1997, did you attend any other school? [*I attended Harvard Law School.*]
- Did you graduate from Harvard Law School? [*Yes.*]
- What year did you graduate from Harvard Law School? [*2000.*]
- After you graduated from Rutgers in 1997 and

finished Harvard Law School, what did you do? [*I went on to clerk for a circuit court of appeals judge.*]

This is a very simple example of "looping" prior facts into later questions. Why would you care to "loop" like this? In broad terms, most witnesses will agree with questions in which their own words are accurately recited. As to this specific snapshot, you just established and re-affirmed to anyone listening, that this individual is highly educated. Bear in mind though, even though you may add additional facts as part of "looping," the key to cross-examination is to breakdown your questions into small pieces that require the witness to respond with short answers (i.e., break down every sentence into a series of one-word statements). Here is another real-world example from one of the authors (Nunn) in a relocation trial on remand from the Supreme Court:

- You just testified about 27 email chains, correct? [*Yes.*]
- Each of those 27 email chains were between you and your ex-husband? [*Yes.*]
- Each of those 27 email chains between you and your ex-husband occurred after the court ordered your return from _____? [*Yes.*]
- In each of those 27 email chains, your ex-husband asked for additional parenting time? [*Yes.*]
- In none of those 27 email chains did you afford your ex-husband any additional parenting time? [*I don't know.*]
- Show me which one of the 27 email chains includes additional time offered by you to your ex-husband? [*I can't.*]
- You answered discovery in this case? [*Yes.*]
- You provided documents in discovery? [*Yes.*]
- You did not produce in discovery any documentary evidence of any additional parenting time you afforded your ex-husband since you returned from _____? [*I don't know.*]
- You did not produce, at trial, any documentary evidence of any additional parenting time you afforded your ex-husband since you returned from _____? [*I don't know.*]
- You did not produce any written documentation in which you afforded additional parenting time to your ex-husband since you returned from _____? [*I don't know.*]

Anecdotally, there was no concern on the examiner's part that the witness would produce any written evidence as none had ever been produced and the examiner had copies of all emails and text messages between the parties, as well as communications between counsel. Moreover, the three "I don't knows" made the witness look foolish to the trial court judge.[21]

Another effective use of looping is to loop in previously provided answers to "box in" an opposing witness to a desired series of answers. For example, using an opposing spouse's answers to custody and parenting time interrogatories is often a ripe source of attack through the looping method. A line of questioning often employed in similar by one author (Epstein) is as follows (with presumed answers included to develop the point):

- In response to interrogatory #X, you answered that you believe you should have primary residential custody of the children because you are a better parent than the other party. [*Yes.*]
- How are you a better parent than the other party? [*Because I am more available to our children than he is.*]
- You heard him testify earlier that he can modify his working hours so that he can take the children to school, pick them up from school and transport them to after-school activities? [*Yes.*]
- Assuming that is true, would you say he would be just as available to the children as you are? [*….I guess.*]
- Are there any other reasons that you believe you are a better parent than the other party beyond your claimed greater availability for the children? [*I expect our children to follow rules and he is more "hands off" with them.*]
- So you have a different parenting style than he does? [*Yes.*]
- Different, but not necessarily better for the children? [*Yes.*]
- There has been no proof you have provided to this Court that your style of parenting is more in the children's best interests than his style of parenting? [*No, there is no proof.*]
- In fact, when your own custody expert testified on your behalf, at no point in time did she state that you should have primary residential custody of the children over him simply because you have different parenting styles, right? [*Right.*]
- Other than your claimed greater availability for the children and allegedly more effective parenting style, are there any other reasons why you believe you are a better parent than the other party? [*No, that is all.*]

The author has used a similar line of questioning to that outlined above on numerous occasions and it often proves effective in cornering the opposing witness into

your desired theme while simultaneously discrediting their testimony. The author will also often combine this technique with a visual aid approach by having the opposing witness write down each answer as the line of questioning unfolds. In other words, the opposing witness is bearing witness to the looping of their own answers.

III. Specific Rules of Evidence to Remember

i. Relevancy and its Limits

Relevancy is another bedrock rule of evidence. "Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.[22] With respect to cross-examination, you generally cannot ask questions on cross-examination that are outside the scope of direct examination unless your questions relate to credibility.[23] Accordingly, if you ask a question on cross-examination and an objection is sustained for being "outside the scope of direct," make a notation in your outline and call the adverse witness as your witness; this will enable you to both ask the question and do so in a leading manner.[24] Bear in mind though, you have some latitude to develop your cross-examination.[25] That is, it is appropriate—in response to a relevancy objection—advise the judge that the questions will be connected in the next few questions, 10 minutes, etc. (i.e., conditionally relevant facts).

Now consider the "27 email" email line of examination. The attorney opposing the examination could have objected on "cumulative" grounds (i.e., "Mr. Nunn is wasting time going through 27 email chains").[26] The opposing attorney also could have objected that the witness's failure to allow visitation in any of the 27 email chains was impermissible "propensity"[27] evidence or designed to make the witness look bad.[28] In response, the cross-examiner could have answered: (i) propensity evidence is permissible to show intent (i.e., the witness's intent[29] is to deprive the children of a relationship with the parent); and (ii) that the best interest factors require a consideration of whether there is "any history of unwillingness to allow parenting time not based on substantiated abuse . . . ."[30] *Practice tip: anticipate objections and have the corollary evidence rules at your disposal.*

ii. Hearsay

Perhaps the most important substantive rule is "hearsay"[31] and its exceptions.[32] It is also the rule upon which practitioners rely most when addressing an opposing advocate's ongoing examination. Much of the initial law school evidence courses focus on hearsay—and with good reason. As practitioners know, hearsay is not admissible[33] except as set forth in N.J.R.E. 803. Hearsay can be broken down as follows: (i) a statement made by a declarant; (ii) the statement is not made by the declarant while testifying at the trial; and (iii) the party offering the statement does so for the *truth* of the out-of-court statement.[34] Hearsay is *not* implicated where an attorney seeks to use an out-of-court statement at trial for some purpose *other than* the truth of the statement. If the statement is only offered to show that a statement was made and something occurred *as a result of that statement*, it is not hearsay (i.e., an "effect on the listener" is not hearsay).[35] Take the following for example of a direct examination regarding the purchase of shares of stock:

- You purchased 1,000 shares of Blackberry at $100 per share? [*Yes.*]
- The stock dropped $90 per share over the course of the marriage? [*Unfortunately, yes.*]
- Why did you buy the shares of Blackberry? [*My investment advisor told me it would be a great idea.*]
- OBJECTION, HEARSAY. [*Response from counsel: the litigant's answer is not intended to demonstrate that the purchase was actually a "great idea," it is to explain why the litigant purchased the stock.*]

The witness's answer is an appropriate use of an out-of-court statement for non-hearsay purposes. Clearly the purchase of Blackberry was not a "great" idea.

Similarly, statements made by the opposing party, which you seek to introduce against the adverse party, are not hearsay (meaning, they are not even an exception to hearsay—they are *not* hearsay).[36] Take the preceding Blackberry example and now consider cross-examination:

- On September 22, 2009, your financial advisor told you that your wife called regarding stock holdings? [*Yes.*]
- He advised you that your wife expressed concern about the Blackberry shares? [*Yes.*]
- Specifically, that you should sell them? [*Yeah.*]
- Because they had rebounded a bit? [*Yes.*]
- The shares as of September 22 were valued at $84/share? [*Looks that way.*]
- You told the financial advisor: "screw her. You are my guy, do not sell anything without my approval" [*Appears so.*]
- At the time of the divorce, the shares were $8 per share? [*uh huh.*]

The witness's statement: "screw her. You are my guy,

do not sell anything without my approval" is a non-hearsay, party-opponent statement.

Lastly, before discussing hearsay exceptions[37] you must understand how to properly impeach a witness with a prior inconsistent statement.[38] This rule implicates a few "hurdles": (i) the prior statement you seek to use as impeachment (inconsistent) must be admissible;[39] (ii) the statement must actually be inconsistent with the testimony at your trial; (iii) you must use the prior statement in accordance with N.J.R.E. 613;[40] and (iv) if you called the witness, the prior inconsistent statement must be: in a sound recording; in a writing made or signed by the witness in circumstances establishing its reliability (e.g., a Certification); or given under oath at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition.

N.J.R.E. 803© provides the hearsay exceptions. A frequently encountered scenario occurs with the use – or attempted use – of police reports. Assuming a party can obtain access to relevant police reports, a question is: *how can the records be used in my case*? Police reports are frequently relied upon in domestic violence matters. A party seeking, or defending, the imposition of a Final Restraining Order may attempt to use police reports to their advantage. Often, attempts are made to offer the report without the necessary witness(es) that would make the contents of the report admissible. For example, the proponent of the police report does not call the police efinier who wrote the report or a custodian of records who can authenticate the report.

Generally, assuming you call the appropriate witness to authenticate the record and lay a foundation,[41] a police report should be deemed admissible as a record of a regularly conducted activity (i.e., that a police officer responded to a call on a particular date and time).[42] To what end can the contents of the report be used? A police report may be admissible to prove the fact that certain statements were made to an officer. For example, the police report may relay that a domestic violence defendant — if offered against the defendant in a domestic violence trial — admitted to striking the victim, which would be admissible under N.J.R.E. 803(b)(1)(party-opponent). But, absent another hearsay exception, the report may not be offered for the truth if the police officer's report contains statements from non-party witnesses. In other words, the report may be admitted, but the out-of-court (non-party) statement is hearsay (unless it meets another exception, like excited utterance[43]).

The contents of the police report can also be used to impeach the opposing party's testimony even if the report is deemed inadmissible. There may be occasions where you do not want the contents of the report admitted into evidence, but still want to discredit an opposing witness's testimony. Simply identifying the exhibit and asking questions during cross-examination to impeach can be a highly effective technique.

What do you do, however, if the report is admitted over your objection and the police officer is unavailable for cross-examination? Fortunately, N.J.R.E. 806[44] allows the credibility of a hearsay declarant (e.g., the police officer who wrote the report that is admissible under N.J.R.E. 803©(6)) to be attacked as if the officer had been in court that day. For example, in a different context (a contested adoption case Nunn tried), the trial court allowed admission of a party's hearsay statements (the statement was *not* offered *against* the party) offered in court through hearsay documents. Fortunately, a private investigator was hired to observe that party prior to the proceeding. Following admission of the hearsay statements, we called the private investigator to testify. The adverse counsel objected on relevancy grounds and the adverse litigant failed to appear in court for cross-examination. We relied on N.J.R.E. 806 as grounds to impeach the party (also a hearsay declarant in this context) as to the statements made in the hearsay document.

Due to the reliance of experts in Family Part matters, you must understand how to use a learned treatise as part of your cross-examination.[45] A learned treatise is "A statement contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, if: (A) the statement is relied on by an expert witness on direct examination or called to the attention of the expert on cross-examination; and (B) the publication is established as a reliable authority by testimony or by judicial notice.[46] Consider, from this emotional distress case, the following questions by Nunn:

- You provided your CV in this case? [*Yes.*]
- You listed lectures you have given? [*Yes.*]
- In ____ you gave a lecture for _____? [*Yes.*]
- You wrote an article about malingering?[47] [*Yes.*]
- You cited Dr. Richard Rogers in that article? [*Yes.*]
- Dr. Rogers is an expert in the field of malingering? [*Yes.*]

I asked the expert to read into the trial record the definitions of "pure malingering" and "false imputation" from Dr. Rogers's book (a different book than the one

cited by the witness in their article, which is why it was important to get the witness to accept Rogers as an expert in the field).[48] The following then occurred:

- Assume Mrs. Litigant testified in this case that in July of 2012, Mr. Litigant threw her down a flight of steps in Bayhead, New Jersey, and as a result she injured her back. Assume that event *never* happened, yet, Mrs. Litigant claims to suffer back pain and other related discomfort related to that alleged incident, would that qualify as pure malingering? [*Yes, if it never happened.*]
- Assume in December of 2011, Mrs. Litigant informed a physician that she injured her back while moving a pile of leaves and suffered a disc herniation. Four years later she testified during this trial that Mr. Litigant body slammed her 9 times resulting in that same back injury. If Ms. Litigant actually injured her back moving leaves, would you agree with me that that would be a situation of a false imputation? [*Yes.*]

A few more examples of malingering and false imputation were addressed, resulting in similar Responses. The key to this line of cross-examination is that the court already heard testimony, *from the treating physician for Mrs. Litigant*, regarding Mrs. Litigant's chronic back issues, all of which she attributed to reasons other than Mr. Litigant.

iii. Excited utterances and present sense impressions

Excited utterances[49] and present sense impressions[50] are also important hearsay exceptions. They bear similarities, but they are not the same. Think of it this way—almost every excited utterance is a present sense impression, but many present sense impressions are not excited utterances. Consider a diary entry in which the scrivener writes:

> "*a beautiful bird is flying past my window.*"

Consider, the same scrivener, now on the telephone with a friend:

> "*moments ago I saw a beautiful bird fly past my window . . . holy sh-t, it just smashed into the windshield of a car; now the car crashed; and now the car is on fire.*"

The former is a present sense impression, and the latter contains both present sense impressions and excited utterances.[51] These statements would be admissible as exceptions to hearsay.

iv. Prior consistent statements, prior inconsistent statements, and impeachment by conduct.

You should know that under N.J.R.E. 607 you can attack the *credibility* of a witness with extrinsic evidence, e.g., a prior inconsistent statement,[52] but under N.J.R.E. 608, you are generally prohibited from using extrinsic evidence (outside evidence of conduct) to attack a witness's character for "truthfulness or untruthfulness."[53] For example, in an extreme cruelty/*Tevis* case based on allegations of abuse, a defendant can introduce medical records under N.J.R.E. 607 to impeach the plaintiff if those medical records delineate that the plaintiff offered a different causation for the injuries than espoused in a Complaint for Divorce. However, in that same trial, N.J.R.E. 608 prohibits the defendant from using extrinsic evidence in the form of a fraudulent property insurance claim (unrelated to the case) submitted by the plaintiff solely to demonstrate that the plaintiff is, in general, untruthful. Moreover, even if the judge does allow you to delve into specific instances of conduct (e.g., the fraudulent property insurance claim example), you must know that you are barred from impeaching the witness with extrinsic evidence (i.e., the actual documentation demonstrating the fraud) to prove your assertion. In other words, you are "stuck" with the witness's answer. Consider the following:

- Isn't it true you claimed $50,000 of insurance damage for tree damage? [*Yes.*]
- You claimed it happened during a storm? [*Yes.*]
- But in reality you cut the branch directly over your garage causing it to fall on the garage? [*No.*]

If a judge is following N.J.R.E. 608—and assuming that the $50,000 is not a relevant issue in the case—the examiner would be precluded from introducing into evidence "extrinsic" evidence to rebut the witness's lie.

v. Refreshing recollection with records and substantive use of records

A writing used to refresh a recollection,[54] is different than a writing introduced as a recorded recollection.[55] A writing used to refresh recollection allows a witness to review any writing, even one prepared by a third-party, to "jog" the witness's memory. It does not allow that witness to admit the writing in evidence. On the other hand, a recorded recollection permits admission of trustworthy

writings prepared by the witness if the witness has insufficient present recollection; the writing was made while the person's memory was fresh; it was made by or at the witness's direction; and the witness had requisite knowledge when made.[56] For example, in a custody case, N.J.R.E. 612 (writing to refresh recollection) would permit a party to look at pediatrician records to refresh her recollection as to whether she attended doctor visits. Under N.J.R.E. 803©(5) (recorded recollection), that same party could introduce as evidence a calendar of wellness visits she prepared if the entries were made at or near in time of each visit, each entry was made by the witness, and she had actual knowledge when it was made.

vi. Completeness and authentication

Many family law trials are document intensive. You must know N.J.R.E. 106,[57] also referred to as the "doctrine of completeness,"[58] as well as N.J.R.E. 901,[59] which covers authentication. N.J.R.E. 106 requires a party who has introduced a writing/recording to introduce, contemporaneously, any other part of the writing/recording that "in fairness ought to be considered at the same time."[60] In practice, we used this rule during our adversary's direct examination to discredit their mental health expert. In that case, which involved an alimony obligor who sought to eliminate his support payments based on "disability," the expert cited to theefinitionn of "malingering," which in lay terms means "faking sick," within the DSM-V (as in, the expert opined the obligor was not malingering). As we followed along with the expert, we realized that he excluded a key component of the definition. We objected and the expert was then forced to read that malingering should be strongly suspected where: "*the individual is referred by an attorney to the clinician for examination or the individual self-refers while litigation or criminal charges are pending.*" Note: you may also encounter completeness issues with the use of deposition transcripts. If so, you should look to *Rule* 4:16-1(d).

On a related point, N.J.R.E. 901 is a "must-know" since it implicates the mechanics of admitting evidence. Since many of our cases involve Facebook, emails, and text messages, we direct you to *State v. Hannah*, a case involving social media (Twitter) messages, where the New Jersey Supreme Court held that traditional authentication principles apply.[61] Specifically, it held "Authenticity can be established by direct proof—such as testimony by the author admitting authenticity—but direct proof is not required."[62] The Court added: "Authentication does not require absolute certainty or conclusive proof—only a prima facie showing of authenticity is required."[63] It provided helpful examples of how to authenticate: "circumstantial proof may include demonstrating that the statement 'divulged intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have" and "under the reply doctrine, a writing "may be authenticated by circumstantial evidence establishing that it was sent in reply to a previous communication."[64] Thus, while it is easy to authenticate and admit text messages or emails, do not forget that you can, contemporaneous with the direct examination about those writings, insist that other portions of the text or email are read into the record, so the Judge does not have a misconception about the relevancy.

vii. Conclusion

We hope you found this material instructive and helpful. We intended it to provide some basic principles, as well as some more nuanced, higher-level cross-examination techniques. We also highlighted evidence rules that often arise during trials—but you really should know all of them to which we could devote another 10,000 words. ■

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Endnotes

1. A Few Good Men (Columbia Pictures 1992).
2. Francis L. Wellman, *The Art of Cross-Examination: With the Cross-Examinations of Important Witnesses in Some Celebrated Cases* (Good Press 2002), pp. 13 and 14 (separate quotes utilized).
3. Dodd, Roger and Pozner, Larry, "Cross-Examination: Science and Techniques," §§2.01-2.25, Lexis-Nexis (3d. 2018).
4. *R.* 4:17-1 to -8.
5. *R.* 4:18-1.

6. *Cesare v. Cesare*, 154 N.J. 394, 411-12 (1997) (citing *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974)).
7. *In re Return of Weapons to J.W.D.*, 149 N.J. 108, 117 (1997).
8. *Cesare*, *supra* (quoting *Pascale v. Pascale*, 113 N.J. 20, 33 (1988)).
9. *State v. Silva*, 131 N.J. 438 (1993).
10. When we say "impeachment material" it is not necessary to think of this information as "smoking gun" evidence. It could simply be that the witness said "X" during trial, but wrote "Y" during discovery. If you repeatedly impeach a witness with "small" material, you may effectively achieve the "death by a thousand cuts" of that witness's credibility.
11. Wellman, *supra*, *The Art of Cross-Examination*, pp. 15-16. Similarly, when your cross-examination elicits from the opposing witness what you want to hear, also maintain your composure as you try to convey that there could not possibly have been any answer other than what the trial judge just heard.
12. You may also want to Bates stamp every document you intend to use so that you can simply refer to the Bates stamp numbers.
13. Both Benjamin Franklin and Confucius have been credited with this or a similar form of this saying, so the authors determined it cannot hurt to credit both of them.
14. Although additional questions were prepared, the examiner moved on because of the favorable answer.
15. This was from the expert's report. He was citing an outdated edition of the article.
16. Had the witness answered "yes," I had approximately 10 additional questions based on his report, and the Kelly and Lamb article, to show the absurdity of the opinion.
17. Timothy B. Walthall, *The Secrets of Cross-Examination How to Avoid the Pitfalls at Trial*, 44 ABA Litigation Journal 4, at 26, 29 (Summer 2018).
18. N.J.R.E. 403(b).
19. N.J.R.E. 611(a)(3).
20. N.J.R.E. 611(a)(2).
21. *See Bisbing v. Bisbing*, 468 N.J. Super. 112 (App. Div. 2021) (regarding large counsel fee award).
22. N.J.R.E. 401.
23. N.J.R.E. 611(b). Of course, attacking credibility is an exception.
24. N.J.R.E. 611(c).
25. N.J.R.E. 104(b)(conditional relevance).
26. N.J.R.E. 403(b)(allowing a court to exclude cumulative evidence).
27. N.J.R.E. 404(b)(1) ("Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition.").
28. N.J.R.E. 403 (permitting a court to exclude unduly prejudicial evidence).
29. N.J.R.E. 404(b)(2)(" This evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.").
30. N.J.S.A. 9:2-4(c).
31. N.J.R.E. 801(c).
32. N.J.R.E. 803(c).
33. N.J.R.E. 802.
34. N.J.R.E. 801(c).
35. *See, e.g.*, *Carmona v. Resorts Hotel*, 189 N.J. 354, 376 (2007)(permitting use of a company's investigative report to rebut the allegation that an employee's termination was based on retaliation); *see also Jugan v. Pollen*, 253 N.J. Super. 123, 136-37 (App. Div. 1992) (holding that statements made to plaintiff regarding the limitations of his activity were not hearsay when "offered to prove that plaintiff limited his activity based upon advice given to him.").
36. N.J.R.E. 803(b). In Family Part cases, "party-opponent" statements are often the most used source of information for party cross-examination, as well as the cross-examination of the adverse party's expert.
37. N.J.R.E. 803(c).
38. N.J.R.E. 803(a)(1):

    (a) A Declarant-Witness' Prior Statement. The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement:

    (1) is inconsistent with the declarant-witness' testimony at the trial or hearing and is offered in compliance with Rule 613.

    However, when the statement is offered by the party calling the declarant-witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the declarant-witness in circumstances establishing its reliability or (B) was

given under oath at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; . . . .

[(Emphasis added).]

39. *Ibid.*
40. The Rule requires as follows:

    (a) Examining Witness Concerning Prior Statement. When examining a witness about the witness' prior statement whether written or not, a party need not show it or disclose its contents to the witness. But the party must upon request show it or disclose its contents to an adverse party's attorney or a self-represented litigant unless the self-represented litigant is the witness.

    (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a witness' prior inconsistent statement may be excluded unless the witness is afforded an opportunity to explain or deny the statement and the opposing party is afforded an opportunity to interrogate on the statement, or the interests of justice otherwise require. This rule does not apply to admissions of a party opponent as defined in Rule 803(b).

    Consider the language in (b) allows—even on cross-examination—a witness to explain a prior inconsistent statement with which the witness has been impeached. In other words, the typical "yes" or "no" responses you seek may be temporarily halted to allow a more robust response (if the Judge and/or your adversary know the rules).
41. *See* N.J.R.E. 601 (competency); N.J.R.E. 602 (personal knowledge requirement); and N.J.R.E. 901 (Authentication).
42. *See* N.J.R.E. 803(c)(6)(business records), and as a public record, *see* N.J.R.E. 803(c)(8).
43. *See* N.J.R.E. 805 (hearsay within hearsay). In this example, the hearsay statement of the non-party witness embedded within the hearsay report, may not be admissible without some other exception.
44. This little-known and little-used rule is quite powerful:

    When a hearsay statement has been admitted in evidence, *the credibility of the declarant may be attacked*, and if attacked may be supported, *by any evidence which would be admissible for those purposes if the declarant had testified as a witness.* The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, that party is entitled to examine the declarant on the statement as if under cross-examination. [(Emphasis added).]
45. N.J.R.E. 803(c)(18).
46. *Ibid.*
47. "Malingering" is defined in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 726-727 (5th ed. 2013) as:

    The essential feature of malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs. Under some circumstances, malingering may represent adaptive behavior—for example, feigning illness while a captive of the enemy during wartime. Malingering should be strongly suspected if any combination of the following is noted:

    1. Medicolegal context of presentation (e.g., the individual is referred by an attorney to the clinician for examination, or the individual self-refers while litigation or criminal charges are pending).
    2. Marked discrepancy between the individual's claimed stress or disability and the objective findings and observations.
    3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen.
    4. The presence of antisocial personality disorder.

    Malingering differs from factitious disorder in that the motivation for the symptom production in malingering is an external incentive, whereas in factitious disorder external incentives are absent.

    Malingering is differentiated from conversion disorder and somatic symptom–related mental disorders by the intentional production of symptoms and by the obvious external incentives associated with it. Definite evidence of feigning (such as clear evidence that loss of function is present during the examination but not at home) would suggest a diagnosis of factitious disorder if the individual's apparent aim is to assume the sick role, or malingering if it is to obtain an incentive, such as money.

    If you handle personal injury litigation or Tevis

claims in your divorce cases (e.g., claims regarding intentional infliction of emotional distress and other tort-based claims), you must be aware of malingering and structure discovery around it.

48. Practice point: it is fair game to use a learned treatise if the witness on the stand does not identify it as such. Accordingly, if your expert recognizes a treatise as an authoritative material in the field, you may rely on it. The judge, however, decides how much weight to give the dueling witness testimony about the treatise.
49. N.J.R.E. 803(c)(2)("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.").
50. N.J.R.E. 803(c)(1)(" A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it and without opportunity to deliberate or fabricate.").
51. For an example of an utterance that did not qualify as an excited utterance, *see Gonzales v. Hugelmeyer*, 441 N.J. Super. 451 (App. Div. 2015). On the other hand, *State v. Buda*, 195 N.J. 278 (2008), provides an explanation of the importance of the "shock" or uncontrolled response to a startling event.
52. N.J.R.E. 613(b).
53. *See* N.J.R.E. 405(a) and N.J.R.E. 608(a). However, in a criminal case, specific instances of conduct can be used to attack the character of a witness. In September 2019, the New Jersey Supreme Court ordered amendments to the New Jersey Rules of Evidence (approved and adopted effective July 1, 2020) following recommendations from the Supreme Court Committee on the Rules of Evidence (the "Committee"). The amendments to N.J.R.E. 608 expanded the scope of permissible cross-examination in criminal trials, permitting inquiry into specific acts of the conduct of a witness when probative of his/her character for truthfulness or better stated, lack of truthfulness. The amendments came in the wake of the Court's opinion in *State v. Scott*, 299 N.J. 469 (2017), which led to the Court's referral of the matter to the Committee. As noted in the Scott opinion, the federal courts and a majority of other state courts allow examination into specific instances of conduct that bear upon untruthfulness. In the Committee's 2017-2019 Report (issued in January 2019), a narrow majority of committee members recommended expanding N.J.R.E. 608 to allow inquiry on cross-examination, in certain limited circumstances, into a witness's specific instances of conduct. The committee's Minority Report argued against the amendments as did the State Bar Association and the County Prosecutors Association. By way of example—and to show what is impressible in a civil case—in *United States v. Jones*, 900 F.2d 512, 520-21 (2d Cir. 1990), the court affirmed use, as character impeachment, of false statements on applications for employment, an apartment, driver's license, loan, and membership in an association. In *United States v. Carlin*, 698 F.2d 1133, 1137 (11th Cir. 1983), the court allowed cross-examination of a witness as to the truthfulness of his answer on his verified application for used car dealer licenses. In *United States v. Leake*, 642 F.2d 715, 718-719 (4th Cir. 1981), the court held that conduct such as obtaining money under false pretenses, defrauding an innkeeper, writing checks that were returned for insufficient funds, and having numerous default judgments entered against the witness regarding repayment of loans "established a pattern of fraudulent activity that, if revealed, would have placed [the witness's] credibility in question." The information in this footnote is provided because efforts are being made to allow this line of attack in Family Part cases.
54. N.J.R.E. 612.
55. N.J.R.E. 803(c)(5).
56. *Ibid.*
57. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time."
58. *Alves v. Rosenberg*, 400 N.J. Super. 553 (App. Div. 2008).
59. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims." N.J.R.E. 901.
60. N.J.R.E. 106.
61. *State v. Hannah*, 448 N.J. Super. 78, 88-92 (App. Div. 2016).
62. *Id.* at 90.
63. *Id.* at 89.
64. *Id.* at 90 (internal quotations and citations omitted).

Cross-Examination Techniques for Financial Experts

By Mark H. Sobel and Barry S. Sobel

Often, the largest economic dispute in the context of a divorce trial has nothing to do with the marriage, the lifestyle or the parties' respective contributions to the marriage. Rather, it is the evaluation and determination of the fair value of a closely held business subject to equitable distribution. This article will explore the cross-examination techniques that we believe are effective in demonstrating to the tribunal the subjective nature of expert testimony and the various ways to attack those subjective determinations by the experts.

While expert opinion is allowed under Evidence Rule 702 to provide the tribunal with an assessment of the value of a closely held business, these evaluations are fraught with significant subjectivity. Thus, while it enters the Court's domain through expert testimony, this expert testimony is far from a precise science. In fact, existing case law confirms that business valuation "is not an exact science." Cases both within our matrimonial spectrum such as *Bowen*[1] and *Levine*[2] set forth a clear acknowledgement that business valuation is far from an objective scientific analysis. In fact, relying upon those cases, our Supreme Court in *Balsimides*[3] and *Lawson Mardon Wheaton, Inc*[4] clearly opine that such types of analysis are far from a purely objective evaluation.

Given the above, any cross-examination of a forensic expert should include questioning the witness to confirm that what they engaged in was not a science, was not precise, carried a significant amount of subjectivity, and that reasonable minds could differ on ultimate conclusion. This should be the first area of inquiry during cross-examination so that the Court has within its mental impressions prior to the precise facts of your case the level of subjectivity involved. This clear understanding should include that what the Court is hearing is a subjective view (although based upon objective facts), which can be interpreted in a variety of ways by a variety of experts, all of whom may reach a variety of conclusions. After exploring the initial overall conceptual framework that the entirety of this expert's opinion has in it a great deal of subjectivity, the cross-examination should next focus upon the clearly subjective components of the evaluation. Most business valuations in our area of practice generally use either a "discounted cash flow" or an "excess earnings" methodology, both of which focus upon the normalized income of the entity and project a value based upon that normalized income. If the valuation is a valuation based upon net assets, or another non-income-based model, the analysis of the cross examination must be varied to deal with that specific methodology. However, since most valuations are based upon what we call an "income model," this article will focus upon these types of reports and the cross-examination flowing therefrom.

Importantly, there are at least four subjective components of an income valuation that you can get virtually every expert to agree are subjective. They are as follows:

1. The normalization of the actual income of the company;
2. The reasonable compensation for the owner of the company;
3. The specific company risk associated with the company; and
4. The long-term growth rate of projected income in the future.

Each one of these four components exists in the valuation, and each one contains subjective evaluations by the expert. It is therefore recommended that each one of these four components be separately examined and a separate admission obtained regarding the fact that these items are subjective. Effective cross-examination in this area must focus upon the adjustments to "normalize" the income of the entity being evaluated. These adjustments generally include a look at prerequisites that the owner obtains from the company, whether that's the use of a car or a cell phone, vacations, expense accounts, and a variety of other potential areas where the actual reported income of the entity is significantly lowered by expenses which are not truly business related. These adjustments represent evaluative judgments which a forensic accountant does not have any specialized knowledge about and, for each of these adjustments, examination as to both the why and the amount of the normalization should be questioned.

Similarly, the reasonable compensation to be paid to essentially replace the "owner," which generally focuses upon standardized data that may have little to do with the individual requirements of that particular owner, in that particular job, with that particular experience, are again subjective determinations that should be examined. Similarly, the long-term growth projected out for the company (usually at a rate of inflation) needs to be examined as to whether that comports with the actual economic data available at the time period of the valuation for that particular business.

Finally, the specific company risk used in an income model which evaluates the additional risk and the effect of that additional risk on the capitalization rate, must be explored. Generally, this is an area where there is little to no hard data, causing tremendous variations in expert opinions as to a company's specific risk. By way of limited example, a business which has limited customers is undoubtedly far more risky than a business with many customers, each of which represent a small portion of the overall income of that company. Other areas to examine within this context include: Does one party either have control over the significant customers of the company? Is that client base protected? Are there restrictive covenants in place? All of these areas will provide repeated admissions by the expert that each one of these areas is infused with a significant amount of subjectivity in terms of reaching the conclusions as to these four integral parts of any income valuation model.

An effective cross-examination into these areas requires a substantial amount of preparation and a substantial amount of pre-planned mathematical calculations based upon anticipated testimony from the business evaluator. Many lawyers differ in pursuit of such information and the effectiveness, appropriateness, and strategy of deposing an expert prior to trial. Our experience has been that we generally seek such depositions but do so very differently from the cross-examination technique referenced above. While cross-examination by its notion is adversarial, a deposition need not be, and often should not be as it is an event to gather information. The deposition should include all the factors considered by the expert on these components, all the knowledge that the expert has regarding the business, all the work that the expert undertook relating to this assignment and all information reviewed, all analysis undertaken and all conclusions drawn by that expert on the key components of the conclusion. By so doing, the expert's trial testimony will not be allowed to be varied substantially from the report and from the deposition previously provided. Other counsel believe such depositions can sometimes alert the expert to areas of concern in the report and prepare them for that in cross-examination, but careful use of a deposition does not have to run that risk. On balance, knowing the explanation for various points set forth in the expert's report is a fundamental aspect of the preparation for effective cross-examination of such an expert.

With the above subjectivity components in mind, and with a complete deposition accomplished, the following three areas are essential to an effective cross-examination at trial:

1. Extensive knowledge of the particular business is required. Thus, in order to engage in effective cross-examination, the dynamics of the particular business being evaluated must be known. That includes an examination of the location and operation of the business, any dynamic changes in the business over time, the forecast for the future regarding the specific business and any and all competitive aspects of the business or lack of competitive aspects of the business.
2. A review of all applicable contractual agreements must be undertaken. This would include: examination of any significant contracts regarding business operations (whether leases or existing contracts with customers), as well as the ability for contracts to be altered or renewed. Additionally, the existence of any buy/sell agreements, keyman insurance with subsequent valuation for such keyman policies, and the existence or absence of any restrictive covenants or prohibitions regarding business activity need to be explored as a component of the business evaluator's examination.
3. The expert should be questioned as to the expert's previous reports, previous lectures, and previous publications. In this arena, speaking with your colleagues, going to lectures, and obtaining past reports written by expert provide a vital resource of information knowing how that expert handled other cases in which reasonable compensation, long-term growth, specific company risk and normalization of income were evaluated. Such information can provide comparisons to analyze why those aspects of the evaluation differed or did not differ from those presented in the particular case before the court.

After carrying out these objectives, it is important to explore the methodology the expert used. That would include both the valuation process and the valuation

techniques. By way of limited example, even given the use of an income model within the context of our area of practice which is by far the most prevalent methodology, there are components that differ within such an income methodology. For example, discounted cash flow and capitalization of earnings models both use income factors but do so very differently - one anticipates and explains "outlier" year or years and the other does not. If you are seeing different methodologies used by the experts in different reports, questions as to why that methodology was chosen become an important area of examination. This is especially true if a particular expert generally uses one form of income model but in your specific case used a different form of income model.

Next, the expert's understanding of the standard of value used in New Jersey is an important area of inquiry. Since *Brown*,[5] the standard of fair market value has been replaced by fair value, which is generally thought of as a fair market valuation approach without reduction for marketability discounts or minority discounts. That, however, is a superficial understanding of the standard of value. Fair value may or may not include analysis of those areas, but that should not be the limitation for the analysis. Issues such as value to the holder, the age of the owner, tax deferrals, and excess capital in the business will affect the ultimate valuation and should be explored both in the deposition and then during the cross-examination. *Brown* does not stand for a universal statement that fair value must never allow for minority discounts or marketability discounts. Fact patterns exist which would justify these discounts and should be explored as well.

Similarly, the expert's opinion as to both active and passive factors which may increase or decrease the value in the business over time need to be analyzed. Active components which deal with the owner's efforts, determinations, and decisions regarding the trajectory of the business subsequent to the filing of the complaint for divorce may affect the overall valuation but may not be part of the marital enterprise nor divisible as part of the divorce process. Passive factors for which that owner has no effect upon, may result in a different analysis on the spectrum of valuation. In analyzing those factors, they need to be differentiated between those which are specific to that business and those which are of just a general economic nature.

Once an examination of all of these areas of subjectivity and potential reasonable differentiation by experts as to conclusions are completed, the last area of cross-examination needs to focus on the effects these determinations had on the ultimate value opined by the expert.

This is an area that is often not pursued with a pre-set financial analysis. Often, counsel end the cross-examination after getting effective testimony as to subjectivity and the differentials of that subjectivity without "closing the loop." To complete the cross-examination of the expert, a chart should be prepared for each one of these subjective evaluation differentials which isolates these differences. This will focus the Court's attention on the differential and ultimate valuation for this one particular element you are discussing leaving the remaining comments of the expert's valuation constant. Thus, by way of example, if the reasonable compensation component is an area where there is significant differential of perspective, the gradations of that differential should be laid out so that the Court is aware that for each specific gradation, whether that's $10,000 or $50,000 in terms of reasonable compensation, the ultimate effect on the valuation becomes quite significant. This will further assist the Court in understanding that, while a Court might view the differential as small, the ultimate effect of that differential creates a huge difference in the final conclusion of value. Similarly, the other three subjective components dealing with long-term growth, normalization of income and specific company risk have the same type of statistical variations. Most important among those is the specific company risk where small variations can create significant differences in ultimate value. Once each of those individual differences are then examined, quantified, and the differential in ultimate value of conclusion explored, cumulatively the cross-examination should then package all of these differences to provide the Court with an ultimate differentiation for the combined effect of each one of the subjective variables. In this way, you have provided the Court with the valuation determinations for each one of the differences as well as the valuation determinations for the combination of all of the variables within the same valuation conclusion.

Finally, after providing the Court all of that clear financial data and clear financial conclusions, you may conclude the cross-examination, depending upon which side you are with, by placing that expert at the hypothetical sale of that company and having them opine by switching places – i.e., by placing the expert in the position of now giving advice to the other side as to their willingness to either sell or buy the entity for that value given all of the potential risks to provide the Court with

a realistic real life scenario. You may seek to place the expert at a hypothetical sale negotiation of that company and ask them to opine about their position when that client turns to them and asks you for the professional opinion as to "is that a number I should be buying or selling the entity." This often provides a real-life scenario for the Court when we are dealing with hypothetical sales that do not routinely occur.

The final three areas for examination should then focus upon if there had been an incremental increase in the value of the business from the time of the marriage to the time of the divorce, why that increase in value occurred. Did it occur due to active efforts by the titled spouse or were general market conditions the primary factor? The use and identification of factors which are passive versus active in this area may have a dramatic impact upon how the incremental increase in growth is treated by the Court by way of equitable distribution. It is therefore important to identify the components of active factors increasing the value of the business and passive factors increasing the value of the business. It is also imperative to cross-examine regarding risk factors that exist as to whether these particular attributes are ones which can be controlled by the business or beyond the control of the business.

Next, the precise billing information of the expert often provides information as to what the expert focused upon, where the expert spent time and what the expert's concerns were. Inquire about the appropriate level of payment for such a sale and what restrictions would need to be put into place such as restrictive covenants to prevent the taking of the goodwill of that business somewhere else. This is often a perfect juxtaposition of real-life values and realities of purchase versus a theoretical expert's opinion of value.

The above areas of cross-examination can be used for virtually any business evaluator. While not all of them may produce effective cross-examination, some of them certainly will. They should all be areas for investigation in the preliminary phases of the case so that the cross-examination can focus on the ones that will be most effective for your particular client. The key points to remember is that this examination is an examination of one person's significantly subjective opinion on value. As a result, that subjective opinion on value also includes that expert's subjective determinations regarding the economic view of the industry, the economic view of the economy in general, the subjective determinations as to future growth or not of the business. Such an opinion is never – and should never be -- considered the same as a purely scientific objectively verifiable analysis which is absolute in its nature. By structuring an examination in such a way, using the above principles, the soft underbelly of what had seemed to be scientific absolutes developed during the direct examination of the expert can often become nothing more than an individual's predilections as to subjective valuation theory and subjective valuation components. If you have the Court thinking along these lines, then you have accomplished your task of conducting an effective cross-examination. ■

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Endnotes

1. *Bowen v. Bowen*, 96 N.J. 36 (1984).
2. *Levine v. Levine*, 162 N.J. Super. (Ch. Div. 1970).
3. *Balsimides v. Protamen Chemicals, Inc.*, 160 N.J. 352 (1999).
4. *Lawson Mardon Wheaton, Inc. v. Smith*, 160 N.J. 383 (1999).
5. *Brown v. Brown*, 348 N.J. Super. 466 (App. Div. 2002).

Can Summary Judgement Procedure Resolve Family Law-Related Issues?

By Alexandra M. Freed

Many New Jersey family law practitioners wonder whether using summary judgment is appropriate to resolve family law related issues or if the use of summary judgment is somehow precluded in the family law context. This article will attempt to answer those questions and dispel the misconception that summary judgment is a tool reserved solely for civil litigators. Summary judgment can be employed to resolve family law related issues in New Jersey.

This article will discuss the use of summary judgment motions as a pre-trial litigation tool for family law cases in New Jersey. The first section of the article will provide an overview of the standard for summary judgment and partial summary judgment, as well as the specific rules for filing and responding to a motion for summary judgment or partial summary judgment. The second section of the article will provide a synopsis of the case law in New Jersey where summary judgment was used as part of family law litigation and offer suggestions on how those cases can be cited to argue for and against the entry of summary judgment.[1]

I. Overview of Summary Judgment

What is Summary Judgment?

One explanation for the misconception surrounding the use of summary judgment in family law cases is that the rules governing summary judgment procedure are not included in Part V of the New Jersey Court Rules[2] but are set forth in the Part IV[3] of the New Jersey Court Rules. However, family law practice is also governed by the rules set forth in Part IV as applicable.[4] Thus, the fact that the rules for summary judgment are not set forth in Part V of the New Jersey Court Rules does not preclude its application in family law cases.

Summary judgment is a pre-trial motion that asks the court to issue a decision on at least one claim as a matter of law. If the motion is granted, a ruling is made on the claim or claims involved without holding a trial or hearing.[5] The purpose of summary judgment is to eliminate the expense and burden of a formal trial or plenary hearing when only questions of law are in dispute between the parties.[6] Thus, the use of summary judgment should be explored if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."[7]

Summary judgment can also be partial, in that the court only issues a decision on an element of a claim (hereinafter referred to as "partial summary judgment"). In New Jersey, summary judgment is governed by R. 4:46-2 and specifically states that "a summary judgment or order, interlocutory in character, may be rendered on any issue in the action." (emphasis added).

The distinction between summary judgment on an entire claim versus partial summary judgment on a claim or element of a claim in the family law context is illustrated by the New Jersey Supreme Court case of *Major v. Maguire*.[8] *Major* involved a grandparent visitation claim. One element of a claim for grandparent visitation, is the requirement to make a *prima facie* showing of harm to the child if the visitation is not granted.[9] In *Major* the New Jersey Supreme Court states, "[the] trial court should not hesitate to dismiss an action without conducting a full trial if the grandparents cannot sustain their burden to make the required showing of harm. To that end, a court may dismiss summary actions pursuant to R. 4:67-5, and decide complex visitation cases by summary judgment…. [c]onsistent with the due process autonomy interests, a trial court should not prolong litigation that is clearly meritless."[10]

It is also important to understand that there is a distinction between a motion for summary judgment and other pre-trial motions such as a motion to dismiss or a motion in *limine*. A motion to dismiss, while also dispositive, is very different in format, analysis, and outcome. A

motion to dismiss[11] can be filed prior to filing an answer or counterclaim and can only assert one of the following defenses:

(a) lack of jurisdiction over the subject matter,
(b) lack of jurisdiction over the person,
(c) insufficiency of process,
(d) insufficiency of service of process,
(e) failure to state a claim upon which relief can be granted, or
(f) failure to join a party without whom the action cannot proceed.

In contrast to a motion for summary judgment, a motion in *limine* is not dispositive of the outcome of a case.[12] A motion in *limine* is a request for a ruling regarding the conduct of the trial, which, if granted, would not have a dispositive impact on a case.[13] Due to the frequent misuse of a motion in *limine* as a substitute for summary judgment, the Appellate Division expressly set forth that if a ruling on a motion in *limine* will result in the dismissal of a claim or case, then the rules and standards governing summary judgment motions will apply.[14]

The Standard for Summary Judgment and Partial Summary Judgment in New Jersey

In New Jersey, summary judgment and partial summary judgment are governed by R. 4:46-2 and the seminal case of *Brill v. Guardian Life Ins. Co. of Am.*[15] Summary judgment and partial summary judgment have the same burden of proof and will be referenced collectively as summary judgment in this section. Pursuant to R. 4:46-2(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

Thus, as a first step in determining whether summary judgment is appropriate in a case is to evaluate if discovery has been completed or if the discovery period has closed.[16] Summary judgment is generally premature where discovery has not been completed.[17] However, it is important to note that the completion of discovery is not always necessary for a successful summary judgment application.[18] A party seeking discovery has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. In *Wellington v. Estate of Wellington*, which will be discussed fully below, the Appellate Division specifically held that summary judgment on the termination date of alimony was not premature prior to the exchange of discovery because the settlement agreement was clear, and extrinsic evidence was not necessary.

If a party files a motion for summary judgment asking for an order or decision as a matter of law, any opposition must do more "than simply show that there is some metaphysical doubt as to the material facts. . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"[19] "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."[20]

Moreover, a disputed issue of fact of an insubstantial nature will not preclude grant of a motion for summary judgment.[21] Similarly, "bare conclusions" without factual support in affidavits will not defeat a motion for summary judgment.[22]

The party opposing a motion for summary judgment must make a "sufficient showing" based on the evidence submitted by both parties on the motion and all legitimate inferences permissible therefrom, to require submission of the issue to the trier of fact.[23] A party's mere denial of an essential fact is not sufficient to defeat a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute.[24] Additionally, self-serving assertions alone, or speculation, will not create a question of material fact sufficient to defeat a summary judgment notion.[25]

Procedure for Filing and Responding to a Motion for Summary Judgment or Partial Summary Judgment

When filing or responding to an application for summary judgment, the first thing to be cognizant of is the timing. A motion for summary judgment can be filed anytime between 35 days after the service of the complaint and 10 days prior to the start of trial or plenary hearing.[26] Additionally, motions for summary judgment do not follow the 24-day cycle for family law motions under R. 5:5-4. A motion for summary judgment must be served and filed not later than 28 days before the return date.[27] Responses and cross-motions for summary judgment, if any, must be served and filed not later than 10 days before the return date and any reply or answer must

be filed not later than four days before the return date.[28]

Second, when filing a motion for summary judgment, the motion must be filed with a brief and a statement of material facts.[29] The statement of material facts must also follow a specific format. The statement of material facts must "set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted."[30] The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.[31] R. 4:46-2(a) explicitly states that "a motion for summary judgment may be denied without prejudice for failure to file the required statement of material facts."

Third, unlike a family law motion filed under R. 5:5-4, when filing a motion for summary judgment a certification from the client accompanying the summary judgment motion is optional.[32]

When opposing a motion for summary judgment, the party opposing is required to file a responding statement either admitting or denying/disputing each of the facts in the statement of material facts.[33] Critically, unless a fact is denied with specific citations to proofs in the record, all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion.[34] In the responding statement, a party opposing summary judgement may also include additional facts that the party contends are material and as to which there exists a genuine issue.[35] Each additional fact must be stated in separately numbered paragraphs together with citations to the motion record.[36]

Lastly, the rules regarding an award of counsel fees are different. Pursuant to R. 4:46-6, attorneys fees for the motion for summary judgment are ordered at the conclusion of the trial and not at the conclusion or ruling on the summary judgment motion itself.[37] The exception for this timing of an award of fees is if the court finds that an application or affidavit is submitted in bad faith or for the sole purpose of delay. Under those circumstances, a trial court can issue counsel fees at any time.[38]

II. Synopsis of Family Law Cases in New Jersey Addressing the Use of Summary Judgment

A second explanation for the misconception regarding the use of summary judgment in family law is the view that family law issues are too fact sensitive or too complex to resolve in a summary fashion. However, many of the Supreme Court, Appellate Division and Chancery Division cases referenced below address the use of summary judgment in seemingly complex and fact sensitive cases and provide credence to the position set forth in this article that summary judgment can be used to resolve matters of law in family law cases. [39]

New Jersey Supreme Court Decisions

Major v. Maguire[40] is a New Jersey Supreme Court case that expressly states that "complex" visitation claims can be resolved via summary judgement. *Major* addressed the entry of summary judgment in a grandparent visitation claim where the grandparents filed an action for visitation under N.J.S.A. 9:2-7 following the death of their son.[41] The trial court summarily dismissed the grandparent's claim prior to holding a case management conference or the exchange of discovery.[42]

The grandparents appealed the summary dismissal of their claim.[43] On appeal, the Appellate Division reversed the trial court's summary dismissal due to the lack of discovery.[44] While the Supreme Court affirmed the reversal by the Appellate Division[45], the Supreme Court specifically provided guidance for future cases and stated:

> Even when it has afforded grandparents the opportunity to conduct fact or expert discovery, the trial court should not hesitate to dismiss an action without conducting a full trial if the grandparents cannot sustain their burden to make the required showing of harm. To that end, a court may dismiss summary actions pursuant to Rule 4:67-5, and decide complex visitation cases by summary judgment under Rule 4:46-2(c).

Thus, although the case was remanded on procedural grounds, it is an important citation because it expressly highlights that summary judgment can be appropriate even in "complex" custody and parenting time disputes and should refute any argument that summary judgment cannot be used in family law cases.

Heuer v. Heuer[46] addressed the use of summary judgment to contest the validity of a marriage. In *Heuer*, the parties were married in 1984.[47] The marriage was a third marriage for each party.[48] The wife's first marriage was dissolved by a divorce decree obtained in Alabama in 1968 due to New Jersey's restrictive divorce laws

at the time.[49] The wife filed a complaint for divorce in 1995 seeking alimony and equitable distribution.[50] The husband filed an answer and counterclaim seeking an annulment on the grounds that the wife's first divorce was invalid and then, during the pendency of the case, moved for summary judgment on the issue.[51] The trial court granted the husband's summary judgment application.[52] The trial court held that even though husband knew about the Alabama divorce prior to marrying his wife, he was entitled to an annulment as a matter of law because the Alabama divorce was fraudulent.[53] The wife filed a motion for leave to appeal which was denied by the Appellate Division.[54] The Supreme Court granted the wife's motion for leave to appeal and reversed the trial court's decision.[55]

Notably, the Supreme Court did not take issue with the trial court's use of summary judgment to address the issue.[56] Rather, the Supreme Court disagreed with the trial court's conclusion that the husband was entitled to judgment as a matter of law. The Supreme Court held that as a matter of law, even though the first divorce was invalid, the husband was estopped from disavowing his marriage as a matter of equity because he was aware of the Alabama divorce proceedings and continued to hold himself out as her husband for 11 years.[57]

The Supreme Court's holding in *Heuer* may be helpful to cite in opposition to a motion for summary judgment because it underscores the proposition that even if the facts are not in dispute, if a party is not entitled to judgment as a matter of law, a court should deny an application for summary judgment. The decision is also significant because it suggests that in the family law context, equitable arguments such as fairness can be sufficient to contest that a party is entitled to a judgment as a matter of law.

J.B. v. M.B.[58] addresses the use of summary judgment to determine the equitable distribution of genetic materials. In *J.B.*, prior to the start of invitro fertilization the wife and husband signed a consent form, which contained language discussing the control and disposition of any preembryos.[59],[60] In relevant part, the consent order stated that the wife and the husband relinquished all control, direction, and ownership of their preembryos if their marriage was dissolved by court order, unless the court specified who would take control and direction of the preembryos.[61] At the time of the divorce, the parties had seven preembryos and the wife wanted to have the remaining preembryos discarded/destroyed while the husband wanted to maintain the preembryos.[62]

During the pendency of the case, both parties filed motions for partial summary judgment on the disposition of the preembryos. The wife's motion for summary judgment alleged that she had intended to use the preembryos solely within her marriage to the husband and that she and the husband never had engaged in any discussions regarding the disposition of the preembryos should their marriage end.[63]

The husband's motion for summary judgment alleged that prior to undergoing the invitro fertilization process, the parties discussed the disposition of the preeembryos and agreed orally that any unused preembryos would not be destroyed but would be transferred to his wife or donated to infertile couples.[64]

The couple's final judgment of divorce, entered in September 1998, resolved all issues except disposition of the remaining preembryos.[65] Shortly thereafter, the trial court granted the wife's motion for summary judgment, finding that the parties' decision to undergo the invitro fertilization process - to create a family as a married couple - no longer existed.[66] The trial court found no need for further fact finding on the existence of an agreement between them, noting that there was no written contract memorializing their intentions.[67]

The husband appealed and the Appellate Division affirmed the trial court's entry of summary judgment. The Supreme Court granted the husband's petition for certification and ultimately affirmed the trial court and appellate court's determination.[68]

Given the entry of summary judgment despite the seemingly disparate facts asserted by the parties, *J.B.* may be helpful authority to demonstrate what constitutes "a genuine issue of material fact." The decision further highlights the importance of sufficient evidence to defeat a motion for summary judgment.

Appellate Division Decisions

A.F. v. D.L.P.[69] addresses the use of summary judgment in an application for visitation as psychological parent. A.F. was the former romantic partner of D.L.P.[70] Specifically, A.F. filed a complaint seeking visitation with D.L.P.'s adopted daughter.[71] D.L.P filed a motion to dismiss A.F's pleadings alleging she lacked standing as a psychological parent to seek visitation.[72] The trial court converted D.L.P's motion to dismiss to a motion for summary judgment and granted summary judgment.[73] The trial court found, as a matter of law, A.F. could not meet the first

three elements of the psychological parentage test.[74]

A.F. appealed the trial court's decision and the use of summary judgment on a claim for psychological parentage.[75] A.F. asserted she should have been permitted to submit expert testimony on the parent-child relationship prior to the entry of summary judgment.[76] On appeal the Appellate Division expressly stated:

> We find nothing in the Court's formulation of the essential elements of psychological parenthood to suggest that the cause of action should be immune to the summary judgment procedure, and thus distinguished from other civil causes of action. *See* R. 5: 1-1, providing in pertinent part that "[c]ivil family actions shall also be governed by the rules in Part IV insofar as applicable." If it appears from the undisputed facts before the court that a putative psychological parent cannot prove one or more of the required elements at trial, the legal parent is entitled to summary judgment dismissing the third party's claim.[77]

Moreover, in affirming the trial court's entry of summary judgment, the Appellate Division found:

> While a complaint that alleges the four prongs of the V.C./Wisconsin test confers prima facie standing and will withstand a motion to dismiss on the pleadings, it is not immune to a motion for summary judgment–without appointment of an expert or conduct of a plenary hearing–when the certifications offered by the parties demonstrate under the Brill standard that no reasonable fact finder could conclude that the first three of the essential prongs existed.[78]

The findings in *A.F.* echo the Supreme Court's decision in *Major* that summary judgment can be appropriate in parenting time cases and third-party visitation claims. In fact, *A.F.* provides stronger language by expressly finding that a visitation claim is not "immune" to summary judgment.

Zappala v. Zappala[79] addresses the use of a motion for partial summary judgment to establish the termination date of a marriage. In *Zappala*, the parties lived in New Jersey during the marriage.[80] The parties separated and the husband moved to Pennsylvania where he filed a Complaint for Divorce.[81] Two years later the wife filed a Complaint for Divorce in New Jersey.[82] Ultimately, the marriage was dissolved after the entry of a divorce decree in Pennsylvania. However, by consent of the parties, the issues of alimony, equitable distribution, child support and custody were left to be resolved in New Jersey.[83]

For purposes of equitable distribution, the parties disagreed on the end date of the marriage.[84] As such, the husband filed a motion for partial summary judgment seeking to set the end date of the marriage as of the date he filed the Complaint for Divorce in Pennsylvania, which was two years prior to the filing date of the wife's complaint for divorce in New Jersey.[85] Relying on *Portner v. Portner*[86] the trial court granted partial summary judgment and set the end date of the marriage as of the filing date of the Complaint for Divorce in Pennsylvania.[87]

The wife asked for leave to appeal the entry of the partial summary judgment.[88] The Appellate Division granted leave and reversed the trial court's entry of summary judgment.[89] In the opinion, the Appellate Division acknowledged that, on its face, the trial court's entry of partial summary judgment in favor of setting the end date of the marriage concurrently with filing in Pennsylvania seemed appropriate.[90] However, the Appellate Division held Pennsylvania did not have jurisdiction over the Complaint for Divorce when it was filed[91] because the husband's complaint was based on a separation of three years when the parties had only been separated for a period of months.[92] Thus, as a matter of law, a valid complaint was not filed terminating the marriage until the wife filed her Complaint for Divorce in New Jersey two years later.[93]

Zappala, like *Heuer*, is an important authority to cite in opposition to a motion for summary judgment as it provides further support for the proposition that even if the facts are undisputed, if a party is not entitled to judgment as a matter of law, a court should deny a motion for summary judgment.

Wellington v. Estate of Wellington[94] addresses the use of summary judgment to set the termination date of alimony. In *Wellington*, the plaintiff sued the executors of the estate of her former husband, claiming that under the terms of the property settlement agreement the estate was obligated to continue paying her alimony on her former husband's behalf until her death.[95] The trial court granted summary judgment to the former husband's estate, finding that the property settlement agreement, which required a lump-sum payment from the husband's estate upon his death satisfied his alimony obligation to

the wife.[96] The plaintiff appealed the entry of summary judgment.[97] She argued that the trial court erred because it entered summary judgment prior to the completion of discovery.[98] The Appellate Division affirmed the entry of summary judgment holding that the entry of summary judgment was not premature prior to the exchange of discovery because the settlement agreement was clear, and extrinsic evidence was not necessary.[99]

Thus, as referenced above, *Wellington* is a useful case to cite in support of summary judgment prior to the completion of discovery. *Wellington* stresses that the completion of discovery is not always required prior to the entry of summary judgment.

Chancery Division Decisions[100]

Baxter v. Baxter[101] discusses the use of summary judgment to prove a claim of adultery. In *Baxter*, the wife filed a Complaint for Divorce on the basis of extreme cruelty.[102] In response, the husband filed a Counterclaim for Divorce on the basis of adultery.[103] During the parties' alleged separation, the wife gave birth to a child, whom the husband denied was his child.[104] The husband moved for summary judgment on the claim of adultery, which the trial court denied.[105] The Court found, based on the pleadings, there was a genuine issue of material fact that would preclude the entry of summary judgment.[106]

Marschall v. Marschall[107] addresses summary judgment and the enforceability of a prenuptial agreement. In *Marschall,* the wife filed a Complaint for Divorce seeking support and equitable distribution.[108] In response, the husband filed a motion for summary judgment claiming that the issues were resolved by the terms of the parties' prenuptial agreement.[109] The wife opposed the motion for summary judgment.[110] In opposition she asserted that the husband failed to make full disclosure of his assets in the prenuptial agreement and, thus, there was a material issue in dispute about the enforceability of the prenuptial agreement.[111] The Court agreed that the husband had not met his burden on a motion for summary judgment to prove that there was full disclosure of his assets.[112] As such, the trial court denied the motion.[113]

The foregoing cases demonstrate that summary judgment can be an effective tool in narrowing or eliminating issues in the family law litigation practice. As such, family law practitioners should be familiar with summary judgment procedure to understand how to file an application for summary judgment, as well as oppose an application for summary judgment. ■

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Endnotes

1. This article addresses the published New Jersey decisions through August 2023.
2. Part V of the New Jersey Rules of Court is titled "Rules Governing Practice in Chancery Division, Family Part.
3. Part IV of the New Jersey Rules of Court is titled "Rules Governing Civil Practice in Superior Court, tax Court and Surrogate's Court.
4. R. 5:1-1.
5. R. 4:46-2(c).
6. *Ledley v. William Penn Life Ins. Co.,* 136 N.J. 296 (1995).
7. R. 4:46-2(c) (emphasis added); *See also Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995).
8. *Major v. Maguire*, 224 N.J. 1 (2016).
9. *Moriarty v. Bradt*, 177 N.J. 84 (2003).
10. *Major v. Maguire*, 224 N.J. 1, 18 (2016).
11. R. 4:6-6.
12. In New Jersey motions in *limine* are governed by R. 4:25-8. Significantly, R. 4:25-8 prohibits filing motions in *limine* that may have a dispositive impact on the case, including "application[s] to bar an expert's testimony in a matter in which such testimony is required as a matter of law to sustain party's burden of proof." *See also*, *Seoung Ouk Cho v. Trinitas Regional Medical Center*, 443 N.J. Super. 461 (App. Div. 2015).

13. R. 4:28-5.
14. *Seoung Ouk Cho v. Trinitas Regional Medical Center*, 443 N.J. Super. 461 (App. Div. 2015).

Seoung Ouk Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461 (App. Div. 2015) stating that "absent extraordinary circumstances or the opposing party's consent, the consideration of an untimely summary judgment motion at trial and resulting dismissal of a complaint deprives a plaintiff of due process of law.; *See also* R. 4:46-2(c).

15. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995).
16 *See Crippen v. Cent. Jersey Concrete Pipe Co.*, 176 N.J. 397, 409, 823 A.2d 789 (2003); *See also Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602 (2002).
17 *See Crippen v. Cent. Jersey Concrete Pipe Co.*, 176 N.J. 397, 409, 823 A.2d 789 (2003); *See also Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602 (2002).
18. *Auster v. Kinoian*, 153 N.J. Super. 52, 56, 378 (App. Div. 1977)
19. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)(footnote omitted).
20. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).
21. *See Prant v. Sterlind*, 332 N.J. Super. 369, 377 (Ch. Div. 1999), *aff'd o.b.*, 332 N.J. Super. 292 (App. Div. 2000).
22. *Cortez v. Gindhart*, 435 N.J. Super. 589, 606 (App. Div. 2014).
23. Pressler & Verniero, Current N.J. Court Rules, Comment to R. 4:46-2 (2016); *See also*, *Too Much Media, LLC v. Hale*, 413 N.J. Super. 135, 166 (App. Div. 2010), aff'd on other grounds, 206 N.J. 209 (2011).
24. *Rankin v. Sowinski*, 119 N.J. Super. 393, 399-400 (App. Div. 1972); *Mangual v. Berezinsky*, 428 N.J. Super. 299, 312-13 (App. Div. 2012).
25. *MEMO v. Sun National Bank*, 374 N.J. Super. 556, 563 (App. Div. 2005); *See also* Fargas v. Gorham, 276 N.J. Super. 135 (Law Div. 1994).
26. R. 4:46-1.
27. R. 4:46-1.
28. R. 4:46-1.
29. R. 4:46-2(a).
30. R. 4:46-2(a).
31. R. 4:46-2(a).
32. R. 4:46-2(a).
33. R. 4:46-2(b).
34. R. 4:46-2(b).
35. R. 4:46-2(b).
36. R. 4:46-2(b).
37. R. 4:46-6
38. R. 4:46-5.
39. This section only addresses published decisions. However, there are several unpublished family law decisions where the use of summary judgment is addressed. Those cases include, *Acosta-Santana v. Santana*, 2018 N.J. Super. Unpub. Lexis 2667(addressing death during a divorce); *Caprio v. Caprio*, 2010 N.J. Super. Unpub. Lexis 126 (addressing the modification of alimony); and *Weidel v. Weidel*, 2021 N.J. Super. Unpub. Lexis 2829 (addressing the enforceability of prenuptial agreement).
40. *Major v. Maguire* , 224 N.J. 1 (2016)
41. *Major*, discusses the background, legislative history, standard and procedure for grandparent visitation claims. However, this article will not focus on those topics. The article will focus solely on the use of summary judgment at the trial level and the outcome of the appeals on that issue.
42. *Major v. Maguire*, 244 N.J. 1, 6 (2016).
43. *Ibid*.
44. *Ibid*.
45. *Ibid*.
46. *Heuer v. Heuer*, 52 N.J. 226, 229 (1998).
47. *Ibid*.
48. *Ibid*.
49. *Ibid*.
50. *Id*. at 231.
51. *Ibid*.
52. *Ibid*.
53. *Ibid*.
54. *Ibid*.
55. *Ibid*.
56. *Id*. at 232.
57. *Id*. at 239.
58. *J.B. v. M.B.*, 170 N.J. 9 (2001)
59. Preembryos are fertilized eggs.
60. *J.B. v. M.B.*, 170, N.J. 9, 13-14 (2001).
61. *Ibid*.
62. *Ibid*.
63. *Id*. at 14.
64. *Id*. at 15.

65. *Ibid.*
66. *Id.* at 16.
67. *Ibid.*
68. This article does not discuss the substantive standard outlined by the New Jersey Supreme Court for agreements on genetic materials and preembryos.
69. *A.F v. D.L.P.,* 339 N.J. Super. 312 (App. Div. 2001)
70. *Ibid.*
71. *Ibid.*
72. *Ibid.*
73. *Ibid.*
74. To the establish the existence of a like relationship with the child, a party must prove four elements: the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged. *See V.C. V. M.J.B.,* 163 N.J. 200 (2000).
75. *Ibid.*
76. *Ibid.*
77. *Id.* at 320. (emphasis added).
78. *Id.* at 325.
79. *Zappala v. Zappala*, 222 N.J. Super. 169 (App. Div. 1998).
80. *Ibid.*
81. *Id.* at 170.
82. *Id.* at 171.
83. *Ibid.*
84. *Ibid.*
85. *Ibid.*
86. *Portner v. Portner*, 93 N.J. 215 (1987) establishes a bright line that a marriage is deemed ended upon the filing of a valid divorce complaint.
87. *Id.* at 171-172.
88. *Id.* at 170.
89. *Id.* at 172.
90. *Id.* at 172- 173.
91. *Id.* at 173.
92. *Ibid.*
93. *Id.* at 173 -174.
94. *Wellington v. Estate of Wellington*, 359 N.J. Super. 484 (App. Div. 2003).
95. *Id.* at 486.
96. *Ibid.*
97. *Ibid.*
98. *Ibid.*
99. *Id.* at 496.
100. Although the chancery division decisions are not binding on a trial court, they are included in this section to provide further guidance on the use of summary judgment to address family law issues.
101. *Baxter v. Baxter*, 20 N.J. Super 554 (Ch. Div. 1952)
102. *Id.* at 555.
103. *Ibid.*
104. *Id.* at 556.
105. *Ibid.*
106. *Ibid.*
107. *Marschall v. Marschall*, 195 N.J. Super. 16 (Ch. Div. 1984)
108. *Id.* at 20.
109. *Ibid.*
110. *Ibid.*
111. *Ibid.*
112. *Id.* at 34.
113. *Ibid.*

10 Tips for Your First Family Law Trial

By Tamires M. Oliveira and Gregory L. Grossman

Every attorney remembers their first trial! No matter how skilled or experienced a trial attorney becomes, they began somewhere. While trying your first family law case can be intimidating, it is an exciting learning opportunity. This article provides useful tips to prepare for your first family law trial so the opportunity will be a positive experience.

1. Know the file better than anyone else in the courtroom

At your first trial, few things will be entirely within your control. You may be overwhelmed by the many nuances of the case law, statutes, court rules, and evidence. It may be difficult to know where to begin. However, one thing will be fully within your control – your factual knowledge of the case. Knowing your file inside and out is a key component and can provide you with a distinct advantage at the trial.

Mastering the file means having a comprehensive understanding of the parties, the procedural history, the witnesses, the experts, the evidence, and everything else that is involved in your case. You will need to read every document in your file regardless of who produced it. Your thorough review of the file may reveal a line in an order, a report, or even a bank statement that is seemingly unremarkable but now has the potential to change your trial strategy for the better. Mastering the file takes time, effort, and hard work but, in the end, it pays significant dividends.

2. Preparation is key

What good is information if it cannot be easily used? Once you have read through and mastered the file, you will need to distill the information you learned into a format that is user-friendly and capable of being presented in a clear and concise manner. Here, preparation is critical. Many attorneys ensure proper preparation by creating trial binders. Trial binders are binders created specifically for trial which often begin being created at the inception of a case. Trial binders contain key information and documentation that furthers the theme of your case including, but not limited to key procedural documents, evidence, pertinent law, anticipated evidential objections and *in limine* arguments. Through your trial binder, the information you need will always be at your fingertips and accessible to you, allowing you to be present and fully engaged during the trial.

In preparing, make sure you've done your research on the trial court and are prepared to appear in front of *your* trial judge. Some judges will start the trial by letting the attorneys know that they have read the pleadings and do not want the attorneys to reiterate what they've already read. Other judges prefer that attorneys fully present their position and the law that applies to their case. Some judges may be more lenient as to the application of the Rules of Evidence, while others require strict compliance. It is crucial to know as much as you can about the judge assigned to your case and what they expect at the time of trial. Each judge controls the courtroom differently and knowing what to expect of your judge will give you valuable insight of the extra steps you might need to take to be fully prepared to try your case. Once you are educated as to what to expect about the trial judge's style and preferences, you can make informed decisions as to what to include in your trial binder.

3. What is the burden and who has it?

To be successful at trial, it is imperative you know what you must prove and by whom. Simply stated, this is "the burden of proof." Once identified, the applicable burden (or burdens) of persuasion can serve as a critical roadmap for trial. For example, if your case involves an allegation that an asset is exempt from equitable distribution, the party asserting the exemption has the burden of proving immunity under *Painter v. Painter.*[1] Having the knowledge of the burden of proof is of paramount importance and will enable you to zero-in on the criteria that must be established to succeed at trial.

If the burden of persuasion is not easily discernible, be sure to obtain clarification prior to the start of trial. This may involve doing more research, or simply using your network of colleagues to seek advice. Some burdens, such as a modification of alimony under *Lepis v. Lepis,*[2] may lend themselves to a more clearly defined burden of

proof. However, more discrete issues – even certain *Lepis* issues – can be more complex and present certain challenges. By way of example, in an application for a modification of alimony, is the burden modified if a party has been adjudicated disabled by the Social Security Administration? Pursuant to *Golian v. Golian,*[3] despite the applicability of *Lepis*, if a party is adjudicated as disabled by the Social Security Administration, it creates a rebuttable presumption which modifies the typical *Lepis* burden of proof. This is one of numerous examples which highlight the importance of correctly understanding the applicable burden of proof.

4. The trial brief

The trial brief is a pre-trial submission that sets forth the applicable law and arguments you anticipate you will make at trial. Through your trial brief, you can present the Court with a detailed analysis of the law which is interrelated with the facts supporting your client's position. Drafting an exceptional trial brief requires you to devote the necessary time and legal research and to write with purpose and persuasion. In this vein, it is essential for you to read the relevant case law and statutes *in their entirety* and tie the law to your case *with specificity*. How are the facts of your case similar to the cases you are relying upon? How are they different? Has a *prima facie* case been made which warrants discovery? Your trial brief is your chance to present your legal arguments and persuade the trial judge why your client's position should prevail and result in a winning decision in your client's favor.

5. Getting exhibits into evidence

The Court's decision in a matrimonial trial will be determined by the evidence presented. As such, the Rules of Evidence apply, and only exhibits entered into evidence can be relied upon by the trial judge in rendering a decision. In other words, it is not enough to simply present your exhibits during the trial – each individual exhibit must be admissible and ultimately admitted into evidence.

During the trial, you will refer to exhibits which may be a written document, a bank statement, an audio recording, a photograph or any other tangible item that supports your client's position. You will "mark" the exhibit for purposes of identification and present a copy to the trial judge, your adversary, and the witness. Typically, the witness will then be asked to identify the exhibit. Assuming the witness can identify the exhibit, questions will follow as to the exhibit and its significance in the trial. At the conclusion of the questioning, it should be clear why the exhibit was presented. However, before the Court can reference the exhibit and rely upon it in its decision, the exhibit must be moved into evidence.

The formal moving of exhibits into evidence usually occurs at one of two moments during trial – either as each respective exhibit is presented to the Court, or collectively at the conclusion of trial. If you do not move your exhibits into evidence, they cannot be relied upon by the Court in its decision, making it critical that you do so. If not already known to you prior to trial, you should ask the trial judge the preferred procedure for moving exhibits into evidence. Regardless of when exhibits will be moved into evidence, it is critical to keep track of the exhibits you identify during the trial so that no exhibit is inadvertently omitted.

When you seek to move a particular exhibit into evidence, your adversary will have the opportunity to object and argue that the exhibit should not be moved into evidence. There are countless evidential objections which may be applicable to a certain exhibit, and it can never be assumed that an exhibit will be admitted into evidence. For this reason, you should anticipate potential evidential issues and objections and be prepared to make arguments to the trial judge why your exhibit is evidential and the objection is overruled.

6. Serving a trial subpoena

In the context of family law, subpoenas are often used to obtain evidence and gather crucial information. Subpoenas can be particularly effective in situations where the opposing party is withholding essential evidence or attempting to conceal assets (e.g., bank account statements or employment records). An attorney handling a pending New Jersey divorce action may issue a subpoena to an individual or entity within the state of New Jersey.

Under New Jersey Court Rule 1:9-1, a party may issue a subpoena to command a nonparty witness to appear and testify (subpoena *ad testificandum*) or, under New Jersey Court Rule 1:9-2, produce documents or other evidence (subpoena *duces tecum*) at trial. Objections may be made to the issuance of a subpoena by filing a motion to quash the subpoena. As such, when issuing a subpoena, the nonparty witness who is served with the subpoena should also be notified that they cannot release the requested documentation until the due date as stated in the subpoena, providing an opportunity for an opposing party to file the motion to quash the subpoena.

New Jersey Court Rules have specific guidelines for the issuance of subpoenas. Accordingly, one should review the relevant Court Rules that apply to the issuance of subpoenas, including:

- R. 1:9-1: trial subpoenas *ad testificandum;*
- R. 1:9-2: trial subpoenas *duces tecum;*
- R. 1:9-3 and 1:9-4: service of subpoenas; and
- R. 1:9-5: failure to obey a subpoena.

7. Identify potential evidential objectives

Family law trials are emotionally charged proceedings where critical decisions are made. In preparing for a family law trial, you need to keep in mind that in New Jersey, family law matters are tried without a jury and the judge is the ultimate trier of fact. The judge is not only the decision-maker but also the referee and overseer of all aspects of the case. As such, it is crucial that a family law case is presented to the judge in a way that highlights the facts of the case and shows how, when those facts are applied to the existing law, it warrants the relief sought.

A judge in the family part will resolve anything from minor issues such as the division of kitchen utensils, to impactful issues such as determining a custody dispute that will affect the children's lives both short- and long-term. To ensure a fair and just outcome, it is crucial that the evidential objectives are identified effectively. The way these objectives are identified and presented to the judge can strengthen or weaken your case. Identifying potential evidential objectives takes a lot of work, including making sure you clearly identify and have the case law ready. Once done effectively, it can help build a compelling case that presents the strongest possible outcome to support your client's position.

8. Pre-trial conference: Ask questions about how the case will be handled

A pre-trial conference may be held at the discretion of the Court either on its own motion or upon a party's written request. But what actually happens at a pre-trial conference? In simple terms, the pre-trial conference is a way for the Court to ensure the parties are prepared for trial, but most importantly, it's one last opportunity for the parties to try to settle their case.

At the pre-trial conference, the judge will confer with the attorneys (and sometimes also the parties) to discuss the issues in the case, the evidence presented, and any possibility of a settlement. In advance of the pre-trial conference, the judge may ask you to prepare a Pre-Trial Statement. Depending on your trial judge, you may be instructed as to what needs to be set forth in your Pre-Trial Statement. If the judge does not have specific requirements, the Pre-Trial Statement should include a witness list, an exhibit list, a proposed parenting plan (if applicable), and a list of stipulations or conditions that both parties agree to before the trial. Stipulations can be a useful tool that will save time at trial and ensure that important facts will not be in dispute. On the other hand, stipulations have the potential to limit what you can and can't present to the trial judge so you must consider the importance of every stipulation before it is submitted so that you are sure that the stipulation will not interfere with what you want to present at trial. The Pre-Trial Statement should also include a trial brief setting forth your legal position and its supporting facts. The Pre-Trial Statement is your opportunity to start the presentation of your persuasive and convincing arguments to the Court. All the hard work you've been putting into being prepared and knowing the facts of your case better than anyone else will start to pay off here.

If the parties reach agreement(s) on certain issues at the pre-trial conference, these agreements can then be signed by all parties and become part of the final judgment of divorce. On the issues that the parties were unable to reach an agreement, those issues will be determined by the trial judge at trial.

At your pre-trial conference, don't be intimated to ask the judge the questions you may have in advance of the trial. For example, ask whether the judge wishes to hear an opening statement. Or, if the trial judge has a preferred procedure for moving exhibits into evidence. As previously mentioned, not every judge handles their trials the same way. Depending on the judge, if there is a trial brief, an opening statement may not be required. Asking the judge the questions you may have about the trial at the pre-trial conference, especially at your first family law trial, will help you plan ahead and be prepared. Remember that the trial judge also had their very first trial one day.

9. Listen to your gut feeling and to the advice of a colleague you can trust

Being a family law attorney is rewarding. The hard work you put into your first trial will help mold the future of a family who came to you at what may possibly be their most difficult stage of life. However, in this process, you may find yourself in unfamiliar waters. When you find yourself in an unknown territory, ask a

trusted colleague for help. Everyone needs support, and there isn't one successful lawyer who has reached their level of success without help.

Family law encompasses numerous areas of expertise, and a family law attorney can't be an expert in every area. If you're faced with a trial where there is a legal issue that falls outside your area of expertise, seeking help from a colleague can be the deciding factor for you between success and failure.

Now, there will be times when the unfamiliar situation may not necessarily be related to a legal issue. For example, it may involve decisions you will need to make that will affect your adversary in ways you wish it wouldn't. In those situations, "two heads are better than one" may hold true. Discussing matters with trusted colleagues can help you move forward with strategies that you wouldn't be able to come up with on your own.

With this said, always keep in mind the ethical boundaries that you must adhere to. While reaching out to colleagues is important, you need to ensure you don't compromise the confidentiality you have with your client or breach any ethical standards when discussing an issue with a colleague.

Ultimately, the goal is to serve your client to the best of your abilities. Seeking help from colleagues can help ensure that you are doing just that – even if that means you have to admit you don't have all the answers. Asking for insight is not a sign of weakness, but a sign of wisdom.

10. It's trial day! A few practical things to remember:

- Do not call a judge "judge." Address the judge as "Your Honor."
- Do not speak over the judge. Speaking over the judge will not only make it difficult for the court reporter to prepare a clear record, but it will also upset the trial judge.
- Ask to approach the bench if there is an issue you do not want raised in open court. Do not approach the bench on your own. Always ask the judge if you can approach with your adversary.
- Stand when speaking: When the judge enters the courtroom, you should stand up and remain standing until the judge advises everyone to sit. You should also stand when addressing the judge.
- Respect your adversary. The adversary is on the opposing side during the trial but will remain your colleague for many years after the trial is over. Even if your adversary is rude or aggressive, your ability to maintain a level of professionalism and respect toward your adversary will undoubtedly be noticed and appreciated by the judge.
- Prepare your client. By the day of trial, you should already have prepared your client as a witness on all aspects of their case. However, make sure your client also knows what to expect at the actual trial. Having a conversation about things as simple as what they should wear; how long the trial may take; where they should park; who will be in the courtroom; what time they should meet you at the courthouse; and what they should do if the other side is disingenuous, will help your client feel more prepared and confident the day of trial.

Conclusion

Don't leave anything to chance. As prepared as you may think you are, the days leading up to the trial will likely be stressful for you and for your client. Thorough preparation will provide you with the tools necessary to effectively argue your client's case and handle any last-minute issues that may come up. We hope these tips will help ease that stress and help you prepare for your first family law trial. ■

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Endnotes

1. *Painter v. Painter*, 65 N.J. 196 (1974).
2. *Lepis v. Lepis*, 83 N.J. 139 (1980).
3. *Golian v. Golian*, 344 N.J. Super. 337 (App. Div. 2001).

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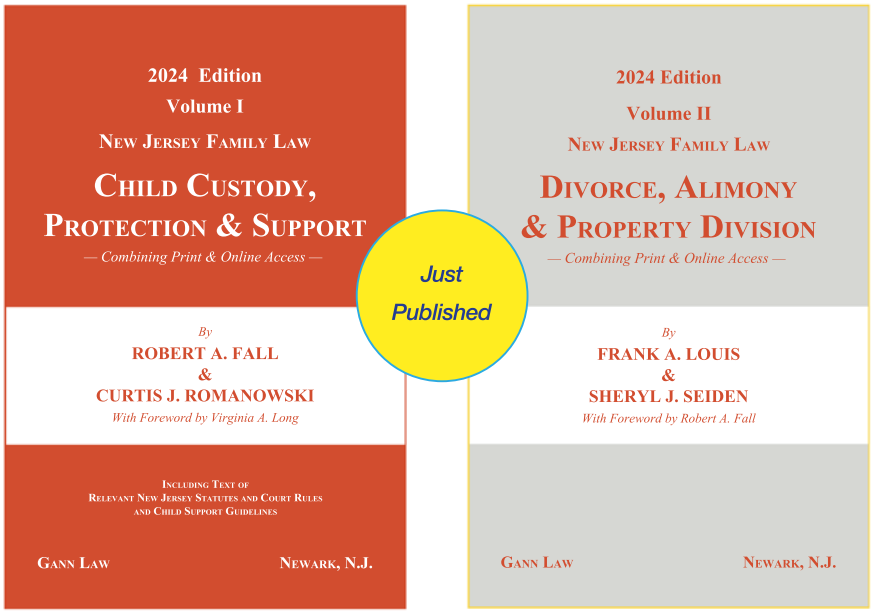

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