

SELECTING CREDIBLE WITNESSES ACHIEVES DESIRED RESULTS

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As in any trial, the selection of witnesses in matrimonial litigation can have a significant impact on your trial results. The process begins at the first client interview. A spouse's knowledge of the facts, his ability to effectively communicate those facts, and his demeanor in doing so all provide you with an initial insight not only of the potential effectiveness his eventual testimony may provide, but also of what additional witnesses may be necessary or helpful in presenting the case at trial. While in the majority of cases the parties are the individuals with the most knowledge of the facts relating to the dissolution of the marriage, they may not always be the best people to call as witnesses for many of the issues which become important in their litigation. The conversation which evolves during the initial consultation with your client can help determine the contested issues of the case. These can include custody, the amount of income the parties earn or have the potential of earning, the value of marital assets, the desire of one of the parties to move out of state, and the existence of property exempt from equitable distribution. All create situations which can benefit from the assistance of both expert and fact witnesses beyond the parties themselves.

The first witness to consider, of course, is your client. He is in possession of many of the facts which are relevant and essential in presenting his case. In addition to relating the basic elements required to establish standing and grounds

for divorce, his statements regarding identification and ownership of assets, the employment history and income of the parties, the lifestyle maintained during the marriage, and the extent of each party's involvement in the children's lives is crucial. Your client's testimony alone, however, is often not enough.

Sometimes it may actually be beneficial to call your client's spouse as your witness. This can occur, for instance, in a situation where your client knows little about the parties' finances, which have always been managed by his spouse. Calling the other party to testify as your witness in such a situation not only serves the purpose of having the information presented to the court from the party who understands the finances better, and thus perhaps in a clearer fashion than you would be able to do with testimony from your own client, but it may also take the other party by surprise, which can also be used to your advantage.

Presenting the other party as your witness can also be a useful strategy in situations where the other spouse has a weakness you immediately want to expose. For example, plaintiff's counsel calling a defendant spouse whose Case Information Statement budget is totally unrealistic to the witness stand at the beginning of the trial can help place the credibility of that spouse in question from the very start of the litigation, before she has even had an opportunity to put forth her own case.

Other fact witnesses to consider depend upon the contested issues of the case. In the situation where the parties have submitted very different budgets and lifestyle is thus an issue, friends, neighbors, nannies and housekeepers can testify about the couple's social lives and spending habits. Present witnesses

who can tell about the lavish parties the couple hosted, the frequent dinners out, the vacations they took, their generosity in gift giving, and other indications of their spending habits. Closely related to the lifestyle issue, if you are attempting to show that a spouse has significant cash income, people the parties regularly paid in cash, such as nannies, housekeepers, and gardeners could be called to testify. Did the couple make any improvements to the house which were paid for in cash? The contractors might make good witnesses. Employers, employees and co-workers of the parties also may be able to testify about cash income, as well as various perks of employment. Although they may naturally be perceived to be biased, relatives can also sometimes be effective witnesses relating to these issues. Suppose, for example, your client is claiming certain assets to be exempt from equitable distribution because they were gifted to him from his parents. Certainly his parents, if available, can testify to the gift. If his siblings received similar gifts, and they have documentation to back up the paper trail of money flowing from the parents to the children, this can bolster your client's claim. Depending on the circumstances, family members can also be powerful witnesses if they have information to offer which hurts the position taken by their blood relative.

Relatives you should try to avoid using as witnesses, however, are the children of the parties. Clients often tell their attorneys that their son or daughter is willing to testify "against" their spouse. The first thing to consider when your client makes such a suggestion is the relevance of the information the child may have. The very fact that your client is offering the child's testimony as an attack

against his spouse rather than in support of a particular position speaks volumes, as it will to the judge hearing the case should you attempt to use the child's testimony for that purpose. Except in very limited circumstances, such as when a child happens to have been the only witness to or a victim of abuse or an act of domestic violence, and his or her future safety may be in jeopardy, having children testify is not a good idea. Pitting a child, even an adult child, against his own parent, no matter what relevant information the child may have, may end up doing nothing other than making the parent who has used him as a witness look bad, since he is obviously involving the child in the litigation, and encouraging the child to look at the other parent in a negative fashion. It is rare that a child would be the only person in possession of information relevant to the salient issues in the case. It is best, both for your client and for the child, that you search for alternate methods of getting into evidence whatever information the child might have to offer.

While shielding children from the litigation is always a goal, it is not always possible. Indeed, in custody cases, their future is the focus of the trial. Even in these circumstances, if it seems necessary for the children to offer testimony, one's goal should still be to prevent them from having to talk about their relationships with their parents in the courtroom. One of the reasons mental health experts are used in custody cases, which will be discussed further below, is to allow professionals to elicit information from children in a way that will minimize the trauma of their involvement in the divorce litigation. If further testimony is needed from the children involved in a custody battle, efforts should

be made to keep their participation in the court proceedings as easy and painless for them as possible. To that end, most judges will interview the children in chambers with specifically suggested questions or topics of discussion submitted by the attorneys representing their parents.

In presenting the custody case at trial, there are numerous fact witnesses who can be called upon other than the children themselves. Again, friends, neighbors, nannies, housekeepers and relatives may be helpful to your case, as well as teachers, coaches, scout leaders, and other adults who have regular contact with the children.

In addition to fact witnesses, experts are often crucial to the successful outcome of divorce litigation. While experts are sometimes appointed by the court, or jointly agreed upon by the parties, each spouse may also each retain his or her own expert with respect to a number of issues. Among the most common experts employed today are forensic accountants. Where one or more of the marital assets is an interest in a closely held business, their expertise is invaluable. Not only can they render opinions as to the value of a business entity and a party's true income, but they can also prepare a lifestyle analysis and analyze tax returns and financial reports. In fact, when a party engages the