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EVIDENCE AND FAMILY PRACTICE

Part Two of a Three-Part Article

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Here, we continue to look at some of the rules of evidence that all family law attorneys should be aware of, even if they aren't called upon to use them as often as legal practitioners in other fields.

VOIR DIRE

Voir dire may be requested, during a trial or hearing, when counsel wishes to challenge the foundation for the introduction or exclusion of evidence, or the competency of a witness. The qualifications of an expert witness, the competency of a witness, the facts upon which a claim of privilege is based, the foundation for the introduction of evidence, and the foundation for the authentication of evidence are matters upon which a voir dire may be requested.

In New York, the usual practice is for the testimony of the witness to be interrupted -- at the time the foundation is being laid or before the offer into evidence is made -- by counsel requesting, a cross-examination of the witness.
Counsel usually states: "May I have a voir dire, your honor?" If the court allows the voir dire, and it exposes a defect in the foundation for the admission of the evidence, or the competency of the witness, the inadmissible evidence or witness will be excluded.

EXPERT WITNESS TESTIMONY AND PAYMENT OF EXPERTS FEES

An expert witness may refuse to testify. However, if he chooses to testify, he is entitled to compensation as a condition for his appearance. In People ex rel.

Kraushaar Bros. & Co. Inc., v. Thorpe, 296 NY 223 (1947), a tax certiorari proceeding, the relator subpoenaed an involuntary expert witness who previously had prepared an appraisal of the property in a suit for a prior owner. At the trial, the relator sought to elicit the witness's opinion as to the value of the premises but the witness declined to accept a fee and refused to testify, stating that he did not wish to take part in the case. The trial court ruled, over the relator's objection, that, while that witness was required to testify with regard to what he had seen on the premises, he had a right to refuse to answer any question connected with his experience and judgment as a real estate expert and not as an ordinary lay witness. The Court of Appeals affirmed, holding that the better rule is not to compel a witness against his will to give his opinion as an expert.

In Lynette D. v. Carlton W., 112 Misc2d 738 (Fam Ct. 1982), a paternity proceeding, a doctor was subpoenaed to produce in court lab analysis and blood test results of a court-ordered test. The doctor had no independent knowledge of facts material to the issue of paternity, but the witness was an expert in administration of blood tissue tests. As an "expert," he could refuse to testify.
The family court modified the subpoena to allow the witness to negotiate for compensation as a condition for his appearance.

REFUSAL TO PROCEED WITH DEFENSE BEFORE PLAINTIFF RESTS

Very frequently, witnesses in custody and divorce cases are called "out of turn" to accommodate scheduling problems. Although the trial court has discretion in determining the sequence of proof and regulating the conduct of the trial, it is reversible error to compel a defendant to proceed with his case before the plaintiff rests. In Roberts v. St. Francis Hospital, 96 AD2d 272 (3d Dept, 1983), the Appellate Division held that the trial court committed reversible error in striking the defendant's answer after she refused to proceed pending appearance of the plaintiff's final witness. It held that the speedy disposition of cases should not take precedence over the substantial rights of the litigants.

The trial court in the Roberts medical malpractice case was so concerned by the loss of half a trial day that it imposed the drastic penalty of precluding a defense on the merits. This was done despite the valid basis for defendant's refusal to proceed before

all of plaintiff's evidence was in. The appellate court held that, ordinarily, the party bearing the burden of proof is obligated to complete his prima facie case before the opposing party must present his proof.

The saving of a half day's trial time was not a sufficient justification for a departure from the general rule. The court noted that, without the testimony of the medical witness concerning the effect of the delay in diagnosis, plaintiff had quite arguably failed to present a prima facie case of malpractice. Plaintiff had presented no other testimony to link the defendant's failure to contact the plaintiff and the possibly resultant delay in diagnosis with the worsening of her condition. Had the defendant been permitted to hear all of the plaintiff's case against her, she might have moved upon the close thereof for a nonsuit on the ground that the plaintiff had not proven a prima facie case. She might also have been so confident of the weakness of plaintiff's case that she would have chosen to proceed to the jury without presenting any proof on her own behalf. The appellate court thus held that the defendant should have had the opportunity to exercise these options after hearing all of the plaintiff's case.

COURT MAY NOT COMPEL TESTIMONY

It is well settled that a court may conduct limited examination of a witness "to elicit significant facts, clarify an issue or facilitate the orderly and expeditious progress of the trial." If, in the opinion of the trial court, a party has failed to introduce sufficient evidence to support the judgment sought, the clear option available to the court, and duty imposed by law, is to render a judgment in favor of the adversarial party, rather than compelling the production of additional testimony.

A party cannot, however, be compelled to testify except at the instance of the adverse party. It is error if he testifies on motion of the justice. By presuming to direct the production of testimony from witnesses neither deposed by the parties nor called by them at trial, the trial justice transgresses the bounds of adjudication and arrogates to himself the function of an advocate, thus abandoning the impartiality required of his office. Carroll v. Gammerman, 193 AD2d 202 (1st Dept., 1993).

FAILURE OF A PARTY TO DENY OR CONTRADICT EVIDENCE OR PLEADINGS

If the testimony of a party or other interested person is not contradicted by direct evidence nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor in its nature surprising or suspicious, there is no reason for denying it conclusiveness. Hull v. Littauer, 16 E.H. Smith 569, 57 N.E. 102 (1900).

EFFECT OF WITHHOLDING EVIDENCE IN YOUR POSSESSION, OR FAILURE TO CALL A WITNESS

Where an adversary withholds evidence in his possession or control that would be likely to support his version of the case for which support is needed, the strongest inferences that the opposing evidence in the records permits may be drawn against him. The rule with respect to the drawing of an unfavorable inference from the failure to call a witness applies only to a person whom the party would naturally be expected to call, not to one known to be biased against or hostile to the party, or to a stranger to the party. The finder of fact may not speculate as to what the witness would testify to had he or she been called. The rule is that the finder of fact "may construe the evidence already in the case most strongly against the party who might have called the witness to contradict or explain that evidence." Jarrett v. Madifari, 67 AD2d 396 (1 Dept. 1979).

The failure of a party to a civil action to testify as to matters upon which he is or should be informed permits every inference warranted by the evidence introduced to be weighed against him. Wolf v. Gold, 18 AD2d 987 (1 Dept 1963).

IN-CAMERA INTERVIEW OF A CHILD: WHO MAY BE PRESENT?

Although there is no case law on the issue, it appears that, absent the consent of the parties, it is improper for the law guardian/attorney for the child to be present at an in-camera interview unless the attorneys for the parties are also present. The attorney for the child has no greater rights than the other attorneys in the case. Both the law guardian and the court are bound by the Code of Professional Responsibility and Canon 3 of the Code of Judicial Conduct, which prohibit ex parte communications.

Rule 7.2 of the Rules of the Chief Judge defines the role of the law guardian, now known as the "Attorney for the Child." 22 NYCRR 7.2 (a). The rule provides that the attorney for the child is subject to the ethical requirements applicable to all lawyers,

including but not limited to constraints on: 1) ex parte communication; 2) disclosure of client confidences and attorney work product; 3) conflicts of interest; and 4) becoming a witness in the litigation. Id.

The rules do not elevate the attorney for the child to a greater position than that of the attorneys for the parties. An attorney for the child is not an investigative arm of the court. While attorneys for the children, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate. As the rules do not authorize the attorney for the child to be present at the in-camera interview, and emphasize that he or she is subject to the same ethical requirements applicable to all lawyers -- including constraints on ex parte communication -- it follows that the law guardian may not be present, absent the consent of the parties.

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