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. ■

Tamires M. Oliveira is an associate with Greenbaum, Rowe, Smith & Davis LLP in their Red Bank office. Gregory L. Grossman is an attorney at Aronsohn Weiner Salerno & Kaufman P.C. in Hackensack.

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).