

THE VOIR DIRE INTERVIEW

The Commissioners Speak

Editor's Note: *What follows is a free-ranging interview conducted on March 13, 1998 by two of our Editors with all of the sitting Court Commissioners in the Third Judicial District.*

PC: Patrick Casey
LJ: Lisa Jones
ME: Michael Evans
TA: Thomas Arnett
VD: Voir Dire Editors

What Matters Most

VD: *What is the single most important thing that someone who is not experienced in domestic law should do before appearing before a Commissioner?*

TA: In my opinion, the single most important thing is to consult with an experienced domestic practitioner. It is hard for me to believe that there is any lawyer in the state that doesn't know such a person. And you just need to call that lawyer up and talk to that lawyer, find out what the unwritten rules are and the best way to proceed.

ME: [T]he practitioner may also benefit from sitting through a calendar before at least one of the Commissioners, preferably the Commissioner assigned to the case in which they will be appearing. The Commissioners' practice is very different than the general civil practice, and one thing to remember in that regard is [that] Rule 4-501 does not apply to proceedings before the Commissioners. That is the most common mistake I think we see from those who don't regularly practice in this area.

VD: *What is so significant about Rule 4-501 not being applicable to practice before the Commissioners?*

ME: That rule contemplates the court would rule only on the basis of the written pleadings in the time parameters set for the initial request, the response, and the final response, which time parameters are generally longer than the period of time it takes for you to get on the Commissioner's calendar. So we will see attorneys appearing on our calendar saying, "I have not been allowed my ten days to respond, or my five days to file a response to their response and so we have to continue the hearing." There is a consequence in not being prepared as they should be to argue the merits at the hearing before us.

PC: If a notice to submit is filed under Rule 4-501, our practice is to send it back with a note reminding the attorney that the rule doesn't apply and the matter needs to be scheduled for hearing. But I am sure that sometimes the notice doesn't make it back to the lawyer for one reason or another.

LJ: I think it is important to know, too, that we don't take live testimony. You either have to put affidavits in the file or bring someone who can proffer their testimony. But we hear between three and four thousand hearings a year, and we don't have time to take live testimony, so the attorneys just stand up and proffer the testimony and we make our recommendations based thereon. I have had people come up from central or southern Utah with twenty to thirty witnesses, thinking they will be able to testify, and we just don't hear them. So it is a very different practice, and they need to be aware of the differences.

PC: To follow up on Commissioner Arnett's response, a lawyer experi-

enced in the domestic relations area will likely be familiar with statutes and case law in the field which would not be easy for the inexperienced practitioner to find. Lawyers who do not regularly practice domestic law sometimes overlook critical points of substantive law which can be to the detriment of their client's interests.

The Problem with Ex Parte Contacts

VD: *The Office of Professional Conduct indicates that a great many ethics complaints are generated out of the domestic practice, and many of those arise out of ex parte contacts corraling the Commissioner or Judge and discussing the merits of the case with him or her. Do you have any thoughts on that?*

TA: You would be amazed at how often lawyers and parties attempt to make ex parte contact, and we are very careful about it; we just won't do it. We won't pick up the phone, we won't let somebody in our office if it is on a case before us. But it is common; people try it all the time.

LJ: We get letters from dozens and dozens of attorneys who ought to know better, thinking that if they just [carbon copy] the opposing counsel at the bottom [of the letter] that somehow it is no longer ex parte because the other party knows about it after the fact. But it is a real problem. Some attorneys think they are entitled to have access because we see them more often, we are a closer knit Bar, we are very specialized and they think they can get away with it. So it is a problem.

ME: The problem has gotten even worse with the pro se litigants. Yesterday I got a fax from a pro se party complaining, among other things, that he couldn't reach his attorney and wanted me to do something about that, as well as the merits of his case. Only had the name of the business from where he faxed it and it didn't include an address or anything else, so I couldn't have responded to him directly if I chose to. And not too long ago, somebody, me or somebody else, got e-mail from a pro se party who apparently is also a State employee and got the address that way, and said he wanted to communicate in this case with passing it back and forth.

I am concerned about the apparent frequency with which that rule is breached. [Attorneys] take it as a matter of course to be able to come in and explain to you [on an ex parte basis] why a hearing needs to be continued, or under the guise of asking a procedural question, will then try to get into the merits of the case, or at least make comments about their opposing party. . . . [W]e do all we can to prevent such contacts and make sure the attorneys are clear on that, but they seem to respond, at least through our staff, that we represent the exception rather than the rule.

VD: *There seems to be a perception that the rule on ex parte contacts is slacker in the domestic area. Nothing in the rules of ethics exempts domestic practice from the prohibition against ex parte contacts.*

ME: That is absolutely right, and we expect [lawyers who appear] before us to be [as ethical] as we would expect a lawyer . . . to be in any other kind of matter.

Available Resources

VD: *What is somebody to do if they have been out of practice for a year or two or three, someone who typically doesn't do domestic law, and a domestic problem walks in the*

door. What resources are available to them? You earlier said that such attorneys need to talk to a domestic practitioner who is experienced. Aside from that, what resources are available?

UJ: I think it is most important to note that the Family Law Section is probably one of the most active sections of the Bar. And, monthly, there is a CLE [in which] we take up all of those types of issues; yearly, there is a May seminar, a day-long seminar for people to come to. So the training through the Family Law Section is really quite broad. We are always having break-out sessions at both the Mid-Year and the Annual Bar conventions for CLE purposes, and right now we are looking into starting a training program for volunteer attorneys who want to take on pro bono cases through Legal Aid or Legal Services or through the Bar to get people to have access to the Bar. There are all kinds of training . . . for volunteer attorneys [who] come into our courts for protective orders.

ME: Volunteer guardians ad litem.

UJ: [The Family Law Section] is a very active Bar. The kind of training that we offer through that really comes in handy.

TA: Actually, the Legal Aid training is already in place, and that is a training program for non-family law lawyers . . . who volunteer to do one case for Legal Aid, and it is free.

VD: *And I understand that they get a valuable book of resources that they can use. They can use those cases as a basis, and they can also locate mentors through that project. They can use that process as a basis for developing some skill in the area.*

TA: That is a very good point! I had forgotten about the forms. Legal Aid has put together some of the best forms around, starting back when Mike Evans was the director of the Legal Aid Society of Salt Lake. They provided all of those [forms] to the lawyers who go through this training, and [the forms] can be utilized from there on out in private divorces.

ME: [] Legal Services actually got federal

money to fund a book that I helped draft. It was a training manual, including forms, and it has been updated on several occasions. I am not sure of the present description, if you will. But I understand that there [is] a book available, as well as some face-to-face, in-person training for those willing to accept the pro bono appointment.

VD: *Another interesting thing is that years ago there was a formal mentoring program set up through the Stewart Hanson, Senior, Foundation, and no one used it. I have spoken in the course of putting this together to dozens of experienced family law practitioners. All of them said, "I would be more than happy to help, and have just never been called." It is unusual that the resource that existed just wasn't used.*

VD: *We are all somewhat ashamed to say that we don't know [how to do something]. But the bottom line is that the ethical rules require that an attorney be competent to perform any given task that may come before him or her, and if he or she isn't [competent] then they have an obligation not to accept that matter. It seems to me that people wouldn't think about taking on a complex securities filing matter, yet at the same time, they think nothing of taking on a domestic relations matter even though they don't practice in that area of the law.*

UJ: I think one of the problems that we have for those of us who love this area of the law is, as you say, [that] a lot of people out there believe it is easy to do, and anyone can do it. Not only is this a very important area of the law in that it has an impact, a long-term impact, on people's lives, particularly children's lives. We are dealing with poverty issues with children, we are dealing with bonding issues, not seeing one of their parents. All of those kinds of issues. . . . You superimpose upon that how complex it is with regard to its impact on bankruptcies, tax law,

and all of those types of issues. It is a very complex, paper-intensive, fact-intensive area of the law. You will be [committing] malpractice if you do not know the area [but nevertheless] come in and try to practice it. It is far too complex to do, just thinking you can just run in there and do it.

VD: *One other resource I just thought about is the American Academy of Matrimonial Lawyers.*

ME: They do a day-and-a-half seminar each year on family law. [Another resource] is the Family Law Section newsletter, . . . coming out four [times] a year. It provides a lot of information to practitioners: new statutes, new rules, [], upcoming CLE, and all that sort of thing. If anybody is going to do this kind of law at all, I think it is worth it to pay \$30 a year and be a member of the Family Law Section.

I might go back to the complexity of domestic relations matters. And Lisa is not old enough to remember this, but when I started this practice, and Tom fortunately is old enough to remember this, there were many cases where the divorce file from the complaint to the decree would be maybe ten to twenty pages total. There were times when we could get decrees entered. We used to joke about who had the record, how quickly we could get a decree entered []. But almost every year, divorce matters become more complex. One problem with the old days is that the orders were simply inadequate. They were inconsistent in terms of financial awards, in terms of addressing all of the marital estate. [And that has] contributed substantially to what has now become known as the feminization of poverty. I don't think there is any question about that. [] We now divide retirement accounts; before that, it was never true. That in itself has become [a] very complicated and complex area of the law. We have child support guidelines that

you had better be familiar with, especially if you are seeking to establish an award other than that indicated by the guidelines. We now have visitation guidelines. We have more specific requirements in terms of finding things in the custody area. I think it is fair to say there are more custody evaluations, and more detailed custody evaluations. While in the collection of child support intrastate, [the law] has changed, and requires a much deeper understanding of federal statutes and perhaps even conflict questions. So it used to be [] true that the area of domestic relations was less complicated, but it is no longer.



Some lawyers seem to think that they need to raise every possible issue and argument they can think of in the hope of prevailing by the sheer volume of their words. This is not an effective strategy.



TA: I recall a seminar being taught out of state some years ago, and the title of it was "The Federalization of Divorce Law," and that is exactly where many of these changes have come from. It is the Feds that require the child support guidelines. It is the Feds that have a lot to do with the impact of taxes and bankruptcy law on divorce, and so on. It has become just a lot more complicated. I agree with something you said at the beginning of this meeting, and that is just the perception that anybody can walk in off the street and handle a divorce. That may have been true at one time. I am not sure I have ever agreed with that, but it is certainly no longer true.

Being an Effective Advocate

VD: *What advice would you give to*

lawyers on how to be more effective in your court?

PC: My first advice would be a reminder that, because of the volume of cases that we handle, motions and arguments should be kept as simple as possible. Some lawyers seem to think that they need to raise every possible issue and argument they can think of in the hope of prevailing by the sheer volume of their words. This is not an effective strategy, and it can interfere with our ability to focus on the issues and arguments that really matter. It also tends to lengthen our law and motion calendars unnecessarily, which is inconsiderate to other lawyers [and their clients] on the calendar.

VD: *Commissioner Jones, what areas would you most emphasize for attorneys appearing in your court?*

UJ: I think probably the most important thing they could do is to talk to opposing counsel prior to coming to court. They get here, and they get here late, which happens to be my pet peeve, and then they want to stop and take the opportunity to talk. Well, I have got calendars scheduled and a lot of matters on the calendars, and so that pushes me further and further back if they haven't spoken to each other to begin with. They need to talk to opposing counsel before they get here. Most cases have a partial stipulation if they talk at all, and it is not an effective use of my time or theirs to get here cold, come in, sit down, and sit here for over an hour listening to someone else, and never go out in the hall and talk, then just get up and say, "well we are disputing all of these issues."

I think another ineffective use of lawyer talents is the lack of civility in the practice of law, and I don't believe that it is in just the domestic area. But because the emotions are running so high in the domestic area, it happens quite a bit. With the lack of civility between two attor-

neys who stand up and spend more time digging the other side or the other party, instead of focusing on what their important issues are. They are slamming the other party, they are calling them liars, they are grandstanding. And I know you have to impress your clients, I understand that part. But it does not help [the clients] at all, it does not help me at all, and quite frankly I get irritated that they are wasting my time grandstanding. I could have done it on the pleadings a lot easier than listening to them calling the [other] attorney a liar. I think it is uncivilized and inappropriate, and I'd just as soon it stop.

VD: *Commissioner Evans?*

ME: I will try to keep my comments under sixty minutes in this area! First of all, put everything in the pleadings. If you wait until you get to the hearing to argue, the chances are great it won't be persuasive, it won't be perhaps heard, may not be understood. Make the pleadings concise, make the relief you are requesting crystal clear, summarize lengthy exhibits, and count on the Commissioner's having read everything in the file prior to the hearing, and then don't repeat it. We are scheduled to hear five matters in an hour's time, and that is not very much time for argument. So if it is not in the pleadings and we haven't read it beforehand, we may not ever get to it.

The other thing I would like to address is recognizing that family law matters are unique in that these people are going to have ongoing relationships, sometimes for decades, depending on the age of the children or the property circumstances, and [] although you may win at a hearing, you created a circumstance wherein both clients will lose for years to come. So, what I am suggesting [is] that mediation be seriously considered at the onset, before the proceedings, [], before it is too late. And I encourage all practitioners, especially family law

practitioners, to become aware [of], to understand the mediation process. I hear attorneys say with alarming frequency that [] "you shouldn't refer this matter to mediation because we have already been mediating." Well by definition, two attorneys discussing issues does not make a mediation. So they don't understand the process, and I think they fail to recognize the ongoing relationship of these family matters. They fail to recognize specifically that litigation is contrary, just litigation in itself is contrary to the best interest of children, who are attempting to maintain an appropriate relationship with each of their parents. So I would say consider mediation, consider it early, and don't discount it.

VD: *Commissioner Arnett?*



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TA: Since I am going last, I am going to have to overlap just a little bit. Lisa talked about civility. My point would be, don't take on the emotional coloring of your client. I think you have an ethical obligation to your client to be objective and to render objective advice, and if you get yourself drawn into the emotions you are unable to do that. The second thing, and this kind of overlaps some of the things that Mike said, is to be prepared, particularly on the financial issues. So few lawyers, even among the regular practitioners, show up for a hearing fully prepared in the financial area in terms of [having a] complete list of income and expenses, [and] documentation behind that. They run the

child support worksheets, and they need to do that. [But] [j]ust in the child support worksheet area, lawyers are often amazed how little difference it makes which level of income we adopt in terms of the ultimate child support, and if they would simply run two alternate worksheets, they would know that in advance and save a lot of time and money.

Civility

VD: *Commissioner Casey, have you found a problem with a lack of civility among attorneys appearing before you?*

PC: Yes, I have. The problem is not necessarily worse in domestic practice than I have observed in other arenas, but it seems to worsen the already emotionally charged nature of most contested divorce matters. The problem is most evident when lawyers adopt, as Tom Arnett mentioned, the emotional posture of their clients. Lawyers who are focused on resolving a conflict, rather than on winning a fight, seem to generally remain far more civil with one another. While I don't know that this can be proven, I suspect this often enhances both the quality of the result and the client's experience of the process. On the other hand, although I try very hard not to assume that a client is responsible for the shortcomings of his or her lawyer, sometimes that appearance is created, and that can hurt the client's position. Ultimately it matters very little whether a lawyer is adopting an unduly hostile or unreasonable posture because of the client's wishes or because of his or her own poor judgment. The result is the same. The credibility of both the lawyer and the client are damaged.

ME: Regarding the issues of civility, I think domestic law matters may be weakened, in that emotions run so high between parties. I think it is probably higher than [it is for] people dealing with contracts or auto accidents; you don't have a prior relationship, you

will have a later relationship. I practiced in the area for fifteen years before I took this job, and I have had clients get upset with me if I appeared to be too friendly with the opposing attorney. They were ready to fire me, or they would not take as totally unbiased the advice I had given on how to settle an issue, and that in fact led to my terminating representation of a couple of clients. [] People would call me and say, "I heard you are the meanest son-of-a-bitch in town and that if you are I want to hire you; if not, tell me now." They were looking for a pit bull, and if you were prepared to play that role you could have their case, and if not, they were going to look for somebody that would do so.

TA: On the civility issue, [] because we proceed by proffer rather than live testimony, it is always the lawyer who is giving us both the facts and the law, and so if anything, the domestic lawyer's credibility is more at issue than [it is with] any other kind of practice. I think that a lawyer who simply does what the client asks, regardless of the reasonableness, quickly loses that credibility, at least among us, and I believe among all the judges as well, and it severely handicaps that lawyer in the future in every case that lawyer is involved [in]. We remember who lies to us, we remember who takes very unreasonable positions, and it is hard not to have that affect us the next time around.

VD: *Do Commissioners talk among themselves as to who these problem lawyers are?*

TA: Not weekly, not daily, but hourly!

UJ: I think it is imperative for the attorney to understand that, yes, we all practice, yes we understand that we are serving our clients, but we are also, counselors at law. I get extremely irritated when it is clear to me [that] an attorney wants me to give the clients the bad news. They know how it is going to come out; it is clear how it is going to come out. Case law dic-

tates the result, [but] they take a totally different position than they know is ever going to win, so I look like the bad guy. I don't mind looking like the bad guy, but I think they are not doing their duty as counselors to look at these clients and say, "no, I am not going to lose credibility with the court to make this argument for you, and if you want someone to do that, go find someone who doesn't care as much about their reputation as I do." I did that a lot when I was in practice. I would say, "Go find some bozo who is going to make that stupid argument to the court and lose their reputation. I am not going to." I did not have one client say, "Well, I am going to take my work elsewhere, then." They all said, "if

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you don't think that is a good idea, let's not do it." That is an attorney's duty, and they're not following through with that duty. They are making the legal system look very bad because it is the court that looks unreasonable, when in fact the attorney is taking an unreasonable position. The attorney's credibility with the Court is at stake.

TA: You can always tell those attorneys because at the end of the argument they kind of just give a shrug of the shoulders before they sit down. I knew, we all knew, what was going to happen, but I had to go through the motions.

VD: *A prominent lawyer of the first half of this century said, "Half of what a good lawyer should be doing is telling his client 'no.'" And perhaps we have too few lawyers these days who are telling their clients "no."*

ME: We talked about the importance of

family law, and reference was made to the volume [of cases]. We have referred to [] the long term effects of the orders we enter. We [] hear of the time about this jury trial, the big deal like [] a million dollar verdict or a two million dollar verdict, and if you look at the orders entered in family law cases for very young children with substantial marital estates, perhaps alimony awards by the time the controlling date of that order is reached, if you will, or by the time the order is no longer applicable, the dollar amount is at least as great before you even get around to the bonding issue and that sort of thing. [] I was on the Child Support Task Force that proposed the advisor, guidelines, and our presumptive guidelines are based on that [in] large part. And the one thing that we learned [] that stuck with me forever is that all the input was that the status of children, or the likelihood that they would be affected adversely by their parents' divorce, all evidence suggests that that isn't true, so long as their standard of living was maintained. But if their standard of living declined, they became truant, they became alcoholic and drug abusers, they became criminals. The troubled youth that we see now, obviously we are looking at the connection with child support. . . . If the appropriate order is not entered in all areas, then it is not appropriate in any area, and it really can have long-term effects, not so much for that family, but for all of society.

TA: Many non-family lawyers don't understand how rewarding the practice of family law can be. I enjoyed the practice, I very much enjoy the job I have now. And in both jobs, that is being a family law practitioner and being a Commissioner, I felt like and I do feel like we are solving people's problems and helping them get on with their lives. In particular, we are trying to help children.