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DIVORCE IN NEW YORK – SO YOU THINK YOU DON'T NEED A LAWYER?

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NOTE: *This monograph is intended as an educational guide and not as legal advice. Legal advice should only be obtained from a qualified lawyer who is familiar with all of the facts and circumstances of your matter.*

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So You Think You Don't Need A Lawyer?
Why you should never, ever, ever represent yourself in your own divorce.
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The Many Dangers of Representing Yourself

There are so many reasons why it is a mistake for even the best, most skilled, powerful lawyers in the world to represent themselves in their own divorces. And it's so much more true for anyone who is not [yet] a skilled and practiced trial-lawyer. No matter how straightforward or simple the case seems, no matter how smart and competent in other areas of life the person is, it is still a mistake. It is not for naught that lawyers have the well-worn adage "Any lawyer who represents himself has a fool for a client." Proving that truism were several recent instances of apparently-skilled lawyers who represented themselves at ultimately great personal cost (detailed in the Case Studies below). Here is why it is a mistake:

The Role of Emotions. Speaking in public is considered the number one fear of most people. The fear and excitement of performing in public causes adrenaline to surge through the body, triggering the fight or flight response, increasing the heart rate and blood pressure, and causing more rapid, shallow breathing. It also causes the mind to become intensely focused on what the amygdala *perceives* as a threat, ignoring everything but the perceived immediate threat.

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If the "perceived threat" and the "actual threat" are one and the same, the response is perfect for the situation. However, when someone is thrust into unfamiliar territory with only limited understanding of the actual proceeding, the amygdala's exclusion what it considers extraneous, nonconsequential matters, is often quite dangerous.[1] (More on this below.)

Most people have a strong emotional reaction to any adversarial challenge to themselves, whether or not the subject matter is particularly consequential.[2] Where the subject matter *is* consequential, most everyone feels threatened, exhibiting the symptoms of anxiety. Stomachs clench. Emotions run high. Tolerance diminishes, irritability increases. Focusing on tasks become more difficult as the pre-frontal cortex's focus is hijacked by the amygdala to deal with the source of the anxiety and perseverate over it..

Litigants who represent themselves, therefore, suffer the double-whammy of litigant's anxiety as well as litigator's anxiety. Many people find even one of these doses to be overwhelming and intolerable. Functioning competently with a double dose requires an iron stomach and super-human control of anxiety-emotions.

Impaired judgment, sensibility, and objectivity. One of the most important services an attorney provides clients is reasoned judgment and sensibility. In every litigation there are numerous choices that need to be made, and each carries consequences. There are usually pros and cons to each option. Recognizing the positive and negative effects of different paths and the ability to strategize to the client's advantage, is an important skill that only some lawyers hone.

Every person's judgment and sensibility is impaired in proportion to the emotional strain felt. The stronger, more intense, the emotions, the more judgment and reason are impaired. Thus, when a person is operating with the emotional strain of both litigant and advocate, judgment will be impaired and the person is likely to do things and respond in ways that, in every other situation, they would recognize as being inappropriate or harmful to their own case. Moreover, they will not have the supportive professional, fully knowledgeable of their case, to warn them off the

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[1] Wolfgang Langeweische, in his seminal book *Stick and Rudder*, points out that if you dropped an aboriginal person in the middle of Times Square, he would likely get run over by a car. That would not be because he didn't see the green and red traffic lights–of course he would have seen them. It would be because of the many other flashing, blinking, and multi-story lights and displays that would have seemed more important to someone that does not know the significance of a traffic light. That is the reason why CEOs and CFOs have legions of data analysts working for them, whom they expect to separate the wheat from the chaff and reduce the overwhelming information overload to the succinct PowerPoint presentation of the immediately-relevant data.

Similarly, when in Court, it is important to disregard the insignificant in order to focus on the significant. In order to do so, however, one must know what is, and what is not, significant which can only be done with knowledge of the law and courtroom experience.

[2] Most litigants receiving an adversarial communique from opposing counsel Monday morning will perseverate over it all week long. Their ability to consider or focus on other matters will be diminished and they will experience a sense of fear and dread, unable to enjoy life.

harmful strategy.

Emotional hijack. Yet another, related, phenomena is the emotional hijack. There are some messages that have such an intense emotional effect that they fully hijack and shut down all mental functions. This routinely occurs, for example, when people get terrible diagnosis from their doctors. Doctors often recommend that a patient coming for a bad diagnosis bring along a friend with a pen and notepad and who would take extensive detailed notes. That is because when a patient hears the "cancer" word, the patient's brain typically freezes, and the patient is unable to hear much or most of what the doctor says after that. The patient therefore needs the friend's notes so that, when the hijack subsides, the patient can "hear" all the other important information the doctor had said in the meeting.

So too in a Courtroom. Litigants, and even lawyers, remember some Courtroom occurrences more vividly and others hardly at all. The vividness and strength of the memory is determined by the amount of adrenaline coursing through the body and the emotional resonance of the occurrence at the time.

A *pro se* litigant is even more susceptible to such a brain hijack, missing critical court proceedings during the period that the brain was rendered incapacitated by the fear and intensity of something emotional that occurs in the Courtroom.

Preparing the Case. One of the most important aspects of preparing a case is developing a cohesive "theory of the case." A theory of the case is a one-sentence, emotionally compelling, narrative that drives the decision-maker to find in your favor.

Preparing a winning theory of the case, requires knowledge of the law as well as of all the relevant facts. Even one powerful fact that is inconsistent with the theory of the case can destroy it.

Preferably, a great theory also includes what the late Judge Ralph Adam Fine calls "legal *jiu jitsu*," the technique by which a skilled advocate uses the adversary's strength *against* them by converting their greatest strength into their greatest weakness, and converting the advocate's own weakness into a strength.

Developing such a winning theory requires the use of strategy, knowledge of law, and knowledge of human psychology. It requires the experience and foresight to predict how the case will play out and what must be done to defend against the opponent's eventual counter. It requires an honest, balanced, disinterested assessment of the strengths and weaknesses of each side of the case. And, of course, wisdom and judgment. Most people who feel besieged are unable to take a fully balanced view, bound as they usually are, to their own passionate positions, unable to

consider the other side's view of things.[3]

The practice of law is <u>not</u> arithmetic and how the judge "feels" about the case (and, unfortunately, the litigant) is as important as what the law says. There is no other area of law where the Court has as much leeway and discretion as it does in family law. Moreover, the secret that master litigators know is that litigation is as much about emotions as it is about technicalities.

Many people mistakenly believe that the law is immutable and that it clearly compels a particular result in every case. Master advocates know that it is more important to present an emotionally-compelling case to a judge or jury, one that leaves them feeling that to not rule in the advocates' favor will do a grave injustice. That the technicalities merely give the judge or jury the ability to rule in the advocates' favor; the motivation to do so, must come from the emotional story of the case.

Thus, even if a litigant is able to master the "arithmetic" of the case, and knows the winning argument, too often the litigant cannot make the judge "feel" the injustice and therefore stands a grave chance of losing.

The competent advocate must master many disciplines. To represent someone competently, and advocate must master many legal and practical areas. These include:

A. **The substantive law** governing all of the issues involved in the matter. What needs to be proven (known as the "elements" of the cause of action) in order to prevail? For example, to be awarded custody a Court will look for the "best interests of the child." What issues have been included by the Courts in a best-interests analysis? Each point in contention will be governed by certain controlling law and the advocate, to be effective, must be familiar with the law, its application, and its exceptions;

B. **The procedural law.** How do you get things done in a Courtroom? When must a formal motion be made? When must a motion be made by an Order to Show Cause? How are the different motions made? What are the differences between them? How much time do you have to answer a motion from the other party? Although these are only the "rules of the game," if you don't know which way to run after you hit the baseball, you won't be able to win the game.

C. **The rules of evidence**. Completely aside from the rules of procedure, there is a separate body of law controlling the admission of evidence in Court. It is a sufficiently complicated

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[3] Indeed, one of the greatest benefits of mediation is that it provides a venue and process that opens people to see the other side of the case they've been litigating, sometimes for years. In one mediation I conducted, several hours in, when the lawyers were sure it would not settle, one of the lawyers looked at me and thanked me because, he said, he now sees the case an an entirely new light.

area that law schools devote a full four-credit course to it. It includes the notorious "hearsay" rule, a simple several-line rule, with several exclusions and dozens of exceptions. It also includes the methodology of establishing foundations for the evidence that a party seeks to offer into evidence.

D. **Burdens of proof, standards of proof, and burdens of persuasion.** In addition to the elements of every cause of action that a party needs to prove in order to prevail, a party needs to consider who, among the litigants, bears the burden of proof on any particular issues. The law has several different standards of proof that apply to different matters and, although burdens of proof are constant upon whatever party bears it, the burden of persuasion shifts as testimony and evidence are introduced.

E. **Courthouse- and, what we call here in New York, Part rules.** Each Courthouse, and each Part (Courtroom) within the Courthouse, can publish their own rules that control the Courthouse and the Courtroom, respectively.

F. **The custom and practice of the Courthouse or judge**. Some courthouses have their own convention or way of doing things that are not denominated in their published rules. Some judges have preferences, and are annoyed with the preferences are ignored.

G. **General court decorum and "batting order."** In addition to all the formal rules above, there is a general, formal, custom and practice about how to behave in a Courtroom. Moreover, there is an established "batting order" about who goes first and what happens next. As with the rules of procedure above, not knowing the lineup and being prepared for the proper order can have severe consequences.

H. **Proper protocol and technique for effective direct examination.** There are specific, detailed rules for proper direct examination and improper questions will not be allowed. In addition to the formal rules, there are advanced techniques to make direct examination more powerful and leave a more lasting impact on the fact-finder.

I. **Proper protocol and technique for effective cross examination.** Like direct examination, cross-examination has its own set of rules and protocols, and techniques on how to effectively destroy an unfavorable witness. (The rules of direct and cross-examination are generally encompassed within the rules of evidence but because of the skill and technique required to do it well is a separate study, they're broken out separately here.)

J. **Protocols and techniques for making effective opening and closing statements.** Like with other areas, many books and courses are devoted to each of these elements of trial practice. There's a good argument that all cases are won or lost at the opening statement.

Closing statements, of course, drive all of trial preparation.[4]

K. **Strategy and tactics, Game Theory and The Art of War.** Knowing what options are available is only a small, albeit important, part of protecting clients. Predicting the effect of one course of action over another is the more important part. A skilled advocate must be a clever strategist and tactician, schooled in Game Theory and familiar with military strategy to be able to create and successfully implement not just a strategy, but a strategy that will achieve the client's objectives. Like in chess, the same winning move made too soon or too late can cost the player the game, and the practice of law is not arithmetic. Rather it is a game of strategy and tactics and the ability to see into the future and be able to use the opponents strengths against them.

L. **Raconteur and the art of storytelling.** The essence of advocacy is sales. Selling an adversary on why to settle with you or selling the decision-maker (be it judge or, in some cases, jury) on the justice of the client's case. Thus, knowing the story is not enough. The advocate must be a skilled raconteur, able to bring the story to life, to evoke emotions that compel the decision-maker to not allow an injustice to be done or to continue; to redress the wrong that's been done the client. This is not a mechanical, STEM skill. It is a performance/artistic one. It requires emotional intelligence and the ability to utilize the process in such a way that it has a dramatic impact. Anybody can pick up a paintbrush and paint a wall. But only an artist can make the wall imbue its inhabitants with the feelings the owner wants evoked.

M. **Creativity.** Some cases are "run of the mill," where the issues have been dealt with so many times that it can be handled on auto-pilot. Too often, however, there are angles to the case that make it unique. Perhaps the area of law does not deal with this issue directly and the creative lawyer finds a maxim from another area to apply here and to win the case. Moreover, finding "win-win" resolutions often require creativity, the ability to think of solutions outside the box, the solutions no one's considered before.

N. **Stability and clear-headedness (to balance the creativity).** While creativity is important, it must be tempered by stability and clear-headed-ness. It is important for lawyers to recognize when an idea is so creative, so far out of the box that not only won't it be accepted by any tribunal but it won't even be considered. It might even destroy the advocate's ability to represent the client as the lawyer will no longer be take seriously by the judge. So creativity is important so long as it is tempered by knowledge of what is acceptable and the ability of the advocate to present even novel ideas in a way that make them sound reasonable. That is why we were able to achieve results that many other lawyers were not able to.

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[4] Best practice for trial prep is to first draft a closing argument and then to build the case that supports that closing argument. Of course as new facts come to light, all elements will have to be adjusted.

O. **Flexibility and nimbleness.** Litigation is never static. The sands of litigation are constantly shifting as the case moves forward, additional information is uncovered, the sides learn more about the controlling law, the judge makes rulings, and the parties adapt to them. As a result, something that was irrelevant yesterday may become crucial today; something crucial yesterday becomes irrelevant today. The skilled advocate must be able to "turn on a dime" and adapt to the shifting shape of the case, adapt the theory of the case and adapt the litigation strategy as needed. A big, bloated law firm, may have too many layers and too many people involved to make the necessary changes. A skilled firm must be flexible and nimble, able to adapt quickly and efficiently to the changes of the case. As Helmuth von Moltke the Elder, Chief of Staff of the Prussian army before World War I famously noted even the best laid battle plans never survive the first encounter with the enemy.

P. **Scholarly.** Though people-skills are important in advocacy, so are the scholarly ones. The people skills (EQ) will create the atmosphere for the fact-finder to feel compelled to find for the client. It is the law, however, that enables the judge to do so. The skilled advocate must therefore know all of the relevant statutes and case law. The advocate must be able to recognize the issues that the parties and perhaps opposing counsel has not noticed nor identified. Most importantly, however, often a powerful case in the client's favor does not explicitly state the proposition that the advocate needs it for. The scholarly advocate, however, recognizes that for the court to have arrived at the result it arrived at, it had to hold the proposition that the client requires. The scholarly advocate is primed to recognize such unstated, but necessary, holdings of the case, and finds them for the client's victory.

Q. **Devotion and commitment to exert the mighty effort required to master and succeed.** In case all of the above has not made it explicit, doing all this work for the client is not simple nor easy. It requires dedication, devotion, and commitment to the client's cause and victory. It requires what my law professor said, "Sometimes you just have mount the insurmountable wall!" I learned this from my mother, the Auschwitz survivor. Thrice she was sent into the line for the gas chambers, each time managing to weasel herself out. She survived by getting herself onto a work transport to a slave labor battalion. From her I learned never to be satisfied with the simple answer, and it is amazing how many times I've managed to snatch victory from the jaws of defeat, by working through nights when necessary and appropriate, to find the evidence to prove the righteousness of my client's cases.

R. **The Formula For Success:** To summarize all of the above, what results in victory for the client is Substance (technical, psychological, & interpersonal knowledge and skills) + Advocacy Skills + Hard Work & Dedication + Creativity + Flexibility/Nimbleness = Exceptional results for Clients.

The skills of advocacy. The practice of law requires art in addition to mechanics. It is a mistake to view litigation as an arithmetic or mechanical problem that can be

solved with logic alone. Two lawyers can make the same argument to the same judge in the same case, and one will lose and the other win. It is a mistake to think that all that needs to be done is to pipe up, "Two plus two, your Honor," to have the judge conclude "Four, of course," if that is in your favor. Like in chess, the same winning move made just a moment too soon or a tad too late, can lose the game. Except that advocacy is even more sensitive. The same winning move made with a different tone or inflection, can lose the game.[5]

The Job of the Lawyer in an Adversarial System. Many people mistakenly believe that judges know all the laws. Some smart ones might. Many more do not. The "job" of the lawyer in our adversarial system is to "teach" the judge everything the judge needs to know to make the "right" decision.[6] The job of the other lawyer is to teach the judge everything she needs to know to make that side's right decision. All the judge really should have to do is to point to one side or the other and declare, "You're right." That may sound easy, but it's not. Well-litigated cases pose only hard calls for the judge to make.

A *pro se* litigant who himself does not know the law is, obviously, not in any position to "teach the judge" the law. The litigant is, therefore, at a disadvantage from the get go.

Doing all this without legal training. Mastering all of the above is difficult even for the best students of law. Doing so without the benefit of formal legal training may well be impossible.

In his seminal 1944 book on flying Wolfgang Langewiesche noted a truism about humans' ability to deceive themselves into believing that they know enough to get by. "Someone once said that if you will look at an airplane long enough, sit in it long enough, fool with the controls long enough you will decide you can fly it."[7] The same thing occurs to litigants. They appear in Court several times, observe what happens, and get by without incurring any injury and convince themselves that they could continue without counsel. It is a mistake! In one instance, a woman called me asking me to represent her son even though she had no lawyer. She was convinced that

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[5] This was aptly demonstrated by the harsh 7-year sentence meted out to infamous Pharma-bro Martin Shkreli. Among other bizarre and damaging behvior, Mr. Shkreli defied his lawyer's admonition to keep a lower profile. At trial, he smirked and taunted prosecutors. Though this bad behavior should have had no bearing on his actual guilt or innocence, his lawyer, Ben Brafman, said, "I've never had a client who did more to hurt his own standing with the court than Martin Shkreli . . . . [His behavior] probably added several years to his sentence." *https://www.nytimes.com/2018/03/22/business/shkreli-holmes-fraud.html*.

[6] The late judge Theodore T. Jones, when he ascended to New York's highest Court, the Court of Appeals, told us once at home bar, the Brooklyn Bar Association that the reason he was so successful was that he always "protected" the judges he appeared before. Once when a judge was going to rule in his favor for a wrong reason, he said, he told the judge, "Judge, I'd rather you rule against me than you rule for me on that reasoning. You will be reversed."

[7] Stick and Rudder, at 326.

she was competently representing herself, not even realizing that the trial had already started and that she was halfway to losing her son.

Moreover, someone who is not studied and schooled in law, may not appreciate the many disciplines that must all be brought to bear in every representation. A lawyer representing a client, or a litigant representing themself, must know all of the following to be skilled and succeed in the endeavor:

Effects of specialized lingo. Every profession and industry has its common terms that are then reduced to shorthand abbreviations. That's why, for example, only doctors and nurses can easily read doctors' notes.

Family law, and family court proceedings, use and refer to certain specialized terms and statutes so frequently that, by necessity, they must be abbreviated and referred to with only shorthand. Court-regulars understand what is being said and know how to respond.

An outsider, however, unfamiliar with the lingo, hears the specialized terms but doesn't comprehend their import. Like the aboriginal dropped into the gleaming, flashing Times Square, he sees the green light but is distracted by the larger, brighter, more dazzling lights and has no reason to think that the six-inch-in-diameter street light is the most important indicator he could see. More important than the billboard-sized neon strobe that's capturing his attention.

Add all this to the person who is representing himself, suffering the double-whammy of litigant- and performance-anxiety, means that the person can be cognizant of only a small fraction of what is actually occuring in the Courtroom.

This is made even more dangerous by yet another phenomena at play. People generally attribute importance to facts they understand to be important, and tend to discount those things they don't understand. A patient listening to two doctors discuss his condition, will often discount everything he doesn't understand and, therefore, give more importance to the things he did understand. In Court, however, this could be very dangerous. There are some things said, that though spoken softly and quietly in very few words, have the greatest effect on the case. Not understanding every word that's said in the Courtroom is like watching a hockey game without understanding the significance of the nets at the two ends of the rink.[8]

If you could learn it all and practice competently then you may as well devote your life to helping others with your skill and earn your living this way. There are too-few sophisticated, polished advocates who are dedicated to their clients' well-being. The skills, however, are way too complex to master for a single matter, and nobody can do so while maintaining full-time employment and keeping up with familial obligations. Indeed, many find it too difficult and time-

[8] Indeed, one woman who called me asking me to represent her son . . . .

consuming to even be good litigants and prepare everything that needs to be prepared for their lawyers. Doing so while studying the mechanics and art of advocacy is insurmountable.

Pro se **litigants pose particular challenges to the Court.** As stated above, the job of a judge in an adversarial system is to listen to the attorneys and decide which one is right. When one of the parties is a *pro se* litigant, not represented by counsel, the judge's job becomes infinitely more difficult.

Generally, courts try to be solicitous of *pro se* litigants and not hold them up to the standards that courts hold members of the bar. It would be inappropriate, however, for a court to give an advantage to a *pro se* litigant that it does not extend to the other side. A court may not impair its impartiality and fairness merely because one party comes in without representation. Nor can a court become an advocate on behalf of one party, or protect one from her own folly.

Thus, when a Court observes an unrepresented party to make a misstep, the Court is placed within the horns of a dilemma. The Court does not want a party that should prevail to lose merely because they are unfamiliar with the controlling law. On the other hand, the Court cannot become an advocate for that one side. A Court may attempt to coax or gently guide a party, but the Court cannot become the party's legal instructor and teach them all they need to know to prevail in their case.

Add to all this that most litigants, because of the important stakes hanging in the balance, are vehement and emotional. Clients entering lawyers' offices for the first time often veer from issue to issue, conflating the irrelevant with the critical. Lawyers spend countless hours in their offices with clients working through the issues, culling the relevant from the irrelevant, mining other relevant information from their clients' memory banks–facts that the clients didn't think were relevant that might be critical to the outcome, and helping clients understand how to present in a manner that enhances, rather than diminishes, their credibility.[9] A litigant without counsel does not have the benefit of all this knowledge and organization, and will likely subject the judge to the onslaught, fire-hose of unorganized information, unreasonably expecting the judge to sort it all out.[10]

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[9] Once after about fifteen minutes with a client, I summarized what I understood her case to be. "Wow," she said, "I've been living with this for years and you, in a few minutes, summarized it better than I ever could."

[10] The Appellate Division, First Department, recognized these phenomena. "[W]hile parties do have an unquestionable right to proceed pro se—and here were probably driven to do so by their economic circumstances—in matters such as these, where emotions often rise to the surface, it would serve everyone's interest if the system were able to ensure that both sides were represented by counsel who presumably could limit the issues to what is reviewable and relevant, and argue them coherently upon a proper, adequate record and with greater objectivity. Such professional help would also save the already overburdened Family Court precious time, since the arguments of understandably upset self-represented litigants, sometimes clouded by anger and despair, and expressed under the drumbeat of emotion, often confuse extraneous matters with the legal issues relevant to their claims." *Kent v. Kent*, 29 A.D.3d 123, 129-30, 810 N.Y.S.2d 160, 165-66 (1st Dept., 2006).

Courts therefore beseech members of the Bar to undertake representation of *pro bono* clients to save the Courts from these dilemmas. Indeed many Bar Associations have *pro bono* projects and undertake to arrange representation for many economically-disadvantaged litigants.

Pro se **litigants face particular challenges.** Because "normal" litigants hire and pay for lawyers to represent them, someone appearing in Court *pro se*, rightly or wrongly, is viewed as being unconventional, perhaps unreasonable, argumentative, litigious, or a gadfly. As stated above, the practice of law is not arithmetic and so how a judge "feels" about a litigant is as important as "what the law is." Being viewed as unconventional is certainly an obstacle that sets a litigant at a disadvantage and may be insurmountable.

The Rough and Tumble of the Courtroom. Courtrooms are generally formal, austere places, where justice is meted out. There is a formality and decorum that can't be broken.

That, however, does not mean that it is a kind, polite place or that presentation-time are allotted fairly. Lawyers often hijack the stage and it requires some degree of tact and diplomacy to recapture the judge's attention without seeming to be an aggressive bully.[11] Too much aggressiveness and you'll be slapped down by the judge. Too little, and you won't get your client's argument across effectively. Navigating that tightrope challenges many and requires skill and aplomb, usually developed by experience.

A *pro se* litigant is unlikely to know how to read the situation correctly or know where the line between acceptable pushiness and unacceptable is. Representing yourself effectively puts you in the Hobson's choice of acting gracious and perhaps not getting in a word in edgewise, or being aggressive and turning the judge against you.

The Danger of Not Having a Buffer. I often tell my clients that part of the service I provide them is to take the heat for their unpopular decisions. Though I consult with them before any decision, and my position is always their decision, I advise them to tell their spouse, "my lawyer is making me do it." That way their spouse is angry at me and not at them.

Similarly in Court, a lawyer can sometimes take a required but distasteful position, hoping that the judge won't attribute it to the client directly. A lawyer can become somewhat vocal and strenuous, whether making a claim or objecting to the other side's, and the judge will hopefully not ascribe any ill-feelings toward the litigant. Good lawyers should not always remain within the safe margins and must sometimes "push the envelope" and make novel claims to obtain the best results for their clients. Such liberties, are understood by good judges to be "lawyers doing their jobs" and do not generally prejudice the clients.

This safety-buffer, however, does not exist when a party represents themselves. The

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[11] Gender issues also play a role in this issue.

party must be careful not to make any claim that will leave a bad taste in the judge's mouth, or make any legitimate claim in such a tone that might effect the judge's sensibilities. The litigant cannot seem smart-alecky in making unconventional claims,[12] or vehement in making typical ones.

Moreover, because in family law the judge has such wide discretion, and because all humans are always curious to know "whose fault was it," a *pro se* litigant who makes even a legitimate claim vociferously is apt to have the judge feel, "now wonder the spouse is leaving. Who could put up with that?" In a family-law case, such an ill-feeling may cost the litigant dearly.

Even small emotions are magnified hundredfold in the austere, formal Courtroom. A slight frown, wave of the hand, or rolling of the eyes, unobserved and unimportant in the day-to-day world, can take on huge significance in the courtroom. The frustrated dropping of a pen on counsel table can seem like an out-of-control angry outburst. The slight raising of the voice, in the formal atmosphere of a courtroom, can seem like shouting.

When properly done by counsel, it can lend emphasis to a claim or get a judge to reconsider an ill-advised ruling. When done by a litigant it is more likely to result in the Court officer moving to stand behind him, with his hand on either the sidearm or handcuffs.

A *pro se* litigant must be super-careful of her behavior and places herself at a disadvantage, unable to make any vociferous arguments, if they ben needed, for fear of being viewed as out of control.

The Most Important Attribute of a Lawyer is to always seem to be the "truth teller."[13] An advocate must vociferously guard against saying or doing anything that diminishes the persona of him being the truth-teller to the Court. Even when objecting to unhelpful evidence, he must ensure that he looks like he's merely helping the Court discover the truth. That is difficult even for the skilled advocate. Likely impossible for the client representing themselves.

Moreover, even unreasonable claims must be couched and presented as reasonable. Unfortunately, because of the emotional stakes, litigants often make even their reasonable positions seem unreasonable. This, of course, destroys any semblance of being a "truth teller."

First Timer's Experience. Even if one were to master all of the knowledge, skills and expertise required to perform capably in a Courtroom, the first time one does so often nets worse results than what an old-timer would get. According to the studies cited by a recent New York Times article, lawyers with experience arguing before the United States Supreme Court

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[12] The judge is likely to dismiss such claims as the imaginations of someone that is not knowledgeable in the law, instead of considering it as a novel theory by someone who is looking to expand the law. Even experienced lawyers generally have trouble getting judges to consider novel theories.

[13] Fine, chapter 17.

obtained significantly better results than comparably trained and practicing lawyers who had never tried a case before that Court.[14]

Too often, it will only make things worse! I often tell people, "The two things you hope never to need is a doctor and a lawyer. But if you need one, get the best you can afford, because a bad doctor and a bad lawyer is worse than no doctor and no lawyer." People without knowledge and skill often make situations worse. Hence the expression, "He knows just enough to be dangerous."

With the best of intentions, litigants who cannot afford lawyers often make their situations worse. As lawyer, author and screenwriter Jason Shapiro, in his book *Lawyers, Liars and the Art of Storytelling* recounts, "My grandfather was a steelworker and a plumber. He used to say he made his money off people who tried to do things themselves. The damage do-it-youselfers did with their work required that my grandfather do much more extensive–and expensive–work than the original problem would have required."[15]

Hiring a skilled, devoted advocate to guide and represent you will likely be cheaper than incurring the costs of not having one or, worse yet, having to hire one to fix the mess that resulted.

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[14] https://www.nytimes.com/2019/07/22/us/politics/supreme-court-expert-lawyer.html.

[15] Jason Shapiro, *Lawyers, Liars and the Art of Storytelling* at 158.

So You Think You Don't Need A Lawyer - Case Studies
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In three relatively-recent cases, smart, skilled, intelligent and experienced lawyers decided to represent themselves rather than have another lawyer do so. Their mistake, cost them dearly:.

David Evan Schorr:

Matter of Schorr, 166 AD3d 115, 86 NYS3d 75 (1st Dept., 2018)

According to news reports,[16] Mr. Schorr earned a Masters Degree from Oxford University in England, a law degree from NYU, along with several other specialized degrees. He worked for several large, prestigious law firm before turning to private practice. When he was sued for divorce by his wife, however, he chose to represent himself, not realizing that his judgment would be impaired turning his skills and smarts into a weapon of self-destruction. His divorce lasted from _____ to _____, involved ____ state-court appeals, a federal lawsuit and appeal from the United States Court of Appeals for the Second Circuit.

Surreptitiously accused a Suprme Court justice, her law secretary, and a court officer of perjury, and recorded the state court proceedings, something which violates the Rules of Court. Charges brought by the disciplinary committee. After considering the mitigating circumstances, the Committee offered him a private censure but Schorr demanded a full hearing. The Committee then proferred formal charges against him. Schorr then commenced a Federal Court action against the Appellate Division Attorney Grievance Committee, claiming it was violating his Constitutional rights, and retaliating against hm at the behest of the Chief Judge of the Appellate Division, Second Department. The Federal District Court dismissed his case, abstaining under the *Younger* doctrine. Schorr then appealed to the Second Circuit who affirmed the dismissal of his suit. Mr. Schorr also filed a lawsuit against the court-appointed psychologist who evaluated the family, and alleged bias by a financial analyst appointed to appraise the value of his insurance business. In addition, he created an internet website disparaging his wife's lawyer and claiming he lied under oath. Mr Schorr ultimately consented to a public censure by the grievance committee. *Matter of Schorr*, 166 AD3d 115,

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[16] *see* my file, nylj pdf: *Lawyer Who Taped.pdf*

https://www.law.com/newyorklawjournal/2018/10/30/manhattan-lawyer-who-taped-his-divorce-court-proceeding-then-fought-in-court-over-it-is-censured-by-appeals-court/?kw=Manhattan%20Lawyer%20Who%20Taped%20His%20Divorce%20Court%20Proceeding%2C%20Then%20Fought%20in%20Court%20Over%20It%2C%20Is%20Censured%20by%20Appeals%20Court&et=editorial&bu=NewYorkLawJournal&cn=20181030&src=EMC-Email&pt=DailyNews&slreturn=20180931111841

http://www.abajournal.com/news/article/not_satisfied_with_private_censure_lawyer_sues_and_gets_public_punishment/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email

116, 86 NYS3d 75, 77 (1st Dept., 2018). In his own divorce, the court found him to be "evasive and not credible," *Schorr v. Schorr*, 154 AD3d 621, 622, 63 NYS3d 368, 369 (1st Dept., 2017),

The court found that he "engaged in extensive motion practice, including motions that had little merit," *Schorr v. Schorr*, 96 AD3d 583, 584, 948 NYS.2d 14, 17 (1st Dept., 2012), and delayed and extended the divorce resulting in a divorce "action which has now lasted longer than the parties' marriage," *Schorr v. Schorr*, 154 AD3d 621, 623, 63 NYS3d 368, 370 (1st Dept., 2017). The Court issued a protective order quashing what it held to be Mr. Schorr's "harassing and unnecessary subpoenas." *Schorr v. Schorr*, 113 AD3d 490, 491, 978 NYS.2d 683 (1st Dept., 2014)

Borstein v. Henneberry, 129 AD3d 563, 11 NYS3d 163 (1st Dept., 6/23/15)

Husband, later characterized by the Appellate Division Court as an "experienced matrimonial lawyer," represented himself in his divorce and, among other claims, claimed $27,000 for a post-commencement loan he made to his wife. The final judgment of divorce did not address this claim so the now-ex-husband, later commenced a separate action for the $27,000 His ex's lawyer asked him to discontinue it (because his claim was precluded by the divorce action) but he refused. She was therefore forced to defend her deposition. The ex-wife then moved for summary judgment which was granted by the Court along with her fees and costs, though it denied her sanctions for frivolous conduct. The ex-wife appealed to the Appellate Division which reversed and penalized the ex-husband an additional $5,000 as a sanction, and required him to pay the costs and attorneys' fees of the motion and appeal. His "blatant lack of merit" and his "unreasonable persistence" even after he was asked to discontinue the lawsuit, coupled with his bad behavior in the underlying divorce action for which he was sanctioned and reprimanded, "exhibits a 'broad pattern . . . of delay, harassment and obfuscation' that warrants the imposition of sanctions and attorneys' fees." (Internal citations, throughout, omitted.)

Zappin v. Comfort, 2015 NY Slip. Op. 51339(U), 2015 WL 5511519 (Supreme Court, NY County, Sept. 18, 2015 (Matthew F. Cooper, J.)

Plaintiff, _____ Zappin, was a large-firm patent infringement lawyer who represented himself in his divorce action. In the course of just two months, the Court noted, the plaintiff himself had made three motions and four orders to show cause. The plaintiff had also issued a subpoena to the Attorney for the Child ("AFC," an attorney appointed by the Court to, generally, represent the child's wishes) who, as another party's attorney, is not subject to discovery, and filed a complaint with the NYS Office of Professional Medical Conduct (OPMC) against the psychiatrist hired by the AFC. The Court, in its decision, dealt with the AFC's motion to quash the plaintiff's subpoena and to allow the AFC to speak to the OPMC to defend the psychiatrist and to impose sanctions upon the plaintiff. The plaintiff cross-moved to disqualify the AFC, permit him to

call her as an adverse witness and vacate the Court's prior money judgment in favor of the AFC.

Previously in the divorce litigation the plaintiff had, among other things, discharged two sets of lawyer, told the prior presiding justice that what the judge was saying were "lies," that he was "tired of the lies coming from you . . . It's lie after lie after lie that comes out of your mouth. And I am tired of it"; brought an article 78 proceeding in the Appellate Division against the trial court; filed numerous motions and application that he later withdrew; filed a lawsuit in Federal Court against his wife, her family and her lawyers; sent notice to the Attorney General that he intended to file a Federal Civil Rights action for the deprivation of his civil rights; filed a Court of Claims action against the State of New York for assault, battery, false imprisonment and conspiracy by a judge and court officer; threatened to file claims against the AFC for "fraud, tortious interference with parental rights, legal malpractice and disgorgement," if she obtained a judgment for the money the Court required him to pay her; registered a website in the name of the AFC's on which he posted derogatory information about her;

The Court granted the AFC's motion to quash the subpoena because, as an attorney for a party, she is not subject to discovery. The Court sanctions the plaintiff $10,000.
