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Shepherding you safely through difficult family transitions!

DIVORCE IN NEW YORK – THE SUPERIOR DIVORCE & FAMILY-LAW LAWYER: THE SKILLS NEEDED TO BE A SUPERIOR MATRIMONIAL ATTORNEY

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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.*

The Skills of a Superior, Skilled Family & Divorce Lawyer

Just being a competent lawyer is hard enough. Being an excellent one requires commitment and dedication, and a deep yearning to keep improving and developing expertise in the craft. Skilled advocacy encompasses many different disciplines including technical legal knowledge, legal reasoning, procedural knowledge, psycho-social deftness. and performance skills. All these and more must be mastered to be effective in the difficult cases.

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.[1]

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.

[1] 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.

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. **A careful listener with intuition:** Perhaps the most important skill a superior lawyer must have is the ability to listen carefully with intuition to what people are saying. Too many people, in our busy, distracted, complicated lives just listen with half-an-ear, waiting for the chance to jump in and reply. What is absolutely crucial, however, is for the superior divorce and family-law lawyer is to listen carefully to not only what is said, but to what is not said. Each pause, each inflection, might have deep meaning. Indeed some of my most important discoveries in client cases occurred when a client hesitated or responded with a somewhat hesitant "yes" or "no" to what had previously seemed a simple question. The follow up questions revealed information that was crucial to the success of the case, yet the client did not realize its importance and the information was brought to light only by questioning the pause, the hesitation, the begrudging way the question was answered. The superior matrimonial attorney listens carefully, and gauges the actual reaction by knowledge of general human behavior to recognize any inconsistencies that require deeper questioning;

B. **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;

C. **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.

D. **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 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.

E. **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.

F. **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.

G. **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.

H. **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.

I. **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.

J. **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.)

K. **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.[2]

L. **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.

M. **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.

N. **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.

O. **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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[2] 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.

P. **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.

Q. **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.

R. **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.

S. **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.[3]

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.[4] 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.

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[3] 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*.

[4] 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."