A View from the Pews

By Vesselin Mitev

Sitting in the pews waiting for the judge to take the bench recently, while the attorneys on the case on trial perched at the tables, a fellow attorney struck up a conversation with me. We did not know each other, so in place of mundane pleasantries, s/he decided to run me (I don't know why) through a small test regarding my knowledge of matrimonial and trial law. Again – without any put-on – I don't know why I was chosen for this particular exercise (I suspect mostly to waste time) but I decided to play along.

S/he started out easy, with an air of benevolent indulgence: What's a note of issue? The document that cuts off discovery and, annexed to the certificate of readiness, declares the matter ready for trial. I anticipated the next question: How long do you have to set it aside? Twenty days, unless good cause is shown. The queries became harder (or so s/he thought), and I shall not bore the reader any more, but then the topics turned to trial mechanics and our respective views on same.

First, my learned colleague declared, in any matrimonial trial, it was his/her practice to always call the other spouse. In a tone that left no room for argument, it was decreed that this was a superior practice since you got to lead the witness. I replied that the authority on this issue was at best, split, and that while there may be a presumption that the adverse party is hostile (*Jordan v. Parrinello*, 144 A.D.2d 540, 534 N.Y.S.2d 686 (2d Dept.1988)), that does not automatically mean you can cross-examine them at will, or ask leading questions as to any topic.

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Rather, there is a whole host of case law that says that a witness that demonstrates him/herself to be obstreperous, or sneering, or combative with the examiner, may (and probably should) be declared hostile, but the obverse is also true: Any presumption that the adverse party is hostile may (and can) be rebutted by a pleasant, even-toned, and responsive witness (*Ostrander v. Ostrander,* 280 A.D.2d 793, 720 N.Y.S.2d 635 (3rd Dept. 2001)), where the trial court sustained objected-to leading questions of an adverse witness, who answered the questions fully and openly. Moreover, I posited, calling the other party first means you are bound by their testimony and cannot thereafter seek to impeach, since you are limited by CPLR 4514, which provides for impeachment of a witness to prior inconsistent statements "made in a writing subscribed by him or was made under oath."

Also, while in a typical civil case a prior inconsistent statement would be admissible not only to impeach the witness but as to the facts contained within the statement itself, when one is seeking to impeach their own witness the inconsistent statements are only limited to credibility (in other words, the facts sought to be proven via the inconsistent statement are to be disregarded) and if the statement is admitted, it is only for the purpose of showing that on a particular occasion the witness made a different statement than the one they had just made on the stand.

What about, my colleague countered, when one exceeds the scope of direct examination on cross? Does one make the witness their own with each such query? I posited that since bias, credibility and motive are always relevant areas of inquiry no matter what was asked on direct examination, even if (absurdly) it was limited solely to the witness' name and age, then any other questions beyond the scope of direct and beyond credibility, motive and bias, would so make the witness, at the court's discretion, *Tarulli v. Salanitri*, 34 A.D.2d 962, 312 N.Y.S.2d 55 (2d Dept. 1970).

Having woven our way through and out of this thicket, my colleague then declared his/her usual approach: "I sit them in the box and ask them five things — did they see it happen; did they hear it happen; did they smell it happen; did they taste it happen; did they touch the thing. If the answer to these (or most of these is no), they're out of the box."

I appreciated this rather straightforward approach of focusing on the five senses, but noted it seemed a bit rudimental when delving into matters such as expert testimony or detailing the effects of financial transactions and/or financial decisions that were made in a joint household (such as applying for a second mortgage, or renting an illegal apartment for an income stream). When I spoke of these to my new friend, s/he seemed oddly pleased. "By the time you get through with the first five, the court or the jury has usually made up their mind" s/he said, which in turn made me equal parts happy and equal parts sad, because of its profound, yet unintended truth. In a system of carefully designed rules, exceptions to rules, and hook-and-ladder addendums to rules, it comes down (mostly) to an innate, unteachable, mostly subconscious reaction from the trier of fact as to how you or your client look, act, appear, and behave — in other words, what's the view from the pews.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.