

## **The Revealing Moment**

Show me the trial lawyer who has not dreamed of having a witness who provides unexpected and decisive testimony in the waning moments of a dismal case.

How could this possibly happen in a domestic dispute? How did I get so lucky?

The case involved a request for an order of protection. This is serious stuff. One in five murders evolves from a domestic dispute; in my part of Tennessee, the rate is 38%. Defendants also have much to lose. Arrest is mandatory for violation of a final order of protection; gun ownership can be precluded.

The burden of proof is often determinative. Children are too young to testify; other family members do not know what is happening behind closed doors; and police, physicians, employers, and ministers are reluctant to take sides or get involved. This is a classic instance of what he said versus what she said being irreconcilable. The tie goes to the defendant.

Shortly after a petition is filed, a judge usually issues an *ex parte* order providing protection until the case is heard. It is occasionally continued by agreement while a parallel divorce case is being heard separately. This preliminary order does not affect the right to gun possession and often permits continued employment for the alleged abuser. By the time the divorce case is concluded, the need for a final order of protection may have disappeared. The alleged victim enjoys interim protection without having to prove the need for it.

Unfortunately, this compromise of convenience is used infrequently. When the defendant is assertive or in denial, he or she frequently employs a lawyer who chooses to put the plaintiff on trial.

Things can get nasty, and the need for a believable witness is paramount. Because hearings are required to be held promptly, judges often relax the usual rules, including those about advance revelation of the witnesses a party plans to call.

In the situation I am describing, Mr. Uptight and his lawyer were not interested in compromise. They wanted complete victory in the two cases pending. The judge had previously decided to combine a hearing for temporary financial support for mother and child in the divorce case with a final hearing about the proposed order protecting the wife.

It began badly for my client, the wife. When I examined her, she seemed truthful and her story plausible. But the other lawyer scoured her during cross-examination. She cowered before him.

Our only witness was a friend of hers to whose house she rushed immediately after the abuse occurred. The wounds were said to remain visible when my client met her friend, but there were no photographs and the injuries were not visible on the date of trial. There was little to corroborate what the witness would say in behalf of my client.

The other lawyer had not bothered to interview the witness, if he knew of her existence. He was concentrating on the financial issues. So, it was a surprise to him when she entered the courtroom

from the waiting room.

Try as I might, I could not get the witness to offer the convincing details that were essential. She merely stated conclusions about how poorly the husband treated the wife on prior occasions. There was relatively little mention of violence. I finished the direct examination, much dismayed and without having looked carefully at the other lawyer whose client's victory seemed certain and total.

Little did I know that he would rescue my case through his cross-examination. For reasons that were not initially apparent to me, he seemed to be at a loss about what to ask, so he merely repeated many of my questions. This time they produced detailed testimony that assisted my client, not his. She recalled events that proved decisive.

The judge issued the final order of protection and, even more remarkably, granted the temporary alimony and child support that we requested. Complete victory for my client despite my meager efforts.

Something had happened that I did not understand. So, I asked the witness: why did your testimony get so much better when the other lawyer asked the questions?

She said that he had previously been *her* lawyer when she too had been a victim of domestic violence and sought a divorce. Not content with empathy and legal service, he offered romance to her. She declined but agreed to continue to employ him in what, as you might imagine, was a misguided alliance. She was not pleased when matters concluded. And, as later seemed evident, he knew of her dissatisfaction.

Justice is sometimes obtained in mysterious ways. A make-up call may not be confined to sporting events where referees and umpires undertake this form of penance. Or was this case just another instance of unnecessary cross-examination that went awry? I will never know.

I only wish that I had been prescient enough to look carefully at the other lawyer when he first saw the witness in the courtroom. I missed the revealing glance between them.

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