"I Hate That #@*%!": Overcoming the He-Said She-Said Battle in Family Law Cases

by Andrea Blount and Paula Pratt

Divorce is one of life's most stressful events, rated by some as more stressful than being fired, having a major personal injury or illness, or even going to jail. On top of the many life changes and uncertainties that come with divorce is the divorce process itself, multiplying stress with every attorney visit, court hearing, deposition and mediation. The pressure is magnified considerably when custody of the children is also at stake.

Across all types of litigation, the side that is better able to tell its story has the advantage. This is true whether the decider of fact is a jury or a judge, as is nearly always the case in family law. Preparing witnesses to enhance clear communication is important in any case, but family law matters have some additional unique challenges: (1) managing the emotional drama, (2) enhancing credibility in a he-said she-said environment and (3) cutting through the noise and telling the story. These three areas are addressed below, including specific case examples and practical strategies.

Enhancing Credibility in a He-Said She-Said World

Almost all evidence in family law boils down to what "he-said" or what "she-said." For obvious reasons, the one who says it the best, and with the most credibility, has the advantage. The goal of preparing witnesses is always to help them communicate the truth in a more clear and effective manner so that the audience actually hears, and believes, the intended message. Often when we communicate, our message is clouded by noise that has nothing to do with what we are trying to say and as a result the truth is not heard. Let us consider Mark's story:

Mark's Story[1]

After 32 years of marriage Mark separated from his wife, Jennifer. Their children were grown so child custody or support was not at issue, but the case centered on a family business that had been in Mark's family for three generations. Mark was outraged that Jennifer claimed she was entitled to half the value of the family business. Further complicating matters was Mark's history of substance abuse and an old DUI arrest. He had since gone through treatment and had been sober for four and a half years, but he remained embarrassed about his history and avoided talking about it. Mark's attorney met with him before his deposition and went over what questions he could expect. Repeatedly during this pre-deposition meeting, Mark insisted he knew what he was doing and that he knew exactly what to say. At the deposition, however,

it was as if the attorney never talked with him at all. Mark's responses were all over the place. He stammered, rambled, argued and refused to answer questions about his substance abuse history.

With a disastrous deposition behind him, Mark's only chance to tell his story was going to be in 60-90 minutes of trial testimony (including cross examination). In preparation for his testimony, the attorney and a trial consultant worked with Mark for several hours to accomplish three main goals: (1) help Mark talk about his substance abuse in clear and matter-of-fact terms, (2) identify the most important elements about the family business that the court needed to know and (3) separate his anger at Jennifer from the story he needed to tell the court. After preparation focusing on these goals, Mark was able to express himself clearly before the judge without being overcome by embarrassment or anger. By learning how to keep his cool as he testified, Mark was able to explain why the family business should not be considered marital property. The judge agreed.

Pause and Breathe

This is the simplest of all the tips and possibly the most important. Advise witnesses to take a complete breath (inhale and exhale) before answering questions. It takes only a second or two but accomplishes several goals. A pause and a complete breath:

(1) Gives the witness a moment to think about the question being asked;

(2) Allows the witness to think about what the response should be before opening his or her mouth;

(3) Provides time for the attorney to object to the question if necessary; and

(4) Helps control the pace of the question-and-answer volley.

As with many witnesses, learning to take a deep breath before responding was critical for Mark to control his embarrassment and anger during his testimony. Getting used to the breathing pause takes some time because it is not how people normally talk, so it feels unnatural. In testimony, however, it does not come across that way. As long as the pause is not too long, it generally gives the impression that the witness is taking this testimony seriously.

Talking about the "Bad" Stuff

In contested family law cases, little remains private. Sexual details, drug use, violence, health issues, and criminal pasts are often discovered and must be discussed. Refusing to talk about it or attempting to hide from it will not work. The best option is to practice talking about it openly, directly and matter-of-factly. Whenever opposing attorneys sense discomfort when the witness talks about the "bad stuff," it is simply an invitation to keep poking and digging at the issue to see if they can gain an advantage. If, however, the witness responds to the questions with a "yes, that happened to me and I've moved on" attitude, the opposing attorney is likely to move on as well.

This is exactly what happened in Mark's situation. At his deposition, he let his embarrassment get the better of him when asked about his DUI and substance abuse, giving the opposing

attorney the impression that was his weak spot. During trial, the opposing attorney expected to get the same type of response so he started his cross-exam poking at the same issues.

Because Mark was prepared for it, however, the strategy backfired and instead of looking like a raging substance-abusing fool, Mark wound up coming across as humble, remorseful and strong. Since he was not getting what he wanted, the opposing attorney quickly moved on to other topics.

Managing the Emotional Drama

It is surprising there have not been more television shows based on family law, because there is no shortage of drama in a family law practice. Many litigants take their cases personally, but it does not get any more personal than someone saying they no longer love you or they think you are an unfit parent. This very personal element of family law creates a tremendous amount of emotional drama and background noise that is difficult to break through and really hear what is going on; Lisa's story gives us an example of this.

Lisa's Story

Lisa[1] was a 27-year-old petite and beautiful luxury car saleswoman who married John, a 45-year-old wealthy business entrepreneur who was well-known and respected in the community. Days after their only child turned 18 months old, the couple had a terrible fight, ending with John telling Lisa to take the baby and move out of the house. He announced he was through with the marriage and had a new girlfriend. Through her anguish, Lisa did what he demanded and left.

At the first hearing for temporary custody and financial matters, Lisa felt so victimized that she could hardly control her emotions. The more she complained about how John had treated her since the separation, and the more John glared at her in the courtroom, the more overwhelmed Lisa became. She crumbled and began talking in a rapid, high-pitched voice without thinking about the words leaving her mouth. The result was Lisa wound up sounding like a whiney and annoying adolescent. The judge was not moved to listen to Lisa's position; in fact the judge acted as if he wanted her to stop talking as soon as possible and delayed his decisions until a second hearing a few weeks later.

Before that next hearing, Lisa worked with her attorney and a consultant to help prepare her for her testimony. Lisa had an important story to tell but she needed help doing so in a way that invited people (especially the judge) to listen to her and respect her position. Even though it was a very emotional situation, tears were counterproductive and Lisa's fears of not being able to support her child overwhelmed her ability to communicate effectively. Just two hours of working with Lisa taught her how to manage the anxiety she felt in the court and to find the focus she needed to tell the most important aspects of her story in clear, concise and descriptive language.

The next time she was in court, Lisa was able to give her testimony with such a strong voice that she commanded respect from everyone in the courtroom. The judge wound up giving Lisa everything she asked for in temporary matters. More importantly, however, John and his attorney no longer saw Lisa as someone who could be easily intimidated to back down and go away quietly. John suddenly was motivated to avoid the courtroom and settle matters quickly so Lisa wound up with a much more favorable settlement and custody arrangement than she would have had otherwise.

Setting Expectations

Family law parties typically find themselves living through situations they never imagined would happen to them and they are recreating expectations for their lives. In addition to having a former loved one as an adversary, family law parties are rarely experienced in the world of litigation. Typically all they know about testifying is what they have seen on *The Practice* or *Law and Order*; neither of which adequately educates them on what to expect.

The worldviews and experiences of the attorney and witness are so different that it can be easy to skip over the basic introduction about what to expect during a deposition, hearing, mediation or trial. A witness will feel more in control if he or she knows exactly what to expect, who will be there, what the rules are and how things will unfold. Sometimes, witnesses have such skewed expectations that it prevents them from focusing on what really matters.

For example, in Lisa's preparation session she confided that John told her he would be able to take the baby away from her because she smoked marijuana in college. She believed his threats and her unrealistic fear clouded everything else in her mind. Once the attorney calmed her underlying anxieties, Lisa was able to concentrate on the specific questions she had to address in her testimony.

Taking Back Power

Some witnesses are afraid of being bullied or intimidated as they are testifying, either by their soon-to-be ex spouse or by the opposing attorney. There are several ways you can help clients overcome this fear and feel more empowered as they are testifying. One way is to control at whom the witness looks.

This simple strategy was very important for Lisa who was easily intimidated by her husband. It was very helpful for her to learn that if he made her anxious, she did not have to look at him in the courtroom. Instead, she could focus her attention on the judge, her attorney, or a spot on the wall. The same advice holds true if a witness is intimidated by the opposing attorney – advise the witness to look at the attorney's forehead instead of making direct eye contact.

Another, and very effective, way of taking back some power is to alter the pace of the questions. Many attorneys ask questions in quick succession to throw off the witness. Have the witness practice turning this strategy around by slowing down his or her rate of speech and using the pause before answering to break up the questioner's rhythm.

A third strategy that works for some creatively-minded witnesses in feeling more empowered during their testimony is using imagery. Some witnesses benefit from imagining themselves in a protective bubble or imagining themselves as having characteristics of someone they know who is strong, confident and a good communicator. Others benefit more from focusing imagery on others in the room, such as imagining the intimidating opposing attorney as a yapping Chihuahua.

Attending to Nonverbals

Family law litigants have a long and intimate history that does not go away simply because there is a judge, mediator or court reporter in the room. Beyond supplementing testimony with unintended messages, nonverbal signals also influence the level of stress in the room.

Help your client become aware of the nonverbal messages he or she is unwittingly sending out, but also prepare them for the nonverbals from the opposing party. If your clients know what to anticipate from the other side, they will be less likely to respond in turn and escalate the situation. Family law judges often have difficult dockets; your client's attitude and demeanor can increase or decrease the tension in the room. Which do you think would be most beneficial?

Cutting through the Noise and Telling the Story

Parties in family law cases often have very long stories to tell and a very short amount of time to tell it. Hearings are brief, depositions are short (often two hours or less), and trials are typically completed inside one day. Parties may have just an hour to say everything they need to about a relationship that took years to develop and fall apart. The party who credibly tells their side of the story in the most efficient way usually wins.

Beth's Story[1]

Beth and Tony had a traumatic marriage and were in the middle of an equally traumatic divorce and child custody battle. At one point in the three-year marriage, Beth had called the police and obtained a restraining order against Tony stating she was afraid of him. After several months of working with her divorce attorney, Beth finally confided that their two-year-old child was conceived through forced and unwanted sex with Tony. Like many victims of sexual assault, Beth was struggling with how to understand what happened between her and Tony, what language to use to describe it and whether she was to blame. She loved and was devoted to their son and was terrified of leaving him alone with his father but she could not clearly explain why.

In order to secure primary custody of her son, it was crucial that Beth find the right words to explain what happened and why she feared for their son's safety. She had a therapist who was helping her deal with the trauma of the marriage and divorce, but she needed her attorney and a trial consultant to help her share her story with the judge. Across two half-day witness prep sessions, Beth learned to describe specific events in which she felt afraid of Tony, including the night he forced her to have sex against her will. It was not enough for Beth to say Tony was abusive or threatening, she had to be able to explain what happened, when, where and how.

Beth told her story clearly and with a compelling voice at her deposition. Opposing counsel had hoped that asking about these issues would make Beth crumble and decide not to fight. Instead, Beth was able to hold her own and it was Tony who ultimately decided to back down. The case was settled shortly after Beth's deposition with a child custody time-sharing plan Beth believed would keep her children safe. Beth's credibility centered on her ability to use concrete descriptive terms to explain what happened and give detailed examples of why she was afraid.

Credibility is in the Details

Factual discrepancies in family law cases often come down to he-said and she-said disputes. The prevailing party will be the one that can explain the situation in the most credible terms. The natural tendency is for individuals to use the same type of over-generalizations they do when arguing with their ex. For example, they might testify that "She always belittles me in front of the children" or "He never picks the kids up when he is supposed to." Neither of these statements carry the specificity needed to convince the listener.

To enhance the credibility, (1) eliminate the qualifying or over-generalizing terms and (2) include specific details to back up the statement. Instead of the two statements above, it would be much more powerful if the witness said:

> "She frequently belittles me in front of the children. For example, last Sunday when I dropped the children off, Michelle told our son that she hopes he does not grow up to be selfish, rude and lazy like his father."
>
> or
>
> "On Friday evening, little Tommy was packed and ready to go but he sat there waiting 90 minutes for his Dad to arrive. He never called to let us know he would be late. This has happened at least two or three times a month for the past six months."

Role-playing

Talking about how to handle testimony is quite different from actually doing it. Every attorney, whether family law or not, has likely experienced the frustration of having a client adamantly tell them, "I've got it, I know exactly what to say." Then, the witness cracks under the pressure of the event and provides disastrous testimony at deposition or trial. The best way to prevent witnesses from crumbling during their testimony is to practice through a question and answer role-play. Depending on resources and the strength of the attorney-client relationship, the role-play questioning can be done by either the primary case attorney or a colleague.

Additionally, during the preparation session, it is often helpful to use a video camera so witnesses can see and hear how they are coming across to others. Most of us actually have no idea how others perceive us. We rarely recognize our own communication problems, we do not hear the pitch of our voice, see the rolls of our eyes or attend to our slumped shoulders – but all of these nonverbal signals communicate a message, and probably not the one we want to express. Playing back a segment of video to a witness can give them the "ah-ha" moment they would not have had otherwise.

Addressing Discoverability Issues

Because trial consultants are considered non-testifying experts or agents of the attorney, their involvement in a case is generally not discoverable because it is attorney work product done in anticipation of litigation. In family law matters, however, use of a consultant's services could be discovered at the conclusion of the matter if your client asks the other side to pay attorney's fees. This should not be a reason to avoid working with a consultant, but be prepared for this possibility. By this point, the case would be settled so it is too late to make a difference, but now that attorney may be clued in to ask about it in future cases.

Some simple strategies can help protect the privileged and confidential communications in a witness preparation session. First, to protect attorney-client privilege, the attorney should always be present in the room. Second, discuss the importance of maintaining confidentiality of the preparation session with the witness – things get messy in divorce and in the heat of an argument, one party might be tempted disclose to another that they are ready for trial because his attorney brought in a trial consultant.

Finally, prepare witnesses how to respond if they are asked how they prepared for their testimony. Usually saying "I met with my attorney" is sufficient but if the opposing attorney presses the issue and the witness must respond, he or she should state clearly and matter-of-factly that "of course" they had help making sure they communicated effectively. Because they were nervous and wanted to make sure they were as clear as possible when giving their testimony. Let your witness know that there is nothing wrong in working with counsel before testifying; effective preparation is not only legal, it is necessary.

The Bottom Line

Lawyers communicate in court and under stressful situations nearly every day. For family law clients, not only is testifying a foreign experience, their testimony may be an event of singular importance with consequences that will shape the future for their entire family. Some individuals are naturally gifted communicators and it is the lucky family law attorney who has one of these as their client. If your client is not the most effective communicator, however,

bringing in a consultant can help give the extra perspective and strategies needed to make a difference. By helping them communicate effectively, you can give your clients the confidence and tools they need to tell their story.

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Endnote

[1] All witness and party names and identifying information have been changed to protect confidentiality.

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Editor's Note

As you page through this issue, you'll see content on shadow juries, managing and mentoring Millennials, a review of the iJuror application for the iPad, recommendations on family law disputes, some research on damages presentation, thoughts on communication and gender of attorney, supplemental jury questionnaire items for Arab or Muslim parties in cases, and an interview with the trial consultants involved in the civil rights retrials featured in the new movie *Neshoba*. As always, our goal is to educate and inform and cause you to think. We do that through a combination of articles and a sprinkling of original research and technical pieces aimed at helping you keep up with the latest in trial advocacy and thought. We have two departures from trial advocacy in this issue--the interview elicited by the *Neshoba* movie release and the article on *Managing and Mentoring Millennials*.

We are proud of our history with civil rights and proud of our ASTC members who have worked to bring justice (albeit delayed). We're bringing you this interview with Andy Sheldon and Beth Bonora to show that pride and to highlight the contributions of these consultants. (And to encourage you to see the movie!) The Millennial piece is a follow-up to our piece in the July issue on what we really know about the Millennial generation. There has been a tremendous debate in the online community on the work ethic of the Millennial attorney. We are publishing this review of research on the Millennials at work and offering management/mentoring tactics to firms struggling with welcoming and retaining Millennial attorneys.

Read. Comment. Enjoy. Tell your friends and colleagues about The Jury Expert! And (ta-da!) watch for our very cool and way current web redesign coming at some point during the next month!

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