

Crafting your client's family law story for hearings, expert witnesses, mediation and trial.

A CLS Presentation by Bryan V. Reed

- I. Welcome storytellers
 - a. We think our jobs are fancy; we're actually just storytellers
 - b. Storytelling throughout the ages
 - i. [This ancient cave art is the oldest known 'storytelling' | CBC News](#) (power point photo)
 - ii. Modern day examples: campfires, bedtimes, show and tell at school, courtship, reflections by the elderly, etc.
 - iii. In each of these occasions, to be effective, the storyteller adapts the story to the audience.
 1. Content – what is appropriate and relevant to share
 2. Duration – how long does one reasonably have to speak
 - iv. In each occasion, the storyteller has a point to make
 1. Bedtime: The world is good; you are loved; Jesus protects you; your home is a safe environment
 2. Courtship: This is who I am and this is the life I have led until now
 3. Campfire: Once upon a time, there was this haunted house....
 - c. Storytelling is a craft to master. Too often, lawyers do not see themselves as storytellers and thereby miss their calling and fail to master their craft.

- d. Your goal is to be the best storyteller possible and tell your client's story within the context of the law. You will tell the story through the mouths of witnesses. Think of the ventriloquist scene in the musical Chicago.
- II. The story we are telling
- a. Not our own. It's not about us. Keep yourself out of your client's story.
 - i. Real example of the time as a young attorney I explained that I was shocked at the other side's claims and the judge reminding me that this was not about me.
 - ii. Resist the temptation to use "I" and instead attack the other side for being disingenuous and using "It is shocking that they would claim..." instead of "I am shocked."
 - b. Tell your client's story and explain how and why it relates to the law.
- III. The state of the client's story
- a. Many of you are likely familiar with the idiom, "spin a yarn." According to idioms.thefreedictionary.com it means to tell a long complicated story. Most clients' stories resemble a tangled ball of yarn.
 - b. Our job is to represent the client. We do not just present our client to the judge, with the tangled ball of yarn story. We untangle it and re-present them.
 - c. And we do it within the window of time that we have.
- IV. The ball of yarn
- a. How much of the ball of yarn can we actually tell to the judge? Do you ever tell the judge the whole ball of yarn? No. You don't want to lose your judge. Because if you lose the judge, you lose your case. Write that down.
 - b. Clients often think that at trial they will get their chance to tell the judge the entire ball of yarn. If that were to actually happen, the judge would hate that party. At trial you

tell the judge what he or she needs to know, keeping in mind that this is your one opportunity to get it all out there. That's the longest the string of yarn will ever be.

- c. At an evidentiary hearing on temporary support, you tell even less than at trial, because your issues are limited and so is your time, so the string of yarn is even shorter.
 - d. At presentment of your motion...or maybe even at a status, your window of time is even shorter (it's just a small piece of yarn). And here's where the storytelling gets really challenging. What do you pick from in this ball of yarn to tell the judge? You tell the judge what is absolutely necessary and nothing more. It's real life, serious pain, and you have to thread the needle. This is where your skillset of a storyteller becomes critical.
 - e. The three keys to properly re-presenting your client are: Preparation, preparation, and preparation. And all too many lawyers think that a quick five or ten minute court window requires little preparation. In so doing, they greatly shortchange their clients and miss a golden opportunity to shape the story.
 - f. President Wilson was once asked by a friend the following question: "How long does it take you to prepare for a speech?" He answered that if he could talk as long as he wanted, he was ready to go now. If he could only talk thirty minutes, it would take him a week to prepare. And if he could only talk for ten minutes, he needed a full two weeks to prepare. *The Operative Miller*, Volume 23, Number 4, (Short freestanding item), Quote Page 130, Column 1, Operative Miller Press, Chicago, Illinois.
 - g. The great motivational speaker, Jim Rohn, said, "Preparation is like building an account from which to draw. When you get ready to talk, you want to make sure you have a verbal check to cash."
- V. When to develop the story

- a. Audience Question: At what point should a family law attorney begin to develop the theme of his/her case? (a) During the discovery process when proofs are taking shape? (b) During the initial consultation; (c) During the trial prep period when everything can be viewed as a whole; or (d) When it becomes clear what the other side will say about your client?
- b. If you answered anything other than (b), I invite you to reconsider how you approach your case. This is not to say that that your theme will not change or evolve. It likely will. But the initial consultation is where you begin the process.
- c. The story your client first tells you in the initial consultation will be powerful and unspoiled.
 - i. It is unspoiled because the client does not yet know you, and they have no idea what to withhold from you out of fear of reaction or judgment.
 - ii. You need to listen well. You need to be present. Not distracted by your cell phone or interrupted by your staff. If you're going to properly tell your client's story, you need to understand it...as they have lived it. Your re-telling of their story starts at the moment you first meet with or speak to your client.
- d. Nuggets drop after 50 minutes.
 - i. When I'm on the phone with a client and have set aside an hour, the first 50 minutes is often tangled yarn and emotions (fear, anger, greed, revenge, etc). It's often in the last ten minutes that share a *critical* fact without even realizing it's critical to their case. It's one of those, "Hey wait. What did you just say?" moments.

VI. How to develop the story

- a. Your story needs a theme and a tag line.

- i. Sometimes you can get this from the initial consult and other times it needs to emerge, develop, and evolve. See “The Divorce Trial Manual” by Lynne Z. Gold-Bikin and Stephen Kolony.
 - ii. Example of husband who, suspecting his wife cheated on him, spread her wedding dress on the driveway, urinated on it, and left it for the neighborhood to see. Theme: abusive and vengeful husband that nobody in their right mind would want to live with. Tag line: The Wedding Dress Case.
 - iii. Example of the Steel Case Man – controlling husband who put family in a steel case. Every time they talked about where he worked, it reinforced my theme.
 - iv. Another case where the wife tells the husband (my client) what goes and what doesn’t, so I call her Sheriff Susan. I now have the mediator referring to her as that. It’s stuck in her head and she can’t get it out.
 - v. Other possible themes on cases:
 1. “My way or the highway ” for a controlling spouse;
 2. “The stay-at-home mom who was just a stay-at-home, not an actual mom”;
 3. “The narcissist spouse”;
 4. “The emperor is not wearing any clothes,” etc.
- b. Emphasize your theme every chance you get
 - c. In the book “Storytelling with Data,” author Cole Nussbaumer Knaflic explains the power of repetition and how repetition bridges short term memory to long term memory. She says that your story needs a plot, a twist, and an ending.
 - i. The plot lays out what content is essential for the audience
 - ii. The twist explains what is interesting about your data and what it tells

- iii. The ending is a call to action. What is it you want your audience to do?
- iv. She says nirvannah is reached when you have an effective story and beautiful data to back it up.

VII. Pleadings

- a. Your pleadings lay out your plot. Like a good game of tag where the oak tree in the middle of the yard is base and you can pivot any direction around the tree you want, as long as you stay grounded to your base, your story line can go any number of directions, as long as you stay grounded to the statute.
- b. Focus your pleadings on facts and law. Remember you are telling your client's story within the context of the law.
- c. A review of Illinois statute 750 ILCS 5/609.2. Parent's relocation. (***See handout materials***)
 - i. Focus on factors set forth in subsection (g)
 - ii. Notice it give us the framework for our story
 - iii. It literally prompts us, as many statutes do. It begs us to tell the story.
- d. Review of actual Petition for Relocation (***See handout materials***)
 - i. Focus on background section to set the stage for our story
 - ii. Focus on actual enumeration of the statute, serving as an outline for the meat and potatoes of our story (i.e. the nitty gritty). Each factor is a chapter in your story.
- e. Don't fret over facts that don't exist
 - i. You can't magic facts
 - ii. You have to play the hand dealt to you. The facts either exist or they don't.

iii. Is the case example a slam dunk? No! But that's ok. We have more than enough to make a compelling case. The judge will make the final call. And whatever the judge decides I can sleep well, as long as I know:

1. I have uncovered all the relevant facts;
2. I have done my best in telling the story, putting my client in the best light; properly characterizing the other side; and
3. I have pointed the decision maker to all applicable law.

VIII. Uncovering the relevant facts to the story

a. Interrogatories – they are a tool with a purpose.

- i. Interrogatories are a tool, not an exercise. Write that down.
- ii. Propound them and then read the responses.
- iii. Periodically review your own responses to interrogatories. Write that down.

1. Interrogatories can be dangerous because they are typically the first thing to be worked on in discovery. As your theory of the case develops and evolves, you might need to go back and amend your interrogatories to make sure they match your current story. If you are maintaining that something is non-marital, did you say that in your responses to interrogatories or did you not include that non-marital property because you didn't know about it at the beginning of the case?

b. Document requests – be careful what you ask for

- i. I've come up with an idea for an award winning Netflix show on the law
 1. It's a show about what really goes on in a legal case
 2. One entire season will be devoted to document production

3. For each episode that season, there will be no dialogue and only one small set...just an attorney in his or her office, digging through a box or computer folders, looking at financial statements and emails between the parties.
 4. It's sure to win every award out there for real life drama.
- ii. Ask for *everything* you need
1. This is your chance to get your hands on information
 2. This is also a chance to give the other side homework and make them sweat
 - a. It's a lot of work
 - b. They feel uncomfortable turning over sensitive information
- iii. Don't ask for too much
1. Example of case where opposing counsel filled an entire room with records my office had to review
- iv. Carefully examine what you receive
1. Malpractice lurks in not properly reviewing responses to discovery
 2. Don't just look at it; examine it
 3. We lawyers feel secure having lots of paper in our files. It's a smoking gun on a malpractice claim if you somehow (accidentally or on purpose) asked for a critical document, received it, and didn't realize you had it.
 4. Too many lawyers don't properly examine what they get.
 5. If you don't understand it, ask for help

6. Real life example of case where my entire case theme changed on a multi-million dollar case upon reading two seemingly benign documents that meant little to anyone else.
- v. Issue additional requests down the road if necessary
- c. Witnesses
 - i. Talk to witnesses. What is the story they would tell?
 - ii. Get clients to provide a list of witnesses. (**See handout materials** Form 4.9 from Building Trial Notebooks – by Leonard H. Bucklin)
 - iii. Get clients to provide the most favorable and worst points for each witness. (**See handout materials** Form 4.8 from Building Trial Notebooks – by Leonard H. Bucklin)
 - iv. Prepare for the worst. Front it to the judge, the mediator, expert witness, GAL, etc.
- d. Depositions
 - i. There are three reasons to depose someone
 1. To learn something;
 2. To get a party or witness to commit to a position under oath; and
 3. To evaluate the deponent as a witness.
 - ii. Remember that third party witnesses have their own stories to tell. They see a part of the big picture, and you need to know what their version of events is.
 - iii. Find out who can help you and who can hurt you. Know what you want to accomplish in your depositions. How will this impact your story. Get deponents to commit to your version of the story or some important fact in your story.

- iv. What about your own client? Often times, your client can be their own worst enemy. Consider getting a coach.
1. Don't let your client destroy their own story
 - a. It is important to prepare your client for the format and tactics of a deposition (***See handout materials – sample letter to client***). Send ahead of time and then meet with client to discuss.
 - b. It is important to spend time with your client and do mock depositions
 - c. It is critical to spot areas of weakness
 - d. Foreign language issues – when to use an interpreter (not translator) and how to use one. Nothing can derail a story faster than a client who didn't understand a nuance of the language during a question posed or uses a word in the wrong sense in an answer.
 2. A coach can help polish the client and the way that he/she answers questions.
 3. Coaches are good for arrogant clients, timid clients, meandering and stream-of-consciousness clients.
 4. Coaches are great when you do not have the time or expertise to properly serve as coach, or perhaps you are worried that your being honest with your client about how they present might be detrimental to the attorney/client relationship.

- v. Real life example of client who froze up in a deposition because I failed to properly gauge his anxiety

IX. Request to Admit

- a. Once you have enough facts together (maybe after depositions are completed), consider sending the opposing counsel a request to admit.
- b. It's a dangerous weapon in your arsenal that can cement your theory of the case and put the other side in a bad position or even a motion for summary judgment on a particular issue.

X. Telling your client's story to expert witnesses

- a. What's their pressure point? Missing date or failing to properly analyze something that allows them to be later discredited.
- b. If you are using an expert witness, they need to understand the theme of the story before you send them on a scavenger hunt.
- c. Explain patterns of the other party's behavior that are worrisome to you
- d. Let them know what they need to prove or disprove
- e. Help them understand the dynamics at play between the parties
- f. Their version of facts needs to comport with your theory of the case
- g. They need to prepare beautiful data that backs up your story. That's the pot twist that we spoke of earlier.

XI. Telling your client's story to the attorney for the children

- a. What's their pressure point? They fear not protecting the children (their clients), and losing credibility with the judge who appointed them
- b. They can't lose credibility if they have all the relevant facts and act responsibly.
- c. So give them the facts!

- i. Don't give them conclusions
- ii. Give them specific facts that demonstrate what you want them to conclude, which is that the other side is controlling, narcissistic, irresponsible, neglectful, selfish, spiteful, etc.
- iii. Conclusions are much more powerful when the person draws it for themselves
- iv. Don't obviously run the parent down with your own labels. Just give 'em the facts, Ma'am. And show specific acts by your client that demonstrate that they put the children's best interests first.
- v. Appear reasonable, and always frame things not from a party's perspective, but from a child's perspective. That is their client and all they care about.

XII. Telling your client's story to the mediator in attorney assisted mediation

- a. What is the mediator's pressure point? They fear not getting a deal. They want to be the "get it done mediator," not the "I can't ever get parties to agree" mediator. They want more business. It's a matter of marketing for them.
- b. Show the mediator that your client is not weak...or if he or she was, has now been empowered in this process
 - i. Mediators are like lions on the Serengeti. They look for that weak wildebeest that they can get to buckle and say they will agree to the other side's position.
- c. Know your facts – overpower the other side with control of the facts
 - i. Put yourself in a position to control the conversation...and the outcome
 - ii. Have a balance sheet already prepared
 - iii. Statements to back it up
- d. Stay on a nicer version of events. Don't get too nasty and show all your cards.

- e. When you talk about what's fair (and you must), remember the mediator doesn't care as much about what's fair as you do. But they need to know you believe what you are saying. And if your side is truly the fair one, and you must show him/her why it is, then you must provide facts for the mediator to use against the other side to convince them that your client is principled, your side is fair, and if they go to court, they will lose boatloads of money and their case.
- XIII. Telling your client's story to the judge
- a. Judges have lots of cases. Stand out with your theme.
 - b. Practice your pitch. Do it out loud.
 - i. It always sounds different than what's in your notes.
 - ii. Develop muscle memory so that you have a baseline and can always improvise but easily come back to your outline, as you know instinctively where you are going and the points you need to establish.
 - c. What is the judge's pressure point? The judge doesn't want to be appealed. So he/she is focused on making a mistake of applying law to facts. So keep your story within the framework of the law.
 - d. Give the judge the easy way out; they will take it every time. Write that down.
 - i. Make your story and your request for relief the easy one.
 - ii. Explain the law and why when applied the judge can only really side with your version of events
 - iii. Have case law ready in hand
 - e. Use pretrial conferences to develop your theme
 - i. Gives the court a chance to hear facts not necessarily relevant at trial – remember the wedding dress case

- ii. Helps the judge understand the dynamics of the case
- f. If you go to trial, make sure that the theme of your trial is one that the judge has heard throughout your motion practice. Follow through on what you started, unless other unforeseeable facts have arisen which make a new theme necessary. Have a plot, twists, and ending (call to action).
- g. Your opening at trial should make your theme clear by showing the judge what the evidence will show and how it will prove your theory
- h. Your closing at trial should again hammer home your theme, by showing the judge what the evidence did show and how it proved your theory
 - 1. If your version is not the easy way out, consider other ways to re-frame your story...or strongly consider settlement.
- i. Know your rules of evidence.
 - i. Illinois Rules of Evidence (***See handout materials for Rule 106***)
 - ii. Real life example of this rule in practice at trial.
- j. When you are arguing a motion, you should be able to distill your entire argument to one page
- k. When you go to trial, control the entire process with the marital balance spreadsheet
- l. Have your technology ducks in order.
 - i. Test everything out well ahead of time.
 - ii. Technology failures will cause the judge and your client to lose confidence in you.

XIV. Organization

- a. Be organized

- i. Account for memory fading via vacations, trials on other cases, sickness, family emergencies, etc.
 - b. Use good case management software to catalog and organize notes, emails, etc.
 - i. Maintain a good electronic filing system. Documents tell the story. And a disorganized filing system on your computer is worse than a messy office. You literally can't see it.
 - ii. Be able to locate what you need.
 - iii. We are overrun by minutia from years of clients. Don't trust your memory!
- XV. General practice tips for storytelling
 - a. Don't multitask during or before important moments. Be present. Be in the moment. There is no substitute.
 - b. Stay focused. Practice mediation.
 - c. Take care of yourself. You have to be there and be present.
 - d. Assume the judge is honest. They have ethical cannons.
- XVI. Conclusion
 - a. Everyone has a story
 - b. Your job is to tell your client's story within the framework of the law.
 - c. You provide the plot; your experts and witnesses provide the twist; and your ending is for the judge – that call to action where you ask the judge to rule in your client's favor and grant the relief you have requested.
 - d. Get in. Make your point. Get out. Sit down.

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