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View from the Ivory Tower: Musings of a Former Family Lawyer

David Spratt

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BY: DAVID H. SPRATT

My son, at nineteen months, has "mastered" the art of question and answer. "What's that?" and "What happened?" are currently in the running for his favorite question, and "I don't know" (even when he does) is hands-down his favorite answer. Friends who have made it through the "terrible twos" tell me that shortly my son will be asking the question: "Why?"

As lawyers, we cringe at the thought of having to answer, "I don't know," as we are paid for our knowledge and ever-present words of wisdom. Yet, all too often it seems that we fail to ask ourselves "why" we do the things that we do.

After more than ten years of practicing family law, I recently became a full-time law school professor. Last summer, I taught a family law practice and drafting class. As a "seasoned" family lawyer, I thought I knew the "ins and outs" of what we did and why we did it. Nonetheless, while teaching my class, I encountered several hard-to-answer questions (either self-imposed or asked by students), six of which are asked and answered below:

1: Why do some family lawyers internalize their client's personalities and emotions, resulting in unprofessional and detrimental behavior?

Few will disagree that going through a divorce is an emotionally-devastating, stressful experience. As family lawyers, we see many of our clients at their low points – facing the end of a relationship they thought was permanent, trying to adjust to news of infidelity, dealing with uncertain financial security. As a result, some clients are unable to control their anger and seek to lash out at their soon-to-be-ex spouse through whatever means possible. Such means include finding a lawyer who is willing to take the bait and join them in the "fight to the death."

In an ideal world, clients should choose a lawyer based on experience, advice, and professional demeanor. In reality, however, many clients look for lawyers who will internalize the on-going conflict. Unfortunately, these lawyers exist. Although the client is initially thrilled to have found a battle ally, ultimately the client is disserved. Petty arguments between counsel who cannot control the emotions that they have internalized benefit only the lawyers, whose bills are artificially increased by "fighting," when a simple conversation, putting emotions aside, could resolve some, if not all, of the issues far more expeditiously.

In family law, attorneys need to check their personal emotional involvement, remembering that the client, not the lawyer, is getting divorced. If a lawyer becomes too absorbed by a client's problem, that lawyer is unable to step outside of the immediate conflict to "think outside of the box" and offer solutions that could truly benefit his client. A family law attorney should strive to control, not contribute to, the chaos. Family law is unpredictable and emotionally demanding; the best solutions often involve compromise, and when emotions get in the way, thinking of compromise is not often practical, or even possible.

2. Why do other lawyers often forget that many family law clients are at their emotional low points and are more than simple names on a file?

On the flip side, clients are more than just names on a file. Because all clients are searching for resolution and advice at a time when they don't possess all of their faculties, a good family lawyer needs to remember her role as an "attorney *and counsellor*"[1] at law. Although we are not trained therapists, we should fa-

miliarize ourselves with extra-legal resources that might benefit our clients – financial planners, family and individual therapists, parenting coaches, occupational advisors, etc. When applicable, clients should be told about these resources and encouraged to use them.

ABOUT THE AUTHOR

Professor David H. Spratt is a legal rhetoric instructor at Washington School of Law. He received a B.A. degree in Government and Psychology from The College of William and Mary and graduated summa cum laude from The American University, Washington College of Law. Prior to teaching legal rhetoric, Professor Spratt taught legal writing and research at the George Washington University School of Law, legal analysis and writing at Concord School of Law, and legal methods at the Washington College of Law. Previously, Professor Spratt has was a founding partner of Schwartz & Spratt, PLC, an associate at the Law Office of Betty A. Thompson, Ltd., and at The Lewis Law Firm, in Washington, D.C.

3. Why not be as selective when taking clients as when choosing a bottle of wine?

Rule 1.1 of the Virginia Rules of Professional Conduct provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation."

Even if you have the experience and skill needed to take a family law case, you do not have to take every client who walks through the door. One "bad" client takes up a lot of time and energy, resulting in repeated telephone calls and e-mails, possible ethical and malpractice claims, and unpaid bills. Sniff out the following warning sign behaviors and red flags early in the process, before a *potential client* becomes a client:

a) Balking at a charge for an initial consultation.
b) Asking multiple questions by e-mail or telephone before the consultation.
c) Interviewing or retaining a series of lawyers.
d) An outstanding balance with a previous lawyer.
e) Evasive or untruthful behavior during the initial consultation.
f). Expressing a desire to have their spouse's head on a tarnished silver platter.

If a bottle of wine does not live up to expectation, it is easy to return the bottle after sniffing the cork. Terminating a difficult client once a retainer agreement has been signed, however, can involve motions and hearings and is not always possible.

4. Why do some family lawyers put language in letters to opposing counsel that they would chastise their clients for using in an e-mail to a spouse?

I am confident that every family lawyer has memories of an insulting letter that she has either written or received. Although we cannot readily control being the recipient of such letters, hopefully the memory of being the sender is a vague recollection of the one time you "let it slip," rather than a commonplace behavior.

Some lawyers (often those that have internalized the conflict between the parties) find it "effective" to engage in puffery and bullying in letters between counsel. Such techniques are arguably useful when employed sparingly but incredibly ineffective when used routinely. Think back on your career. Recall the letters you wrote to or received from opposing counsel that contained insults, exclamation points, abrasive rhetorical questions, frequent underlining and constant imperative sentences. Did these letters lead to better and more immediate results for your client?

Sure, being a zealous advocate sometimes requires strong language and assertive writing; often, however, a velvet hammer rather than a jackhammer is more effective. Sentence structure and presentation can often make the same point in a more professional and less inflammatory manner.

For example, the sentence, "Your client failed to answer her

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discovery responses" can be softened by hiding the direct blame: "The discovery deadline has passed, and we have not received your client's answers." Instead of "Give me the bank statements," consider: "Can you please forward your client's bank statements?"

I used to tell my clients to be careful with putting anything in writing, lest the document end up on the front page of *The Washington Post*. The same warning should be given to lawyers. Do you really want to see the one time that you "let it slip" as Exhibit A in a hearing before your local judge?

5. Why do some lawyers represent that they have made a good faith effort to settle a case when nothing could be further from the truth?

Rule 4:15 (b) of the Virginia Supreme Court rules provides:

"Counsel of record shall make a reasonable effort to confer before giving notice of a motion to resolve the subject of the motion and to determine a mutually agreeable hearing date and time. The notice shall be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."

Abide by this rule, and don't say that you did when you didn't. Enough said. Plain and simple: do unto others as you would have them do unto you (or as required by the Rules of the Virginia Supreme Court).

6. Why do some lawyers play games with discovery?

I learned how to draft and respond to discovery requests from my mentor, Betty Thompson. In a nutshell, her paraphrased advice: ask carefully and specifically for what you want, and answer only what is asked of you. I am eternally grateful for her instruction.

It is unprofessional and arguably unethical to deliberately be evasive, intentionally "misinterpret" a question or give it a strained reading; however, if the opposing party's counsel did not draft effective discovery, that is not your issue to correct – you need not do the other party's job (just make sure you are not being cutesy by going too far with your objections).

Discovery abuse is common, and not only in the family law bar. In an entertaining law review article, Professor Charles Yablon discussed a federal securities case from the Southern District of New York, where the judge, in ruling on a motion to quash the deposition notice of a class representative, wrote[2]:

Although we have before us two highly competent law firms, there is, in this vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers. It is, on the contrary, obvious that they have all been produced by some word-processing machine's memory of prior litigation. . . .

Accordingly, the Court, on its own motion, strikes both the interrogatories and the purported answers. To the extent that they may have already been filed, we direct the Clerk to return them to the respective parties. The parties are, furthermore, ordered to never refer to them again in this litigation.[3]

In his article, Professor Yablon postulates that the best way to improve the litigation process and reduce discovery

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abuse is to for judges to tell lawyers to "shut up and knock it off," and he offers the additional following suggestions:

a) Appoint special discovery masters to attend every deposition and glare at the litigators whenever it looks like they are going to get out of line;

b) Throw the abusive discovery in the garbage, and make the lawyers start over;

c) Give the non-abusive lawyers twice as much time to file papers as the nasty ones, or, make the nice lawyer's papers always due on Friday at noon, and the other lawyer's due on Monday at 9:00 a.m.;

d) Make the abusive lawyers go back and take some remedial law school courses; and

e) Sentence abusive lawyers to community service on the most unimportant boring bar association committees.

Interesting . . . . food for thought for our judges?

Now, don't get me wrong, I have fond memories of my life as a family lawyer. The overwhelming majority of the family lawyers with whom I worked over the years were professional, responsible advocates for their clients. I speak of the profession and the domestic relations specialty on the whole with respect and admiration. Unfortunately, the exceptions are the ones that stick in my memory. As I now sit, in what some may erroneously call my "Ivory Tower," I have the somewhat unique opportunity to look back on my practice with the hopes of instilling solid skills in my students. Doing so made me ask myself "why" some attorneys do the things that they do. Hopefully, trying to answer these questions prepared me for the onslaught of "whys" that I soon expect from my son. ■

NOTES

[1]Look over your shoulder at your Bar Certificate: the word "counsellor" (spelled as it is here) is on there!

[2]Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 Colum. L. Rev. 1618 (1996).

[3]*Blank v. Ronsom*, 97 F.R.D. 744, 745 (S.D.N.Y. 1983).