

Preparation and Presentation Conquer Perceptions in the Courtroom

By Hannah Hayes

In the 2008 presidential election, Republican vice presidential candidate Sarah Palin received raucous cheers when she likened hockey moms to pit bulls with lipstick. Yet when then-presidential candidate Barack Obama referenced an idiom about “putting lipstick on a pig” to disguise a bad plan, he was met with angry charges of sexism.

“Women and men who do the exact same thing are often perceived very differently,” says Sarah Wald, a lawyer and senior advisor to the dean of the Kennedy School at Harvard University. Wald gives seminars on gender communications to lawyers across the country. “How you act, how you present yourself is not always interpreted in the same way.”

For lawyers litigating before juries of unknowns, differences in gender communication styles can be difficult to navigate. Over and above dress and appearance, conscientious litigators must consider how language, style, and mannerisms may impact their persuasiveness when arguing a case. While this is true for all lawyers, male or female, most experts agree that women have less room for error.

“It’s not simple because there is not a clear set of rules that apply to everyone that you can just follow,” Wald says. For example, people who take their time posing questions may be perceived as thoughtful; however, such pauses may also be interpreted as indecision. And according to many experts, women who hesitate are often viewed through a harsher lens.

“Female attorneys walk a fine line,” says Leslie Ellis, a jury consultant from Kroll Ontrack, a technology and litigation consulting firm that focuses on pre-litigation preparedness, in Washington, D.C. Ellis consults with lawyers on jury selection for high-risk and complex civil cases to develop themes and trial strategies. “Juries expect them to be smart and on the ball, but they often have certain expectations of a woman at the same time.”

While there is no formula for exuding power or confidence, Wald stresses the importance of being aware overall of the way you are presenting yourself—whether it’s what you’re wearing or how you’re moving. “Gender has much more of an impact than one might think,” she observes.

Understanding Communication Styles

Judge Norma Shapiro likes to say that no one mistakes her authority when she walks into a courtroom—but that only happened when she started wearing the black robe of a judge. Shapiro became the first woman to sit on the Third Judicial Circuit when she was appointed by President Jimmy Carter in 1978. She has written and spoken extensively on the impact of gender and communication styles when arguing in front of a jury.

“Neither our courtrooms nor communities are sex-blind or sex-neutral,” Shapiro says. “It should be no surprise that psychological studies show that women are often given less credence than their male counterparts.”

Studies show that while women have made great strides in gaining acceptance in leadership roles, stereotypes still exist. In 2007, researchers in Norway found that even though a male and a female actor gave the exact same political speech, men were consistently rated as being more competent. Wald cites an earlier study that showed female candidates scored higher on issues that voters associate favorably with women, such as education, while issues like national security were perceived as more masculine qualities. (*The Political Consequences of Being a Woman*, Columbia University Press, 1996).

However, how women can address differences in com-

munication styles is not always clear. But according to Ellis, quite a lot of academic research exists that is useful and informative. While each case is different, Ellis says, it is important to “understand expectations and limit distractions.” For example, Ellis points to “mechanical things” in a woman’s communication style that can undermine her credibility in a courtroom.

“Many studies show that women are more focused on developing consensus, while men may be focused on getting a task done,” Ellis says. “Women want to get as many people on board [as possible], so they use language and words that are more passive and less direct because they are geared toward not offending anybody.”

Deborah Tannen has written extensively on communication styles of men and women and how they relate to power and success in the workplace. Tannen maintains that while men may make an assertion in a direct statement, women often end with a question aimed at achieving consensus, such as “does that make sense?”

The downside is that in a courtroom, this style may make a woman sound less sure of herself. “It sounds like we’re questioning ourselves,” Ellis says. “Women can sound more powerful if they stop using language techniques that undermine their own strength and conviction in their position.”

Even body language and gestures can give distorting impressions. Wald points to studies that show sitting a certain way or using a simple gesture such as putting one’s hair behind one’s ear can be perceived as flirtatious or inappropriate in a woman, while that same gesture might go unnoticed in a man.

Myriad studies and focus groups indicate that jurors may have certain expectations of what is appropriate behavior for women lawyers. Wald uses the example of two concentric circles that intersect. “On the one end, you have smart and competent, and on the other hand you have approachable. Where they intersect for men, the area is bigger—they can be both competent and likeable—but that area is much smaller for women.”

Assertive or Aggressive

Female judges have a unique perspective. Judge Margot Botsford spent 18 years as a trial judge where she heard a range of civil and criminal cases. Today, she is an associate justice on the Massachusetts Supreme Judicial Court.

“I do think that women are given less leeway,” Botsford says. “A male lawyer can get angry at a witness or express frustration or disgust and can be successful. I think a woman may be able to do that but to a much lesser degree.”

Women sound more powerful if they don’t use language techniques that undermine their strength and conviction in their position.

While Wald talks about the common areas of concentric circles, Botsford describes a continuum where men seem to have more latitude when it comes to expressing reactions or emotions in a courtroom. “On the one end, you’ve got timidity and on the other end, shrillness. Where women fit in between is pretty important. Men seem to have a much broader band; women have less room.”

Whether the issue is clothing, attitude, or demeanor, there are more areas where women can go wrong, agrees Barbara M. G. Lynn, a judge on the U.S. District Court for the Northern District of Texas. “There is still a lingering perception of what is appropriate in terms of attitude for women,” she observes. “For example, women are still criticized for being overly aggressive.”

So how do women lawyers reconcile being assertive and not aggressive? How can they be audibly forceful without sounding shrill? “You have to speak up and speak with confidence,” Shapiro says. “You can’t be persuasive if the jury can’t hear you.”

Further, showing confidence in the way you address the bench is important. “If you’re engaged in discussions in chambers, [a judge] may pay more attention to you if you are less assertive,” Shapiro notes. Lawyers who attempt to dominate a hearing or impose an agenda run the risk of being reprimanded by the judge. “But in front of jury you want to be assertive, which is different from aggressive,” she says.

Lynn agrees that technique can make a difference when questioning a witness or making an appeal to the bench. While gender studies show that women tend to be more polite and less direct in conversation, this style does not serve female lawyers in a courtroom. Inevitably, a witness may wander or need to be interrupted. Or the lawyer may need to appeal to the bench to get the witness to answer.

“I’ve seen women effectively say to the witness, ‘perhaps my question was unclear,’ which is a control mechanism that still has a courteous aspect,” Lynn says. In contrast, she cautions that when making an appeal to the judge, “showing great exasperation makes the lawyer look weak and ineffectual.”

Lynn also points out that knowing the judge’s style and what to expect is crucial. “There is sexism on the bench out there in the world, and if a judge is not going to be helpful in taking control of the witness, you don’t want to look bad.”

Competence Is Key

Despite the mixed messages and gender stereotypes, experts agree that the most important thing a woman can do is be prepared. Lynn points out that the issue of shrillness or volume can be tackled with good planning. “My courtroom has very high ceilings,

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Focus on Diversity

After a distinguished career as a litigator at Howrey LLP, an arbitrator, and a trial advocacy instructor, Karen Lockwood of Washington, D.C.—who is also a member of the *Perspectives* editorial board—says she became a diversity consultant “because I was running to something, not running from something.” As a bar leader, she discussed strategies to increase diversity and saw that it resonated with people. “They said things like, ‘I never thought of that before,’” she says.

Lockwood realized she wanted to do more insightful work in diversity that would require immersing herself in diversity data and business literature. She left practice and in May 2010 she founded The Lockwood Group LLC, in Camden, New Jersey, which she hopes will become a business large enough “to leave a lasting name in this field.”

“Undoubtedly, my background gives me more empathy and trust” than that of the typical consulting practice, Lockwood says. “I understand the challenges of law firms like I understand how my blood flows.” Typically she is called in to consult on developing women and minority lawyers to become more effective rainmakers. Her approach is to convene a workshop in which lawyers at all practice levels explore how to create rainmaking teams and share expertise on how to build a book of business.

“I’m always strategizing about attracting clients and constantly rethinking services,” Lockwood says, noting that her business now includes strategic and group coaching. She scoffs at the suggestion that she’s retired from the law after 31 years of practice. “I’m still in the law. I am working with it and presenting it all the time.”

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and you do need to speak up to be heard,” she says. “If a woman is concerned about being too loud or too shrill, they might want to try it out.”

Competent and well-prepared lawyers will consider the image they want to project before a jury. “The goal is not necessarily to be likeable,” Wald says. “But you need to be aware that these [perceptions] happen so at least you can make a conscious decision and know that it might have that effect.”

“It usually boils down to competence and ability,” Ellis says. “As long as you’re good at your job, you know your material—that’s what juries will ultimately focus on. But you don’t want them to work to get there by running contrary to expectations.”

The goal, Shapiro says, is “calling attention to your arguments instead of you.”

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ADVICE FOR APPELLATE ADVOCATES

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those answers will spring to mind.”

Women should not wear clothing that is too low cut or see-through, and men should not wear distracting ties. But women do not need to dress in conservative, button-down suits.

“Sometimes you can see what you don’t want to see,” Battaglia says, especially because judges often sit physically higher than the advocates. “I certainly wouldn’t want to call attention to my body when I was trying to get a legal point across.” Werdegar agrees. “Attire should be something we don’t even notice,” she says.

... And a Few Key “Don’ts”

Be careful not to offend the judges. During one argument, a judge questioned a lawyer, and the lawyer replied directly to the judge: “With all due respect to the court, you are reading XYZ case all wrong,” Battaglia says. “It is one of the worst things to do before an appellate judge. He didn’t win. Why be offensive to the people who are going to be deciding the case? There is a diplomatic way of differing.”

To prepare, Battaglia recommends that lawyers conduct a mock argument before other people—even family members. “When you hear some of the things you say about cases, it is so

much more graphic,” she points out.

Don’t attack your opponents personally. “I don’t find it very effective when people who are arguing in an appellate court or trial court take on the other side directly rather than take on a point legally,” says Battaglia, who heads the Maryland Court Commission on Professionalism. For example, one lawyer characterized another’s argument as “disingenuous.” She says this approach just doesn’t work.

Watch the theatrics because you are arguing to a judge, not a jury, Werdegar advises. Several judges caution appellate advocates to be careful not to point at the judges or walk from the podium toward the bench.

Do not use legal jargon or an alphabet soup of initials and abbreviations that are not extremely well known. “If we don’t understand you, you are going to lose,” Sears says.

But also be careful to stay away from overused colloquialisms and clichés. One catch phrase Battaglia says lawyers use but must avoid in oral argument is “to be perfectly candid”—as if they weren’t being candid before.”

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