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Show, Don't Tell

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Much of human behavior involves trying to convince others to believe us. (50,000 years ago: “OMG, there’s a lion behind that tree!”). Trial lawyers are specialists on the subject of persuasion. Before I was a judge, I was a jury trial lawyer for more than 30 years. I learned that *telling* a factfinder what to think is not effective. But *showing* the factfinder convincing facts and allowing the factfinder to draw her own conclusions—that’s the ticket!

I reflect on this a lot in my current job. I see a ton of lawyers who are advocating on disputed issues of fact and law. Let me share what I see and hear.

Lawyer One: “The Petitioner continues to mislead this court by her self-serving, half-truths. In fact, a half truth is a good day for this liar.” Lawyer Two: “Objection! Not so, your honor; it is the Respondent who continually has lied to this court and so has his counsel. I expect their pants to burst into flames at any moment.” This exchange—far more common than one might think—is of no use to me. Both sides are telling me what to think without giving me any information upon which I can draw my own conclusion. It is white noise and something I need to put an end to in order to do my job. Worse, it portends more bad things to come in the hearing. Some lawyers might think that this is a good way to get off on the right foot with the judge. It’s not. And you owe it to your client to explain that early and often.

How about this instead: “Your honor, really this dispute comes down to which party is telling the truth on the critical issue of X. You are going to have to make that determination. We have in our brief and we will in our focused inquiry of witnesses demonstrate that our version of the facts reflect reality and Respondent’s does not.” My reaction? This is more helpful because this lawyer understands her job is to show me facts and not assert conclusions. I am disposed to learning what she will have to say.

Thus, we see that persuasive advocacy overlaps directly with civility. Lawyers should practice civility not (only) because it is virtuous and professional behavior—but because it is the behavior of winners! Juries *hate* unpleasant bickering and accusations in court. Guess what: your jury of one—the judge—does as well. Judges are people too. Although we will do our best to decide matters on the facts and law, we cannot help but to be influenced by the conduct of counsel.

Again, I suggest that lawyers owe it to their clients to explain that unpleasant, harsh, acerbic, sarcastic, stonewalling or—heaven forbid—profane behavior is not a sign of strength or commitment. It is usually a sign of desperation and weakness which will hurt the client with the factfinder. Thirty-seven years into my life in the law I am prepared to state a law as immutable as gravity: Being a jerk doesn't work; it's not effective; it's counterproductive; it is bad lawyering.

Judges have a keen ear for lawyers who can discharge the difficult assignment of conveying disagreeable topics in a non-disagreeable way. We admire that. It is a credibility enhancer. Let's take a look at two examples. First: "Your honor, they refused to meet and confer! Everything with Mr. Smith is 'my way or the highway'. The only thing that will work on this guy is a financial sanction or a complaint to the State Bar." Even if true, it's not very helpful and it grates on my ears. My stomach produces acid. I'm not looking forward to the next sentence from this lawyer.

Second: "Your honor, it is true that our meet and confer did not result in resolving this dispute and as you can see, each side has its view as to the sincerity with which the meet and confer occurred. We are prepared to dissect that with you in depth and indeed, we look forward to that inquiry in light of what the facts will show." This is a better presentation in my view. I'm thinking: Sure, I have to figure out if someone's failure to meet and confer will result in a sanction (my least favorite part of the job) but at least I know I will not be splattered with mud by this lawyer.

My bottom line: the key to successful advocacy: show, don't tell. And among the things to show—show you are part of the solution, not the problem.