Apologies & Lunch

by Sidney Kanazawa

Apologies and lunch — two of the most effective tools in dispute resolution — are normally not even listed as possible litigation tactics. Clients expect their lawyers to be "tough," "demanding," and "aggressive." They don't expect their advocates to say "sorry" or "do lunch." In the beginning, I too believed the myth of "lawyer warrior."

In the Beginning

As a young attorney, I was dying to become a trial tiger with credible claws and tactical teeth that could intimidate any opponent into submission. I wanted to shed my novice "deer in headlights" appearance and swagger and growl like the grizzly old "gray hair" who could make others nervously quiver and beg for mercy, or so I thought.

Becoming a Tough Litigator

With practice, I learned to emulate the behavior of "tough litigators." I tried to be one step ahead of my opponents and gave no "favors" without getting something better in return. I pushed opponents against time deadlines and read all the rules and cases to squeeze opponents into weak positions. And I looked for every opportunity to take a case to trial.

Lawyer Warrior

Being a lawyer warrior seemed the only way. Clients wanted the "toughest," "meanest," "SOB" trial lawyer. Fellow lawyers seemed to revere similar traits. To these bulldog lawyers, there was only one truth: their truth. Without a doubt, this was the only way to be a truly zealous advocate. Or was it?

Becoming a "tough litigator" was fun, frustrating, and futile. To my surprise, my "tough," "demanding," and "aggressive" behavior was not met with meek submission. The other side was just like me. An onerous set of discovery was immediately turned around and served on my client. Raised voices, raised voices on the other side. Zealous representation of my client's interest was met with an equally zealous response. And being "tough" meant more billable hours, which gave my clients pause to wonder whether this viscerally satisfying approach made any economic sense. I too wondered whether this was the most effective way to reach a just result.

A Loss of Independent Credibility

At the same time, with law becoming more of a "business" and less of a "profession," I sensed lawyers were losing their independent credibility. Lawyers were no longer revered as crusaders of justice but only as "for profit mercenaries" who manipulated the law and legal procedure for the benefit of their clients.

It is amazing to look back at then Senator Richard Nixon's "Checkers" speech. In 1952, Nixon was accused of misusing campaign funds. To win public support and continue as the Vice Presidential nominee on the Eisenhower Republican Presidential ticket, Nixon went on TV and, besides talking about his dog "Checkers," called upon an accounting firm and a law firm to vouch for his credibility. What politician today would call upon those two "businesses" to attest to his or her credibility? The obvious answer to that question is a sad measure of how far we (and public accountants) have fallen in credibility before the American people.

Personally, I became disillusioned until I had a series of epiphanies about effective persuasion and the role of lawyers.

Winning without Hiding

In a hotly contested product liability trial, I noticed I could win even when everyone — opponent, judge, witnesses — was vehemently against me and ostensibly beating me, if I focused on a few credible propositions and conveyed an honest desire to tell the whole story, bad facts and all. I discovered the power of transparent sincerity and humility.

Just before trying a product liability case for a manufacturer, I reviewed the transcripts of several trials involving the same product where the company sometimes won, and sometimes lost with the imposition of punitive damages. I wondered what separated the wins from the losses since the products were identical, the company documents and witnesses were essentially the same, and the jury instructions were similar. To my surprise, I found that where the manufacturer's attorney objected a lot, the manufacturer lost. Where the manufacturer's attorney structured the case to object less, the manufacturer won. The appearance of hiding, even behind legitimate objections, was deadly for the manufacturer.

With this knowledge, I tried my case with very quiet objections, not even rising to my feet in most instances. The objections were so soft and casual that the court reporter would interrupt and ask me to repeat my objection. I was trying to convey an image of nonchalance about the subjects of my objections. By contrast, my opponent would leap to his feet and boom out an objection whenever I treaded in areas sensitive to my opponent's case. More often than not, the judge would sustain my opponent's objection and overrule my objections.

By the end of the trial, the jurors got the message. I was trying to tell the whole story and my opponent, the judge, and the adverse expert witnesses would not let me tell it. The jurors voted 12–0 for the defense on design defect, an unprecedented verdict. By taking a quiet, transparent, and sincere approach, I turned a multi billion dollar defendant into an underdog trying to tell its story.

Winning with an Apology

A few years later, I learned the power of apologies. After apologizing to more than 2,000-plus claimants in the largest oil spill in the Port of Los Angeles, the claims resolution group I set up settled 600 claims within two weeks of the spill and all 2,000-plus claims within three months of the spill.

In this matter, an ocean-going vessel spilled oil in the Port of Los Angeles and contaminated seven miles of shoreline and thousands of pilings. The spill shut the port for five days and generated more than 2,000 claims. Initially, the focus was on my client's vessel and an accidental overflow of its fuel tanks during a normal fueling operation. Due to inattention, oil spewed out of the vents, filled the ship's deck, flowed down the hull of the ship and entered the water below. The cleanup crews thought they had contained the spilled oil and cleaned up the tarry mess by the end of the day.

However, that evening, oil was spotted throughout the harbor, contaminating seven miles of shoreline and thousands of pilings, marinas, boats, ships, and other marine surfaces.

Two days after the spill, we held a meeting with the claimants to explain how we would process claims generated by this spill. The claimants were angry. A group was signing everyone up to bring a consolidated action against our ship-owner client. As we started to explain the claims procedure we had created, we were shouted down. "You guys are so stupid!" "How could you let this happen?" "How are we going to work or live with all of this oil all around our boats?" "Where's my money?" I stepped to the podium and asked each person yelling at me, "What should we be doing now that we are not doing already?" Each suggestion was noted on a white board behind me. After filling the white board with suggestions, a fellow at the back of the crowd rose and shouted, "We don't give a damn about all of this talk. Where's my money?" At that, a woman in the front row who had been organizing against us stood up, turned to the back of the crowd, and said, "Sit down and shut up. These guys are trying to help." With that comment, the persons originally organizing against us became our liaisons with the claimants, resulting in a settlement of 600 claims within two weeks of the spill and all 2,000-plus claims within three months of the spill.

Later, when we discovered that the oil spread throughout the harbor came from another vessel, the owners of that other vessel attempted to use my public admissions of responsibility and apologies against us. The attempt fell flat. The trier of fact could see from all of the evidence that at the time of our admissions and apologies we were sincere but mistaken.

By sincerely apologizing, earnestly listening, and intently focusing on the present, without hiding from the past, I found potential opponents could join together to solve a mutual problem with trust and without the baggage of the past. In addition, I learned that an opponent's ability to adversely use humane apologies is more theoretical than real.

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Winning in the Present

In a death in a silo case, I learned the power of focusing on the present and bringing stakeholders together. One morning, I was called to assist a company that had experienced a death in a sand silo the night before. By the time I arrived on scene, the district attorneys' investigator was pulling up and the Occupational Safety and Health Administration (OSHA) investigator was already gathering documents and talking to witnesses.

As the facts of the accident unfolded, nothing looked good. The decedent was a new temporary worker who had no experience cleaning out the silo. Although a steel frame for an emergency man hoist was installed over the silo, the automatic retractable man hoist was not installed. The decedent was not given a tethered harness that could have been used to pull him from the sand. There were no spotters at the top of the silo. There were no radios or other communication devices between the men in the silo and the control panel where the silo vibrator switch was located. There were no emergency shutoff switches or procedures for the men in the silo. None of the facts were favorable to the company.

I gathered the company's officers and managers and formed a crisis team focused on the present. Although the company had just engaged in a very hostile union battle and the plant manager had fired the union shop steward (who was reinstated through a grievance procedure), the team reached out to the union shop steward as he was leaving the meeting with OSHA and the district attorneys' investigator and invited the shop steward's thoughts and suggestions as to what we should do now. The shop steward was surprised but made valuable suggestions. The company also reached out to the decedent's family, offered immediate financial assistance for the funeral, and apologized for the incident. The company provided counseling to all employees and asked for their thoughts about what should be done. An OSHA specialist was employed to critically evaluate the plant and offer a course of action that could be immediately implemented.

The company freely gave the OSHA and district attorney investigators everything they requested and more. No effort was made to hide from the past. Whether positive or negative, the past conduct of the company already happened and could not be changed. The only thing the company could do now was to join together with all stakeholders, focus on the present, and move forward. Rather than shielding itself from the past, the company embraced the past, warts and all, and united with all interested parties to do the right thing.

This "in the present" approach generated cooperation and reasonable win-win solutions. The decedent's family did not urge a vigorous criminal prosecution and ultimately received more in compensation from the company than they were entitled to under applicable statutes. The union did not use the incident to incite labor unrest and instead worked with the company to improve working conditions and safety procedures. Improvements at the facility were immediately installed to surpass all OSHA requirements. Employee relations improved. With the support of the decedent's family and the union, OSHA and criminal penalties were reduced and imposed with virtually no adverse publicity. And the entire matter was resolved before any interested party filed a complaint. No matter how bad the past, thinking "in the present" allowed adverse parties to join together to create a better future.

Winning with Lunch

The next revelation was how quickly a case could settle with lunch.

In a plaintiff's case, I wrote a moving closing argument in a letter to the defendant without filing a complaint and invited the defendant to join me for lunch. We talked at length at lunch and eventually began discussing structured settlement approaches that were "in the ballpark." Within a few weeks, the case was resolved and a structured settlement put in place that would take care of my client and his family for the rest of his life.

In a defense case, I similarly invited an opponent to lunch before answering the complaint. The case was very ugly and emotional. While liability would be hard to prove, the catastrophic injuries suffered by the totally innocent little boy plaintiff would push the jurors to find a way to help his suffering. We engaged in a series of lunches that ultimately resulted in a settlement within months of the service of the complaint and with very little discovery.

Lunch bypassed much of the fighting and got us to the bottom line faster than any bullying power strategy.

Putting It All Together

Why are apologies, transparency, sincerity, "thinking in the present," conceding the past, and lunch so effective? As recognized by Aristotle in his Book of Rhetoric, persuasion begins with a speaker's credibility and believability. It is about trust. No matter what a speaker may say or do, no one will listen or follow the speaker's lead if they do not trust the speaker. Apologies, transparency, sincerity, "thinking in the present," conceding the past, and lunches are human acts that generate trust. They reflect a decency, a mutual respect, and a selfless vulnerability that invites reciprocal trust and fair conduct.

Goal

As attorneys, we must ask ourselves "what is our goal?" It is easy to be a "tough" zealous warrior. Clients (and lawyers) seem to think this is the ideal. In practice, however, loud and powerful bullying seems less effective than the powerful sea changes that can be generated by a credible speaker selflessly seeking mutually beneficial solutions. Dr. Martin Luther King, Jr. and Mahatma Gandhi changed years of accepted "truth" by sacrificing for and championing causes beyond themselves. They acted as polar opposites to the greedy mercenaries and "merchants" we lawyers have become in the eyes of the public. It is not about power. It is about trust. Jesus and martyrs of all political persuasions have a long history of generating causes with lasting momentum beyond their own lives, even though it might appear that a more powerful force defeated them during their lifetime. As we have seen in Iraq and Afghanistan, overwhelming firepower is not enough. To create quick and lasting solutions, opponents and stakeholders must find a way to trust each other and respectfully join together in the present and future rather than disrespectfully battling for dominance in the present and past.

If our goal as attorneys is, as suggested by Rule 1 of the Federal Rules of Civil Procedure, to "secure a just, speedy, and inexpensive determination of every action," then apologies and lunches should be prominent strategic options. Without apologies or lunch, the battle begins with pleadings, letters, e-mails, and one-way phone missives that intentionally convey uncompromising dominance, self-interest, and separate visions of the past – all matters that are difficult to reconcile. With self-deprecating apologies and "small talk" at lunch, the credibility and believability of each side is given a chance to take root, ears and minds are opened, and trust can be nurtured and developed. Attorneys must choose. Zealous uncompromising warriors? Or Aticus Finch small town lawyers with the character to apologize and accept apologies, to standup for what is right and to admit what is wrong, and to confidently engage opponents in friendly sincere conversations over lunch. As Abraham Lincoln once noted, "The best way to destroy an enemy is to make him a friend." Apologies and lunch are a means to that end, if we choose to use them.

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