Art of Persuasion

Authenticity in Negotiations

By Sidney Kanazawa

Zealous partisanship can often hinder the very trustworthiness necessary for successful representation of your clients.

Have you ever listened to a speaker who you knew was nervous, but he claimed he was not? I bet you could not wait for him to fail. And I bet you felt a thrill of satisfaction when he did falter.

On the other hand, have you ever listened to a speaker who was obviously nervous and openly admitted that she was nervous? I bet you were rooting for her. You wanted her to succeed. You wanted to reach out and tell her she can do it. And I bet your stomach twisted a bit when she stumbled, and you felt a smile stretch across your face when she got through her presentation in decent form.

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Authenticity

The difference is authenticity. When we perceive people faking confidence, we feel they are conning us. Lying to us. Our sense of justice wants them to fail. We want to expose their charade and show their real character. By contrast, when we see those who seem sincere, our same sense of justice wants them to succeed.

It is no different in negotiations. To the extent that we perceive our opponents to be disingenuous, we want them to fail. We distrust them and want to rip off their mask and show them to be a fraud. We are wary of their every action and their motivations behind each act. But when our opponents appear genuine and appear interested in our concerns, our hostility toward them softens and our reciprocal interest in their concerns kicks in.

Zealousness

Ironically, we assume the worst in our litigation opponents, in part, because of our lawyer ethical rules. Like the rules of a sports contest, our current rules encourage lawyers to get as close to the ethical line as possible for the benefit of our clients. The preamble to the ABA Model Rules of Professional Conduct expects lawyers to be zealous partisans. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others." In fact, our current rules naively assume justice is automatically achieved when lawyers act in an entirely self-interested manner:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time ***assume that justice is being done***. [Bold italics added.].

Of course, this "zealous" advocacy applies to both sides. Thus, our current ABA Model Rule of Professional Conduct advises zealots on both sides to push right up to the limits of the rules and assume justice is being done. No one needs to check if justice is, in fact, being done. (This 1983 formulation of the ABA Model Rules of Professional Conduct has not always been the standard for professional conduct. Earlier versions of the ABA Model Rules (1908, 1969) did not mention "client" or "zealous" even once in their respective preambles. Instead, the earlier preambles emphasized the role of lawyers as the "guardians of the law" with the duty of maintain public trust in the "integrity" and "impartiality" of our institutions of justice.)

Thoughts on Negotiating with Authenticity

So how do we balance our ethical obligation to be zealous advocates with our practical objective of being authentic and trustworthy negotiators on behalf of our clients? Here are a few thoughts.

Is Zealous Advocacy and Authentic Trustworthiness Compatible?

As normally understood, no. A zealot is focused on themselves and their own righteousness. A trustworthy person gives the impression of being principled and respectful of the expectations, hopes, needs, and desires of others. It is hard to trust a warrior. Warriors are single-mindedly devoted to destroying the opposition and winning. Warriors cannot be trusted to be empathetic, to be transparent, or to be just. Warriors are focused on themselves winning and others losing. Period. Warriors want us to fear them, not trust them.

True, the ABA Model Rules tempers the pure warrior model with requirements of honesty. Nevertheless, the constant calls for attorney civility suggests the win-at-all-costs warrior model is a prevalent norm that continues to undercut trustworthiness and collaboration.

This client-centric zealousness has a price. In the 2020 Gallup Poll, *Honesty/Ethics in Professions*, 89 percent of the public rated nurses as high or very high in honesty and ethics. Nurses are perceived to be selflessly focused on the needs of others. By contrast, only 21 percent of the public viewed lawyers as sharing those same virtues. Like car sales persons (8 percent), members of Congress (8 percent), and business executives (17 percent), lawyers are perceived as more selfishly devoted to their and their clients' own self-interests than honesty and ethics.

Is There a Different Way to Look at this Incompatible Choice?

Yes. If we understand "zealous" in practical terms, it can mean being an "effective" advocate—achieving practical results.

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So How Can We Be an "Effective" Advocate?

We start by understanding how we persuade. Aristotle thought about this problem and concluded in his book, *Rhetoric*, that we persuade by using three elements—ethos, pathos, and logos. *Ethos* is the credibility and believability of the speaker. If our audience does not trust us, they will not listen or take seriously what we say. Thus, the perceived character of the speaker is the first element of persuasion. *Pathos* is the emotional or moral justification for following the speaker's lead. If our audience does not feel in synch with our message, they will not feel moved to act consistent with our appeal. Thus, the passion generated by our words is the next motivating factor in persuasion. Finally, *logos* or logic just fills in the gaps and justifies the audience's reaction to its belief in and symbiotic feelings with the speaker. To Aristotle, logic does not persuade. As we have seen in our highly divided politics, facts and logic do not bridge our differing perspectives. We are persuaded by our belief in and our aligned feeling with the speaker and tend to force any inconsistent facts to fit our beliefs and feelings. When they don't fit, we disregard them—e.g., "fake news."

How Can We Open Closed Hearts and Minds?

Be humbly curious. Just as minds are often irreversibly closed and made up once a speaker announces they are a Democrat or a Republican, we can open hearts and minds by changing the focus. Instead of focusing on ourselves (who we are and what we want from the other side—behavior we would expect from a warrior), a focus on the other (asking about the other side's needs and wants and exploring how can we satisfy their needs and wants) changes the dynamic of the interaction. It forces us to listen, to be curious, and not to assume we know what the other side really needs and wants. Rather than presenting ourselves as warriors intent on taking as much as we can, we present ourselves as brainstorming helpers who look for solutions to our opponent's problem. Rather than worrying about losing and compromising more than necessary, our opponent is engaged in telling us their story, their fears, their hopes, and their dreams. To create this shift, we must be humbly curious about the other's perspective and open to shifting our own perspective. We don't need to agree with our opponent. But we need to show a willingness to understand their perspective.

What Is the Problem We Are Trying to Solve?

We begin this humble curiosity by asking ourselves and our opponent, "What is the problem we are trying to solve?" This is the first question in Columbia Law professor Alexandra Carter's book, *Ask for More: 10 Questions to Negotiate Anything.* She leads with examples of Albert Einstein and Steve Jobs and notes how they spent most of their time thinking about the problem in its broadest sense before looking for a solution. When we are in conflict with someone, we both need something from the other and sometimes feel powerless to get what we want. Ms. Carter suggests that you stop. Think about the total situation. Write down all of the issues and summarize them in a single sentence. Then turn that sentence into an open-ended question that looks forward—not back. "What can my opponent and I agree on today with respect to the persons involved in the lawsuit on file?" By framing the question in this manner, the focus is on what can be done now. It does not focus on past events that cannot be changed nor on issues that are unlikely to be agreed upon in the present (e.g., who is liable, interpretations of the law, amount of damages). These unchangeable and debatable matters from the past and the present are still part of the discussion but are now part of a larger question about what can be done today.

Why Focus on an Agreement?

Contrary to popular imagery, lawyers are not fighters. We are agreement makers. Transactional and regulatory lawyers create agreements that govern and coordinate personal and group behavior for the present and future. Litigation attorneys focus on past events, but ultimately resolve disputes with a settlement agreement (in 98 percent of cases filed) or a judgment or verdict that is essentially an agreement with a judge or jury on one side's theory of the case (in 2 percent of the cases filed). We are agreement makers.

Evaluate with Your Client What a "Winning Agreement" Looks Like

At the very outset of the case, sit down with your client and evaluate what a "win" would look like. What are we trying to achieve? What are we trying to avoid? What are the likely alternative outcomes if an agreement is not reached? How palatable are each of the alternative outcomes? What are the risks and costs of each alternative? What strategy will we use to achieve our desired outcome? Like lawyers, clients expect their lawyer/warrior to defeat their opponent and often forget that, in law, opponents are "defeated" by agreement. A judge or a jury must agree with the facts and theory of a party to defeat an opponent. Or, an opponent must agree to a settlement that ends a dispute. A winning strategy is a strategy to reach a winning agreement.

Keep Your Fear in Check

When we think of an opponent as the enemy, we often act out of our fast-thinking, instinctual, fear response rather than out of our slow-thinking more evaluative rational response. *See* Daniel Kahneman, *Thinking Fast and Slow* (2013). When fearful, we react with either a fight, flight, or freeze response. Since most lawyers do not want to appear cowardly, they instinctually choose the fight response. This usually invokes the same fast-thinking, instinctual, fear response in the other lawyer who similarly does not want to appear weak and will correspondingly react with an identical fight response. This circle of responses usually keeps the fight escalating to new heights. STOP. Remember the ultimate goal—an agreement. Change your image of yourself and your opponent. Our goal is not to slay or maim our opponent. Rather, our goal is to reach an agreement with our opponent (or with the judge or jury) to move our clients and all involved out of the past and into the future by an agreement. We are seeking trust and turning opponents into friends and allies. Thinking of your opponent as an enemy exacerbates fast-thinking, instinctual, fear reactions and precludes the slow-thinking, rational thought process needed to reconcile seemingly irreconcilable differences. Suppress fear. Reserve judgment. Be curious. Be humble. Seek to understand. Look for common ground and opportunities from which an agreement can be built with opponents (in 98 percent of the cases) or judges or juries (in 2 percent of the cases).

Ask Open-Ended Questions

Rather than aggressively boasting about our facts and our theories, ask about the other side's perspective. Ask open-ended questions that sincerely seek to understand the position, rationale, and interests of the other side. Be prepared to listen carefully, hear what an opponent has to say, and possibly change your perspective. Hold back on immediate criticisms and counterarguments. No judgment. Keep an open mind. In her book, Ms. Carter suggests asking "Tell me…" questions. The magic of this question is that it allows the other side to choose to tell you what they think is important. In negotiations, understanding the other side's thinking is invaluable. In Chris Voss' 2016 book, *Never Split the Difference: Negotiating as if Your Life Depended on It*, he explains how he negotiated with hostage takers as an FBI agent and notes that the key to negotiating in this context is to see the world through your counterpart's eyes. To demonstrate his respect and understanding of his counterpart's perspective, Mr. Voss would probe and probe until his counterpart would say, "That's right." Not

"You're right." But "That's right." "You're right" is another way of brushing someone off and signals a reluctance to mentally engage any further. "That's right," signals agreement with a perspective and is a necessary first step before your counterpart will listen and respect what you have to say.

Explore Interests

In addition to listening and understanding the facts and theories of an opponent, search for what an opponent may be interested in protecting or promoting in the present and future. Is it publicity? Money? An apology? Acknowledgement of injustice or suffering? Enhanced reputation? Avoidance of similar copy-cat litigation? Clearing a name or reputation? Avoiding a government investigation/prosecution, recalls, or adverse customer reactions? Future medical expenses? Avoiding a malpractice action? At an initial meeting, an opponent is unlikely to give you straight answers, but you should ask open-ended questions that may start to shed a light on the other side's underlying interests, concerns, and objectives. And then develop strategies that can help your opponent achieve their objectives. Don't assume you know what your opponent wants.

Create Value

Evaluate how we can create value in negotiations. What are your opponent's and your strengths, weaknesses, opportunities, and threats (SWOT)? How will timing or external events alter each side's SWOT? Under what circumstances would each side's SWOT be more valuable or more vulnerable? How can we increase or decrease a party's value during the course of the litigation? How can we capitalize on the circumstances of the moment? How will value change for the better or worse in the future? Throughout a dispute, there are windows of opportunity for resolution when one side's negotiation leverage is increased, diminished, or put in question. To see and capitalize on these windows of opportunity, however, an attorney must evaluate each side's SWOT from the outset and keep reevaluating that relative value throughout the dispute.

Share Your Vulnerabilities

While it may seem counter-intuitive to share our vulnerabilities, it is the timing of this counterintuitive thinking that makes this a potentially powerful and authentic tool. Opponents expect us to be the speaker who hides and glosses over our discomfort. They will be pleasantly surprised to see us exposing our vulnerabilities. By doing so, we generate a helpful image of being honest and sincere. Remember, all of our relevant facts and interests will probably be disclosed in discovery later. But being forced to disclose information does not have the same currency as an early, uncompelled sharing. Early sharing allows us to create negotiation value and positively capitalize on information we would otherwise be giving away later.

Avoid Asking Why

"Why" is an excellent question in depositions because it locks the witness into a motivation and a reason for his or her actions. It is difficult to explain our actions later with a different motivation or reason once we commit to "why" in a deposition. For the same reasons, asking "why" in negotiations is a bad idea. "Why" in negotiations locks a party into a position that becomes hard for that party to back-down from once they have publicly proclaimed their rationale for their position. *See* Robert Cialdini, "Commitment and Consistency" in *Influence: The Psychology of Persuasion* (2006). Finding out "why" is critically important. But it is better to ask "how" the person arrived at that position, or "what" influenced him or her to think a certain way, or "when" and "how" he or she arrived at a particular perspective. Open-ended questions other than "why" invite a descriptive or historical narrative, rather than a commitment to a particular position.

Have Lunch

We are reciprocal animals. *See* Robert Cialdini, "Reciprocation" in *Influence: The Psychology of Persuasion* (2006). From birth, we learn language, culture, and values by mimicking those around us. Negotiations are no different. We reciprocate the conduct we see. Ridiculously high or low offers are usually reciprocated with similarly unreasonable low or high counters. To break this partisan standoff, try having lunch with your opponent at the outset of the case. Before serving a complaint, invite your opponent to lunch—with their lawyer. Develop a friendly relationship. Leave aside discussions about the case. Just get to know the other side and let them get to know you. You may find a more open opponent willing to listen to you as you have listened to them. *See* Sidney Kanazawa, "Apologies and Lunch," *For The Defense* (July 2004).

Mediate

If you are uncomfortable exploring interests and exposing your own vulnerabilities, hire a mediator. This can be at any time during the litigation or even before litigation commences. Hiring a mediator earlier saves time and expenses for both sides, nullifies the polarizing effect of blind advocacy, and capitalizes on unspent resources (time, attorneys' fees, experts, preparation expenses). Unlike the ABA Model Rule of Professional Conduct, mediation encourages listening and understanding the interests of the other side, rather than zealously advocating for one side. The mediator explores the interests of both sides, buffers partisan positioning, and gives both sides an opportunity to build authenticity, credibility, and trust.

Parting Thoughts

As a mediator and a negotiator, I have found the warrior/advocate assumptions underlying the ABA Model Rules of Professional Conduct to be counterproductive. The best speakers, performers, politicians, friends, negotiators, and lawyers are those we would characterize as authentic. Sincere. Transparent. Trustworthy. Opposing warriors may be sincere, but they are not trustworthy. Their allegiance is solely to their client. Warriors are disinterested in the best interests of opponents or our collective whole. As such, it is difficult for an opponent to open up and collaborate with a warrior. By contrast, a reputation of fairness, integrity, and impartiality—the opposite of a warrior image—usually generates the trust needed for parties to open up and collaborate with each other. When one or both parties are reluctant to step away from their zealous advocacy on behalf of their clients, a mediator neutral can play that role on behalf of both parties to give both parties the authenticity, credibility, and trustworthiness they need to negotiate an appropriate settlement effectively, which is better than any likely alternatives. FD