

Wednesday, October 15, 2008

**Finding points of commonality with opponents.**

It is human nature to avoid unpleasant people and to seek out pleasant ones. That is why I avoid Barney and am transfixed by the Dalai Lama. No matter how much I myself could not stomach prosecuting or being a cop, I have to deal daily with those serving such functions. Consequently, in trying to persuade cops, prosecutors, judges, juries, and opposing witnesses, I try to find points of commonality between me and them that set aside the professional role and humanize me, them, and my clients. I have a good friend whom I first met when we were public defender lawyers fifteen years ago. He is like a kindly Hawkeye who cared about his criminal defense clients. He can turn a lunch at a diner into an Ernie Kovacs extravaganza. One day we acted like sophomoric hyenas jumping up and down on our desks, chairs, and floor performing our own a capella air guitar version of Led Zep's 1970 song "Whole Lotta Love." Then my friend moved many states away, with a job not only on the opposite side, but with a prosecutor's death penalty appellate division, fighting to keep the state's death chamber doors wide open. I do not think he chose the new job out of any ideology. My friend invited me to read a brief he had written, and later asked what I thought of it. When I replied that I had not read it, he asked why. I told my friend that I still considered him a friend, with our friendship having started before he started advocating for executions, but that I doubted it would have been easy for me to have become his friend if I first met him now, and that I felt no comfort reading his brief. I feel more comfortable that his prosecutorial appellate work no longer includes death penalty cases. How did I remain friends with this man who ultimately worked hard to keep executing people, when I expect it would be hard for me to start a friendship with such a person if I first meet such a person when s/he already is doing such work? Part of the answer goes back to people's inclination to gravitate to those they find pleasant and those they find unpleasant. The death penalty is beyond unpleasant for me, to the point that it will take substantially extra effort for me to be willing to deal with death penalty prosecutors beyond their death penalty advocacy hats. Yet, I recognize that if I am going to persuade them, I still need to try to find points of commonality with them. With my friend who spent some time arguing death penalty appeals for the prosecution, he was already beyond humanized in my mind and being, and appeared to be engaged in a hopefully temporary aberration. I still struggled with having a friend doing such work. Consequently, I try to find genuine points of commonality with those I try to persuade, without forcing it, but by recognizing that we are all interconnected. Being a father helps me find that commonality more easily. Who knows if my two year old boy one day will become a prosecutor, a cop, or a Phil Collins groupie? Then again, that will not foreclose his option to switch any of those roles later on. More immediately if my son becomes friends with any children of such folks, am I going to refuse to go into their homes or to invite them to mine (but what does that say about my advice never to voluntarily let a cop into your home unless you are reporting a crime)? A few years ago, I spoke with a lobbyist for the adult entertainment industry who talked about finding points of commonality with legislators by saying: "Let me help you ease your burden on this piece of legislation with the experience and knowledge I have gained." Only so many hours exist in a day and a week, and such an offer is very non-confrontational and non-pushy, letting the offeree use or not use the help. Often criminal defense lawyers walk into court with many fewer cases than the prosecutor. If the prosecutor can trust the criminal defense lawyer not to think of nor broadcast him or her as an incompetent, ineffective fool, the prosecutor might admit that s/he has not yet seen the criminal charging documents, the relevant statute, nor certain evidence. If I have such information, I will gladly give the first two items to the prosecutor, and there is plenty of evidence I will give, too, if the prosecutor will easily obtain it from the police. The prosecutor may see me as helping to lighten a heavy day's load of work. Then I might have the prosecutor's attuned ear more than the prosecutor who maintains a thick coat of armor and does everything to hide his or her vulnerability and need even to see the charging document and relevant statute, and scowls that the defendant is scum and "I admire you for being able to do such work, because I could not." When I visit a county that I do not frequently visit, some prosecutors and cops see me as an interesting curiosity, a change of pace from the usual gang of lawyers they deal with, particularly in some of the smaller counties where sometimes there is some more time to chew the tofu. That provides an opportunity to find points of genuine commonality to assist the persuasion process. Some clients think they need a lawyer who will go into the ring growling, baring fangs, and showing fresh blood on the fingernails. Other clients feel uncomfortable seeing their lawyers yuck it up with cops and prosecutors who are trying to get them convicted and locked up. I respond to my clients that the goal is neither to seek to draw blood that does not need to be drawn for the client's benefit, nor for me to find a new friend for happy hour. Instead, the goal is to harmonize my client's problem to my client's best advantage; if this can be done without harming the other side, wonderful; if this can only be done by seriously (and at all time ethically) damaging the other side, so be it. To reach that harmony, it is best that the prosecutors and cops be no further than arms length from me -- at least figuratively -- so that I may have a better understanding and anticipation of their plan of attack and of their strengths and weaknesses. Once an opponent gets farther away than arms length is when they can be at their most dangerous. My goal is to win through a path similar to tai chi pushing hands/sensing hands, and meanwhile to give the opponent little to push against as I seek to redirect the prosecutor with his or her own energy in the direction most

advantageous to my client. Jon Katz

Posted by Jon Katz in Persuasion at 00:01