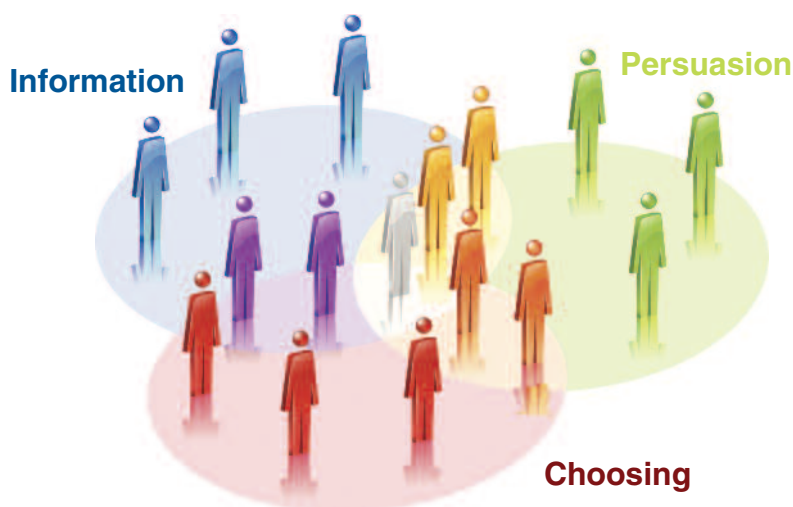


The Good Words of Lawyers: Say It and Mean It!

By Robert A. Creo

Earlier columns have addressed the lawyer's identity and reputation and explored self-awareness, perpetual learning and professional growth through humanitarian and civic service. This column on effective communication and persuasion is the next in the series addressing the 17 core traits for becoming a more successful practitioner, as articulated in the Pennsylvania Bar Institute's PBI 50 March 2015 initiative.



Venn Diagram

Lawyers are in the business of solving or preventing problems for clients. Reduced to basics, problem-solving consists of information, choosing and persuasion cycles. We cycle through this process on both macro and micro levels in each transaction, dispute or drafting matter. An apt expression of this model is a typical Venn diagram. Each of what I consider the three key components — information, choosing, persuasion — occupies one of the overlapping circles.

Information is not static and is exchanged and revised frequently during the course of representing clients. Choosing involves analysis and insights gleaned from reflection, placing the information in the context of experience and weighing uncertainties and risk tolerances. Persuasion involves seeking the optimal outcomes and implementing the goals of the decisions. Traditional legal-analysis

processes, including the reliance on statutes, regulations and court decisions (law), permeate all three cycles of the problem-solving process. Law encompasses all three phrases of the action cycle since it provides information, creates decision parameters and often constitutes the final conclusory statement in rendering advice or in a negotiation. We have all been on both the giving end and receiving end of the “It’s the law” pronouncement.

Persuasion

Aristotle categorized persuasion into three primary means: ethos, pathos and logos. Each of these strategies interacts with each other and targets a different area of the person or audience. Logos is based on logic, ethos is based upon credibility and pathos is the emotional appeal.

One model is to determine the purpose or goal of the communication. What does the presenter want the receiver to think, feel and do?

Ethos is about the characteristics and attributes of the speaker, especially his or her credibility and trustworthiness. Being knowledgeable, transparent and fair enhances ethos and promotes the qualifications of the presenter. No one respects a lawyer or client who parses words or is evasive in responding to direct questions. Active listening is a key tool to build rapport and ethos.

Ethos appeals to the morality, values, principles and conscience of people who have common ground or a community of shared interests. Ethos is promoted by constructive dialogue more than by didactic presentation. No one wants to be subjected to lecturing from a lawyer. Very few lawyers or clients respond favorably to arrogance or condescension. Accomplished people, especially celebrities who fall from grace, lose the ethos required to be persuasive. People are more open to the ideas of speakers whom they believe intend to do them no harm. A key challenge for any lawyer is to overcome the human cognitive bias that immediately discounts ideas or propositions from a perceived adversary. Psychologists call this “reactive devaluation.” Engaging in a self-effacing and authentic conversation often works to advance a difficult proposition in an adversary setting.

Pathos seeks to tap into emotions, anxieties, fears, love, joy, guilt and shame and to call upon



the individual and collective memories of the audience. Communications are often simple and direct. Lawyers should use vivid or figurative language and imagery; rhetorical devices such as varying tone, pauses, facial expressions and gestures are the hallmarks of pathos. For example, one communication technique is called anaphora, which is a repetition of the same words at the beginning of successive clauses or sentences. A prime example is the Martin Luther King Jr. speech in which he intoned “I have a dream” to mesmerize and motivate his audience. Stories, anecdotes, analogies and metaphors invoke sympathy, empathy or passions. Pathos is a call to action; people are moved to do the right thing. Successful trial lawyers are fluent in the realm of pathos.

Logos is the logic of inductive and deductive reasoning using facts and statistics in a well-organized manner to support the argument and claim. The target is the audience’s intelligence. It involves research, presenting authorities/experts, precedents and the common-sense application of cause and effect. It builds a chain where the facts and the arguments link together to lead to a conclusion supported by the evidence.

Practicing Persuasion

Persuasive communication occurs on at least two levels: presentation and content. Every interaction with a client, adversary or tribunal is a presentation. Lawyers operate not only in the context of the social cues of the specific interaction between or among the individual participants in the communication but also in the context of culture: the norms and values of the legal culture, business environment or community. The most effective presentations usually involve multisensory processing of communications.

Understanding and memory are enhanced by engaging more than one sense; the aural and visual senses are the two most often appealed to by lawyers. Photos, demonstrations, displays, charts and summaries have been the mainstay of advocacy in and out of the courtroom for years.

Whether you are a transactional lawyer or a litigator or are drafting for planning in a nonadversarial context, there are best practices that can enhance effectiveness. You are in control of the planning and preparation of your own presentations. Here are a few practical tips:

- You can’t control your adversary; you can control yourself and your communications.
- The coherence of the story or theory of the case trumps the quality (logos) of the information.
- Focus on positive and reduce negative thoughts and commentary; threats to other lawyers are usually counterproductive.
- Avoid a “what if” proposition when the adversary may perceive it to be an actual position or action your client is willing to take, unless that is in fact true.
- Legitimize the interests, comments and contentions of the opposition by affirming your understanding of the “what” and the “why” of their communications without conceding the final position to them.
- Do not use the word “but” since whatever precedes and follows it may be dismissed or discounted in the context of adversarial communications.
- Authenticity creates credibility, which trumps the skepticism inherent in communications involving lawyers.

- The proper way to elicit information from a group may not be by starting with a public and open discussion but instead by privately and confidentially collecting each person’s perspective and engaging in a dialogue premised on active listening. ☞



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Takeaways

- Information, choosing and persuasion cycles constitute the core problem-solving process for lawyers.
- Decisions arise from the interplay of logic, values and emotions.
- Carefully package authentic communications.
- Civil and respectful relationships are base camps and safe harbors.