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For Attorneys, There Is No Such Thing as a Self-Evident Truth

by K.C. Victor

Decades ago, several weeks into my first year of law school, I formed the opinion that there are two fundamental lessons we are meant to learn during that first year. The first is to be searingly analytical. (For an extraordinary critique of the “searingly” aspect, see “*How Lawyers Lose Their Way*” by Jean Stefancic and Richard Delgado.) The second fundamental, which time after time is driven home by case law study, is that there is no such thing as a fact. While for all aspects of life that may not be true, and sometime later this year the Large Hadron Collider may show us that indeed some facts do exist, a unified theory of physics is generally not considered part of the law. The law’s vision of facts is at best ephemeral. Nonetheless, a good lawyer is supposed to be so persuasive that he or she can make things that may not be facts seem inevitable and true.

In law school we learned, *sub rosa*, that the successes we will have as lawyers are a matter of persuasion, intelligence, charm, hard work and luck. In other words, there are no facts. Whether in a courtroom or at a negotiating table, we try to persuade others that some things are unavoidable, or at least easier or better. When we are extremely talented, we may even persuade people that things are “true”, but we know that is only metaphor. The law is, in other words, like the rest of human endeavors – complicated, sticky and intermittently fair.

During law school, between my second and third summers, this rule was brought home to me with a clear example. That summer I clerked for a 2nd Circuit Court judge. In the intimate setting of that judge’s chambers, I learned that a good lawyer (in that case, a good judge) can sometimes let facts erase legal categories. The circuit had been asked to review a lower court decision that an irrevocable letter of credit was, under certain exigent circumstances, revocable. The argument was that considering Iran was in a state of chaos, and that a state of insurrection had occurred that created a suspension if not a termination of the status of the plaintiff, that plaintiff could not then demand payment on its letter of credit. In law, the case was fairly clear – the letter of credit was irrevocable and foregoing payment did not technically fit under and of the narrow legal exceptions. Nonetheless, the judge wanted, under those circumstances, to cancel the letter of credit. After doing my research, I saw no way to get to the judge’s desired outcome. Fortunately, he had been around for a while and knew his statutes. The appellate court used its “general equitable powers” to act “in the interests of justice” and cancelled the letter of credit. *KMW International v. Chase Manhattan Bank, N.A.*, 606 F. (2d Cir. 1979).

A knowledgeable judge looked at circumstances and made “facts” paramount. In that case, the facts were political realities and not legal or financial categories.

Such behavior is more complicated for legal practitioners who don’t have equitable statutes with which they can shift the grounds of an argument by fiat. Instead, good practitioners, by altering

what at first appear to be facts, regularly (even if not often) turn expected bad results for their clients into good ones. How do they do this? They define their terms.

It is said (although in my opinion, doubtful) that Thomas Hobbes was forty before he stumbled upon Euclid. Hobbes, who was not mathematically inclined, happened upon an open Euclid in a friend's library. He saw the Book I proof for the Pythagorean Theorem. Not believing the proof, he worked his way backwards, all the way to the axioms. Although uncomfortable, he was persuaded. It's all in the definitions.

Good lawyers do the same thing. Those of us who are not appellate justices cannot use our "general equitable powers ... in the interest of justice." Instead, we persuade ourselves and others that our client's cause is not only equitable, but also logical and legally correct by defining terms in ways that can alter the landscape. A clear example of this is *Brown v. Board of Education*. There was no way that Thurgood Marshall was likely to persuade a unanimous Court to overturn *Plessy v. Ferguson* (particularly the portion of the case from Kansas) unless "equal" education was redefined to, for the first time, also include psychologically equal education.

Much more recently, juries and judges had to decide whether the terrorist behavior that occurred on September 11, 2001 constituted one occurrence or two occurrences for purposes of insurance payouts from the Towers' leaseholder's various insurers. The answer depended, of course, on the definition of the word occurrence.

The buildings were insured and reinsured by many companies. Final policies were under negotiation when the planes hit. After arguably one of the great law firms of all time persuaded a jury that two plane attacks constituted two occurrences, the jury verdict was reversed for some of the insurer defendants. The language in the overarching, and as yet unfinalized, binder read; "*Occurrence* shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes." The jury, using a *Palsgraf* mode of thinking, was persuaded to ignore the "series of similar causes" language. There were two planes and two hits and therefore two occurrences.

The Circuit looked at the definitions actually in play, not merely those in the dictionary or common usage. The circuit saw two definitions of *occurrence*. Those companies which had not negotiated their own policies, and therefore fell under the binder language above, paid for only one occurrence. Those companies that used their own policy language almost all paid for two occurrences. The typical "occurrence" language makes most events separate events so that the insured is liable for more deductible payments. What was not typical was the total destruction of two major office towers.

How do successful rainmakers define the terms of their engagements? Probably the most important aspect of these definitions is to define success. Good rainmakers limit their clients' expectations. I once read an interview with a well-known and well-regarded First Amendment lawyer. He said that he lost almost all of his cases, but that he personally believed and persuaded his clients that he obtained their best possible outcome. Likewise, on the transactional side, a

good deal lawyer should be able to persuade his or her client that regardless of their leverage in a transaction, something should be left on the table. Will this get the client the best possible deal? Probably not. Instead the client will get the best possible company, career, reputation or possibly all three. What does best mean? It depends. But if you can persuade your client to use your definition, you will succeed.