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Habits Create Character, Even in Lawyers

by K.C. Victor

I have worked with lawyers for over 30 years, most of that time as an evaluator and marketer of their skills and character. In my opinion, a lawyer's professional style of relating to the world is highly correlated to his or her professional conducts and habits.

At least among the people with whom I spend most of my professional hours, there are almost no general practitioners. (Those lawyers who do work across several practice areas are usually in-house counsel.) Cosmopolitan lawyers basically fall into three categories - transactional lawyers, litigators and regulatory (most often tax) lawyers. In large part because of the habits inculcated by these different practices, each of these types of lawyers has a distinctive way of viewing the world and their role in legal proceedings. As always, perceptions affect both thought and behavior.

Litigators basically act as if the world is about winning or losing. Theirs is. Even in the best of circumstances – a nearly preordained fair settlement – litigation is a zero sum game. Skillful use of purely procedural tactics as well as making the best of substantive advantages are part of what makes one a better litigator. Procedural tactics are often used solely to wear down the other side, which is habitually viewed as an opponent.

Great litigators are people who can think simultaneously about form and substance. They are also flexible enough not to have preconceived ideas about whether form or substance should predominate in any given matter. On the substantive side, litigators are also often the most intellectually expansive lawyers. This expansiveness also makes litigators the least perfectionist of lawyers. A conversation between a new client and a litigator can sound something like this. "What do you know about the timber industry?" "Nothing. Give me three days." One cannot become an expert on any industry in three days, but you might just be able to learn enough to be of great use to a new client.

In short, bantering with litigators is fun; arguing with them is not fun.

Transactional lawyers want to accomplish things. Although it is crucial to remember that there are deals not worth making, the goal is to make a deal and for all sides to be happy or at least content. Deals happen when people, regardless of their differences, view their worlds with a common vision moving towards a common end.

In order to really understand what such a common end may be, successful transactional lawyers must thoroughly understand their client's goals before the other side is even involved. A good transactional lawyer is not about bravado but about questions and understanding. What is substantively important in a deal? Is a particular schedule crucial? Are there deal points that

might seem important but in which the client actually has little at stake? Unlike litigations where each side often wants to vanquish the other, transactional lawyers do not play zero sum games. Even when one side has all or most of the power in a transaction, transactional lawyers make better deals by being cooperative, by leaving something on the table.

Yes, the best deal lawyers want the best deal for their clients. However, they know that neither their world nor the client's world is ending tomorrow. There will be other encounters, often with exactly the same people or their "cousins." A scorched earth policy rarely helps a business client in the long run.

The psychological stance for a win-win outcome means that transactional lawyers prioritize what matters. Their goal is to move all parties in a transaction to a common vision of the best outcome. When a common goal is accomplished resentments tend to fade away. The very nature of the work of transactional lawyers helps them stay focused on being helpful and understanding.

Finally there are the big picture regulatory lawyers. A majority of such lawyers work with federal, state and international tax codes. The best tax lawyers have a tent-like understanding of the whole code and the interrelationships among the various code sections. A transactional lawyer once explained to me that the reason he did not become a tax lawyer was that he did not want to take five years to learn if he was any good. A tax lawyer I know correctly points out that it is impossible to know what a transaction really costs without knowing the deal's tax ramifications.

The Internal Revenue Code, state and local tax codes and various other regulatory rule sets can be quite complex. Code sections which seemingly should not interrelate sometimes do. Sophisticated tax lawyers are the chess players of the legal world. They see many moves ahead and the good ones can sometimes point out deal consequences that even the best transactional lawyers miss. Tax lawyers can see how a deal that looks bad is good or the other way around; they can also shift deals in important and subtle ways through timing or characterizations.

An excellent transactional tax lawyer often behaves like an excellent scientist – staying in his or her office or lab, doing the hard work and not making a fanfare of his or her successes. Sometimes tax lawyers do not even tell their client of their successes. Victory is its own intellectual reward.

Moreover, although clients understand and appreciate a deal's tax consequences, the legal skills behind fortuitous tax results do not always show. The best tax results can look natural and inevitable. For instance, the crux of international tax is, "How can you be nowhere at all when you're really two places at once?" Looking like a business has no real nexus to a location can simply seem like a fact and not an arguable proposition.

Even when a deal is tax driven, credit for the success of a transaction may be perceived as belonging to the lawyer dealing with the nuts and bolts of the transaction. Therefore clients

seldom bond with their tax lawyer who frequently takes more pleasure in the law than the relationship.