If I Knew Then What I Know Now (cont'd)

laser beam during my preparation for oral argument on an unimportant aspect of the case—a distracting case inaccurately cited by my opponent in his brief. I spent much more time than necessary in preparing to beat up my adversary about this relatively minor aspect of the case. In retrospect, it should not have been surprising that my opponent spent precious little time during oral argument on this aspect of his argument. When I got up to argue, I decided to simply react to the arguments I had just heard. I went "big picture," instead of zoning in on the minutiae of trying to show how wrong the case citation was. By happenstance, I was able to avoid looking petty and stayed on message.

Now for the forest. When I argued my first criminal appeal many moons ago, the idea of actually meeting in person this scary person who had been convicted of a violent crime never even crossed my mind. Eventually, I was assigned to represent a client who, though seeming not to have much to argue in the appeal, would not stop begging for me to visit him in prison. I finally gave in and visited him. Meeting the person I was charged with advocating for made me realize how important it is to be an attorney. The value of meeting the client in person also helped me gain perspective on a number of potential issues I had found in the record.

I also created a relationship of trust that would not otherwise have been formed. I never realized the value of meeting my appellate clients before this case. Now it is an integral aspect of my criminal appellate practice to visit each client, or if the prison is too far away, to set up a confidential call with the client to discuss the case. Having perspective allows me to size up the particular fight in front of me and further recognize that with each new case I handle, the forest may become clearer.

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By Elizabeth Bernhardt

Law was a second career for me. I had started out to become an English professor, and I taught college students for 15 years before entering law school at age 40. So I had developed writing and oratorical skills and confidence as a public speaker. But this experience was paradoxically both a help and a hindrance. On the one hand, I benefited from having some experience in the world, especially the experience of being responsible for others. On the other hand, my idea of speaking in public was to dramatize and impress. To clarify, when I teach (I still teach, though nowadays it is law students rather than undergraduates), I am concerned above all with my students' progress. My philosophy of teaching is "less teaching, more learning," meaning that I intentionally do not dominate my classes so that my students can step up and develop their own skills. But sometimes I have to lecture, and when I do—whether the subject is a Shakespearean sonnet or Bluebook citation—I try to present material as clearly and dramatically as possible.

I now realize that I approached practicing law the same way. Whether talking things over with my colleagues, negotiating with an adversary, or arguing before a judicial panel, I assumed that my listeners' minds would wander and that only a vehement argument would hold their attention. I injected my speech with drama and emotional urgency. I probably conveyed sincerity and commitment to my point of view—all to the good—but I didn't realize that passion and rhetoric could make it more difficult for people to hear me. What I wish I had known then, that I know now, is that people need mental and emotional space to consider another person's ideas, and that it can be harder to take in what someone else is saying when emotion and excessive rhetoric are used. In other words, people hear me better when I speak softly.

I recently had evidence of this when I made a motion in a lower court. I was standing at ease while the judge spoke, and was honestly shocked to hear him deny my motion from the bench. The court's ruling was not only legally incorrect, it would be a disaster for my client. Against my instincts, I did not respond with emotion. Instead, when the judge finished speaking, I quietly and slowly explained the impact that his ruling would have. The judge then immediately reversed himself and ruled in my client's favor. In a recent case, instead of passionately laying out a syllogism whereby my client's position would prevail, I calmly laid out the relevant facts and law. My client's position prevailed.

Emotions accompany my sense of what is just and fair. When I was an Assistant District Attorney, I felt very strongly my obligation to speak for victims and to help achieve a just outcome. Today, as a defense attorney, I feel a strong obligation and loyalty to clients. But speaking calmly and slowly gives others the space to consider the content of my argument without feeling bullied or pressured. This is not only a good legal technique; it's a better way to communicate with everyone.

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