"Argumentative Lawyers—Ethical Lawyers, an oxymoron?"

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We are an argumentative profession. Our instinct to argue about anything and everything is both genetic and cultural. Consider our heritage as a profession. One of our illustrious ancestors[1] said: "Bluster, sputter, question, cavil; but be sure your argument is intricate enough to confound the court." At the end of every case, we stand up, puff out, take deep breaths and hold forth, and so on and so on. We *argue*. At least that's what the judge tells the jury is about to happen: "Ladies and Gentlemen, of the jury, now is the time for you to hear the closing arguments of the lawyers, of course, what they say is not evidence but it may help you to understand the evidence, . . . [and so on and so on]."

An argument is a disputation. On that subject, one of America's most beloved (and most often quoted) statesman, Benjamin Franklin said: "Persons of good sense, I have since observed, seldom fall into disputation, except lawyers, university men, and men of all sorts that have been bred at Edinburgh." Most of us are members of two out of three of Franklin's suspect class. For many of us, the opportunity to argue the client's case is the light at the end of the dreary pre-trial tunnel. If that end were not in sight (at least figuratively) we would take up some other sport (or profession).

Arguments are the essential armament of the professional trial advocate. James Grafton was a gifted lawyer from another era. In 1921 he wrote an article for the ABA Journal, entitled "The Armament of the Lawyer."[2] Mr. Rogers studied the biographies of 160 lawyers and made a table of the relative frequency of their most outstanding characteristics. The most frequently mentioned attributes were: industry, legal learning, broad culture, strong will, oratorical power, moral courage, and human insight or sympathy. While perhaps not obvious to the public (or even to most attorneys), this list is a sum of what it takes to put together a good argument on behalf of a client. I say "good" in the sense of good craft, not "good" in a moral or ethical sense. To make a good argument ethical, one must craft and deliver it in a truthful manner. A truthful argument conforms to the facts, mirrors reality and is sincerely stated.

Ethical arguments exert a powerful and, in some respects, a dominating influence on our society. How the public perceives us and what we do is often a matter of genuine public concern. That is because of the magnitude of the interests placed in our hands. Because confidences are entrusted in us, much is

[1] William Wycherley, Esq. (1640-1716).
[2] 14 ABA Journal 301 (1928).

demanded of us. Preparing and delivering ethical arguments is the least our clients, and the rest of our society, has a right to expect of us. Incidentally, they also have a right to brevity. When asked by a long-winded lawyer to comment on his argument, a wise judge said: "It was a divine argument—for it was like the peace of God—which passeth all understanding. And, like his mercy, it seemed to endure forever."

Lawyers, like images, cluster around other images with which they have an affinity. Red, white and blue seem to belong together. Summertime, sunshine and sunglasses all seem to coalesce and blend as if they were inseparable. Because the law's most powerful image is *adversity* it seems natural to think of lawyers and arguments as kith and kin. Our adversarial system of justice is based on the undeniable premise that if two sides each do their best to win a case then the best case will win (at least most of the time). That can only occur if the best case is armed with the best argument. My own view is the best argument is the most ethical. If it is, it is likely to be the most persuasive. Honesty is not just good for the soul, it is good for the throat and the diaphragm. It will bring a smile to your face as you argue your case. Smiles work.

The most effective advocates often argue by analogy. That allows the jury to grasp the essential truth of the case. In arguing a religious freedom case, an ethical advocate might use H.L. Mencken's notion that "the universe is a great pinwheel revolving at the rate of ten thousand miles a second, and man is a fly hanging on the outermost rim of the wheel. And religion is the fly's belief that the machine was invented and set in motion to give him a free ride."

Among the distinguished members of the American trial bar, few are better known to the public than Edward Bennett Williams. It is likely that no other trial lawyer has achieved as much unanimity of acclaim. He headed President Richard Nixon's "enemies list" but, when the time came, was asked to defend the former President. He refused. When asked for his opinion on the single-most important quality of advocacy he said: "The *affidavit* quality. It must appear . . . that what the advocate says is true simply because he says it is true." What he did not say, but which he no doubt meant, is that the ethical argument must be a sincere, truthful presentation of reality. It cannot be a story made up to mesmerize the jury into a favorable verdict.

Oscar Wilde was noted for both his wit and his cynical view of our profession. He said: "Arguments are to be avoided: they are always vulgar and often convincing." It seems appropriate to begin this discourse with the observation that, for lawyers, arguments cannot be avoided. To avoid the label of vulgarity, we should strive to make them ethical. Argue the truth.

A few paragraphs ago I quoted Edward Bennett Williams and described him as one of America's most distinguished lawyers. While immensely talented, Gerry Spence may not be as "distinguished" as Mr. Williams but may be even better known. His most recent book is entitled "*How To Argue and Win*

Every Time."[3] Appropriately, he began his book with an argument for his book: "The art of arguing is the art of living. We argue because we must, because life demands it, because, at last, life itself is but an argument."[4]

Mr. Williams believed that argument was an important part of our profession. Mr. Spence believes that argument is our profession. Just as I do not intend undue adulation for Mr. Williams, I intend no disparagement of Mr. Spence. Both have served our profession long and well and both were giants in whatever courtroom they held forth in. But, for Mr. Spence and thousands of other good, ethical lawyers, winning is the only goal. That perspective makes the crafting and delivery of ethical arguments unnecessarily difficult. That is because winning and the search for truth and justice are often incompatible.

Perhaps the most recent scholarly work on the general subject of arguments is Deborah Tannen's book entitled: "*The Argument Culture—Moving from Debate to Dialogue*".[5] Ms. Tannen begins her book with the observation that:

> This book is about a pervasive warlike atmosphere that makes us approach public dialogue, and just about anything we need to accomplish, as if it were a fight. . . . Our spirits are corroded by living in an atmosphere of unrelenting contention—an argument culture."[6]

It is fitting to end this small discourse by contrasting the views of the professional trial advocate (Spence) with the professional sociologist (Tannen). One sees argument as noble and uplifting, the other as creating more problems than it solves and causing rather than avoiding damage. A large part of the debate over whether argument is *good* or not, is based on one's perspective. Too many lawyers rationalize (i.e., perceive) unethical arguments as a necessary extension of the obligation to zealously represent the client. This perspective is noted by Ms. Tannen:

> But from the point of view of society at large, many now question the ethics of the adversary system in general and the principle of zealous advocacy in particular—because it often serves to obscure the truth rather than reveal it, because it is inhumane to the victims of cross-examination, and because of what it does to those who practice within the system, requiring them to put aside their consciences and

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[3] St. Martin's Press, 175 Fifth Avenue, NY, NY. ISBN 0-312-133776

[4] *Id*. At line 1, page 1.

[5] Random House, Inc., NY, NY—ISBN 0-679-45602-3

[6] *Id*. At page 3.

natural inclination toward human compassion.[7]

Another way we (the lawyers among us) justify ignoring guilt or innocence in our arguments is by the argument that arguments are not the search for truth (that's the function of the jury). We often argue the search for truth is not the point of the adversary system. In all matters non-legal, acknowledging mistakes and taking responsibility is the first step toward making things right. In legal matters, acknowledging mistakes is avoided because those who make the mistakes are not legally required to sustain the burden of proving those mistakes. In both the civil and criminal justice systems, admitting liability or guilt is determined and decided on the basis of whether we can prevail at trial rather than the reality of fault or guilt.

But, if arguing the truth were the ultimate test (as opposed to merely winning the case) then lawyers, clients and society would all be better served. So, I end where I began. Argue the truth, it will do you and the rest of us a great deal of good.

[7] *Id*. At page 146.