

THE COMMANDMENTS OF ADVOCACY*

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“Let us, then, be up and doing.”

—H.W. Longfellow, *A Psalm of Life: What the Heart of the Young Man Said to the Psalmist*

ADVOCACY AND ITS INGREDIENTS

The art of advocacy lies at the confluence of forensic skill, judgment and reputation. The absence of any of these elements renders the exercise inadequate—bereft of a requirement essential to the art. These, then, are the commandments of advocacy: practise forensic skill, exercise sound judgment and strive to be of good reputation.

Let there be no denying that advocacy is an art form, an endeavour where human skill is exercised by the expressive and intellectual functions being directed towards persuasion—one of the ancient activities of sentient and verbal humankind.¹

The advocate’s art is made manifest in the form of forensic persuasion. As one author noted, “[A]dvocacy is plainly a method of persuasion; a method which relies primarily on words, though gesture and tactics play their part as well.”²

In the view of another authority on the subject, advocacy is “the outward and visible appeal for the spiritual gift of justice”.³ More than half a century ago, in what may be the *locus classicus* of advocacy, *Forensic Persuasion*, Arthur T. Vanderbilt, then Chief Justice of the Supreme Court of New Jersey, put the matter in these terms:

There are two distinct parts in the lawyers work in Court. The first is the presentation of evidence on direct, cross and redirect examination, a great art in itself, but the evidence alone would often fail to attain full significance without the other phase of the advocates work-skill in forensic persuasion which enables him to make the most of the evidence. These matters are the heart of the lawyer’s work.⁴

In the course of this essay, little will be said of forensic skill. Enough has been written on this topic to fill the Library of Alexandria. Ultimately, the development of forensic skill is a matter of thoughtfully putting into practice a few basic rules.

The matter of judgment requires fuller explication. It is an aspect of advocacy that is essential to the art, though difficult, but not impossible, to learn.

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Finally, we will look at the subject of reputation (and its components) in broader compass, as it is this quality of the advocate's art that, today, seems so much to be in need of enrichment.

FORENSIC SKILL

We first address forensic skill. Here we find the clever tactician, the precise cross-examiner and the profound orator. Here stands the rhetorician—the sensate and expressive speaker of the courtroom. Some, like Marshall Hall, Edward Carson, Clarence Darrow and J.J. Robinette, had the capacity to transcend and to transform the mundanity of the trial process into the ethereal. The Temple of Great Advocates still has space for new inductees, but notwithstanding oratorical reach, the pantheon cannot be obtained by forensic skill alone. Absent judgment and reputation, even the best-sounding advocate will resonate hollowly, like an ill-tuned cymbal. More is required.

JUDGMENT

Judgment equates with discernment. It is the ability to perceive the situation at hand and make the correct choices. It is a critical tool for the respected advocate. It operates at the levels of both the general and the particular. It begins with seeing the main chance and then crafting, and applying, the workable theory of the case in pursuit of that desired goal. The essential questions for the advocate at the outset are: “What is the best result I can achieve, and how best to design an approach to achieve it?”

Judgment is next manifested in the multifold, and often immediate, decisions required to be made as contingencies arise in the litigation,⁵ questions such as: “Do I ask this question?” “Do I call this witness?” “Where do I place the greatest emphasis in my address to the court?” *et cetera*.

Judgment is, indubitably, the most elusive and intangible of the elements of advocacy. It is a quality that is difficult to define but easily recognizable, by both bench and bar, in the oft-heard remarks: “Smith has good judgment,” or “Jones has poor judgment.” To resort to an old saw, judgment is the ability of the advocate “to see the forest for the trees” and to then react competently to issues and circumstances as they emerge. Judgment is said to be largely innate, but there surely exists an experiential aspect to it as well. Most of us need only be bludgeoned a few times before we realize the folly of running forlornly through the same gauntlet. Notice the use of the word “most”. Unfortunately, some lawyers either never had good judgment or, if they did, it has, as in Marc Antony's lament, long since fled.⁶

There is a further aspect that is of importance and necessary to the full development of this ingredient of able advocacy. This involves the merit of embracing an ideal as opposed to a cause. Embracing the ideal—the determi-

nation to see justice done—as the primary goal enables the advocate to remain objective. Conversely, the lawyer who takes up the client’s cause will most often approach the case with tunnel vision. Generally speaking, to be a “cause lawyer” is to be a lawyer who lacks the ability to see the whole case and pursue the main chance. Hearken to the advice of Lord Darling:

It is doubtless of great moment that an advocate should appear to believe in his case, as he is then more likely to convert others; but I think that most counsel would be better advocates did they content themselves with simulating the belief instead of actually embracing it. The manifest appearance of a believer is all that is wanted; and this...will not interfere with that calmness of judgment which it is well to preserve in the midst of uncertainties...⁷

REPUTATION

We now turn to the final quality of the successful advocate, reputation. Reputation is the embodiment of ethics and professionalism. It is the credit earned in terms of distinction, respectability and good fame. It is the sum total of the advocate’s conduct, both in and out of court, over many years of preparedness, integrity and civility.⁸ It is the *sine qua non* of the great advocate. It is, simply put, the advocate’s “good name”.⁹

Reputation is also an extremely potent weapon. When a lawyer has a reputation for integrity and civility, others become disarmed. There is an immediate relaxation of the guards considered essential when dealing with a person known for underhandedness, obfuscation and trickery. At the same time, we are apt to accept the reputable advocate’s word on a given proposition, or at least attribute it with merit, thus requiring due consideration as opposed to dismissiveness. A good reputation has many emoluments.

What are the essential qualities of a good reputation? Surely a starting point is preparedness.

Preparedness

The advocate who is known for sound preparation—even if he or she is a person of modest forensic skill—will have the “ear of the court”. Preparation is the foundation of good advocacy, and being recognized as an advocate who prepares well puts the court at ease and, frequently, receptive to the propositions advanced. The unprepared, or ill-prepared, advocate is a cipher—a lawyer adrift on a sea of chance and, like the Midian priest, “a stranger in a strange land”.¹⁰ If you are not prepared, you cannot adequately know the factual and legal terrain that lies ahead, and this will show; and because it shows, your reputation will be affected in a deleterious way: neither the court nor your opponent will respect you.

Unpreparedness is eminently conspicuous. As one author has noted, “[A] poorly prepared [presentation] is almost impossible to conceal.”¹¹ The care-

ful study of the facts, as well as the legal and evidentiary issues of each case one handles, form the foundation upon which a reputation is built.¹² To put it another way: “The height of one’s reputation as a lawyer should not be disproportionate to the capacity of its base.”¹³

One final matter demands mention. Preparedness is not an option; it is a duty, owed first, to the party you represent; second, to the court you appear before; and third, to the due administration of justice. The adversarial system only operates in the manner it is intended to operate when the parties vigorously contend before an independent and impartial trier of fact. Unpreparedness is anathema to this system because it results in the facts and the legal issues not having been subjected to the rigour which the law permits, nay, demands. Ineluctably, a failure to adequately prepare is a failure of one’s duty. Every barrister’s oath speaks to this, either expressly or implicitly.

Integrity

Integrity is defined, *inter alia*, as “soundness of moral principle; the character of uncorrupted virtue, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity”.¹⁴

Integrity is a condition that plumbs the depths of a person’s essence. It is wholeness and wholesomeness. In the colloquial, it is the sense others have of a person’s record for forthrightness. In the realm of the advocate there is no place for anything but integrity when interacting with clients, opponents and the courts. Candour is a requisite.¹⁵ Slyness is to be eschewed, as are sharp practice and taking paltry advantage. Legal *legerdemain* is simply “not on”, nor is obfuscation. No matter how tempting it may be in a given case to deceive, mislead or dissemble, such conduct is not to be engaged in, as it will inevitably lead to discredit or, worse, discreditation. Conversely, honesty and candour redound to one’s reputation.¹⁶

To emphasize this is not to engage in some whimsical homily. Rather, it is to impress the importance of a simple virtue and a simple truth. An advocate who has integrity will always have a place in the courtroom even when lacking the refined qualities of the consummate rhetorician. On the road to the Acropolis of Advocacy, many are called but few are chosen,¹⁷ and those who are chosen will invariably be advocates renowned for their honesty. As Judge Parry noted, “[A]dvocacy is necessary to justice, and honesty is essential to advocacy.”¹⁸

Civility

Civility is a concomitant of integrity. If integrity represents the way we treat truth, civility represents the way we treat people. It is the manifestation of a thoughtful and equable nature that does not distinguish between lord and serf—all are entitled to respect and courtesy. All are entitled to an even hand.

On a cautionary note, it is a grave mistake to conflate civility with weakness. Some of the greatest advocates have been persons of great gentility. Indeed, Thomas Erskine, perhaps the greatest advocate to have ever graced a courtroom, was recognized for “his exquisite tact, his instinctive quickness, his attaching courtesy, and his indomitable courage”. As a judge, it was said of him that lawyers and litigants alike “shared in his flowing courtesy”.¹⁹

Civility is the hardest quality to maintain in the face of adversity. In the strenuous arena of the courtroom, it is the first quality to depart the heat of battle. In the shallow advocate, it is a thin veneer. Acts of incivility, on the part of counsel, are often the product of an emotive reaction to a stressful event in the trial of an action. Sometimes they are acts of desperation driven by a sense of futility in a losing cause. However, there are some counsel who resort to incivility in a calculated manner and use it as a weapon. On these occasions, acts of incivility are designed to gain unfair advantage. Such tactics are to be deplored as the conduct of a jackanapes.²⁰

No lawyer should resort to the use of incivility as a trial tactic. It is demeaning to the trial process and, thus, to the administration of justice. It lowers the respect of the public for the courts. It is the conduct of abasement. It is to be eschewed.

Michael Code puts the matter in the following terms:

[T]he parties and the public lose confidence in the administration of justice when incivility breaks out during a trial. If courtrooms are allowed to become places where posturing lawyers endlessly bait and attack each other, rather than places that efficiently and effectively resolve litigants’ disputes, the essential role and legitimacy of the justice system is undermined.²¹

As with integrity, civility is of indispensable importance to the trial process. Stryker remarked on this in the conclusion to his *magnum opus*:

[I]t is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future...depends upon our maintenance of justice pure and unsullied. *It cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all...*²²

A lawyer whose courtroom manners are peppered with incivility is a disturbance to the solemnity of the very process in which a client’s liberty, property or rights are at stake. Incivility will not avail the client’s plight. No one gains from incivility, neither the lawyer who engages therein, nor the client who will suffer from it. The lawyer whose stock-in-trade is incivility earns nothing but the disrespect of colleagues and the wrath of the court.²³

Perhaps the matter was most aptly summed up by Justice Warren Burger, in a passage quoted by the late Rick Sugden:

[T]he overwhelming majority of judges and lawyers comply with basic good manners and professional decorum... We know that only a small fragment of reckless, irresponsible lawyers are guilty. Some few of them seem bent on destroying the system and some are simply ill-trained, ill-mannered and undisciplined noise makers. But there again we return to the concept so eloquently stated by Archibald Cox to the rowdy Harvard students—and I paraphrase him again: *we cannot tolerate incivility in a few without encouraging it in many.*²⁴

These remarks bespeak the notion that if we tolerate incivility it will tend to become a mainstay of practice. Unchallenged usage inevitably leads to acceptance. This is the downward spiral from the dignified to the dismal, the vaulted to the vulgar.

WHERE NOW?

It was more than 50 years ago when Stryker penned, and published, his thoughtful work, *The Art of Advocacy*.²⁵ He subtitled his work *A Plea for the Renaissance of the Trial Lawyer*. Stryker lamented the state of advocacy in his day, and cried out for the return to a golden age, imagined or real. To like effect, Judge Parry put out his plea in 1927, emphasizing adherence to those virtues he believed necessary if the heart of the adversarial system—advocacy—was going to survive, let alone thrive.²⁶

It would seem that every generation of legal writers believes their current state of affairs to be approaching the nadir, while also believing that the previous generation represented the acme—a halcyon view of life and law in years gone by. An exemplar of this was Lewis Broad, who, in writing an encomium to four great advocates at least a generation removed, stated:

Surveying the Courts from a distance, there seems today to be a lack of personalities at the Bar...the Bar does seem to have run out of outstanding characters...of the quality of the great advocates of the golden age that has gone.²⁷

The present essay does not intend to portray the aforementioned view. To the contrary, it is eminently arguable that there are as many outstanding advocates today as there have ever been. It is simply the fact that it takes the lens of time to put such things in perspective.

This essay, therefore, is not purely about advocacy as an art. Rather, it is about what appears to many to be a decline in the professionalism of our calling, in a phrase, a decline in civility, which, at least in the view of two distinguished writers, is a modern phenomenon.²⁸ It is as if we have lost our way in the pursuit of the business, as opposed to the practice, of law. Instead of paying homage to Themis, we have succumbed to the lure of the golden calf. In doing so, we seem to have forsaken the fundamental rule that has animated civilized societies for millennia: “Do unto others...”²⁹

The win-at-all-costs attitude that has apparently gained favour in recent times has no place in our profession. As lawyers we have rights and privileges

denied to the laity. We have the right of audience in the courts of the land to represent citizens and the Crown. With every right there is a concomitant duty; the duty here is to uphold the rule of law, and to do so in such a way as to neither denigrate others nor to detract from the importance and symbolism of the process, as embodied by the courts.

If we do not demonstrate respect for the very institution in which we conduct our daily affairs, can we possibly expect the public to have such respect? It is through our reputations as lawyers, and the reputation of the courts, that we refine our base currency. We devalue it every time we act with pettiness, stridence or bellicosity. If the reputation of the legal profession falters, we have none to blame but ourselves. It will only be the result of our having let lie fallow the very promises we made upon being sworn to the bar.

Unlike many aspects of human endeavour, our conduct is open and markedly visible. Our work as criminal lawyers is regularly scrutinized by the media and made the subject of adverse comment, and, because of this, our individual failings may be magnified, and extrapolated, across the bar. To counter this we must collectively adhere to, and exemplify, a code of conduct that sets us apart. There is nothing wrong, and everything right, about thinking of ourselves as members of an ancient and honourable profession, and conducting ourselves accordingly. Whether this is an idle fancy, or the acorn of an ideal, is up to us.

It is felicitous that we have the great, good fortune to live and work in a constitutional democracy predicated upon the rule of law. We must never fail to remember that while the courts are the guardians of this grand enterprise, we are the champions, and we must be firm in our adherence to the tenets of our calling.

Let us be advocates. Let us mark our work with vigour and integrity. Let us stamp our acts with equanimity and civility. In a phrase, “Let us, then, be up and doing.”

ENDNOTES

1. Lloyd Paul Stryker, *The Art of Advocacy* (Washington, DC: Zenger, 1954); Edward L Greenspan, “The Art of Advocacy Is Not a Science” (2006) 41:3 *International Society of Barristers Quarterly* 418.
2. CP Hervey, *The Advocate’s Devil* (London: Stevens and Sons, 1958) at 2. See also John A Munkman, *The Technique of Advocacy* (London: Stevens and Sons, 1951).
3. EA Parry, *The Seven Lamps of Advocacy* (London: T Fisher Unwin, 1921) at 13.
4. Arthur T Vanderbilt, *Forensic Persuasion*, The 1950 John Ralph Tucker Memorial Lectures, Washington and Lee University.
5. *Wigmore on Evidence*, Chadbourn rev (Boston: Little, Brown, 1974) at para 1368. As the famous American criminal lawyer Jake Ehrlich observed, “[T]here are many more factors to be encountered in a court of law than one would imagine”: JW Ehrlich, *A Reasonable Doubt* (Cleveland: World, 1964) at 21.
6. William Shakespeare, *Julius Caesar*, act 3, scene 2, line 110: “Oh judgment, thou art fled to brutish beasts.”
7. The Hon Mr Justice Darling, *Scintillae Juris* (London: Stevens & Haynes, 1919) at 90.

8. M Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim. LR 97; R Sugden, QC, "Civility in the Legal Profession" in *Splendour of the Law*, ed Jack Giles (Toronto: Dundurn Press, 2001) at 89–111.
9. "Good name in man and woman...is the immediate jewel of their souls": William Shakespeare, *Othello, The Moor of Venice*, act 3, scene 3, line 155.
10. Exodus 18:3.
11. Fred Ferguson, QC, "Advocacy in the New Millennium" (2003) 41 Alta L Rev 527–545 at para 26.
12. "Take no enterprise in hand at haphazard, or without regard to the principles governing its proper execution": Marcus Aurelius, *Meditations*, book 4 (London: Penguin Books, 1964) at para 2.
13. LJ Bigelow, *Bench and Bar* (New York: Harper & Brothers, 1868) at 262.
14. *Oxford English Dictionary*.
15. "[A]pproach your duties with reverence and be trustworthy in what you say": Confucius, *The Analects*, book 1 (London: Penguin Books, 1979) at para 5.
16. As Stryker noted, in quoting an eminent jurist, "honesty is as essential to true friendship as it is to sound advocacy": Stryker, *supra* note 1 at 283.
17. Matthew 22:14.
18. Parry, *supra* note 3 at 14.
19. Lloyd Paul Stryker, *For the Defense* (New York: Doubleday, 1947) at 458–459.
20. *Oxford English Dictionary*; "jackanapes" is a somewhat archaic (but highly descriptive) word meaning a person who displays the qualities of an ape "in tricks, airs or behaviour".
21. Code, *supra* note 8 at 105.
22. Stryker, *supra* note 1 at 284 [emphasis added].
23. "He who troubleth his own house will inherit the wind": *The Proverbs of Solomon* 11:29. As to the ire of the court, see Code, *supra* note 8 at 103, in reference to the case of *R v Dunbar*.
24. Sugden, *supra* note 8 at 110.
25. Stryker, *supra* note 1.
26. Parry, *supra* note 3.
27. Lewis Broad, *Advocates of the Golden Age* (London: John Long, 1958) at 9.
28. Code, *supra* note 8; Sugden, *supra* note 8.
29. This was the adage of the great Jewish scholar Hillel: "Do not unto others that which is hateful unto thee."

