

Reflections on the Fairness of Passion in Advocacy

**Text of Marc Garfinkle's presentation at the
Seton Hall Law Review Ethics Symposium – October 1, 2014**

Dean Hobbs, friends, students. Especially students.

It is fitting for me that this Symposium takes place during the period known on the Jewish calendar as “The Ten Days of Repentance.” This is the period between the New Year, *Rosh Hashanah*, when we say that G-d is writing our fate for the coming year into the Book of Life, and *Yom Kippur*, the holiest of days, when we say that the Book of Life is sealed. We have ten days to offer atonement before it's too late. It is now that Jews around the world are confessing our sins and asking G-d, and each other, for forgiveness.

And so it is fitting indeed, that I stand here before you today.

For almost a decade, I have been teaching Persuasion and Advocacy - that's *one* course - in the hallowed so-called Small Moot Court Room of this venerable university. Persuasion. Advocacy. “Persuasion” is... persuasion. It's getting someone else to think - not necessarily as *you* think - but, as you want *them* to think. “Advocacy” is simply persuasion on behalf of a client or cause.

Here at Seton Hall Law, P & A is a special class. With a handful of other well-meaning adjunct faculty, I teach basic techniques of persuasion. The students practice them in our little classes of ten. Semester after semester, I reveal tricks of the trade to thirsty minds. I don't teach my students how to *think* like a lawyer – you all learned that first year - but how to *sound* like one.

Think about *this*. Think about the power of the tools we attorneys wield. The power of language. The power of suggestion. *Astounding* power. For example, by simply uttering just three syllables, I can get everyone in this room to think about a red balloon – there – I just did it. Now, can I make you *feel* as I do about that red balloon? Sure I can. It would just take a few more syllables.

Persuasiveness is a lawyer tool, so we learn to argue to *win*. Our students practice subtle techniques which enhance their credibility, to give traction to their messages. Our students can demonstrate a wide range of emotions, and elicit them, if necessary, from their audience. Equipped with common literary and theatrical conventions, they argue their cases with passion. Passion! We are hard-wired to respond to a speaker's passion. It is almost irresistible.

And what is passion? It is the emotional energy that delivers what we say. *It competes with logic*. It is the antithesis of reason. So I ask myself - why have I been teaching it? And why *here*, in a well-respected national law school?

We say that good lawyers win all the cases they are supposed to win, and that great lawyers win all of those, also, and then a few they are *not* supposed to. Isn't something wrong with that?

Isn't it unfair that the quality of the advocate can impact the outcome of an important legal matter?

By infusing passion into advocacy, are we not upsetting the logical order of things? Are we not paving the way to an unjust outcome whenever technique tips the scales of justice in the arguer's favor? If an ethical lawyer must strive for justice, then any device which may beguile the audience from a balanced assessment violates our mandate. Certainly, teaching that sinful device is worse.

Some will say that, in an adversarial system of jurisprudence such as ours, passion will give rise to the justice we seek, and that pitched argument is a salubrious thing. They will say that two opponents can chip away passionately at each other's weaknesses until only the undeniable kernel of truth remains. But such a system can work only when the combatants are of equal strength, when the hull is removed by blows and counterblows, with the combatants on their feet until the entire kernel is exposed.

What happens between adversaries of unequal strength? Certainly there will be times when one side will fall before the hull has been beaten off the faulty arguments. A passionate, skillful advocate with a good knockout punch can win a case before revealing the kernel, despite a deficiency on the merits.

Imagine two lawyers in a case.

What if one looks at the constellation of facts which make up her case, and figures out which are the favorable and unfavorable facts for argument? Now suppose that she then crafted her case around a theme which she discerned that de-emphasized the bad facts and made the good facts look so right. We call that good advocacy. But I ask you: IS IT FAIR? Does that not impede our search for the truth?

Suppose *one* lawyer had mastered the use of descriptive labels. He would be able to editorialize his message at the time of delivery. Unrebutted!!! Abe Lincoln was *Honest Abe*. Casper was a *friendly* ghost. And who ate Little Red Riding Hood's grandmother? Not just any wolf – not *canis lupus*, but a *big, bad*, wolf. And this lawyer's client, at his side, was not, "My client," but, "Hard-working Mr. Jones, here, an ex-Marine, your friend and neighbor."

Now suppose that *one* of the lawyers knew how to take the other side's words and repeat those in ways that made them sound so different. Shouldn't someone cry, "Foul!"?

Or suppose that one of the lawyers could select words so craftily that all listeners would swear they could smell the sweet kettle corn which the plaintiff was munching at the moment the roller-coaster collapsed.

Or suppose that one lawyer could ask a question in such a way that the other side's star witness looked pretty bad, even though she had done nothing wrong.

Imagine if an attorney could change a jurors mind by arching a cynical eyebrow at a critical answer or by furrowing that same troubled brow.

I TEACH THOSE THINGS!!!

Even a simple pause can tip the scales of justice in a close case. The pause. Imagine that.

Or a shrug. A well-delivered shrug can move mountains. Why can't it alter the course of justice? Why *should* it?

And think - if a pause or an eyebrow or a shrug can upset the balance, think how much damage can be done by a compelling theme that is powered by PASSION!

Imagine a case about a leak at an off-shore oil rig. The P & A student, in preparing her case, would have thought up an appealing theme. She would *never* say, "This is a case about an oil leak at an off-shore rig." That's too bland. Too dispassionate.

My student would look for a theme to arouse the listeners' passion. She *might* say, "This is a case of the fox that was guarding the henhouse." She might even say, "This is case about greed and the power of the dollar." She might even say, "This is all about Evil - cold, dark evil at the bottom of a cold, dark sea."

Cold dark evil. Which brings us back to my repentance.

To my students, past and present: I have equipped you with lawyer tools so that you can win a case because you are more persuasive than your adversary. I have taught you to argue with passion, to use your lawyer tools to tip the scales of justice in your client's favor.

Forget that. Forget *all* that. It is unfair, unsporting and unjust. And *I* have been *teaching* it.

My students, if my words still mean anything to you, remove passion from your tool boxes. It is a devilish device. It is the anti-logic, the de-neutralizer, the skill. It is a trick of the charlatan, the prevaricator, the sleight-of-tongue expert and the ne'er-do-well.

Oh, there may be room for that sort of gimmickry in political debate, or when we call our countrymen to arms. We can play tennis, watch soap operas, or sack neighboring villages with passion. We can have passion in the arms of our lovers. We can speak passionately of Derek Jeter's career, or climate change or corrupt politicians.

Passion is great for theater, but it has no place in the Halls of Justice. Not in America. Not in the twenty-first century. Does passion really belong in that sacred zone where free people struggle to find the truth and to earn ... JUSTICE!?

PASSION! Fear it for its power,.. its ubiquity,.. its inequity!

And *I* have been teaching it! I have been taking young legal minds and teaching them to argue with passion. *HOW DARE I !!!*

And so, my friends and colleagues, forgive me, please, for I have sinned.

Marc Garfinkle

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