



THE DANGERS OF "GOOD" ADVOCACY

Ken Sande

One of the cases referred to me by a major arbitration organization involved a large contract dispute. Although the facts and the law were clearly in the defendant's favor, the plaintiff's attorney did a masterful job advocating his client's position. Testimony that could have been presented in a few hours stretched into three long days, and for a while even I was beginning to wonder whether the plaintiff had been treated unfairly.

By the time both sides rested their cases, however, it was clear to me that the plaintiff had breached the contract and that the defendant's subsequent actions were justified, both legally and morally.

I knew that my decision would probably destroy the plaintiff's last hope of salvaging his business, and I felt badly when I denied his claim. What disturbed me even more, however, was the realization that this young man had been deluded by his own attorney.

No, the attorney did nothing that should be reported to a commission on practice. In fact, his performance was superb by worldly standards. Even so, I don't think this attorney served his client well in the long run.

The trouble with this attorney, from my perspective, was that he was *too* effective when it came to advocating his client's case. Hour after hour, he drew attention to every fact that appeared to justify his client's conduct or condemn the defendant's actions. At the same time, he minimized anything that indicated any fault on his client's part or that vindicated the defendant.

While the attorney failed to win the case, his client obviously accepted his presentation as the only true version of what had taken place. As the hearing continued, the plaintiff became increasingly hostile toward the defendants and their counsel, and he adamantly refused to accept any responsibility for the situation. Thus, by the time the hearing was over, he was absolutely convinced that he was in the right, even though the facts and the law were definitely against him.

Unfortunately, this case was heard pursuant to arbitration rules that did not allow me to explain my award (unlike the Christian Conciliation Service). Therefore, I was not able to explain to this young man where he was at fault and how I had arrived at my decision.

His subsequent evaluation of the hearing showed that he viewed my decision as a gross injustice. It was obvious that his improper attitudes that had given rise to this dispute were more ingrained as a result of the hearing. Until he repents of those attitudes, he will probably find himself in similar conflicts in the future.

This case reinforced my concerns about the adversarial process and strengthened my appreciation for the conflict resolution process set forth in Scripture. Before presenting those concerns, I want to acknowledge that the adversarial system serves a legitimate purpose and that there is a genuine need for effective advocates. In a fallen world, this system is often the only one that can dig out enough truth to settle a dispute justly. In many cases, without effective advocates on both sides, the adversarial system would seldom produce just results.

Even so, I believe that many attorneys need to be more aware of the impact they can have on their clients long after a case is decided. The advocate's job is to present the facts and the law in a way that is most favorable to his or her client. Unfortunately, even when no one tells an outright lie, an adversarial presentation can easily result in a twisting or distortion of the truth. (My wife would certainly affirm this. During the early years of our marriage, she was frequently offended by the way I used my "legal skills" to win arguments.)

Granted, the attorney on the other side is expected to twist things in the other direction, and theoretically the judge or jury is supposed to end up with a balanced and accurate understanding of what actually happened. But the parties in a case are seldom as objective as the judge or the jurors. Like most of us, they are usually inclined to believe what is favorable to their own positions and dismiss what is not. Thus, each party will usually give great weight to his or her attorney's version of the facts and reject anything to the contrary.

This problem is aggravated by the fact that many disputes drag on for months or years, and throughout discovery and trial the parties are repeatedly encouraged to assert their innocence and place the blame on others. As we all know, the more often a person says something, the more fully he or she believes it. Thus, the longer the adversarial process goes on, the more likely a person is to lose the truth and take hold of an illusion. Combine this tendency with the work of an effective advocate, and it is all too easy for a party to leave a courtroom with a badly distorted view of reality.

This can produce two harmful results. First, it can enlarge the gulf between the parties. As the advocates do their job and the two versions of the truth veer further away from each other, each party will be increasingly inclined to believe that the other person is deliberately and maliciously lying. Consequently, even if the parties' relationship was only strained at the outset of the adversarial process, it is often destroyed by the end of it.

Second, effective advocacy can help to ingrain destructive attitudes and habit patterns. As mentioned earlier, advocates naturally assert their client's righteousness and criticize the conduct of others. Thus, by the time a trial is completed, some parties are more convinced than ever of their own innocence, even when they were found to be in the wrong.

My father, who served as a trial judge for twenty years, repeatedly observed this phenomenon. Again and again, he saw that instead of learning where they need to change and how they can avoid similar problems in the future, many parties leave a courtroom holding even more tightly to their harmful values and opinions. Small wonder some litigants end up in one dispute after another.

There are two ways an attorney can counteract some of the dangers of effective advocacy. At the very least, be honest with your client and do all you can to help him see his share of the responsibility for his situation. As Proverbs 27:5-6 teaches:

Better is open rebuke than hidden love. Wounds from a friend can be trusted, but an enemy multiplies kisses (cf. Lev. 19:17; Matt. 7:3-5; 18:15; Gal. 6:1-2).

Regardless of whether you win the case, you can do your client a great service by helping him to face up to his mistakes and wrongs and see the need to change improper attitudes, conduct or business practices. This is especially important if your client professes to be a Christian, because the longer he holds to ungodly or unwise beliefs and actions, the more damage he may do to his reputation and witness as a Christian.

This will certainly be a delicate process if you must also advocate your client's case in a court of law. Having arbitrated dozens of cases (and having talked with my father about the hundreds he has tried), however, I am convinced that a party who accepts responsibility for his mistakes and wrongs will often fare better in court than one who adamantly refuses to face up to reality.

This is why Jesus' timeless advice in Matthew 7:3-4 is as relevant to resolving a lawsuit as it is settling a conflict in a home, church or business:

"Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye? How can you say to your brother, 'Let me take the speck out of your eye,' when all the time there is a plank in your own eye? You hypocrite, first take the plank out of your own eye, and then you will see clearly to remove the speck from your brother's eye."

When conveyed in a carefully planned way, honest admissions can significantly improve a party's credibility. And since humility is a much more appealing quality than pride, such honesty may also improve the court's attitude toward your client. Even if your client loses his case, he may find it much easier to accept the result if he has dealt honestly with the truth throughout the process. More importantly, he will be in a better position to do things properly in the future.

In many cases, an even better way to guard against the dangers of advocacy is to encourage your clients to resolve their disputes through a conciliatory rather than an adversarial process. The Christian Conciliation Service (CCS), a division of RW360, is

uniquely committed to helping people resolve conflicts in a constructive manner. Christian conciliation involves biblically informed negotiation, mediation and arbitration (see 1 Cor. 6:1-8; Matt. 18:15-20).

In addition to resolving the substantive issues of a dispute (which is usually all a court can do), Christian conciliators do all they can to reconcile the parties, to help them accept their responsibilities for the conflict and to encourage needed changes in their attitudes and behavior.

As a result, relationships are often strengthened instead of destroyed, and the root causes of problems are sometimes identified and eradicated. Most importantly, God is honored as people acknowledge his supremacy and show respect for the principles set forth in his Word.

If you've never taken the time to investigate the procedures and benefits that Christian conciliation has to offer your clients, why not do so today? To begin this process, I encourage you to use the link below to download the *Handbook for Christian Conciliation*, which contains an introduction to the conciliation process, model rules of procedure and other documents relevant to this process.

Referring a client to the CCS will certainly not solve all of the problems that you may face as an advocate. But in many cases, it will provide your client with a forum where the whole truth can be presented and dealt with in a manner that encourages those involved to find just solutions and to make constructive changes.

As the Bible repeatedly teaches, the closer people come to the truth, the more they will know genuine freedom, peace and joy.

Ken Sande is the founder of Peacemaker Ministries and RW360 (see www.rw360.org). For more information on Christian conciliation, see www.rw360.org/ccshandbook.