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Professor Goodwin makes a case for the normative complexity of advocacy. She makes this case in the contexts of courtroom advocacy and advocacy in the public relations industry. I am going to examine that conclusion by reference to one of her two chosen case studies – courtroom advocacy. I am also going to agree with her conclusion that courtroom advocacy is normatively complex, although I will part company with her on a few points.

Goodwin has argued that the activity of arguing in court is normatively structured, in the sense that it is more than just persuasion, it is certainly not neutral, and it is both good and bad. I agree. I do not, however, view as puzzling the different treatments of advocacy that Goodwin finds in the communications and the informal logic disciplines. One views argument as useful and positive, while the other views it as deserving a healthy dollop of suspicion and as something against which we need to arm ourselves. In a courtroom argument in a civil case with a judge as the trier of fact and law[1] the judge can be aided by the lawyers' advocacy or, potentially, put on the wrong track by it. She can stay on the right rack due to her own professional training and experience, but this is just one of several constraints that keep the argument content and process in check and that limit the amount of discounting the judge is required to do. My aim in this Commentary is to explore other key constraints that shape and limit arguments in the civil advocacy sphere. These constraints are set by law, procedural rules, and ethics. I will restrict my comments to the constraints imposed by rules of ethics, thus taking the same approach that Professor Goodwin has taken.

At the heart of Goodwin's analysis and evaluation of lawyer argumentation is the concept of 'zealous advocacy'. She reviews the 20th century American history of the American Bar Association (ABA) Canons and Codes of Ethics and observes, accurately in my view, that the prevailing ethical rules attempt to 'de-emphasise zeal'. Carol Rice Andrews agrees, seeing in these modern statements of law advocates' ethical duties a gradual decline in the prominence of the 'zealous advocate' model. (Andrews, 2012) It seems that Goodwin and Andrews part company, however, at this juncture. Goodwin gives 'zealous advocacy' a central place in her thesis and argues that there still is in the United States a positive duty of zeal on the part of lawyer advocates. In her view, the absence of a definition of zeal

[1] I exclude argument before juries from my analysis, in the interests of limited space and time and because the judge-alone model is the model with which I am most familiar.

Mohammed, D., & Lewiński, M. (Eds.). *Virtues of Argumentation. Proceedings of the 10th International Conference of the Ontario Society for the Study of Argumentation (OSSA), 22-26 May 2013.* Windsor, ON: OSSA, pp. 1-4.

in the relevant ethics codes conveys a view that "the cultural model of a zealous advocate is so well-established as to not need much discussion."[2] Andrews disagrees, making a strong argument with reference to the same ABA ethics texts, and others, that no such duty exists and that when it did exist, it was not as unqualified as many have suggested.

It is not necessary for me to resolve this difference of opinion for the purposes of this commentary, and even if it were necessary I think it is too contested a concept to allow for resolution. Whether zealous advocacy is now a positive duty or not, it has had a prominent place over time in the landscape of American courtroom advocacy, it is still referred to in the preamble and some of the commentaries of the ABA ethics code, and it persists in the cultural model of courtroom advocacy (although in my view less pervasively than Goodwin suggests, cf Andrews, 2012). Even those who dispute that courtroom advocates have a duty of zealous advocacy as that term is traditionally understood, must accept that a lawyer advocate has positive duties to a client. That much is beyond doubt. These obligations to clients are one source of the normativity and complexity of courtroom argument. That normativity and complexity arise because the duty to client operates with other, competing duties.

One of these competing duties is the lawyer advocate's duty to the court. Like 'zealous advocacy', there is less than full agreement about the scope and boundaries of an advocate's duty to the court. (Gaetke, 1989; Hussey Freeland, 2012). To say that an advocate has a duty to the court means that the lawyer must have in mind not only the interests of client (as must all courtroom advocates, zealous or not), but that the lawyer must also act in the public interest, or at least as an officer of the court. In a specific case, this might mean for example, not pursuing a technical point if it would cause excessive delay. Taking the point might be advantageous to the client, but it would also waste the court's time and run up costs. "The characterization inherently suggests that lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe." (Gaetke, 1989)

Some critics - or perhaps they are skeptics, or cynics - suggest that 'duty to court' is an empty concept that lawyers use to make themselves feel good about who they are and what they do, but that it means nothing in terms of ensuring more ethical conduct and that it is consistently trumped by the duty of zealous advocacy. (Gaetke, 1989) Eugene Gaetke states, primarily in the context of American courtroom advocacy, that lawyers are more comfortable with the conception of the lawyer advocate as zealous advocate than as someone who owes a duty to the court. Here two brief observations are called for. First, the American considerations of these divergent duties has until recently been starkly dichotomous. Second, there are differences across legal cultures in how these terms are used and understood.

[2] With more time and space to compare and contrast 'cultural models', it could I think be demonstrated that there are significant differences in cultural models of zealous advocacy as between lawyer advocates in England, Canada, Australia and the United States. The concept of zealous advocacy has been less prominent in the codes and canons of ethics in these countries than in the United States. (Bell & Abela, 2010)

For example, English and Australian practice is to prefer the term 'duty to client' to 'zealous advocacy', and in their conceptions of courtroom advocacy, to give unconditional primacy to the latter.

'Duty to court' may be a contested term, but it is nonetheless a useful way to describe another set of obligations that, with the duty to client, create the dilemmatic obligations and goals that Goodwin identifies. Where we differ is that I attach less weight to the duty to client (and I do not call it zealous advocacy) and more to the duty to court. For the latter, Goodwin restricts her analysis to a more limited set of obligations that she summarises as avoiding known falsehoods.

I agree with Professor Goodwin that there are reasons to be suspicious about courtroom argumentation. One reason is that while courtroom argumentation is not exclusively about persuasion, it is certainly an exercise in persuasion. Furthermore, it is a product of an adversarial system, it is almost always a contest, and it is a contest that the arguers would prefer to win – such is the nature of contests. Auditors have to be careful. We can consider some examples, such as the selective use of the facts revealed in evidence when framing a hypothetical question for an expert, or the use of the 'theory of the case' as a selective statement of the essence of the case that drives preparation and presentation of that case.

It is necessary, however, not to overstate this need for suspicion. This is because, in response to the pulls of persuasion, adversarial contest and zealous advocacy/duty to client, there are pushes. One of these is the duty to the court, already discussed. Another applies to almost all courtroom advocates, but is especially applicable in my view to repeat players - those lawyer advocates who make their living as advocates, and who appear in court frequently, often in the same court and often before the same judge.[3] Many lawyer advocates are repeat players, concerned about their professional reputations. Judges and lawyers talk about what happens in court, and this can have positive and negative impacts on the reputations of the arguers. Most lawyers will have a keen interest for those reputations to be positive, not negative. This interest will in turn influence how they argue. They know that their auditors may well form a view of their advocacy performance, and may well share that view with others. This is a view that will persist beyond the specific context within which the argument is being made. This means that one argument event is not self-contained.

These reputational concerns, like a lawyer's duty to the court, can operate in the same way as the 'additional obligations' that Goodwin says an advocate can consider taking on to relieve an auditor's suspicion. In my view these kinds of obligations provide one answer to the question: why doesn't courtroom advocacy self-destruct? My answer to this question is because it is only somewhat zealous, not completely so. It is the combination of zeal/duty to client, with other interconnected ethical, procedural[4] and professional norms that together make courtroom advocacy work, as best it can.

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[3] It may be that the reputational interest will operate differently where the main auditor is a jury, not a judge, and in a criminal as opposed to a civil case.

[4] There is a trend in some common law jurisdictions to place in civil procedure codes rules about litigation conduct that previously would have been found only in ethics codes.

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