

The Most Zealous Advocate is Not Always the Best Advocate

By Justine Borer

I was admitted to the New York State Bar in October 2011. In the past year, I have learned that the most zealous advocate is not always the best advocate.

It is a truism that more experienced lawyers can provide wisdom to newer lawyers. I have many lawyers to thank for imparting wisdom about the contours of my responsibilities as an advocate. The lion's share of my thanks goes to my mother, Brondi Borer, a lawyer focusing on family/matrimonial law, and to the partners at Burger Yagerman & Green, LLP, a boutique Manhattan firm focusing on family/matrimonial law. As a new lawyer, I am fortunate to be supervised by Barbara Burger, Howard Yagerman, and Nancy Green, all talented, experienced, and dedicated lawyers.

It is also a truism that law schools do not teach some crucial practical lessons about the practice of law. Yet in my case, the opposite was true. Law school first exposed me to the philosophical tension between my dueling duties as a lawyer.

On Day 1 of Professional Responsibility at UCLA School of Law, Professor Derian defined the fundamental tension that lawyers must negotiate: the duty to be a zealous advocate versus the duty to be an officer of the court. During my first year as a lawyer, I have observed other newly admitted lawyers allow their roles as zealous advocates to overshadow their roles as officers of the court. Being an overly zealous advocate is detrimental to the reputation of a lawyer, and - most importantly and ironically – detrimental to the client.

A recent experience illustrates this lesson. My firm represented Dad; a newly admitted lawyer represented Mom. Custody was at issue. Dad's argument for maintaining sole custody was strong, both factually and legally; Mom was insisting on a custody arrangement that did not

reflect the reality of her relationship with the child. It was clear to me, and to the partners at my firm, that the court would not grant Mom's requests. Rather than advising Mom as such, Mom's newly admitted lawyer filed motion paper after motion paper, making assertions about why each and every one of Mom's unreasonable and legally unsupportable demands should be granted.

Likely because of her inexperience, Mom's lawyer may not have realized that Mom's demands were doomed to fail. Yet Mom's lawyer's job was to assess her client's position, and to advise her client as to the court's likely response. By bending to each of her client's demands, Mom's lawyer did a number of things that did not serve her client (or her own reputation) well. Presumably, she ran up unnecessarily high bills for her client. She generated ill-will with opposing counsel, and with the court. And, most importantly, her unreasonable demands angered Dad, resulting in a custody arrangement that was less favorable to Mom, and perhaps in contravention to the best interests of the child.

In other words: Mom's lawyer did her client a disservice.

To be sure, experienced lawyers are also capable of misguiding clients, churning out senseless and voluminous motion papers, making strategic mistakes, and alienating judges and opposing counsel with arrogant behavior. But I have noticed that newly admitted lawyers often make these kinds of mistakes. Fortunately, newly admitted lawyers are not yet set in their ways. They can benefit most from the lesson that the most zealous advocate is not always the best advocate.

There is a reason we are called counselors. Our job as lawyers is not to bend to every fleeting whim a client may have. To do so would be detrimental to our client's interests, especially when we know the law is not on our client's side. As lawyers, we learn to be risk-averse and to anticipate the potentially negative consequences - both practical and legal - of any

course of action. When our clients are unrealistic about consequences, or fail to consider them, it is our job as lawyers to remind them.

Justine Borer is an attorney at the New York City law firm Burger Yagerman & Green, LLP, focusing on family and matrimonial law. She is also a member of the New York City Bar Association Professional Responsibility Committee. Justine is a family and divorce mediator, and a sponsoring member of the Association for Conflict Resolution of Greater New York. She maintains the website www.justineborer.com. She received her J.D. from UCLA School of Law, and her A.B. from Harvard College. Justine can be reached at justineborer@post.harvard.edu.