

WHAT IT MEANS TO THE PROFESSION
WHEN LAWYERS CALL EACH OTHER “DISINGENUOUS”

By

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Litigators advocate. In fact, the preamble to the Rules of Professional Conduct says that lawyers are supposed to be zealous advocates for their clients. Those rules, the courts, some training in law school, and practitioners’ customs in each venue put limits on this advocacy. Among each other, lawyers are expected to act within this mix of rules and customs circumscribing the realm of proper behavior.

Even when we act within these rules, and are well accepted by our peers, the public view, and even the view from the bench, is often different. We have been called mercenaries, hessians and a lot worse. We are the butt of too many jokes to count. Yet as long as we honor our code of conduct, lawyers can have some comfort that we are doing our jobs within an acceptable standard. The times are frequent, however, when lawyers themselves question each other’s adherence to our standards as advocates.

The focus here is on lawyers using the word “disingenuous” in referring to other lawyers. Most litigators have seen at least one of their arguments described as disingenuous in an opponent’s brief; or they have heard the word thrown at them in front of a judge. Many of us have used the word in the same ways.

The word is so common that it is virtually a legal term of art. In that context, it may mean something like, “Your Honor, this is an extremely bad argument,” or “This is a ridiculous argument.” Sometimes the use is stronger, and it means that an attorney’s argument has gone beyond any acceptable limits. “The case doesn’t say what counsel claims and counsel knows it.” “The facts counsel argues don’t exist in the record.”

A look in the dictionary shows that “disingenuous” is a serious word. Disingenuous means not being ingenuous. Definitions of ingenuous include: of a superior character, noble, honorable, free from dissimulation, frank or sincere. The opposite: of an inferior character, ignoble, dishonorable, full of pretense, dissembling or insincere. The contrast shows the gravity of the charge.

Definitions of ingenuous with less onerous implications include naive or artless. The opposite of this would be something like “crafty.” Thus, the least pejorative use of the word is taking it to mean that the other lawyer is a clever person; one adroit at making crafty arguments — the kind of arguments that should be always be scrutinized for artful twists and selective omissions. Once examined closely, clear thinking will cause such ultimately weightless arguments to disappear like fog in sunlight.

Calling another lawyer crafty, i.e. the kind of person who needs to be watched carefully, remains a serious thing. The other uses of “disingenuous” are more serious. These uses mean that counsel is saying something that is simply not true, and he or she is saying it because of their bad intentions or bad character. This is not as severe as claiming, *e.g.*, that opposing counsel has intentionally destroyed evidence. Still, when one lawyer accuses another of knowingly leaving out or adding facts in a furtive effort to win an argument at any cost, we confirm the belief outside the profession that lawyers are willing to go too far in achieving their ends. The public will then make the leap that there is nothing we will not do to achieve our ends. Some will even turn such a belief into a performance expectation.

There is also a view that disingenuous behavior is so ingrained in the litigator’s practice that it eventually becomes part of our nature. Judge Richard Posner, one of America’s leading judges, provides a window into this belief. In his book dissecting Justice Benjamin Cardozo’s reputation, Judge Posner talks about Cardozo’s “good judicial rhetoric” and his “bad judicial rhetoric.” An example of this darker side, to which “Cardozo at times *descended*,” consists of “such *familiar* but unedifying lawyers’ tactics as distorting the facts” Some of Cardozo’s sins are compared to the “*characteristic* excesses of a lawyer’s brief.” Judge Posner concludes that “[n]o doubt [Cardozo’s] rhetorical sins reflect Cardozo’s nearly twenty-three years as a litigator.” Posner, R., *Cardozo, A Study in Reputation* at 137 (1990)(emphases added).

So should we be using this word against each other? Do we somehow advance the general opinion of litigator amorality by hoisting the accusation that our opponent is disingenuous? This is worth thinking about.

There is little doubt, however, that the practice of one lawyer calling another disingenuous is going to continue. Thus, for those choosing to use the word, the more useful questions are when and how to use it. The decision on when to use the word and how to use it should be just that — a decision. We should not simply allow the word to flow from our keyboard or our mouths. Such a weighty word should only be used after reflection, evaluation and deliberation, however long that fairly takes. In the end, there is no benefit in calling someone “disingenuous” for rhetorical flourish or effect. Put simply, someone’s actions should really be disingenuous before we call them disingenuous.

Returning to the basic question: Should we call other lawyers disingenuous even when the description is accurate? There are many judges and arbitrators who simply do not want to hear lawyers attacking each other. There are judges and arbitrators who will think less of the lawyer, and his or her case, for slinging pejorative platitudes. If the other side’s arguments or actions are truly disingenuous, then a clear and forceful presentation of a better argument, or a complete exposition of all the facts, will reveal the deception to the court. Done well, the contrast is evident for all to see. The disingenuous lawyer loses, in part, because the distortions in his own words and actions undermines the court’s confidence in anything that lawyer, or his client, said.

Forceful and passionate arguments rooted in reason and evidence will give a judge, an

arbitrator or a juror more confidence in the truth of that lawyer's case. Anger, insults or vitriol are more likely to reduce that confidence than add to it. Instead of focusing on how opposing counsel has muddied the truth, unfold the clean white sheet that holds the truth, and the dirt of that stain will stand out on its own.

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