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Alex Jones Cases Show It's Time To Rethink Zealous Advocacy

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In 1820, in a speech delivered to the English House of Lords, Lord Henry Brougham asserted that it was his duty as an advocate to promote and defend his client without regard to "'the alarm, or the suffering, the torment, or even the destruction'" he might bring to anyone else.[1]

While the high drama evinced in this speech might give us pause today, the essence of Brougham's argument has become a foundation of the lawyer's profession. Zealousy is a skill that attorneys all across the country take pride in.

And it isn't just something that their clients and colleagues require of them; it is something they demand of themselves. In fact, it is so essential to the practice of law that lawyers actually built it into their code of ethics.

The concept of zealous advocacy appeared in the American Bar Association's very first Canons of Professional Ethics — published in 1908 — and still persists today, in the Model Rules of Professional Conduct, which require that lawyers act "with zeal in advocacy upon the client's behalf."[2]

Despite the popularity of zeal within the profession, zealous advocates are not without their critics. Their strategies have historically caused consternation in their colleagues, their opponents and the judges that oversee their practice. At times, they have even caused issues for their clients.

All this has led some to conclude that zealousy is not a "pragmatic means to justice," as law professor James Elkins once wrote.[3] This assessment is perhaps truer now — in the modern age of livestreamed trials and viral social media posts — than it ever has been before.

In this article, we subject the practice of zealous advocacy to a new evaluation, using the recent defamation cases of Infowars host Alex Jones as a case study. By reviewing the strategies employed in these cases, we examine the effectiveness and practical limits of zeal in the courtroom, and propose some cautions and alternative tactics for today's lawyers.

Summary of Jones Cases

In 2018, numerous lawsuits were filed against Jones, alleging he made defamatory statements about the 2012 mass shooting at Sandy Hook Elementary School in Newtown, Connecticut.[4] Cases were opened in both Connecticut and Texas.[5]

According to allegations in the complaints, Jones repeatedly broadcast conspiracy theories that the shooting was a hoax concocted by the victims' families and the media, and this prompted his listeners to harass and threaten the plaintiffs.[6]

In responding to the complaints, Jones and his attorneys adopted a number of zealous hardball strategies. They refused to respond to the complaints and ignored discovery requests and court orders. When default judgments were entered against him, and the cases proceeded to calculate damages, Jones still refused to accept responsibility.

In the end, the juries returned damage awards against Jones. In Heslin v. Jones in the 459th District Court of Travis County, Texas, the jury awarded the plaintiffs $4.1 million in compensatory damages and $45.2 million in punitive damages.[7] In Lafferty v. Jones and Sherlach v. Jones in Connecticut Superior Court, the jury awarded the plaintiffs $965 million in compensatory damages.[8] Further developments are forthcoming.

Zealous Advocacy, Reexamined

1. Fairly value your case.

To zealously pursue resolution of one's case, a lawyer must understand its particular strengths and weaknesses, and accurately assess its overall risks and value. The failure to do so creates an opportunity for opponents and fact-finders to question the lawyer's credibility and arrive at conclusions contrary to their client's best interests.

In one of the Jones cases, during closing arguments, defense counsel stated that his client was willing to pay no more than $1 in damages to each plaintiff for each of the defamation claims.[9]

Perhaps unsurprisingly — especially considering the nature of the case and the fact that liability had already been decided against the defendant, among other things — the jury paid little heed to this suggestion, and instead awarded plaintiffs more than $49 million in compensatory and punitive damages.

Certainly, lowball offers can be useful in laying the groundwork for successful negotiations. That said, they also run the risk of offending opponents and, in courtrooms, fact-finders.

While it is impossible to know for sure, Jones' lawyer might have saved his client some money had he taken care to accurately assess the strength of his case and propose a more reasonable number. It is likely that his offer of just a single token dollar served only to undermine his credibility and inflame both the jury and judge against his client's interests.

2. Play by the rules of the court.

The directive to advocate zealously for one's client can, at times, overshadow the responsibility of lawyers to act as an officer of the court. When the two conflict, and a lawyer is observed choosing their clients over the courts, it affects more than just the offending lawyer's credibility — it also works to increase the public's ambivalence toward attorneys in general.

Jones and his attorneys made national news when it came out that they had accidentally sent two years of text messages to opposing counsel.[10] A number of these messages apparently included content that Jones' attorneys had improperly withheld during discovery, i.e., text messages discussing or relating to the claims in the case.[11]

Both the media and the public had a lot to say about the digital gaffe — and few comments were positive.[12]

While it can be beneficial to take an aggressive stand in discovery to protect privileged information, lawyers cannot forget that a part of their job is to promote confidence in the courts and the adversarial system of law. The failure to abide by the rules of court, and to perform necessary legal duties, works only to undermine it.

3. Show humility where you are able.

"Zealous" means ardently active, devoted or diligent. It does not mean unapologetic. And yet, under the guise of zealousness, some lawyers seem to operate as if humility and remorsefulness are weaknesses that must be avoided and countered at all costs.

In one of the Connecticut cases, when Jones took the stand, he squandered an opportunity to humanize himself before the judge and jury, and instead used the new platform to rail against "his 'liberal' critics and refused to apologize to the families," Jack Queen wrote in Reuters.[13]

It is not entirely clear whether that was a strategy his attorneys instructed him to pursue or one he chose on his own. Either way — if the overall goal was to minimize damages — it seemed to be an ineffective tactic.

Alongside Jones' testimony, Queen wrote, the jury also heard "weeks of anguished testimony from the families," who explained how Jones' lies on Infowars had affected their lives.[14]

In the end, an award of nearly $1 billion in damages signified the jury's distaste for Jones' zealous strategy at trial.[15]

If Jones wanted to contest liability, he could and should have done so; instead, he and his legal team took deliberate steps that resulted in the entry of a default judgment against him.

Once liability was decided, it would have made a lot of sense for Jones to demonstrate some acceptance or concession of fault. But, yet again, the strategy adopted by Jones' lawyers was to be aggressive rather than tactful.

Admitting responsibility is sometimes the correct move — even for a zealous advocate.

4. Focus on credentials, not conspiracies.

In one of the cases, while examining one of the plaintiffs' experts — a psychiatrist — Jones' attorney questioned whether being in court was helping the plaintiffs' healing process, and suggested that sitting down and talking with Jones might have been a more efficient way to help the plaintiffs work through their trauma.[16]

He offered that the case, along with the associated mainstream media coverage, was the true source of the plaintiffs' continuing distress.[17]

While finger-pointing may be a perfectly reasonable tactic, there are effective and ineffective ways of doing so. Context is very important. In questioning the plaintiffs' expert, Jones' attorney made himself look callous and out of touch.

If his questioning had been more respectful of the plaintiffs' grief or attuned to the jury's view of the case, he might have scored some points for himself and his client. Instead, he overreached.

5. Above all else, be credible.

Any attorney who has attended a deposition knows that the goal of the advocate is not to reveal the truth, the whole truth and nothing but the truth. That requirement belongs to the deponent.

That said, the late legal expert Ralph Gregory Elliot wrote, in our adversarial system, "an advocate is encouraged and

expected to prevent truth harmful to the client from getting into evidence and, if it does, to persuade the trier of fact not to believe that harmful truth," or at least, not to accept it from the witness or document that's offered it.[18]

There is, of course, a clear difference between keeping truths out of evidence and adding falsehoods into it. While the former can benefit the client, the latter works only to undermine a lawyer's credibility.

In one of the Texas cases, Heslin v. Jones — motivated, it seems, by overzealousness — Jones' attorney drew out some statements that mischaracterized the actions he and his client had taken in the case. For example, in response to one line of questioning, Jones stated that he took steps to comply with his discovery-related duties.

Soon after, the jury was dismissed, and the plaintiffs' attorney drew the court's attention to that and other mischaracterizations made by Jones, and moved for sanctions.[19]

After listening to both sides, the judge admonished Jones, saying, "[Y]ou may not say to this jury that you complied with discovery. That is not true."[20]

It is counterproductive to make things up in court. Relying on facts that are not on the record is a sure way to aggravate opposing counsel and the judge — as Jones' attorney did — and even turn the jury against the client.

This is especially true today, where viewers and critics have access to trials through livestreaming platforms, as well as to search engines that can be used to quickly check misstatements, almost in real time.

Conclusion

The results of the Jones defamation trials illustrate that judges and jurors do not appreciate when lawyers attempt to make the most extreme case possible.

Instead of responding positively to aggression or incivility, jurors seem to value honesty, authenticity and an ability to connect with them on a basic human level. These are the qualities that advocates should pursue — with zeal — on behalf of their clients today.

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[1] Paul C. Saunders, Whatever Happened to 'Zealous Advocacy'?, New York Law Journal (Mar. 11, 2011), https://www.cravath.com/a/web/474/3272850_1.pdf.

[2] ABA Model Rules of Professional Conduct, Model Rule 1.3 Diligence – Comment 1.

[3] Some have gone so far as to say that overly zealous lawyers, "if not reigned in, would destroy the adversary system created by society to do justice." James R. Elkins, The Moral Labyrinth of Zealous Advocacy, Law Faculty Scholarship (1992).

[4] Elizabeth Williamson, Alex Jones, Under Questioning, is Confronted with Evidence of Deception, The New York Times (Sept. 29, 2022), https://www.nytimes.com/2022/08/03/us/politics/alex-jones-trial-sandy-hook.html.

[5] See, e.g., Heslin v. Jones et al., No. D-1-GN-18-001835 (Tex. Dist. Ct.); De La Rosa v. Alex Jones et al., No. D-1-GN-18-001842 (Tex. Dist. Ct.); Lewis v. Jones, InfoWars LLC et al., No. D-1-GN-18-006623 (Tex. Dist. Ct.); Lafferty et al. v. Jones et al., No. 3:20-cv-01723 (D. Conn.); Sherlach v. Jones, No. 3:18-cv-1269 (D. Conn.).

[6] Williamson, supra note 4.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] See Hogan Gore, 'Perry Mason moment': Video of attorney revealing Alex Jones texts goes viral, Austin American-Statesman (Aug. 3, 2022), https://www.statesman.com/story/news/2022/08/03/alex-jones-trial-lawyer-perry-mason-andy-hook-shooting-text-messages/65391304007/.

[12] See, e.g., Lydia Wheeler, Alex Jones Lawyer Knocks 'Complicated' Technology in Text Flap, Bloomberg Law (Aug. 8, 2022), https://news.bloomberglaw.com/us-law-week/electronic-discovery-is-complicated-alex-jones-attorney-says.

[13] Jack Queen & Jacqueline Thomsen, Alex Jones Must Pay Sandy Hook Families Nearly $1 Billion for Hoax Claims, Jury Says, Reuters (Oct. 12, 2022), https://www.reuters.com/legal/jury-begins-third-day-deliberations-alex-jones-sandy-hook-defamation-trial-2022-10-12/.

[14] Id.

[15] Id.

[16] See Liz Dye, Alex Jones's Lawyer Debuts Crack Strategy to Make Judge and Jury Hate Him More Than They do the Defendant, Above the Law (Aug. 2, 2022), https://abovethelaw.com/2022/08/alex-joness-lawyer-debuts-crack-strategy-to-make-judge-and-jury-hate-him-more-than-they-do-the-defendant

[17] Id.

[18] Ralph Gregory Elliot, The Zealous Advocate, 17 BRIEF 16, 18 (1988).

[19] See Liz Dye, Judge Scolds Alex Jones for Lying on the Stand as Opposing Sandy Hook Counsel Demands Sanctions, Above the Law (Aug. 3, 2022), https://abovethelaw.com/2022/08/judge-scolds-alex-jones-for-lying-on-the-stand-as-opposing-sandy-hook-counsel-demands-sanctions/.

[20] Id.

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