



# BAD ARGUMENTS

*Jonathan Mermin*

**I**F YOU PRACTICE LAW, you may have noticed something about the motions your esteemed adversaries have been filing: they are full of bad arguments. Arguments you are certain, once you have cleared away the smokescreen of obfuscations and evasions on which their dim prospects depend, the court will reject. The sort of arguments that leave you wondering what unpleasantness in their author's past could have forged so bullheaded and undiscerning a personality.

Bad arguments are arguments lawyers make, not because we have a realistic expectation that the court will buy them, but because we have interpreted the ideal of zealous advocacy to mean that we must make every possible argument we can think of on behalf of our client, even if a moment's reflection would reveal their lack of merit. Such arguments emerge from the legal mind out of an ardent desire to win the point, not a reasoned determination that the point is capable of being won. We make them because lawyers make arguments, and sometimes the best argument we can think of is a bad one.

A bad argument is not evidence of a bad lawyer. On the contrary, one trick of the trade is taking an argument that has no actual merit and making it sound like there could be something to it. The exercise is not unlike the act of putting lipstick on a pig, and the result no

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less predictable. The difference is that while the pig can be spotted behind the lipstick with relative ease, good lawyers often disguise bad arguments with such skill and dexterity that it can be no small feat to bring their deficiencies back into focus.

American civil litigation is awash in bad arguments. Summary judgment motions are filed, not because there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law, but because there is a genuine desire to file a summary judgment motion. Motions to exclude expert testimony are submitted, not because there is any real expectation that the testimony will be excluded, but to advise the judge of the moving party's distaste for the testimony. Unobjectionable motions are objected to on the theory that the zealous advocate must resist every enemy advance, even if the disputed piece of ground is indefensible or insignificant. This is due to the fact, understood by sophisticated attorneys, that if you concede that your opponent is right about anything, even an obvious or inconsequential thing, you are deemed to have conceded that they are right about everything.

Where one stands on the phenomenon of bad arguments depends on where one happens to be sitting. When *I* take an unmeritorious position and dress it up to seem almost to make sense, I am upholding the core values of the American legal system by engaging in zealous advocacy on my client's behalf. When my adversaries do the same thing, however, they reveal themselves to be stubborn and unreasonable people inexplicably bent on wasting my time with stupid arguments.

Given the general consensus that American civil litigation costs too much and takes too long, and the significant contribution to these problems made by the relentless pursuit of untenable positions, it is odd that the legal system does next to nothing to discourage lawyers from trafficking in bad arguments. True, there is Rule 11, but an argument has to be nothing short of absurd, or made in obvious bad faith, to run afoul of Rule 11. What I'm talking about is the much larger category of arguments that no one would suggest violate Rule 11, but that an objective analysis would indicate are dead on arrival. It is odd that a legal system committed to "the just, speedy, and in-

## *Bad Arguments*

expensive determination of every action” (Fed. R. Civ. P. 1) has no effective mechanism to deter this major driver of litigation expense and delay.

Once in a great while an argument that looks and sounds decidedly bad defies the odds and prevails – at least in the trial court. This causes lawyers to conclude that because judges sometimes get things wrong, no potential argument should ever go unmade, due to the small chance that the judge might unexpectedly be persuaded by it. Of course, even if you get lucky and the judge blows the call in your favor, the win for your client may prove to be fleeting, as what the trial court gives by mistake, the appeals court has a way of taking back, thousands of dollars in legal fees later.

The evolution of the common law does require that lawyers sometimes make arguments that clash with existing precedent. But there’s a difference between a reasoned argument for a change in law and an argument that simply ignores or mischaracterizes the law.

We take for granted our recurrent encounters with bad arguments. But should we? Arguments in litigation are like tests or procedures in medicine, tools to be used to benefit the client or patient. Bad arguments in litigation are like unnecessary medical procedures: they generate expense and delay without advancing the client’s cause. Healthcare policy makers focus on how to reduce doctors’ incentives to perform unnecessary procedures, while encouraging procedures for which there is actual evidence of effectiveness. Bad arguments – those with no realistic hope of securing the desired outcome – should be no less a concern for the legal system than unnecessary procedures are for the healthcare system.

But they aren’t. The legal system doesn’t even try to discourage lawyers from making bad arguments. Neither the rules of civil procedure nor the norms of the legal profession are structured to deter them. Courts are generous toward bad arguments, giving bogus contentions close and respectful consideration – presumably content to draft opinions that persuasively mow them down. Bad arguments almost always fail, but with no consequences for their purveyors. So seeing no reason not to, and egged on by the prevailing understanding of the zealous advocacy ideal, lawyers keep cranking them out.

Is there a way to make them stop? Assuming that it would be impractical simply to replace the current members of the bar with reasonable people, a more expansive interpretation of Rule 11 would be a place to start. Current practice reserves Rule 11 sanctions for the most extreme circumstances, where a pleading asserts that the sky is green or otherwise takes a position so absurd that it could be explained only by bad faith or rank incompetence. The rule is therefore toothless in the far more common scenario where a dubious contention is adorned with a few superficial indicia of plausibility, but is revealed on inspection to be devoid of any merit. The fact that even a faint hint of coherence is enough to shield an argument from censure, no matter how obviously wrongheaded it proves to be, does much to explain the oversupply of bad arguments.

Hoping the courts will start punishing our enemies for their sins is one idea. Another would be for lawyers to reflect on why we make bad arguments. For the reasons turn out to be no better than the arguments themselves.

One reason lawyers give for pressing untenable positions is the need to “educate” the court about some aspect of the case. We may not win the motion, the thinking goes, but the court will learn important things. Of course, the first and most obvious thing the court will learn upon being presented with your bad arguments is that you are a person of questionable analytical powers and poor judgment. Why lawyers are so intent on imparting this particular lesson is a puzzle I have yet to solve.

A second justification for bad arguments is that even an unsuccessful motion makes extra work for the other side and therefore creates a perceived strategic advantage. The problem with this rationale is that it violates Rule 11 to submit a pleading in order to “harass, cause unnecessary delay, or needlessly increase the cost of litigation.” Fed. R. Civ. P. 11(b)(1).

A response to that irritating observation is to point out that it is always conceivable that a bad argument could gain unexpected traction, and to insist that the true purpose of the pleading is to obtain the relief requested, with any make-work-for-the-other-side effect merely fortuitous or incidental. By that logic, however, no pleading

## *Bad Arguments*

could ever violate Rule 11, as it is never quite inconceivable that a motion could be granted. But when a reasonable lawyer would have to conclude that a motion has no merit, the abstract theoretical possibility that it could be granted does not mean it was not filed in order to harass or delay or increase the cost of litigation. And if the rules are to guide us, that means the motion should not have been filed.

A third reason lawyers give for spending so much time on arguments they cannot expect to win is to increase the size of their bills. That was a joke: no one says their own bad arguments are designed to run up the bill. It's the other guys who do that. The term of art for what the other guys do is "churning."

As a stand-alone justification for making a bad argument, increasing the cost of litigation for one's own client is so obviously unethical that one assumes it must work in conjunction with more discrete rationales. So the churner's thinking in preparing a dubious motion for summary judgment might go something like this:

There does seem to be a material factual dispute. But even if the motion is denied, it could create settlement pressure by demonstrating our determination to fight hard – not to mention educating the judge about things that may become relevant later in the case. And on an unrelated note, business has been slow this month. So it's my client's good fortune that I have time to prepare this very important shot across the bow!

A lawyer who needs to be advised not to engage in conscious churning may not derive much benefit from being given the advice. But others could think about this: if you were booked solid with work for other clients, or uncertain that this client could pay your bill, would it still seem like such a great idea to file that summary judgment motion?

A fourth defense for bad arguments involves avoiding malpractice claims. The idea is that if a lawyer fails to make an argument that could have been made, the client might later assert that it was malpractice not to have made it. But with respect to *bad* arguments, this concern vanishes on inspection, it being impossible to conceive of a viable malpractice claim premised on a failure to have made a bad argument. If a lawyer neglects to make a *good* argument, that

could be a problem. But the solution to that problem is to exercise professional judgment in evaluating potential arguments, not to conclude that any argument capable of being put into words must be worked up into a 20-page pleading. The better malpractice claim would be against the lawyer who wasted the client's money on bad arguments.

Then there is the belief of some lawyers that the more things they ask for, the more inclined the court will be to give them at least something. This quantity-not-quality theory of legal argument assumes that judges gauge fairness by the percentage of rulings that go for or against a particular party; its adherents seek to flood the docket with bad arguments for the court to reject, thus supposedly creating a need for favorable rulings on other issues to balance the ledger. The judicial mind could work that way – or it could reject such a misguided and easily manipulated notion of fairness and instead decide each question on its merits. Or conclude that people who take unreasonable positions on some issues are not to be trusted on others. (“*Falsus in uno, falsus in omnibus.*”) While the introduction of implausible demands may have a measure of strategic value in a negotiation, we don't negotiate with judges, who can simply ignore our view of the world and impose their own.

But the fundamental reason why lawyers spend so much time making bad arguments is that, too often, we simply fail to use common sense in evaluating our cases. Lawyers tend to have hyper-partisan dispositions, causing us to overestimate the quality of arguments that would help our client and to underestimate the obstacles in their path. We tend to imagine that our client is right about everything, from the ultimate merits of the case down to the smallest procedural skirmish. We instinctively feel that anything the other side says is true must be false, and anything they support must be something we oppose. So we find ourselves making arguments as if by reflex, seemingly indifferent to their quality.

That is a problem I have no idea how to solve. But if I could make one adjustment to the default settings of the legal mind, it would be to our understanding of what is meant by “zealous” advocacy. What I would look for in a lawyer would be *zeal*, as in impassioned dili-

## *Bad Arguments*

gence, in pursuit of my interests. I would be less inclined to hire a *zealot*, a term used to connote fanaticism and excess.

A zealous advocate seeks to advance the client's interests in an effective and efficient fashion; a zealot insists that the client is right about everything, whether or not that advances the client's interests. A zealous advocate balances means and ends; a zealot simply assumes that the ends require the deployment of every available means.

If lawyers better understood the difference between zeal and zealotry, we would spend less time arguing about things that are not open to real debate, and more time sorting out the actual issues that need to be decided to resolve our disputes. That wouldn't be so bad.

