

# Lessons from Darrow

## Ethics and Advocacy in the Courtroom

### Colorado Defense Lawyers Association



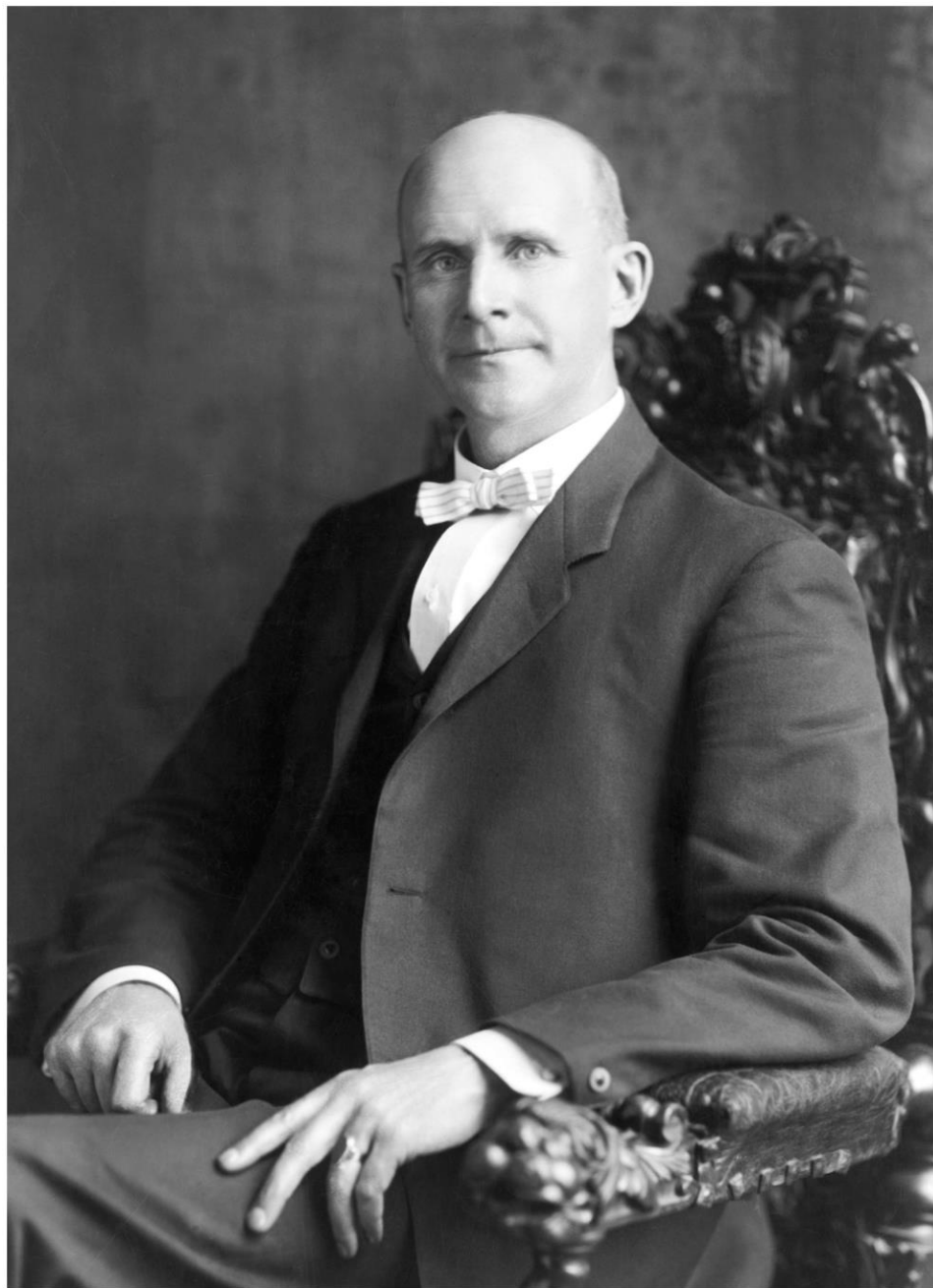
Hon. Sanford M. Brook (Ret.)  
Frank Patterson  
Karen Wheeler  
Meredith McDonald

July 25, 2023













## Persuasive Advocacy or Ethical Dilemma?

### Eugene Debs Case

- If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States which have grown until today no one's liberty is safe.
- 

- Canon 22 (1908) Attitude Toward Jury

*All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal conduct are unprofessional.*



# Persuasive Advocacy or Ethical Dilemma?

## Eugene Debs Case

- I want to say boldly to this court that someone is guilty of one of the foulest conspiracies that ever disgraced a free nation. If my clients are innocent, other men are guilty of entering the temple of justice and using the law, which was made to guard and protect and shelter you and me and these defendants, for the purpose of hounding innocent men to a prison pen.
- 

- Rule 3.4 Impartiality and Decorum of the Tribunal

- A lawyer shall not:

*...state a personal opinion as to the justness of the cause...*

- Canon 15 (1908) How Far a Lawyer may go in Supporting Client's Cause

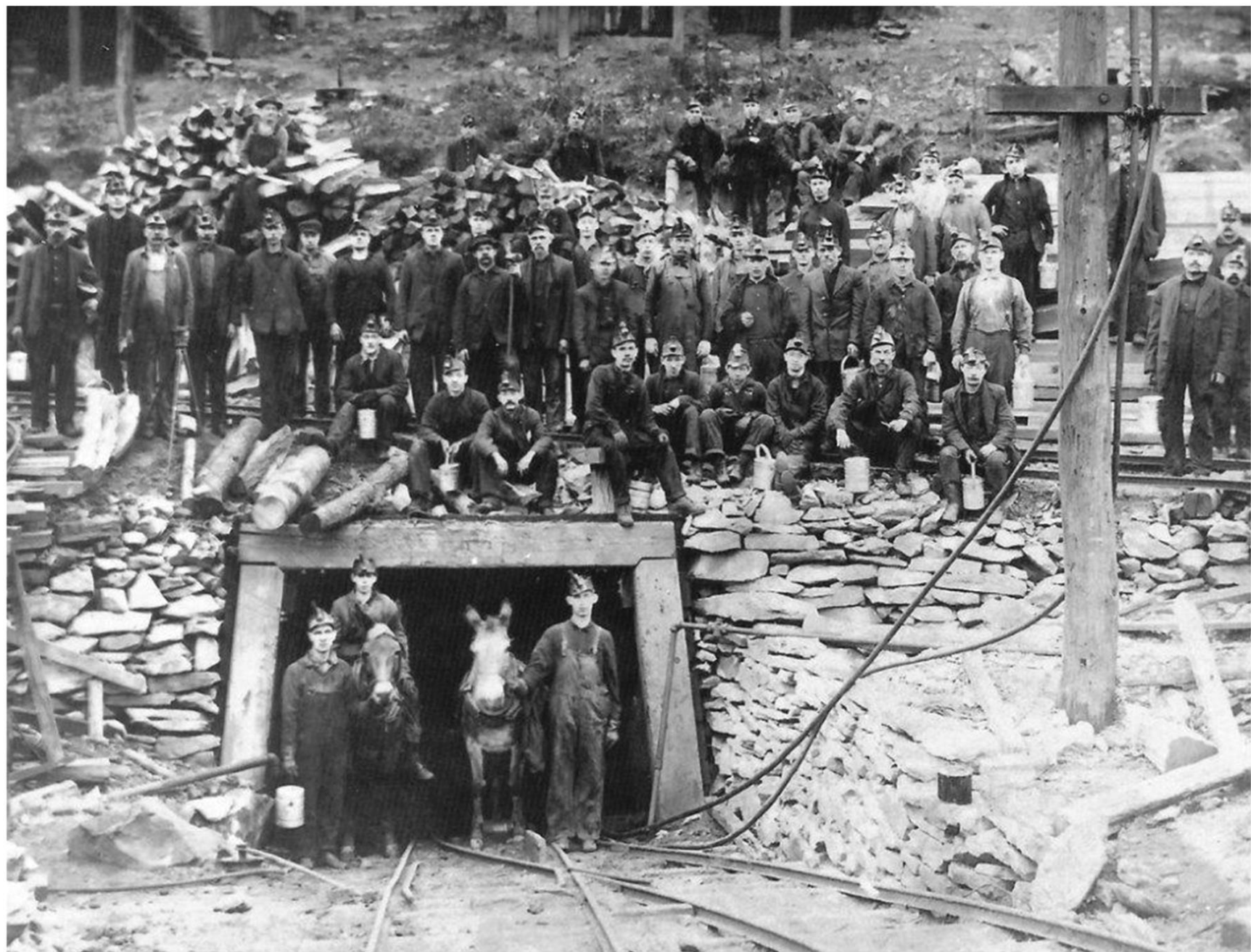
*It is improper for a lawyer to assert...his personal belief in...his clients innocence or the justness of his cause.*

# Techniques of Persuasion and Advocacy Techniques

## Use of Irony and Metaphor

- Gene Debs Case Closing Argument
  - *If a boy should steal a dime, a small fine would cover the offense. He could not be sent to the penitentiary. But if two boys plot to steal a dime but don't do it, then both of them could be sent to the penitentiary as conspirators.*































## Techniques of Persuasion and Advocacy Techniques

### Rhetorical Question

- Pennsylvania Coal Miner's Closing Argument
  - *What will make the best man, the best American citizen to build up a country we can be proud of?*

## Techniques of Persuasion and Advocacy Techniques

### Beginning Strong – Making your first words count

- Pennsylvania Coal Miner's Closing Argument
  - *This demand for a decent life for an eight-hour day and a decent wage is not a demand to shirk responsibility as is claimed in this case.*



# Techniques of Persuasion and Advocacy Techniques

## Ending Strong – Making your last words count

- Pennsylvania Coal Miner's Closing Argument
  - *For all his weaknesses there is still in man that divine spark that will make him reach upward for something higher and better than anything he has ever known.*

## Techniques of Persuasion and Advocacy Techniques

Proper use of leading questions when preliminary

- Pennsylvania Coal Miner's Direct Examination
  - *You're a breaker boy, Johnny McCaffery?*
  - *You mine anthracite coal?*

## Techniques of Persuasion and Advocacy Techniques

Proper use of leading questions - facts not in dispute

- Pennsylvania Coal Miner's Direct Examination
  - *That means they send you and a hundred other men astraddle a shoot and as the coal comes rushing down, you pick out the slate?*

# Techniques of Persuasion and Advocacy Techniques

## Use of Headnotes

- Pennsylvania Coal Miner's Direct Examination
  - *Now, I want to ask you about the time you lost your leg.*

# The Ethics of Advocacy

## Bill Haywood Case

- But, gentlemen, it is not for Bill Haywood alone that I speak. I speak for that long line of men who in darkness and despair have borne the labors of the human race.
- 

- Rule 3.4 Impartiality and Decorum of the Tribunal

*A lawyer shall not...*

*...In trial, allude to any manner that the lawyer does not reasonably believe is relevant...*

# Persuasive Advocacy or Ethical Dilemma?

## Bill Haywood Case

- For God's sake, what sort of a community exists up here that sane men should ask it? Need I come here from Chicago to defend the honor of your state?

---

Canon 15 (1908) How Far a Lawyer May Go in Supporting a Client's Cause:

*No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty...*

## Persuasive Advocacy or Ethical Dilemma?

### Bill Haywood Case

- But if your verdict should be “not guilty” in this case, there are still those who will reverently bow their heads and thank you twelve men.
- 

- Rule 3.4 Impartiality and Decorum of the Tribunal

*A lawyer shall not...*

*...state a personal opinion as to the justness of a cause...or the guilt or innocence of the accused.*





Friday, July 20, 1925

Finest Source of News

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# SCOPES MONKEY TRIAL RAISES TROUBLING QUESTION: IS SCIENCE BEING TAUGHT IN OUR SCHOOLS?

**Scopes Trial Called 'Trial of the Century'**

DAYTON, Tenn., July 19.—The sensational trial of science teacher John Scopes is now being called "trial of the century" by experts in the study of

Never before—and likely never again—has so much abuse and newspaper attention been generated by a single trial in America. According to Harvard Law professor Samuel M. Milburn, "There will never again be a trial such as this, here publishers of soft-covered books and nickel-shilling the peculiarities of trial."

"There is something unique about this Scopes trial," he said. The trial is so unusual, the referee explained, that it is being called the trial of the century from now on.

"It is not likely that another trial will take place in this century that will generate so much popular interest," he said.



**Jessie Smith Signs 3-Cylinder Deal With O-Keh Records**

**PEPPER OF FAMINE LOOMS OVER WORLD, WARNS STAN LAUREL**

**INDIANA CURIOUSLY FREE OF JAZZ MENACE**

**TODAY'S WIRELESS RADIO SCHEDULE**

100 AM to 100 PM, MUSIC  
100 PM to 100 PM, MUSIC  
100 PM to 100 PM, MUSIC

## SHOULD CHILDREN BE EXPOSED TO FACTS?

**Are Reason and Empirical Evidence Suitable School Subjects?**

The Opinion of Edward T. Wilcox, The OXION's Crime and Science Editor

Science! The word is thrown about nowadays as if it were a miracle of our age. To hear its fanatical, wild-eyed supporters talk, one would think that Science could explain everything in all Creation, and that these "Scientists" were privy to the very secrets of the universe. They say that this century will be ruled by Science, and that the nation's might depends upon its adaptation and comprehension by every man. They claim that, if we are to be a great civilization, we must even teach this Science to our schoolchildren.

As a man who holds that the welfare of the country takes precedence over any other human concern, I must stand firmly against the teaching of Science in our schools. This Science has already caused turmoil among God-fearing folk who do not wish to learn that they, as human creatures, may have descended from apes. What if Science were to champion other truths, provable and real, which people do not want to hear? Should we allow our citizens to become aware of facts which go against their chosen beliefs? It would cause untold turmoil and strife among our people! The people's reaction? Who would cause division and conflict in our nation that would doubtless outweigh any benefits of the actual Scientific discovery?

Should we teach our children facts? No, I say, a thousand times no! As they grow into tomorrow's farmers, housewives, mill workers,

**Complexity Marks New Fitzgerald Novel, 'Zelda, Be a Dear and Fix Me Another Gin Fizz, You Incurable Harlot I Love You'**

and coal miners, facts are the last things they will need. Manners! Subservience! Above all, obedience! To speak only when spoken to, and not to cause trouble! These are the principles upon which our educational system was founded. Why in the name of God should we replace it with a system that actually encourages "an ignorant man to ask questions? A good citizen does nothing of the sort. He is content with the reasons he is given by his betters.

Humanity's noblest heroes were not men who cared about facts. They were men who stood up for what they believed in, and to Hell with facts! To Hell with any truth not their own! Our most cherished heroes would fight to the death, bludgeoning their enemies repeatedly, wholly uninterested in whether they were right or wrong.

Once something is accepted as true, it should be true forever. This noble ideal, with its emphasis on unquestioning acceptance of and obedience to authority, is what we should teach our children. It is the rock upon which we have built our government, our religion, and our American way of life, and it is the very ideal which I should like to thwart with my new "discoveries" and impersonal jingles of "facts."

Learning? Why should we provide our citizens with learning? Does learning mathematics aid a man who will spend the rest of his life melting iron in a foundry?

Does knowing that Man comes from apes—if he indeed does, which seems to be a subject of some debate—change the lot of



Attorney Clarence Darrow (above) would have us teach children the scurrilous theories of Darwin.

the farmwife who lives out her years shuttling between the burbling and the milking-stool? I say it does not. Furthermore, it fills the brains of children with useless facts which do not help them to become good American citizens. Does a fact have any inherent moral value? Does Science? We know that Science allowed the Germans to develop the mustard gas and the motor-gun. Has religion ever been used in so evil a fashion? Of course not.

It is possible that we, with our motorcars and aeroplanes powered by the new internal-combustion engines, have already started down a slippery slope of destruction. We were not content to stay with time-honored steam, to travel in our dignified trains and coach-and-fours. But we can take action now. Before age-warshipping scientists turn us one against the other. We must cease our deadly march of Progress now, and there is no better way to achieve this than to keep the hellish demon Science, and his diabolical facts, from coming into contact with our dear children.



**Leaking?**  
Permit our new "Unspakable" disposable hygiene undergarment to gently absorb Mady's food drippings during her late dainty time of the month. Far less cumbersome than the wire-constructed strap-on "secretion sages." "Unspakable" will leave ladies as free as a wing bubble wafting over heavenward.

## Scopes Defended By Super-Intelligent Chimpanzee-Man from Future

Cornelius, a beast imbued with speech and learning

William Jennings Bryan



DAYTON, Tenn., July 19.—

The trial of high-school biology teacher John Scopes took another controversial turn today with the introduction by defense attorney Clarence Darrow of a surprise witness: Cornelius the intelligent chimpanzee-man, a strikingly anthropomorphic simian claiming to originate from thousands of years in Earth's future.

Darrow hopes that the presence of the chimp, a member of the "intellectual class" of a future society ruled by apes, will illustrate to the jury the merits of the biological theory of evolution, the teaching of which Cornelius stands in question under Tennessee law.

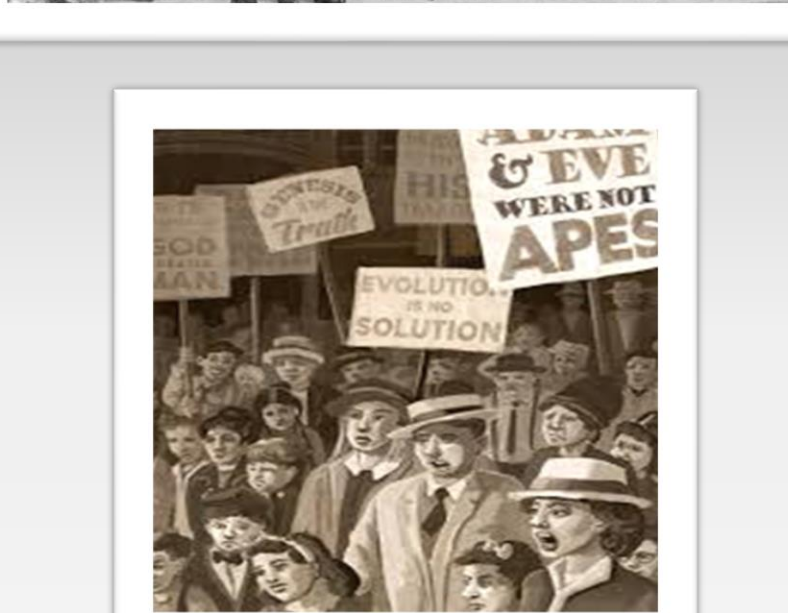
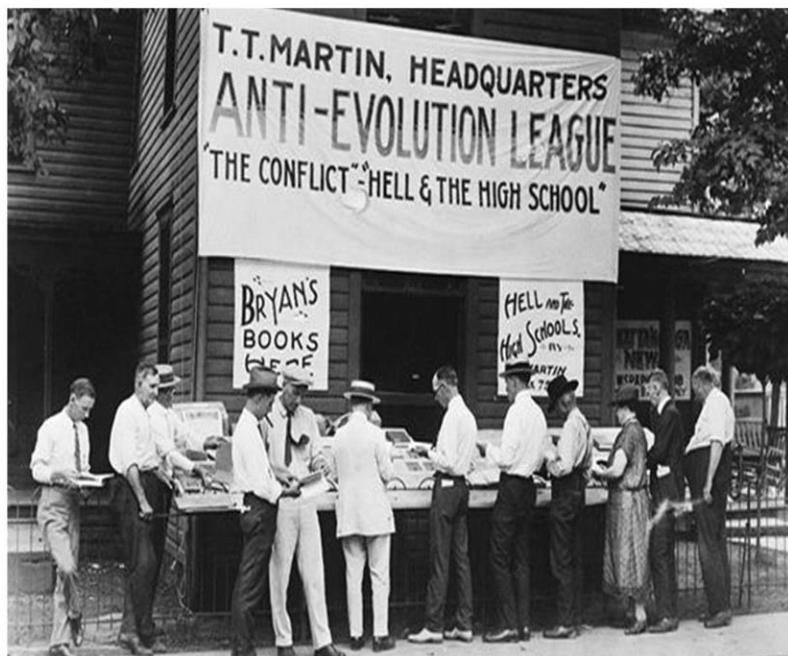
When Cornelius was called to the witness stand, Darrow spoke. "I know that many of you with faith in the Bible's teachings find it impossible to believe that man evolved from apes thousands of years ago." He then pointed to Cornelius and said, "Yet sitting before you today in this courtroom is an ape from the fourth millennium, an ape thousands of years more advanced than any living man."

**APE SPEAKS**  
Cornelius, who, along with his wife Zora, was accidentally transported backward through time from centuries hence, spoke eloquently of a future world ruled by apes. The fantastic testimony caused many ladies in attendance to fall victim to swooning and fainting spells on this hot July day.

"My friends, the humans," Cornelius said in an erudite British accent, "I understand why it might first appear to you that evolution could not be true. I myself at one time did not believe that humans could talk like apes. Then I met a man named Taylor." He talked. But I still didn't believe, until I discovered a human child's doll at an archaeological site, a doll that, although human, spoke as an ape did. My prejudices were dispelled by this evidence that a larger society of men had once possessed the power of speech, and indeed dwelled



William Jennings Bryan









## Persuasive Advocacy or Ethical Dilemma?

### Scopes Monkey Trial – Cross of William Jennings Bryan

- So, when you read that the whale swallowed Jonah, you accept that literally?
  - Was it the ordinary run of whale or one made especially for that purpose?
  - Any idea who Noah threw the rope to when he docked the ark?
- 

- Canon 18 (1908) Treatment of Witnesses and Litigants

*A lawyer should always treat adverse witnesses...with fairness and due consideration...*

## Techniques of Persuasion and Advocacy Techniques

Leading questions establishing complete control

- Scopes Case Direct Examination
  - *You've given considerable study to the bible, haven't you Mr. Bryan?*
  - *You have written and published articles on the bible almost weekly for fifty years?*

## Techniques of Persuasion and Advocacy Techniques

### Challenging credibility by absurdity

- Scopes Case Direct Examination
  - *So that 4,273 years ago there was not a living thing on this earth, excepting the people on the ark and the animals on the ark and the fishes.*















# Persuasive Advocacy or Ethical Dilemma?

## Dr. Ossian Sweet Case

- I insist there is nothing but prejudice in this case...I know what I am talking about and so do you...
- You need not tell me you are not prejudiced. I know better. We are not very much but a bundle of prejudices anyhow.

- 
- **Canon 15 (1908) How Far a Lawyer May Go in Supporting a Client's Cause:**

*It is improper for a lawyer to assert...his personal belief in...his client's innocence or the justness of his cause.*

*No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty...*

- **The Golden Rule and Darrow**

*It is inappropriate for counsel to argue to jurors that they should put themselves in the place of one of the litigants in deciding the outcome of the case.*

# Techniques of Persuasion and Advocacy Techniques

## Ending Strong – Making your last words count

- Dr. Ossian Sweet Closing Argument
  - *Their eyes are fixed on you. Their hearts go out to you. Their hopes hang on your verdict.*













# Persuasive Advocacy or Ethical Dilemma?

## Leopold and Loeb Sentencing Argument

- “I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding that life is worth saving, that mercy is the highest attribute of man.”

- 
- Rule 3.4 Impartiality and Decorum of the Tribunal

*A lawyer shall not...*

*...In trial, allude to any manner that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...or state a personal opinion as to the justness of a cause*

# Darrow's Story Telling Approach

- Creating pictures with words.
- Taking us to the place being described.
- Creative use of themes
- Good trial lawyers cause jurors to have visceral reactions to their story.
- The I'm one of you approach
- Simple terms, simple explanations
- Creatively and respectfully pointing out the absurd
- Pure argument – facts/inferences/conclusions

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