

He Answered

Discreetly

ELDER L. WHITNEY CLAYTON OF THE PRESIDENCY OF THE SEVENTY



I am grateful to be with you and sincerely appreciate the honor awarded this evening. I am also grateful that our daughter Brooke was asked to introduce me. Thank you for that thoughtful, personal consideration. I am very grateful both for the things Brooke said and for the things she generously omitted. || I suspect that an important consideration for this award is the calling in which I serve rather than any personal merit on my part. There are many lawyers whose accomplishments far outstrip mine. Still, Mark Twain said that he could “live for two months on a good compliment.” His comment captures my feelings. Thank you very much. || I have been a member of the J. Reuben Clark Law Society for several decades. Kathy and I attended what I recall as having been the inaugural meeting of the Law Society in Los Angeles. We unfailingly attended the meetings of the society in Orange County, California. Many of my closest friends are members of the society. I have tremendous respect for noble lawyers. At their best, lawyers help ease humankind through the rough spots of life.

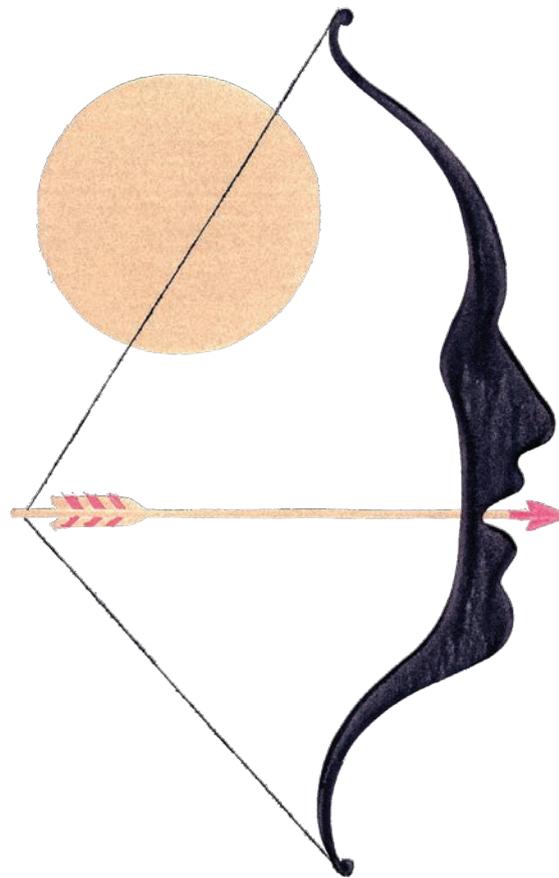
The Two Great Commandments

I would like to recount an experience from early in my legal career. I met one afternoon with a new client in Orange County who asked me to accept a case that had just been filed in federal court in San Francisco. I agreed to do so. There was a hearing scheduled the next morning in San Francisco. Under the circumstances it was not possible to obtain a continuance of the hearing, so I flew to San Francisco that evening and went to the courthouse the next morning.

When the case was called, each of us attorneys who represented parties in the lawsuit made an appearance. However, I told the judge that I was not a member of the bar of the United States District Court for the Northern District of California. When the judge heard this, she asked if there was anyone present who would move my admission so that I might participate in the hearing. One of the other attorneys stepped to the microphone and said, as I recall, the following: “Your honor, I am pleased to move the admission of Mr. Clayton. I have known him now for nearly two minutes, and during that entire time he has shown himself to be of good character and high professional standards.” The court granted my admission and the hearing went forward. The case was settled within a month or so.

But suppose the case had not been settled so quickly. Would that attorney have been willing to make the same statement about me had the case dragged on for several years, had a settlement been impossible, and had the stakes been very high? Similarly, how would his client have felt about my character, ethics, and reputation after depositions, cross-examination, and trial?

The record of an exchange between the Savior and the Sadducees about the resurrection is followed by an account of the Savior’s conversation with a scribe:



And one of the scribes came, and having heard them reasoning together, and perceiving that he had answered them well, asked him, Which is the first commandment of all?

And Jesus answered him, The first of all the commandments is, Hear, O Israel; The Lord our God is one Lord:

And thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind, and with all thy strength: this is the first commandment.

And the second is like, namely this, Thou shalt love thy neighbour as thyself. There is none other commandment greater than these.

And the scribe said unto him, Well, Master, thou hast said the truth: for there is one God; and there is none other but he:

And to love him with all the heart, and with all the understanding, and with all the soul, and with all the strength, and to love his neighbour as himself, is more than all whole burnt offerings and sacrifices.

And when Jesus saw that he answered discreetly, he said unto him, Thou art not far from the kingdom of God.¹

The simple statement that “Jesus saw that he answered discreetly” is one that I have pondered. The first and second commandments were not given with an exception rendering them inapplicable to lawyers. The adversary system produces a charged atmosphere and intense competition. Fortunes, livelihoods, personal and professional reputations, liberty, and even life itself can be at stake. How can a lawyer reconcile these two commandments at the same time he or she satisfies the duty owed to the client?

We call these two commandments the great commandments because all other commandments depend on them. The Savior said, “On these two commandments hang all the law and the prophets.”²

Compliance with these two fundamental commandments is the eternal standard for all that we say, do, and even think in our lives. “For our words will condemn us, yea, all our works will condemn us; we shall not be found spotless; and our thoughts will also condemn us.”³ Every aspect of our lives must bow to these two commandments, for, in the

end, all that we do will be judged by how well our lives conform to them.

A Genuine Spirit of Christian Goodness

All of us are aware of the spirit of confrontation and discourtesy that infects communication in today's public square. Too many people in the public eye or with access to the public ear speak with disdain, ridicule, or contempt for those with whom they disagree, apparently unconcerned about or oblivious to the harm such invective inflicts on public sentiment and morale. This abuse pervades newscasts, debates, and talk shows.

Many jurisdictions impose rules or standards for the professional conduct of the lawyers who have the privilege of working in them. Law schools in the United States commonly teach and require courses in professional responsibility, and, in most states, passing a professional responsibility exam is a requirement to practice law.

My experience with most attorneys, in and out of the Church, was that they conducted themselves professionally and diligently. Unfortunately, we nevertheless find discourse and correspondence among lawyers that is negligently or even intentionally abrasive. Some lawyers criticize and disparage other lawyers. They make *ad hominem* arguments that create a poisonous atmosphere among counsel. Some attorneys establish a persona of toughness by the noxious way in which they treat opposing counsel. In one case I saw an LDS attorney repeatedly mispronounce the opposing lawyer's name to highlight its Jewish origin, which was sort of an ironic tragicomedy—a Mormon making fun of a Jew because of his religion.

These attorneys' efforts seemed designed to wear their opponents out with personal attacks rather than calculated to weaken their adversaries' cases and the evidence claimed to support them. I suspect that most of the lawyers who spend time in litigation have witnessed this sort of behavior.

At some point, tenacious representation becomes overzealous and unchristian. Godless behavior in the pursuit of legal victory is not a virtue; it is a rejection of the first

and second commandments and of Him who gave them. If care is not taken, the demigods of victory, of personal reputation for ferocious advocacy, and of earning fees wither allegiance to divinity and become a form of apostate worship.

Sometimes lawyers seem to feel their offensive behavior is justified because they are zealously discharging their duty to their clients or they think that they are in the "right." The goal in life, however, is not to be right but to be good. Being good means doing good. Even if an attorney believes that a client's position is morally right or that in some point contested during a lawsuit the attorney personally is in the right, in a deposition or anywhere else the attorney's communications and conduct should be drenched with the spirit of genuine Christian goodness. No variety of legal success will compensate for failure to keep the first and second commandments.

I do not mean to assert that an LDS attorney should be a timid milquetoast. An advocate is under no obligation to help his opponent make his case or to fail to take honorable and reasonable advantage of another's mistakes or lack of preparation. An attorney may honorably outwork, outprepare, outthink, and outpresent an opponent. An attorney can honorably cross-examine with skill, pointing out inconsistencies and reasons to doubt a witness's testimony or credibility. It is no blemish on one's moral honor to have an opponent feel impressed by and perhaps even fearful of one's skill, reasoning, work ethic, preparation, and tirelessness.

This address was delivered on January 27, 2012, at the J. Reuben Clark Law Society Annual International Meeting, where Elder Clayton received the J. Reuben Clark Law Society Distinguished Service Award.

I believe, however, that an attorney should never stoop to levels of behavior that are inimical to the key commandments and covenants that guide a Christian in daily living and undergird every moral precept. Ultimately, the golden rule is still in force, as are the first and second commandments. A Christian attorney's duty is higher than to simply stay within the confines of the law.

If you are practicing law, most of your legal opponents will learn at some point that you are a member of The Church of Jesus Christ of Latter-day Saints. When they do, will that knowledge advance the progress of the kingdom of God because of their

respect for your personal commitment to the highest ethical and personal standards? Will they observe that you follow the Savior in everything you do? Or will your behavior cause them to reject our faith because of the negative example they have seen?

Jesus taught:

A new commandment I give unto you, That ye love one another; as I have loved you, that ye also love one another.

By this shall all men know that ye are my disciples, if ye have love one to another.⁴

Although this commandment to love one another is two thousand years old, it must be kept evergreen in our conduct.

At baptism we covenant with God that we will

bear one another's burdens, that they may be light;

. . . Mourn with those that mourn; . . . comfort those that stand in need of comfort, and . . . stand as witnesses of God at all times and in all things, and in all places that [we] may be in.⁵

When we succumb to the temptation to treat others in ways that do not accord with these fundamental commandments, to one degree or another we break our sacred baptismal covenants. Instead of helping others bear their own burdens, which surely are heavy enough, we become burdens for them to bear; we give them reason to feel like mourning, and we unquestionably fail to stand as witnesses of God.

"And Nothing Shall Offend Them"

The Apostle James recorded perceptive teachings about the importance of controlling what we say. He wrote:

If any man offend not in word, the same is a perfect man, and able also to bridle the whole body. . . .

. . . The tongue . . . is an unruly evil, full of deadly poison.

Therewith bless we God, even the Father; and therewith curse we men, which are made after the similitude of God.

Out of the same mouth proceedeth blessing and cursing. My brethren, these things ought not so to be.⁶

Paul taught that we should “give none offence”⁷⁷ and noted that disciples of the Savior should live “giving no offence in any thing.”⁷⁸

Challenges in our communications, of course, can and do arise outside the office and the courthouse. I will share a personal experience from last year. As I do, please remember my father-in-law’s clever comment that “even the worst of us can serve as a bad example.”

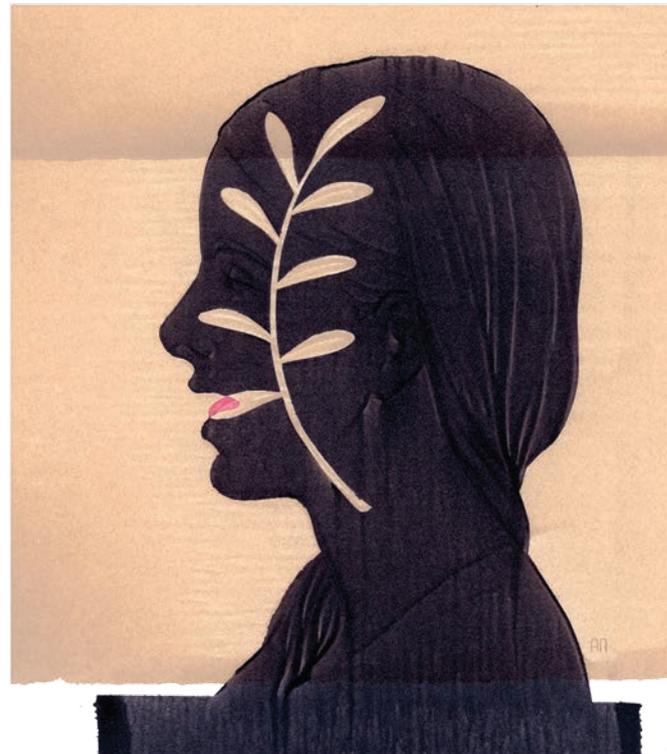
Late last summer I drove to a large gas station to fill my car. Big yellow arrows were painted on the ground to direct the flow of traffic through the station’s many gas pumps. Only a few cars were at the pumps, so I decided to save some time. I ignored the arrows and drove the wrong way into the station and over to a pump. I got out of my car and started to fill the tank.

A few moments later a station attendant walked over to me and asked nicely if I had seen the arrows. I said yes. He then politely asked why I hadn’t followed them. I felt a little defensive and told him I had noticed there were only a few cars at the pumps, so it didn’t make any difference that I hadn’t followed the arrows. He asked me to follow the arrows in the future. I agreed to do so, but I believe we could both feel that my agreement was grudging. He thanked me and walked away. I finished filling my car and drove away feeling embarrassed by my behavior.

I knew I needed to return and apologize. I could have done so right then, but I didn’t. A week later I drove to the station to see if the attendant was there. He wasn’t. A few days later I went by again. This time he was there. I drove in (the right way this time, following all of the arrows) and started to fill my car. I then walked over to the attendant and told him I needed to apologize. I reminded him about our interaction and asked for forgiveness. He smiled and extended his hand to me. He was perfectly polite. We had a courteous exchange.

He was kind to forgive me so readily. I was grateful. But I also knew that if I had behaved better in the first place, there would have been nothing to forgive other than my failure to follow the arrows. I had given him offense, and he chose to disregard it. His behavior was exemplary.

The challenge of behaving our very best is a two-sided coin. First, an attorney should not resort to improper treatment of opposing



counsel or witnesses, no matter the advantage that one believes will follow or the reasons that seem to justify doing so. This means that we should not *give* offense.

The gas station attendant’s example reveals the other side of the coin. We do not need to surrender ourselves emotionally to the behavior of others when their conduct sinks below acceptable levels. We neither *give* nor *take* offense, including in our professional practices.

Litigation can become tense and even heated. Tempers can flare and emotions can snap. The temptation may arise to become defensive, irritable, or rude; to get even; or to become abusive. In each case doing so would be giving in to feeling offended. It is hard not to be drawn in to the personal attacks, ridicule, and name-calling that can characterize litigation. Becoming offended is a choice, however; it is a decision. No one can compel someone else to become offended, angry, or vengeful. Our moral agency precludes that and places us, not others, in charge of our

emotions and our conduct. Thus, while it is true that we should not give offense, it is likewise true that we should not take offense, no matter what another attorney says or does.

Understanding this law of personal accountability for both our actions and our reactions helps us see teachings from the Sermon on the Mount more clearly:

Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth:

But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.

And if any man will sue thee at the law, and take away thy coat, let him have thy cloke also.

And whosoever shall compel thee to go a mile, go with him twain. . . .

Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy.

But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you.⁹

A devoted Christian attorney will likely need to be more astute, better prepared, doggedly relentless in pursuing the facts, and more resolute than one who seeks to weaken opposing counsel rather than win a case on the merits. There is a quiet dignity that comes from excruciating preparation and holding the moral high ground. There is great strength in righteous certainty of self. My experience was that attorneys, judges, and courtrooms become aware of and responsive to those attributes. The longer I practiced law the more fully I came to realize that I could do much to control the temperature in heated litigation.

The Book of Mormon provides an example of choosing not to be offended. During a protracted war between the Nephites and the Lamanites, Captain Moroni sent a letter with stinging criticism to Pahoran, the head of the Nephite government. Pahoran's return letter to Captain Moroni is instructive:

And now, in your epistle you have censured me, but it mattereth not; I am not angry, but do rejoice in the greatness of your heart. I, Pahoran, do not seek for power, save only to retain my judgment-seat that I may preserve the rights and the liberty of my people. My soul standeth fast in that liberty in the which God hath made us free. . . .

*And now, Moroni, I do joy in receiving your epistle.*¹⁰

Pahoran's charitable reaction to Moroni's letter helped bring immediate resolution to a critical problem and set the foundation for the Nephites' eventual victory in the lengthy war. If he had instead chosen to be offended, the resulting story might have been much different. His victory over his own emotions preceded the victory of his people and country. Indeed, "He that is slow to anger is better than the mighty; and he that ruleth his spirit than he that taketh a city."¹¹ Pahoran answered discreetly.

Mormon's teachings capture the essence of charity, which is the crowning virtue possessed by true disciples of the Savior. Charity neither offends nor takes offense: "Charity suffereth long, and is kind, and envieth not, and is not puffed up, seeketh not her own, is not easily provoked, . . . beareth all things, . . . endureth all things."¹²

Following the agony of Gethsemane, the Savior was arraigned before angry scribes

and Pharisees in an inquisition convened in the middle of the night. There He was falsely accused, spit upon, slapped, abused, and questioned. When the high priest said to him, "Answerest thou nothing?" Matthew recorded simply that "Jesus held his peace."¹³

Compelled to appear next before Pilate, He was again accused and questioned. "And the chief priests accused him of many things: but he answered nothing."¹⁴

He was then taken to Herod, and the same thing occurred. "[Herod] questioned with him in many words; but he answered him nothing."¹⁵

The Psalmist taught that keeping the commandments immunizes us against being offended, saying, "Great peace have they which love thy law: and nothing shall offend them."¹⁶ Personal spiritual ascendancy over the natural man is made possible when our own sincere efforts are multiplied by the blessings of the Atonement and the grace of Christ. Always, the Savior makes up what we yet lack if we turn to Him in genuine humility and faith.¹⁷

To Act and Answer Discreetly

Recently I learned of a Church member who as a lawyer successfully handled a large case through complicated litigation. He greatly impressed the officers of the opposing client, a major corporation from another country. When the case ended, the opposing client asked him to leave his firm and practice to work in-house for them. He agreed to do so. His conduct must have been impressive, professionally and personally.

The Book of Mormon account of Ammon's zealous defense of the king's flocks and servants can be applied to teach us that a lawyer should do whatsoever the client wants him or her to do "which is right."¹⁸

Alma asked us to consider whether we have been stripped of pride and whether we make a mock of our brethren or heap on them persecutions.¹⁹ These questions should guide us when we think about how we speak to or about an opposing attorney or witness.

One evening years ago, while serving as a ward mission leader, I was in the apartment of some full-time missionaries as we prepared to leave for an evening of proselytizing. The phone rang and I was asked to answer it. The man at the other end of the

phone line told me his name and asked for the missionaries to teach his wife and him the gospel. I asked him how he had learned about the Church. He said that he had done business with one of the local stake presidents and that "any church that can make a man like that is one that I have to know more about." Within weeks the caller and his wife were baptized.

In the case in which the lawyer in San Francisco moved my admission based on our being acquainted for just two minutes, what would have happened had we known each other longer? There were hundreds of other cases in which I participated. Did my actions tend to help the work of the Lord go forward, or did they cause some disrepute to attach to His name and His Church? If the missionaries knock on the door of your opposing counsel or the opposing party, will he or she be more likely to listen as a consequence of your conduct?

I pray that we may all strive to answer discreetly in every aspect of our lives.

I pray the Lord's blessings upon you in all that you do and share with you my witness of the Father of us all, His Living Son, and the Restoration of Their Church and kingdom to the earth. In the name of Jesus Christ, amen.

NOTES

1 Mark 12:28-34.

2 Matthew 22:40.

3 Alma 12:14.

4 John 13:34-35.

5 Mosiah 18:8-9.

6 James 3:2, 8-10.

7 1 Corinthians 10:32.

8 2 Corinthians 6:3.

9 Matthew 5:38-41, 43-44.

10 Alma 61:9, 19.

11 Proverbs 16:32.

12 Moroni 7:45.

13 Matthew 26:62-63.

14 Mark 15:3.

15 Luke 23:9.

16 Psalm 119:165.

17 See Matthew 19:16-22; Mark 10:17-22; Ether 12:27.

18 Alma 18:17.

19 See Alma 5:28, 30.