Book review: The way of the Trial Lawyer by Rick Friedman

One of my favorite classes in law school was "the law and ethics of war and warfare", taught by Professor Mark Reiff.[1] I remember Professor Reiff telling us that his "war and warfare" class, in particular, is one of the most practical classes we'll take in our LLB program and it will help us think about how to practice law.

At first, I was skeptical about Dr. Reiff's claims. How could discussions about the use of military force from one state to another, targets, weapons and tactics—that is, the means and methods of warfare, and our discussions on whether those means and methods are tactically effective ways of achieving certain outcomes, have any bearing on legal practice?

As I learned throughout the semester, ultimately Professor Reiff's course was designed to teach us about the legal, moral, and strategic implications of our decision making, as students and prospective future lawyers. I confess that although I haven't had to do much thinking about the ethics of war and warfare between nation states, Professor Reiff's claims of his course's practicality has withstood the test of time—as I've had to think hard about the legal, moral and strategic implications of my decisions on each of my files—with some files being harder than others. While there is no shortage of legal textbooks that get published year after year, there is a dearth of practical guidance on the moral implications of our decision making as counsel. Until now.

Rick Friedman's "*The Way of the Trial Lawyer: Beyond Technique*"

Like all of Rick's books, *The Way of the Trial lawyer* is challenging and I expect that it is another one of Rick's books that I'll have to savour, digest, reflect upon, and re-visit time and time again—and his book is to be read as such.

Rick's introduction refers to Aristotle, who is reported to describe three main types of persuasion: logos, pathos and ethos:[2]

> *Logos* is logic. The rational, logical argument we spent so much time on in law school. A lawyer unable to employ logic is not going to be much of a lawyer.
>
> *Pathos* comes from the Greek word *pathea*, meaning "suffering" or "experience"… Pathos is an appeal to thoughts and emotions that already reside in your audience.
>
> *Ethos* forms the root of *ethikos*, meaning "moral", or "showing moral character". It has come to refer to the character or fundamental values of a person or culture. Aristotle is reputed to have said that ethos is the most powerful form of persuasion.

Rick highlights that while "every lawyer has been exposed to at least three years of *logos* training", that there are innumerable books and seminars that deal with *pathos* on how to appeal to the feelings and

[1] You can view some of Mark Reiff's methods of moral reasoning lectures here https://markreiff.org/categories/6-videos.htm, accessed February 19, 2021.
[2] Friedman, Rick, 2020. *The Way of the Trial Lawyer: Beyond Technique*. Portland: *Trial Guides*, p. xx – xxi.

emotions of jurors[3] or triers of fact, he was unaware of any writing or CLEs that attempted to cultivate *ethos.*[4]

At times in my personal and professional life, I have erroneously assumed that cultivating impressive technical skill, or merely appealing to someone's emotions, is sufficiently persuasive. However, neglecting the cultivation of ethos—that is, the cultivation of moral character—exposes my weaknesses, vulnerability and blind spots.

For example, if I avoid addressing my anger that arises as a result of perceived unfairness or dealing with difficult opposing counsel, I could end up responding in a way that is completely disproportionate to the situation at hand. By not expressing anger sparingly, I allow my opponent to have power and control over me instead of leading as a calm and unflappable professional.[5] If I do not address my fears, which could very well be rooted in childhood messages or past events, I could panic, freeze, or make jokes in the courtroom which inhibits and erodes my efficacy as an advocate.[6] While cultivating ethos requires discipline, humility and at times, painful self-reflection, the costs of refusing to do so compound at the end of one's life and career.

Rick tells the following story:[7]

> The best criminal defense lawyer I have ever met or heard about is Jim McComas.[8] In an email he wrote me, he said, "The sincerity of a true heart is the only requirement of effective advocacy. No one wants to know that, because a true heart is so much harder to acquire than a few advocacy techniques".
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> What the heck is a "true heart"? It is ethos.

Rick's books have historically been a source of wisdom in navigating the minefields of our profession, and this book is no exception. His book provides practical guidance to plaintiff's counsel on clarifying and discerning our moral values, how to overcome our fears, how to respond to opponents, and several concrete examples of how we can pursue and cultivate moral steadiness. He distinguishes between self-compassion and self-pity, urging counsel to adopt the former instead of the latter and provides hopeful encouragement against the "cancer of comparison". He reminds us that regardless of our backgrounds, each of us have a unique blend of qualities to flourish as trial counsel. It is comforting to know that the discernment and cultivation of ethos is a lifelong pursuit; I am grateful for Rick's pioneering book and highly recommend it.

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[3] *The Way of the Trial Lawyer*, p. xxi.
[4] *The Way of the Trial Lawyer*, p. xxi. Rick spoke about *logos, pathos* and *ethos* in this keynote address to the Southern California Trial lawyers Conference given at Pepperdine Law, located here: https://www.youtube.com/watch?v=JImMU6aoii8&t=6s (accessed February 19, 2021).
[5] Rick's chapter on anger is at pages 95-97 in *The Way of the Trial Lawyer*.
[6] See Rick's masterful chapter on fear on pages 59-70 in *The Way of the Trial Lawyer.*
[7] *The Way of the Trial Lawyer*, p. xxii.
[8] If you get a chance, check out Jim McComas'excellent book *Case Analysis: Winning hard cases against the odds*. 2011. Portland: Trial Guides.