TRIBUTE TO ARTHUR MILLER

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What a tremendous honor and privilege it is for me, both personally and professionally, to pay tribute to Professor Arthur Miller, who always insists on being called "Arthur," and who is, I think *unquestionably*, *the* greatest legal giant of our time. And I say that with all due respect to all of the other legal giants with whom I am also honored and privileged to share this stage.

In puzzling out why I've been asked to join this august group, it strikes me that, unlike many of the rest of those who are here, I work with Arthur not so much in his academic, television, or public speaking lives, or as a judge hearing arguments, but rather, I've mostly come to know Arthur in the everyday legal trenches where cases are formulated, complaints are drafted, briefs are written, and cases are won or lost. And so I want to share with you a small window into Arthur's additional life, as a highly successful practicing lawyer.

But first I also want to tell you a little bit about how I came to know Arthur.

As a law student at NYU, I got to attend only one Arthur Miller civil procedure lecture, when my own rather accomplished professor, John Sexton, persuaded Arthur to give a guest lecture. That was the first time I ever saw the author of Wright & Miller in person, and even after John's huge build-up, that lecture—on Rule 23—exceeded all expectations, and my own work in the class action field can in many ways be traced to it.

In any event, about a year after graduating from law school I got married and moved to a condominium complex in New Jersey, and when the weather was good, my wife and I liked to spend weekends relaxing by the pool and playing tennis. Except that most weekends I got so caught up watching Arthur's *Fred Friendly* series, that my wife literally could not pry me away from the TV set, and would leave the house without me, in total bewilderment as to why I would want to be inside watching television. For those of you who missed these TV programs, I urge you to find them. They were *terrific*.

I joined my current firm about seven years later, and learned on my first day that the firm frequently worked with Arthur Miller, and that Arthur was in talks to become "Special Counsel" to the firm. What I didn't know was that those talks had been ongoing for

years, and would continue for another fourteen years before Arthur finally decided to make his relationship with the firm official.

My first assignment at the firm required me to write a somewhat difficult response to an interlocutory appeal, and I was told to send the first draft to Arthur for review, which was really pretty scary since I didn't yet know Arthur and so didn't yet know how great he is to work with; all I knew was John Sexton's stories about what it was like when John worked for Arthur at Harvard, which somehow left me feeling more than just a little inadequate.

We ultimately worked very closely together on the brief in that case, which I think was the only case of its type to ultimately be successful. And make no mistake: Arthur's comments and ideas were the thing that made the difference in that case.

My absolute favorite experience, though, happened about a year later.

I had been working on a federal securities class action against the officers and directors of a life insurance company, when a *state* court judge presiding over the company's *state* court reorganization, purported to enjoin our clients from pursuing their *federal* causes of action in *federal* court.

The firm asked Arthur to get involved and to argue the appeal, and since it was my case, it was up to me to work with Arthur and to help him prepare for the argument.

Our clients had purchased three different types of financial instruments, including something called a "GIC." It wasn't really necessary for Arthur to know anything about the GICs, but Arthur is utterly thorough in his preparation, and so still wanted a full tutorial on the GICs, which I convinced him wasn't necessary and which I never provided.

So of course, the GICs ended up being the centerpiece of our opponents' argument. You can imagine Arthur's look of . . . consternation . . . as he stood up on reply, and proceeded to give one of the most brilliant arguments that I've ever heard, based entirely on the relevant attributes of the GICs.

And here's the funny part, where you really have to picture Arthur in your mind. After the argument ended, and after the panel told us what an honor it was to have Arthur in the courtroom and how brilliant the arguments were, and after several moments of utter silence in the cab while we all caught our breath and Arthur just sort of ruminated, Arthur looked up from the back seat and told me he had just one question: "Will you *please* tell me, just what the *hell* is a GIC?"

A quick additional aside about Arthur's modesty. On that same trip, the woman in charge of the lounge where we were preparing came over to Arthur and insisted that she knew him from someplace. Arthur told her that he didn't think they'd ever met, at which point she said, breathlessly, "I know who you are, you're Arthur *Murray*!" Arthur just smiled and told her that no, he wasn't Arthur Murray, and in fact, he didn't even dance very well.

Since that time, it's been my enormous privilege to work with Arthur on countless cases and potential cases, including most recently a Second Circuit argument where the Second Circuit ruled our way on absolutely everything that Arthur argued, but reversed on the one issue the panel told both parties not to bother arguing. Although I'd like to think that the Court wasn't ducking him, it has occurred to me that perhaps the reason that the panel instructed Arthur not to argue that point was that they didn't want him to change their minds.

Of course, beyond these everyday cases, Arthur also argues before the Supreme Court, and I would be remiss if I didn't at least mention his recent success there in the *Tellabs* case,[1] which we all like to say that Arthur won by a vote of 1–8, because even though the Court vacated the ruling we won below, the standard that the Court announced, in a majority opinion authored by Justice Ginsburg, was one that we were all quite pleased with, and in fact the *Tellabs* case is still alive in the lower courts today.

To give you just some idea of the great respect that Arthur commands at the Supreme Court—where some of the Justices are his former students—I'd like to read to you from just a portion of the transcript of the *Tellabs* oral argument.

Justice Stevens wanted numbers to help him understand what level of certainty Congress meant when it used the words "strong inference" in the PSLRA, and asked Arthur: "[D]o you think you can categorize the strength in percentage terms?"

Arthur responded that he "ha[dn't] seen a judicial opinion that says at the 33 and one-third percentage of probability, I've got to give it to the jury."

At that point Justice Scalia interrupted, and said that no, he thought it was "66 and two-thirds."

Whereupon, and without missing a beat, Arthur asked: "Is that because you never met a plaintiff you really liked?" If you think about it, that was really a brilliant response, and not one that many of us could get away with.

1. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).

Plus, a moment later Arthur also showed he could be self-deprecating. After Justice Roberts questioned Arthur's use of the word "okay," Arthur responded: "*No*, I did not mean that. *Don't* take me literally on that. For heaven's sakes, I'm from *Brooklyn*."

I'll conclude by reiterating what a personal and professional thrill it has been for me to work with and get to know and enjoy Arthur over these past fifteen or so years, whether it's been brainstorming over a case or a point of law, or just shooting the breeze. It is these opportunities that keep me going whenever I get down or depressed. Because as a lawyer, and as a human being, there is nothing more satisfying or enjoyable than spending time with the man who I am just so blessed, and privileged, and honored, to be able call my friend, Arthur Miller.

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