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ADVOCACY AS CRAFT—THERE IS MORE TO LAW SCHOOL THAN A "PAPER CHASE"*

by

*Irving R. Kaufman***

SEVERAL months ago, in an address before the New York County Lawyers' Association, I discussed a number of deficiencies in our profession and specifically directed attention to the inadequate quality of advocacy and representation being furnished to a substantial percentage of litigants in our courts.

At that time, I explored the interdependency between bench and bar which characterizes our mutual pursuit of justice. Speaking as a federal judge, a position I have occupied for almost a quarter century, I noted that in view of the current explosion of litigation, courts, more than ever before, require the aid of competent lawyers, a service unfortunately lacking in too many cases. Accordingly, the title of my talk was "The Role of the Advocate: The Court Needs a Friend in Court."

My criticism was hardly a novel discovery, or a revelation. More than twenty years ago, one of the greats of the trial bar, Lloyd Paul Stryker, in a series of lectures at the Yale Law School, commented:

The Art of Advocacy! It is an art indeed, but one which in these latter days has fallen into neglect, judging by the lack of enthusiasm evinced for it in many of the law schools as well as in the forum where both its theory and its practice are of such vital moment to those who would essay it as well as to those for whom it is essayed.

Despite the force of the voices which have addressed this subject in the past, the profession, after all these years, is still searching for methods to improve the quality of advocacy. Thus, I am delighted to see that Southern Methodist University has convened this symposium to consider the problem once again in depth. I am also grateful for the opportunity to expand somewhat on my own views.

My premise today, as it was in my previous talk, is that judges and lawyers are partners in the production of a rare and valuable commodity—justice; and that this partnership is facing a vastly increased demand for its product. While we may be able to withstand an energy shortage, any "shortfalls" in justice would be disastrous for our nation. Yet the demand for this priceless commodity continues to grow. Consider, for a moment, the proliferation of new roles for lawyers in the criminal justice system in the mere eleven years since *Gideon v. Wainwright*. The Constitution, of course, now requires that indigents shall receive full legal representation at public expense in every criminal proceeding which may result

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in incarceration and on any appeal available as a matter of right. The role of the lawyer is being expanded further by statutes and lower court decisions governing the detention phase of criminal proceedings, sentencing, collateral attacks on convictions, and the rights of prisoners and probationers. Similar trends are evident in civil commitment proceedings and, most notably, in the juvenile justice system, where about half of all cases involving criminal conduct are processed.

Not only are lawyers increasingly expected to participate in more phases of what I characterize as coercive justice cases, but their role at each phase is also being drastically redesigned. In my address before the New York County Lawyers' Association I observed that a recent report prepared for the Appellate Division, First and Second Departments, of the New York Supreme Court, concluded that lawyers representing indigent defendants should be required, in addition, to supervise a startling array of extra-legal services and information, including "housing information, job counseling, family counseling, psychiatric aid, and medical advisory rehabilitation."

Many of these services by lawyers, I have since learned, are currently being tested in various places and particularly in a clinical legal education program at the University of Chicago Law School, where students of law and social work, under the careful supervision of attorneys and social service professionals, are working in multi-disciplinary training programs designed to explore the concept of "Full Service Representation." This innovative approach reflects the public's extraordinary confidence in the contribution that lawyers can make toward shaping a more just society. Every lawyer, especially in these times, must find that a welcome bit of news. Nevertheless, we must recognize that such trust and responsibility place an even greater burden on the profession.

In the face of this rising demand for legal services, I hasten to suggest that lawyers must avoid the temptation to sacrifice quality for expedition. The rapid movement of cases can never be the rationale for supplanting thoroughness and excellence. The assembly line—which sacrifices the skill and personal involvement of the craftsman to the demands of mass production—may be an efficient way to produce automobiles, but such an approach to our judicial system, which insists, above all, upon seeing that justice is done to the individual litigant, is guaranteed to fail and fail miserably. Nor can lawyers "externalize their costs," as the economists term it, by cutting corners, presenting shoddy briefs or ill-prepared oral arguments and generally doing their jobs less skillfully, relying on judges to fill the gaps left by hastily prepared and improperly researched arguments. Judges, quite simply, no longer have the luxury of time to compensate for lawyers who do not present their clients' cases as well as wit and effort allow.

Indeed, it is antithetical to the basic tenets of our adversary system to expect judges to forego their traditional role as objective arbiters and come to the aid of unprepared counsel. We must never lose sight of the fact that our adversary system is bedrocked in the principle that the most direct path toward fairness and truth is one where the adversaries are as equally

matched as the constraints of human frailties will permit. This pivotal role played by the advocate in influencing the final result was, moreover, well documented in the landmark study of the American jury by Professors Kalven and Zeisel. Thus, it has been my premise that if we are to have a true adversary system, we must make every effort to eliminate the injustice which must necessarily arise when the outcome of a lawsuit is determined not by the merits of the cause but by the competency of the pleader. Accordingly, in my address before the New York County Lawyers' Association, I emphasized the failure of the *bar* to chart a sound course for improving the quality of trial and appellate advocacy.

This symposium requires, however, that I focus on the role of the law schools in our quest for more competent advocates. I suggest that, in addition to the bar associations, the law schools of this country must assume a substantial degree of leadership in satisfying the hunger for better trained trial and appellate lawyers.

It strikes me as particularly foolish to assume that following a three-year sojourn through the annals of appellate court opinions, the law student will emerge capable of performing the arduous duties of a courtroom lawyer. Without any experience, and with only so much specialized education as he chose to undertake—sometimes only a one semester course in evidence or criminal law, and frequently not even that—the newly-admitted member of the bar is formally deemed to be as qualified to engage in courtroom performance as is a lawyer who has spent a career toiling in that vineyard. Yet, we know from our frustrating experiences, that reality does not conform to the myth.

Since this symposium, if it is to succeed, must cast aside the cloak of tradition, and without any restraint openly examine our system of legal education in the light of today's needs, let me commence the inquiry. Twenty-five years on the federal bench, testing the product of law schools, should provide me with some qualifications to advise the producers how the consumers can best be served.

Of course, as is often the case, it is far more simple to state the problem than it is to solve it. What, after all, is advocacy? What ingredients must we mix to produce a Clarence Darrow—to create an individual whose very presence, whose ideas, whose words literally command the attention of the court and of the jury? Some might say the art of advocacy is really the art of persuasion and is too subjective to capture in any precise definition. That advocacy, like pornography, to paraphrase the words of my friend Justice Potter Stewart, written in the *Jacobellis* case, is something you cannot define but you know it when you see it. Even Aristotle was rather imprecise. He said the advocate should be able to understand human character and emotions and have the capacity to reason logically.

But, perhaps it would be better at this point to turn to something concrete. The law school, if it is to succeed in its goal to train more and better advocates, must begin with a nucleus of basic courses which I consider essential. No one would question, for example, the indispensable foundation

provided by such subjects as Civil Procedure, Criminal Law and Procedure, Evidence, Federal Jurisdiction, and Federal Practice.

In addition to these obvious requirements, I would certainly add a course in Ethics. I realize, of course, that insofar as bad lawyering is the product of bad character, or laziness, or apathy, there is little that can be done in law schools or ethics courses. I submit there are those lawyers who behave badly not because they do not know what is right, but because they do not care. Nevertheless, I have found that plain ignorance of traditional standards of ethical conduct is a not insignificant cause of poor quality advocacy. The law school curriculum can provide a ready cure for those afflicted with the malady of nescience.

Indeed, not only would I accord the subject separate course status, but, I suggest, that moral and ethical considerations should be infused in the teaching of substantive courses throughout the law school curriculum. For example, in a course on contracts, should not the neophyte learn that despite the wishes of his client, certain clauses are simply against public policy and should therefore be taboo? Or, in his torts course should he not be taught that the objective cannot be victory at any price; that offering clearly inadmissible and highly inflammatory evidence in the presence of the jury is dirty business? And that the practice of asking questions you know are improper simply to let the jury in on your suspicions, is to be frowned upon. Should not the future prosecutor or defense counsel, for that matter, learn this as well?

The very concept of an advocate—of one who represents, not adopts, his client's cause—has always stimulated fervent discussion. The defense of the unpopular individual—even a President rating low in the polls—is a traditional professional obligation we cannot forswear. The words of the eminent British jurist, Baron Bramwell, strike the proper note: "A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the Court."

Unrestricted freedom in client selection, however, must never be equated with unbridled license in the methods of representation. Indeed, important and intriguing ethical questions arise quite naturally from a lawyer's unique, almost schizophrenic role—as officer of the court on the one hand, and as guardian of his client's interests on the other—which are suitable feed for the most intellectual of appetites. I urge, for instance, that law students be confronted by the fascinating and challenging debate between John T. Noonan, Jr., Professor of Law at Berkeley, emphasizing the officer of the court model, and Monroe Freedman, now Dean of Hofstra Law School, countering with the so-called "hired-gun" philosophy. These writings, and others in the field, deserve study and synthesis, for the very least that a lawyer owes to both his client and the court is an awareness of the conflicting duties and obligations which derive from his singular position.

Leaving the basic curriculum, which of course should include the traditional courses that nurtured generations of lawyers, there is a strong temptation to rush headlong into what appears to be the Elysian Fields of clinical education. But must we learn at the expense of the living when there are legal

cadavers upon which to practice? Clearly not, and thus, like a course in anatomy, we should next concentrate on developing procedures for teaching the art of advocacy while still in the relatively sheltered confines of the law school.

I recall, though all too dimly I am afraid, that back in my law school days, every course, in some small measure, seemed to promote one's advocacy skills through that delightful professorial technique known as the Socratic method. Indeed, this approach may yet be alive and well, for one of my law clerks has told me of his oft-times agonizing, though, in the end, rewarding experience as a first semester student in a Procedure class taught by Professor J. W. Moore at Yale. I understand that Professor Moore was a boxer in his younger days and still has a penchant for using his students as sparring partners—in the classroom, of course. According to my clerk, anyone who could successfully withstand the good professor's onslaughts would have little difficulty holding his own in the most vigorous of appellate arguments.

I do not suggest, necessarily, that the Socratic method be retained. There are many ways of teaching the process of reasoning and argumentation—not all of which involve such linguistic fisticuffs. Moot Court programs, for example, may be useful in providing a suitable medium for cultivating the art of oral advocacy. More importantly, in formulating such programs, care should be taken to avoid slighting the development of the critical skill of brief writing. Words are the principal weapons in the advocate's arsenal. As many law review readers can testify, and some editors will admit, the rather plodding style in which review notes are often written hardly serves an exemplary role in molding a crisp cadence or furthering the art of persuasion, both of which are the hallmarks of the successful brief. Indeed, the judge is rare who does not—and all too frequently of late—criticize the quality of writing submitted to him in briefs and other documents.

Nor, may I suggest, need we march directly from the classroom to the courtroom in preparing our trial lawyers. Again, practice should first be had on the prime legal corpse, the actual trial record, before the public must bear the cost of a novice's errors on a live client. An experienced lawyer knows the virtue of "making a record." Yet law school education seems to ignore a study of the transcripts of important trials as a means of teaching the art of advocacy. Trial recreation, trial simulation, video tape techniques, and other visual aids, such as the excellent film of a Denver criminal trial narrated by Professor James Vorenberg of Harvard—all can be integrated into a course designed to develop the various courtroom skills used in opening, direct examination, cross-examination, summation, the art of objecting, and so many other factors that play important parts in the dynamics of a trial. Furthermore, trial time consumes only a small fraction of a litigator's life. A good deal of his work is devoted to preparation for trial, *e.g.*, interviewing witnesses and just ordinary paper strategy. Amplification of these skills—the drafting of complaints, answers, interrogatories, motions, the taking of depositions—can surely be achieved by performance, under adequate supervision, of course.

In short, my message to the law schools is the same as Thurman Arnold's, who urged in his autobiography that law schools must give up their disdain for the practical. Instead of being trivia around the perimeter of legal education, the teaching of trial and appellate advocacy should become a hub, a focal point. The old so-called fields of the law—contracts, torts, agency, conflicts—will, of course, remain important; and lawyers skilled in legal theory and public policy analysis are an asset to the profession. But the question becomes ones of emphasis and direction. I am reminded of a remark made by the distinguished judge and professor of law at Yale, Jerome Frank: "Our leading law schools are still library-law schools, book-law schools. They are not, as they should be, *lawyer-schools*."

There is, to be sure, a limit on what can be achieved in the relatively cloistered surroundings of the law school. Just as the medical student cannot, in the end, fully develop his bedside manner at the side of a desk, or his surgical technique from a text on surgery, so too must the law student finally depart the classroom to refine his advocacy skills. Thus, the culmination of our curricular analysis is an examination of the field of clinical education.

Clinical education programs can provide the experience of law practice around which law schools can weave the important doctrinal and theoretical course material. But, let me repeat a word of caution I sounded in my speech before the New York County Lawyers' Association: clinical education does not (or at least it should not) mean putting an untrained student in the courtroom and allowing him to sink or swim. I do not see any purpose in replacing inadequately prepared lawyers with inadequately prepared law students. The great opportunity presented by clinical education is that through close supervision by trained professionals students can learn to perfect their craft, and develop critical standards by which to evaluate their own performance. The aim is to train not just ordinary lawyers, but extraordinarily good lawyers. And here the bar has a vital role to play: clinical education is extremely expensive, since it requires not only trained supervisors but an extremely low student/faculty ratio to guarantee the requisite oversight of all aspects of the students' work. Experienced members of the bar, and I include here prosecutors and public defenders as well as the private bar, are uniquely suited to assist in teaching the art of advocacy. The organized bar must involve itself to a greater extent in clinical legal education programs in cooperative effort with law schools to insure the training of high quality advocates.

Courts too have a role to play in the successful implementation of clinical education. They must be receptive, though constructively critical, in considering the concept of student practice. At present, for example, consideration is being given to proposed rules of student practice in the United States Court of Appeals and in the District Courts of the Second Circuit, drafted by Dean Robert McKay of New York University Law School. The proposed rules are most interesting. They require, of course, that the student practitioner be accompanied at all times by the supervising attorney respon-

sible for the case and that he have client consent as well as the certified approval of the Dean of his law school.

Notwithstanding these safeguards, however, reasonable bounds must be placed on student practice. Few would seriously suggest that students be allowed to serve as principal counsel in felony cases or that they be permitted to argue an appeal in a United States Court of Appeals. But, courtroom experience is invaluable and hence I foresee a wide range of authorized practice for upperclass law students, including appearances before magistrates in criminal cases to handle arraignments, bail applications, identity and removal hearings, preliminary hearings and perhaps even misdemeanor trials. Students can also assist lawyers in civil cases in arguing pretrial motions and, in habeas corpus proceedings, students might be authorized under close supervision, of course, to handle both arguments of motions and the examination of witnesses. To go beyond these boundaries, however, may, I submit, be asking our trainees to run before they can walk—indeed, to operate in the main amphitheatre all too soon.

In light of the formative state of clinical education, emphasis in the development of such programs should be on flexibility and experimentation, exemplified by the University of Chicago's interdisciplinary, legal/social services program, which I mentioned briefly at the outset of my speech. Moreover, thought might be given, for example, to redesigning law school curricula to conform with the work/study model first employed for undergraduate education and now, I understand, actually being tested at some law schools. Dean Sovern of Columbia Law School has recently recommended implementation of a four year experimental syllabus, known as the 2-1-1 program, which would sandwich a year of practice between the second and the third years of the traditional law school curriculum. The key to success in the training of advocates—indeed, of the legal profession as a whole—lies in a willingness to innovate and in constant re-evaluation.

To sum up, then, what I am proposing is that law schools adopt a three-tiered curriculum designed adequately to prepare law graduates to assume the responsibilities of courtroom practice. At the first level, all law students should be exposed to the core-content of an advocacy program—courses in Evidence, Procedure and so on, in addition to the theoretical courses. At the next level, courses should be made available which explore some of the more refined and sophisticated techniques of advocacy, such as drafting a complaint, planning strategy, motion practice, and learning to prepare and question, as well as cross-examine, witnesses, while at the same time, of course, deepening theoretical knowledge. Students seeking this advanced training should have the benefit of modern learning techniques such as video tapes, as well as ready access to trial records. In conjunction with this advanced course regimen, students should have the opportunity to practice their courtroom skills under simulated courtroom conditions in mock trial and moot court appellate programs. Indeed, one of the most successful of these is the Trial and Appeals seminar at Yale Law School which allows a student to try a case in the first term and then argue the appeal from that

case, based on the record the student himself prepared, in the second term. Ultimately, students will reach the third stage in their clinical education which will bring them into the courtroom, under careful supervision, to develop their skills under actual trial conditions.

I do not believe for a moment that this three-tiered system is the final answer to the problem. It can be, however, an enormous step in eliminating the lack of practical experience that now characterizes almost all law school curricula.

In suggesting that law schools play a greater role in teaching lawyering skills, I am not unaware of the difficulties this will present to law teachers, for many are selected to join the faculty not because they possess these skills but for (a) high grades in law schools; (b) teaching skills; and (c) the ability to *write* on legal subjects. If "Clinical-Professors" are to be appointed on a non-tenure track with curious titles, it will be hard to achieve the objective of elevating clinical education and advocacy training to full stature as essential components of the law school curriculum.

Moreover, there are those at some of our leading law schools who profess to consider it unnecessary to give clinical training to potential lawyers. It is their theory that law schools need not teach practical lawyering because most of their graduates will go into the kind of firms which function the way "teaching hospitals" do in modern medicine. When you go to one of these firms and decide to specialize in trial work, you most certainly do not expect to pop into a trial during your first year. After three years you may get a chance to argue a motion or something akin to it, and for years thereafter you will be working with and under a much more experienced advocate. But, what of graduates who go out on their own, or who go to work for a legal aid group or an O.E.O. office which is too busy to supervise and teach the neophyte for a sufficient period of time? They do not get the same post-graduate special training and they pose problems for the client and the court. How do you design a curriculum which optimizes the education of both groups? Those in the first category should spend almost all their time deepening their theoretical knowledge of the law; the second group ought to receive a substantial amount of practical training while still in school. I suppose the real answer is to make some clinical training mandatory, and make a good deal more *available* to those who will need it.

In any event, a lawyer's education most certainly does not end on his last day of law school. Advocacy skills developed in law school must be honed to the proper sharpness on the grindstone of experience. Continuing education and experience are simply indispensable in molding the competent advocate.

By demanding experience, however, I hasten to make it clear that I do not intend to demean our able and dedicated young lawyers, who have my respect and highest regard. Many in this group represent the most energetic and most intelligent lawyers appearing before the federal bench and they are an asset—an invaluable asset—to the profession. Our adversary system finds strength and sustenance in the commendable dedication shown by these young lawyers. We are, I might say, in desperate need of the young lawyer

in the courtroom who is fearless in pleading the unpopular cause. If this prospective pool of important advocacy manpower diminishes, is not available, or is not well trained for the task that lies ahead, we shall not be able to supply the needs of those thousands of poor and underprivileged who daily filter through the judicial system. The courtroom must never become the private province of only the mature and affluent lawyer.

To be sure, I fully realize that everyone must argue his first appeal or try his first case. The inexorable logic behind that proposition does not, however, require that the advocate's debut be in the center ring. If law schools include an adequate clinical education program, and there is sufficient post-graduate training of the sort to which I have referred, then that "first" trial or "first" appeal will not be the cataclysmic event so often unsettling to the young lawyer.

I should add, moreover, that incompetent advocacy can hardly be considered the exclusive domain of the inexperienced. Indeed, there is a tendency on the part of many experienced practitioners to rely too often on old, time-worn arguments instead of approaching novel questions with creative and innovative strategies, especially in the areas of constitutional and criminal law. We all know of the so-called experienced lawyer who habitually pleads his client guilty and cannot recall the last time he went through the rigors of a full criminal trial. This lawyer is in need of learning his obligations to court and client, and if his trial skills have become rusted by disuse, causing him to lose confidence in his ability to try a case, he should abandon this specialty or frankly admit his need for retraining. Poor quality advocacy is a problem that pervades the trial and appellate bar at all levels, and all ages.

The strengthening of our advocacy education system—both within law school and without—is certainly a crucial step in the pursuit of competency. The professional must decide, however, whether a sound program of training is really sufficient to guarantee that all who come before the bar of justice are assured of qualified representation. One suggestion that has been considered is a mechanism of supplemental examinations leading to certificates of ability for trial and appellate lawyers after the applicants demonstrate competence. To be sure, there will always be a place for the generalist in the practice of law. The question remains whether some sort of certification program is desirable for lawyers who choose to specialize in the area of courtroom practice, a group of lawyers who, in my view, more than any other group in practice, hold the liberty of their clients in the palms of their hands.

Like any fairly new concept, the certification procedure has stimulated much thoughtful questioning, the answers to which are not readily available. Will certification, for example, become a mere euphemism for elitist, exclusionary considerations, thus barring competent lawyers from the courtroom because of color or other malevolent reasons? Can truly objective criteria be devised to safeguard against such deterioration? If certification is limited to the criminal bar, will that additional hurdle simply deter entry into this already under-populated segment of the profession? Should

a grandfather clause be included in any certification requirement?

I raise these questions for the purpose of encouraging discussion, though I have as yet reached no firm conclusion on the matter of certification. Certainly, I would oppose any system that failed to recognize that good lawyering is a non-analytic art and, accordingly, is exceedingly difficult to test. We must avoid the tendency, inherent in any licensing procedure, to make that which is testable a substitute for that which is relevant. In short, we must not countenance a program in which advocates will be licensed on the basis of an examination of their knowledge of rules, when the whole point of the procedure is to insure their ability to use those rules in the courtroom.

In any event, these and similar questions must be considered and resolved before we adopt a certification procedure which, through the forces of inertia, may become far more difficult to dismantle than it was to establish. For this reason, as well as to explore methods of improving advocacy skills, I have appointed a Committee on Qualifications to Practice Before the United States Courts in the Second Circuit. The Committee's mandate is to examine the quality of advocacy in the courts of the Second Circuit and to make recommendations for programs and procedures for improving that quality. The Committee is seriously engaged in its task and Robert Clare, President of the American College of Trial Lawyers, and Chairman of this Committee, who is with us today, has led it capably and resourcefully in its pursuit of solutions.

Reform has always been slow in our profession because all of us, judges and lawyers alike, tend to be traditionalists—and rather stubborn ones at that. Suggestions for change are made and often die on the vine. Yet, this symposium is demonstrable evidence that we have cast aside our intransigence. Indeed, I am confident that we will reach our goal of developing top quality advocates, for excellence and the pursuit of excellence have always been the hallmark of our profession.