The Continuing Challenge of Advocacy

by Justice Tom C. Clark (Ret.)*

Nearly fifteen years ago, I had the opportunity to address the American College of Trial Lawyers on the state of advocacy and its role in our adversary system.[1] Essentially, the speech was a call to the law schools and the bar for the implementation of effective advocacy training programs in order that trial lawyers not become rare specialists in our swelling profession. While many changes in legal education and post-graduate legal training have been initiated, very little progress has been made in the trial court area. Today concern over the state of advocacy is fast reaching a fever heat, with the Chief Justice of the United States taking an active role in a monumental effort to improve the state of advocacy.[2]

As Chief Judge Irving R. Kaufman has stated: "The dispensing of justice is a joint enterprise of the courts and the lawyers who practice as advocates in the courts."[3] Unfortunately, in too many instances this "joint enterprise" has deteriorated into a "sole proprietorship" in which the judge not only carries out his judicial functions, but, in the interests of justice, attempts to compensate for the shortcomings of counsel. Because of the increase in the volume of litigagation, it is apparent the courts can no longer afford ill-equipped counsel the luxury of indulgence. The training of competent advocates is essential to the continuing health of the adversary system, and the law school is the logical place to begin such training.

For nearly a century, legal education has focused almost exclusively upon the development of intellectual and analytical skills while neglecting instruction in practical "lawyering." This has prompted one law professor to note that "today's law school graduate is far better trained to assume the bench of the highest appellate court than to draft a will, negotiate a contract, try a case, form a corporation, write a statute, settle a dispute or do any of the other myriad tasks required of attorneys."[4] Although perhaps an overstatement, this observation

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1. Address by Justice Tom C. Clark, American College of Trial Lawyers, March 13, 1962.

2. The Chief Justice recently appointed a committee to study the advocacy problem in federal courts which will be discussed in more detail *infra*. Additionally, the Chief Justice's Sonnett Memorial Lecture at Fordham University in 1973 set forth many concrete proposals which should be carefully considered by every legal educator.

3. Kaufman, *Advocacy as Craft—Law School is More than a "Paper Chase"*, 60 A.B.A.J. 802 (1974).

4. Seidman, *Cranking Out Helpless Experts*, 3 A.B.A. LEARNING AND THE LAW, No. 2, 33 (Summer 1976).

nevertheless recognizes that our law schools must reevaluate some aspects of their curricula. Many schools have established clinical education programs, but none is capable of accomodating entire student populations. Thus, even minimal clinical experience has yet to be established as a prerequisite to graduation. Another persistent and potentially more harmful problem is the failure of the academic community to accept clinical education as a legitimate law school function.[5]

Limited participation in clinical programs is usually the result of limited financial resources. The expense of creating and sustaining a well-rounded program is immense. However, as Chief Justice Burger has pointed out: "If we want an adequate system of justice, we must be prepared to spend more for it—and we cannot train truly effective advocates without spending more."[6] Despite recent tuition increases, and contrary student opinion notwithstanding, a legal education is still a bargain when compared with other professional programs.[7] But, just as surely as medical students move out of the texts and into the hospitals for training, law students must move out of the casebooks and into the courtroom for training, and the added expense in making this move will be money well spent.

The second problem—the attitude toward clinical education—is far more difficult to resolve. The "goat-sheep" barrier which exists between traditional classroom work and clinical experience invariably results in the denigration of the clinical program. Clinical faculty are rarely accorded the same professional respect (or monetary status) as their classroom counterparts. There appears to be a fear of clinical contamination in the sterile classroom. While the law student must develop superior analytical skills and a fundamental understanding of the law, he must also learn how to put these skills to work. The young attorney who fails in this is as helpless in his practice as a dentist who recognizes a cavity but doesn't know how to fill it.

The law is an integrated profession requiring both analytical and practical skills. The complete lawyer is competent in the use of all legal tools, making perhaps his greatest contribution in the trial court.[8]

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5. Oliphant, *When Will Clinicians Be Allowed to Join the Club?*, 3 A.B.A. LEARNING AND THE LAW, No. 2, 34-37 (Summer 1976).

6. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 232 (1973).

7. As an example, Chief Judge Kaufman cites Yale University's appropriation of $23 million for four hundred medical students as contrasted with $2.2 million for six hundred law students in 1975. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569, 571 (1975).

8. Of the fifteen million cases filed annually, ninety-five percent are disposed of in the trial courts. Only five percent of the cases receive appellate review. On the basis of this statistic alone, the trial courts have a greater role in the formulation of

The aspiring attorney will never have a better chance to develop intellectually and practically than in a law school offering strong course work and meaningful courtroom experiences.

The demands on the time of the attorney increase. Once he gets out of school, if he is with a law firm, he is expected to earn his salary, and this usually means he spends very little time trying cases. If he is a sole practitioner, he has to make a living. This will primarily entail office work—wills, real estate transfers, and tax work. In either event, the young attorney rarely sees the courtroom, perhaps never gaining trial experience. As he grows older, he grows more reluctant to do trial work, suffering from what I term "buck fever." Too often this attorney becomes locked in a self-made, unsatisfying office practice. And the number of competent trial attorneys begins to dwindle.

This unfortunate trend can be reversed. Our law schools must recognize clinical experience enhances classroom work and the complete lawyer must be the master of both. Clinical programs must become first-class citizens, and be treated as such. If the present caste system continues, the law student, the law school, and the profession will feel the initial backlash. But the ultimate victim is certain to be the public.

Despite the problems discussed above, the mere creation of clinical programs in the law schools is a significant development in legal education. I would favor further progression in this area—a comprehensive integrated program involving two full years (twenty-four months) of classroom work followed by one year of courtroom practice prior to formal entry into the profession.

Obviously, an aspiring attorney must be well versed in the law before beginning to practice. For the most part, fundamental concepts and principles of law are taught in the first two years of law school. These first years would also provide an excellent opportunity for the student to learn some practical skills. For example, the law student should not only learn probate law in an *Estates* course, but should be drafting wills as well. A *Civil Procedure* course should teach students how to prepare pleadings. Incorporating instruction in these kinds of skills into the course offerings would benefit both the law students and his future clients.

Whatever the professional goals of the law student, I have long been of the opinion that he should spend a substantial amount of time

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new law than all of the appellate courts combined. As such, trial courts occupy the most important position in our judicial system and the trial attorney is the greatest contributor to trial court effectiveness.

in the courtroom before receiving full certification to practice. Today many schools will award a diploma to a student who not only has never tried a case, but has never seen the inside of a courtroom. This is an unfortunate state of affairs, but not irremediable. If the law schools, the bar, and the bench will coordinate efforts to put students in the courtroom, the third year of legal training can be the most meaningful educational experience in an attorney's career.

A certain degree of selectivity is necessary in choosing offices in which to place students, and the overriding consideration must be: where will the student receive quality assistance from supervising attorneys while gaining maximum trial experience? Prosecutorial offices frequently are ideal due to case volume and type, as well as a substantial case-to-attorney ratio. Thus, state attorneys general, United States Attorneys, district attorneys and county attorneys generally provide superior courtroom opportunities for the student practitioner. Public defender and legal aid offices offer many of the same advantages. Legal clinics operated by our law schools can expand the opportunities currently available to students practicing under the supervision of clinical faculty—for example, the Federal Defender Program in Chicago is an excellent model for the school interested in offering students federal practice experience. All of these options are open. The law schools have only to exploit them.

In addition to upgrading the state of advocacy, student practitioners would have an immediate beneficial impact on our criminal justice system. Most prosecutorial and criminal defense offices are overworked and understaffed. The students can not only provide additional manpower, thus easing the workload, but can bring a refreshing idealism back to the practice of criminal law. As the most visible arena of justice, the criminal justice system has been plagued, quite rightfully in many instances, with growing public unrest and distrust. Entry of law students into this area might result in greater attention to all criminal cases, less delay in trial, and a genuine cleansing of criminal justice both within and without the profession.

One student concern that merits consideration in appraising a one-year internship is the status of the bar examination. In my judgment, twenty-four months of classroom legal education is sufficient preparation for the examination. Admissions committees should allow students to take the examination after completing the course work, but prior to the internship year, witholding formal certification until the internship requirement is satisfied. Upon completion of the internship, those students who successfully passed the bar examination the previous year would, in every sense, be fully licensed and ready to practice law.

Participation of the bar and the bench is essential as well if advocacy skills are to be upgraded. In recent years, seminars in trial techniques and appellate practice have gained prominence in a field previously dominated by presentations on legal developments. These workshops, most of which are sponsored by bar associations and professional groups, attract eminent advocates of many years' practice as teaching participants in programs designed to aid the newcomer and the less proficient in improving trial skills. The American Bar Association, National District Attorneys Association, American College of Trial Lawyers and the International Academy of Trial Lawyers jointly sponsor the University of Houston-based National College of District Attorneys, a post-graduate school for prosecutors. The bar is also an integral participant at the Hastings College of Advocacy, which currently offers one week of intensive instruction in civil practice. Planning is underway for a similar program in criminal trial advocacy.

The most encouraging sign to emerge from these seminars and schools has been the response of the practicing bar. Since its inception in 1970, the National College of District Attorneys has attracted over 4,000 participants, while the Hastings College of Advocacy has drawn over 2,100 practitioners since 1971. Both schools anticipate increasing enrollments in coming terms. Similarly, local seminars are attracting larger groups than in previous years, all of which indicates a growing recognition that artful advocacy is an essential legal skill, capable of development by any attorney willing to invest the requisite time and effort.

For years, judges did little to promote the cause of advocacy beyond complaining about low levels of competence among attorneys. Certainly, fear of such judicial criticism contributed to the reluctance of would-be advocates to enter the courtroom. Fortunately, judicial criticism has given way to judicial activism, and judges are now approaching the advocacy problem in a number of constructive ways.

For example, in December 1973, Chief Judge Kaufman appointed a Committee on Qualifications to Practice before the United States Courts in the Second District.[9] This committee's work culminated in the adoption of Second Circuit Local Rule 46, which essentially provides that admission to practice before the Second District Court of Appeals will be predicated upon an attorney's having: (1) read the Federal Rules of Appellate Procedure and the Second Circuit Rules; (2) seen two appeals argued in the Second Circuit; and (3)

9. This committee was chaired by Robert L. Clare, Jr., a New York City practitioner and former president of the American College of Trial Lawyers, and its members included law school faculty, practitioners and judges from throughout the Second Circuit. Not surprisingly, this group was immediately tagged the "Clare Committee."

argued three substantive appeals in state, federal or moot appellate court, or two substantive motions in place of one appeal.

Adoption of Rule 46 was not universally acclaimed,[10] but it has stimulated further judicial activity. Chief Justice Burger recently appointed Chief Judge Edward J. Devitt to head a committee similar in purpose but broader in scope than the Clare Committee. Specifically, the Devitt Committee is studying the advocacy problem in federal courts as well as evaluating the applicability and desirability of the Second Circuit rules in the entire federal judicial system. As the committee was formed just recently, its findings are still some months away. However, the fact that the committee was formed is indicative of concern over the state of advocacy and the resolve to contribute to solutions among members of the federal judiciary.

Additionally, judges are beginning to assist other segments of the profession in actually training qualified advocates. Increasingly, judges are participating in bar-sponsored seminars and programs. Many teach advocacy-related courses in the law schools and judge moot court competitions. Finally, recognizing the long-range benefits, judges have been instrumental in the adoption of student practice rules in many states, thus allowing law students to begin learning the art of advocacy while still in law school.

Justice, as we know it, is the culmination of adversary presentations. And the cornerstone of the adversary system is the trial advocate. Because virtually every significant legal development has its roots in the trial court, the importance of the trial lawyer in the continuing evolution of the law cannot be understated.

For many years, we have allowed attorneys to learn the art of advocacy haphazardly, giving little consideration to the consequences of our neglect. Trial and error instruction invariably results in error-ridden trials. The fact this system, or lack of it, has produced some extraordinary advocates says less about our concern than about the determination of a handful of attorneys to excel in spite of such a system.

The law schools, the bar, and the bench share the responsibility for the current state of advocacy. The law schools graduate thousands of students each year, glibly stating that each one is ready to assume the awesome duties of practicing law. The bar naively accepts this proposition and recommends admittance to the bar. The courts ignore

10. *See* Pedrick and Frank, *Trial Incompetence: Questioning the Clare Cure*, Trial, Vol. 12, No. 3, March 1976, pp. 47-59. Another Clare product—the proposed District Court Admissions Rule—has been rejected by all districts in the Second Circuit with the exception of Vermont, where the rule will become effective in 1979.

years of experience to the contrary, and certify those who pass the bar examination. No mystical transformation takes place between graduation and certification, and to believe that certification is the equivalent of competency is to subscribe to pure myth.

Newcomers to the profession are trained in skills better befitting the legal scholar or appellate judge than the trial practitioner. Certainly we need all three. But the heart of the law is in the courtroom give-and-take. Any effort falling short of providing a substantial body of competent trial attorneys will ultimately take its toll on our system of justice.

As Justice Holmes once wrote, "But after all, the place for a man who is complete in all his powers is in the fight. The professor, the man of letters, gives up one half of life that his protected talent may grow and flower in peace. But to make up your mind at your peril upon a living question, for purposes of action, calls upon your whole nature."[11]

11. HOLMES, COLLECTED LEGAL PAPERS, 224 (1921).