7-1-1982

Arguing the Law: The Advocate's Duty and Opportunity

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[Multiple Affiliations]

COMMENTARY—THE ADVOCATE'S DUTY

ARGUING THE LAW: THE ADVOCATE'S DUTY AND OPPORTUNITY*

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There have been many expositions on advocacy, including some delivered as Sibley Lectures.[1] These expositions say pretty much the same thing: be candid, be thorough, be concise, formulate the issue carefully, answer questions directly, and "go for the jugular." It would be incautious to reject good advice as to technique, and this sort of thing sounds like good advice. Yet the fact that the same advice keeps coming forth raises doubt about whether it is being heeded, or even heard. It also raises the possibility that the problem of advocacy is more complex than implied by these pedagogic admonitions. My purpose is to explore that possibility.

The present analysis concentrates on advocacy concerning legal issues. It thus excludes the complex subject of advocacy of factual issues, a subject that deserves full attention of its own. However, I believe the following analysis also applies to the advocacy of fact issues. At any rate, included within the topic are the advocacy of "straight" legal questions, such as whether a line of precedent should be slightly extended or slightly curtailed, and also the advocacy of "policy" questions, such as whether a particular question ought to be resolved by the courts or relegated to the legislature. Our topic also includes law and motion matters in the trial court as well as appellate advocacy.

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* The John A. Sibley Lecture in Law delivered at the University of Georgia School of Law on February 11, 1982, revised and expanded for publication.

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[1] *See, e.g.*, Fuller, *The Law's Precarious Hold On Life*, 3 GA. L. REV. 530 (1969); Johnson, *The Attorney and the Supremacy of Law*, 1 GA. L. REV. 38 (1966).

A. The Parlous State of Advocacy

In the now more than twenty years that I have been teaching, a great many of my former students have gone on to be clerks to judges. They have served as such in most parts of the country, in appellate courts and trial courts, federal courts and state courts, activist courts and traditional courts. They have worked for famous judges and for obscure ones. They have had all kinds of experience in all kinds of cases. There is, however, one uniformity in this variety. All the clerks have the impression that the briefs generally are not very good. Indeed, generally they are bad.

This testimony of legal novices might be discounted. However, I had confidence in these witnesses when they were students, and can see no reason to think their discernment deteriorated when they went to work for judges. Moreover, the fact that law clerks would hold this opinion so uniformly and so continuously suggests that it reflects the opinions of the judges themselves. Conversations with judges confirm this inference.

Another source evidencing the inadequacy of trial and appellate briefs is the burgeoning of court legal staffs.[2] Every appellate judge now has at least one law clerk, many have two, and some have three. Many if not most appellate courts also have a legal staff serving the court as a whole. To an increasing degree, trial court judges also have law clerks, and some of them have law student interns as well. Of course, some of this staff is committed to managing the flow of work—screening, classifying, sequencing, etc.—and some of it is committed to handling technical detail, such as checking citations and reading proofs. But a great deal of staff time, according to all accounts, is spent in trying to discover the legal issues involved. If contemporary advocacy were serving its supposed function, this kind of staff work would be largely unnecessary, for the advocates' briefs would have revealed the legal issues.

A third datum is the testimony of judges. We have it on the authority of Cardozo that as many as eighty percent of the cases before an appellate court should not be there.[3] That figure is often

[2] For a statistical survey of the use of law clerks in the federal and state appellate courts, see P. BARNETT, LAW CLERKS IN THE UNITED STATES COURTS AND STATE APPELLATE COURTS (1973).

[3] *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 164 (1921). Cardozo observed:

repeated by appellate judges. I venture that the figure for law and motion matters in trial courts is higher. This is powerful evidence. To say that a case should not even be before the court is usually taken as impugning the bar's integrity; but it also impugns the bar's technique. If an advocate cannot convince a court that he has a serious position, let alone a convincing position, then the advocate has failed in his threshold task.

There is thus strong reason to believe that the state of present advocacy is pretty bad, and that it has not been a lot better in the past. Of course, there are reasons to be skeptical about professions of dissatisfaction with the administration of justice. Burgeoning court staffs may simply reflect the operation of a Parkinsonian law that staffs expand no matter what. There is also reason to doubt the opinion of the bench as regards the bar. Judging involves a lot of drudgery, and lawyers are the ones who bring in the work; the possibility is too strong to be ignored that the judges' complaints represent a projection of hostility. In addition, we have the results of the study done in connection with the Devitt Report: on the whole, judges were not highly consistent in the evaluations of the quality of advocates' performances, and the causes of these inconsistencies were unclear.[4] In short, judges' assessments have so much variance as to be untrustworthy.

Yet there is still other testimony that cannot be discounted. This is the experience of lawyers in the Office of the Solicitor General of the United States. That office does more appellate litigation than any other law office in the country, certainly so if routine criminal cases are excluded. The cases in which the Solicitor General is involved are, on the average, very important; also important is the stature of the courts before which that office practices—the Supreme Court of the United States and the United States courts of appeals. By general recognition the office of the "S.G." practices at a high level of professional competence, and with a large measure of professional detachment. Respect is thus due the opinions of

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"Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one." *Id.* In a later work he wrote: "Nine-tenths, perhaps more, of the cases that come before a court are predetermined— . . . —their fate preestablished by inevitable laws that follow them from birth to death." B. CARDOZO, THE GROWTH OF THE LAW 60 (1924).

[4] *See* A. PARTRIDGE & G. BERMONT, THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS 23 (1978).

lawyers in that office concerning the quality of advocacy against the Government. A commonly shared opinion, gleaned from informal conversations with former S.G. staff, is that the quality of advocacy is enormous in variability and poor on the average.

A level of technical performance that is poor on the *average* is a very serious condition. If the average were high, one might be optimistic about the prospects for reform. The aim would be to get rid of the proverbial "few bad apples" that contaminate an otherwise solid barrel. But if we suppose that poor performance is endemic rather than occasional, the problem of reform is vastly more complicated, if not impossible. The difficulties are both political and substantive. The political problem is that the bar in general is likely to resist any reform whose effects would require substantial modification of average practice standards. It would be a mistake, however, to attach too much weight to this political impediment to reform. The problem is much tougher than that. Standards of practice are the result of long-persisting and deeply rooted tendencies. The current generation of practitioners at any given time constitutes the human inventory presently available for work and thus limits the possibilities for change in the foreseeable future. It is an extraordinarily difficult task to raise the average of a skill performed by a group of independent adults. As folk wisdom says, it is hard to teach old dogs new tricks, even harder where the old dogs run the school and do the teaching.

I say this not by way of recrimination but by way of realism. If we are seriously concerned with the level of practice in the profession—here specifically legal advocacy—we should recognize that the general average cannot be changed very quickly, that it will not change very much through voluntary effort, and that trying to change it chiefly through entry-level education is a Sisyphean undertaking. This is not to say that efforts in this direction are not morally commendable, or even that they may not be in some sense worthwhile. It is merely to say that they do not constitute a serious program of change.

A more serious program for improving the quality of advocacy would require achievement of a specified minimum of competence as a prerequisite to regular practice as an advocate. I have already suggested important reasons for doubting the political feasibility of such a regulation. Even if a system of qualifications were adopted, for reasons already suggested, I believe that the minimum standard actually employed would remain minimal. A highly formal definition would simply be given an operative definition that would actually entail little change.[5]

I would not necessarily make this pessimistic prediction about all situations in American life, or even about all situations in the American practice of law. I am led to the forecast, however, by reflection on some feedback received in connection with the proposed revision of the rules of ethics of the American legal profession.

B. *The Advocate's Duty*

As is generally known, there presently exists a Code of Professional Responsibility, promulgated by the American Bar Association.[6] This Code has been adopted, sometimes with amendments, in a large majority of the states.[7] As is not quite so generally known, there is a proposal that the Code be superseded by a reformulated codification called the Model Rules of Professional Conduct.[8] The Model Rules are the product of the ABA Special Commission on Evaluation of Professional Standards, generally known as the Kutak Commission. The proposed Model Rules have been presented to the House of Delegates of the American Bar Association and at this writing are under debate. The coverage of the proposed rules is comprehensive, and some of the recommendations are controversial. My purpose in referring to the Model Rules is not to address them generally, let alone to address questions of professional ethics at large. Rather, it is to focus on a regulation relevant to the issue of advocacy.

In developing the proposed Model Rules of Professional Con-

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[5] In making this statement, I am not referring to the possibility that lawyers would consciously resist compliance with applicable regulations. Of course, there would be legal friction in obtaining compliance, as there always is with new regulations. There would be claims that higher standards violate due process and equal protection; no doubt there would also be unblushing objection that higher standards would infringe the right of clients to assistance of counsel. My forecast reaches beyond this. The forecast is simply that, whatever the rule might be, practice would continue to be about the same, because lawyers in general would not change their standard of practice.

[6] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

[7] For an analysis of the differences between the ABA Model Code and the version adopted by each state, see M. PROCTOR & R. ALEXANDER-SMITH, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980).

[8] MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft May 30, 1981).

duct, a Discussion Draft, dated January 30, 1980, was circulated to the bar. In this Discussion Draft was a provision governing candor to the court in arguing issues of law. The proposal, which was Rule 3.1(c) of the Discussion Draft, was as follows: "If a lawyer discovers that the tribunal has not been apprised of legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue, the lawyer shall advise the tribunal of that authority."[9]

This provision attracted vociferous, indeed splenetic, criticism. First, it was argued that the proposal was a new and therefore dangerous burden on the advocate. Second, it was argued that such a requirement is inconsistent with the advocate's role in the adversary system.[10]

When the Kutak Commission assessed these criticisms it decided that although the proposal might represent improvement over present law, any improvement was not worth the political cost resulting from the controversy engendered by it. Accordingly, we simply retained the formula on the subject that is found in the present Code. DR 7-106(B)(1) of the present Code requires that "[i]n presenting a matter to a tribunal, a lawyer shall disclose . . . legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel."[11]

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[9] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1(c) (Discussion Draft Jan. 30, 1980).

[10] *See, e.g.*, Elliot, *The Proposed Model Rules of Professional Conduct: Invention Not Mothered by Necessity?*, 54 CONN. B.J. 265 (1980); Koskoff, *Proposed New Code of Professional Responsibility: 1984 Is Now!*, 54 CONN. B.J. 260 (1980).

[11] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1980). This provision is carried forward in Rule 3.3(a)(3) of the proposed Model Rules with some unimportant alterations of syntax. In its key terms the proposed model rule is taken verbatim from present DR 7-106(B)(1). These terms are: that the legal material be known to the lawyer; that the lawyer be aware it has not been disclosed to the court by opposing counsel; and that the material be "authority in the controlling jurisdiction . . . directly adverse to the position of his client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (Proposed Final Draft May 30, 1981).

There is no legislative history of the meaning of the term "controlling jurisdiction." The term obviously includes authority emanating from the tribunals of the legal sovereign in which the proceeding is pending. I assume it also includes federal authority when a federal question arises in a state court. It may also include foreign authority in some circumstances; there is an interesting choice of law problem submerged in the term.

It may also be noted that the present Code and the proposed Model Rules, read carefully, require citation of "directly adverse" authority even if it emanates from a tribunal of coordinate or inferior jurisdiction. Thus, if a lawyer knew that an intermediate appellate court had

There is some difference between this language and that in the Discussion Draft that had generated so much controversy. The difference is between authority "that would probably have a substantial effect on the determination of a material issue" and authority "in the controlling jurisdiction . . . directly adverse." The Discussion Draft would have required disclosure of the following authorities that are not covered in the Code: (1) authority from the controlling jurisdiction that would "probably have a substantial effect" even though it is not "directly adverse" and (2) authority from a sister jurisdiction that would "probably have a substantial effect." I am sorry that the scope of the advocate's duty is left unchanged in the final draft of the Model Rules, but no more so than I am about other proposals that have been left on the drafting room floor. The important fact is that only a small difference was involved.

An even more important fact, however, is the perception and interpretation of the proposal in the Discussion Draft. Evidently many lawyers believed that the Discussion Draft proposed a novel requirement—that an advocate cite adverse authority. Implicit in the criticism is ignorance that DR 7-106(B)(1) contains that obligation. Equally revealing was the criticism that such an obligation is incompatible with the role of advocate.[12] Apparently, many lawyers think that an advocate should cite only favorable authority.[13]

If this concept of advocacy as to matters of law is widely shared, most lawyers cite adverse authority only when there is no practical

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ruled on the point in question, that ruling would have to be cited not only to a trial court but also to a coordinate branch of the intermediate appellate court and to the supreme court. This is because the term "controlling" modifies the term "jurisdiction" and not the term "legal authority." Indeed, technically an advocate before a supreme court is required to cite any trial court decision he knew to be adverse, but is not required to cite a case on point decided by the highest court of a sister jurisdiction even if he knows that the opinions of the sister jurisdiction enjoy high local repute. This seems anomalous if not bizarre. It was this anomaly that inspired the revision proposed in the Discussion Draft.

[12] *See* Koskoff, *supra* note 10.

[13] More specifically, the criticism impliedly asserts that it is inappropriate for an advocate to cite "legal authority . . . that would probably have a substantial effect on the determination of a material issue" if that authority is adverse. In this interpretation of the role of advocate, the lawyer would have researched for relevant authorities simply as a matter of competence and self-protection. Thus, he would know about the adverse authority. Presumably the lawyer would be ready to deal with these authorities in a responsive brief or in answering questions from the bench. But he should not advise the court of their existence, let alone address their merits.

way to avoid doing so. Such practical necessity exists where the precedent in question issued from the very court before which the advocate appears and the decision is within memory of the bench. In other situations, however, the lawyer does not bother with adverse authority. No doubt this thought is: Who knows, maybe the judges and law clerks will not find the case? Thus, in the trial courts all the time, and in the intermediate appellate courts most of the time, and even in the Supreme Court, each side cites authorities going its way and leaves it to the court to figure out which line to follow.

If that is the prevalent view of the role of the advocate in matters of law, we can understand the distress resulting when the Discussion Draft reminded the bar that the law presently is otherwise. We can also conjecture that lawyers' compliance with the law in this regard will not be much better under the Model Rules than it has been under the Code. The legal duty may be clear enough, but most lawyers are oblivious to it and will act accordingly.

It is perhaps worth pondering what these lawyers think they are doing in writing a brief that ignores relevant adverse authority. The behavior probably reflects a calculation of risks. First, the risk of violating the rule is low. The rule requiring citation of opposing authority is only rarely operative, because the other side usually cites directly supportive authority and, if it does not, the judges often remember. Against this is the possibility that neither the other side nor the court will retrieve the relevant precedent, and so the case will be decided without reference to it. Second, even if a lawyer is caught in a violation, the court will not make much of it, partly because the rule is at variance with prevailing practice. Third, having to cite adverse authority means having to think why and how that authority can be distinguished or otherwise neutralized. Thinking in this depth takes time, and therefore money, and in any event is the responsibility of the court.

If lawyers are disinclined to cite opposing authority, they must be even more disinclined to give such authority serious and respectful attention. Given that attitude, it is understandable why the briefs are generally so bad. The weight of an argumentative position can be properly gauged only by reference to what can be set against it. Briefs that expound only favorable authorities deal therefore merely with the surface of the controversy. Going below the surface, however, requires direct recognition that the case is chancy. This in turn may explain the bar's anxiety about the citation rule: lawyers find that frankly assessing the strength of their own position is a fearful experience.[14] If the underlying resistance to the citation rule is fear, and if fear of dealing with opposing authority is expressive of a larger fear of weakness in the contest as a whole, then there is not much prospect in trying to improve advocacy through rules. Hence, it is probably right that the advocate's duty in arguing law should not be made more rigorous than it now is. If it is difficult to legislate morality, it is even more difficult to legislate bravery.

We therefore should reconcile ourselves to the fact that we cannot induce better advocacy through more rigorous rules. What can be done to improve advocacy? Perhaps very little. But perhaps something can be done if we shift focus from the advocate's duty to the advocate's opportunity. Anxiety may be overcome, if not dissipated, by the prospect that the chances of victory can be improved by frank dealing with the law, adverse as well as favorable.

C. *The Advocate's Opportunity*

This proposition might be approached by examining the relationship between the advocate's function and the function of the court in deciding issues of law.

The advocate's function in arguing to a tribunal is derivative from the court's function. That is, the advocate's purpose is to induce certain behavior on the part of the court, specifically that of deciding the case in favor of the advocate's client.[15] But the court's task is not simply to decide the case in the advocate's favor. If that were all, a court would decide a case appropriately if it simply said "reversed" or "affirmed" (or, at the trial level, "granted" or "denied"). I realize that many per curiam opinions these days say little more than this. But even these days most opinions are not per curiam, and even the per curiams recite some authority, and occasionally even advance some reasoning, in support of their conclusions. In any event, if two conditions are met, there is more to the court's task than finding some kind of authority in support of its

[14] It occurs to me that similar fear attends a lawyer's preparation for trial and explains why poor trial preparation remains a persistent failing even though every discussion of trial advocacy emphasizes the importance of preparation.

[15] *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 236-55 (1960).

position.

The first of these conditions is that the legal question involved is genuinely arguable. If the legal question is not genuinely arguable, the case should not be there at all. If there is nothing to be said on the advocate's own side, he should not be in court; if there is nothing to be said on the opposite side, the advocate should have moved for summary disposition.

The second condition is that the court is prepared to fulfill its responsibility in dealing with an arguable question of law.[16] The court's responsibility is not merely to decide the issue; as noted, it can do that simply by saying "reversed" or "affirmed." To reach a conclusion rationally requires something more. It requires that the court acknowledge, at least implicitly, what the argument is. That is, the court must acknowledge that the authorities are in conflict or that there is an unresolved question of legal policy at issue. In other words, to make a rational choice among legal alternatives presupposes a recognition that there *are* alternatives. The rhetoric of judicial opinions of course often tries to make it appear that a legal conclusion is foreordained. But this is not true except in cases that should have been summarily dismissed in the first place.

If it is the court's task to acknowledge the competing considerations at issue, and if it is the advocate's task to anticipate the court's task and to help in its performance, then the advocate has to acknowledge and address the competing considerations. If there is conflict in the authorities, he has to recognize the conflict and suggest how it might be resolved in such a way that his client prevails. This is also true if there is conflict in the applicable legal policies on a matter not previously dealt with by the authorities. Moreover, the advocate should suggest a means of resolving the conflict that maximizes the chance of prevailing for his client.

The chance of prevailing is *greatest* if the decision point involves the greatest concession with respect to the client's position that is consistent with victory for the client. That is, where the question is seriously debatable, the strongest position for the client is one that borders on concession to the opposing party. Any more extravagant position on behalf of the client may seem stronger because it is less equivocal. However, it is actually weaker because it asks the court

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[16] For an analysis of the reasoning process employed by courts in deciding close cases, see *id.*; B. CARDOZO, *supra* note 3, at 142-80.

to reject the competing value in greater degree than is minimally necessary to decide the case in the client's favor.[17]

A logically equivalent formulation of the foregoing proposition is that an argument should acknowledge the weaknesses of one's case. This formulation has been put succinctly by Judge (and former Professor) Benjamin Kaplan as follows: "A brief or argument impresses [the court] in the degree that it is willing actually to face rather than mask or evade the weaknesses of that side of the case—a point that should be inscribed on the walls of some major law offices."[18]

However, I believe thus formulating the point in terms of the weakness of the case is generally misinterpreted by lawyers. I believe they interpret it to mean that acknowledging the weaknesses of a position is a weakening of one's position. Hence, the proposition is ignored as being goody-goody advice from judges to lawyers. But "weaknesses" in one's own case exist because there are strengths in the other side's case. The advocate's task is to discern what these strengths are. Specifically, what the advocate should isolate are the strengths in the other side that can be conceded while adhering to a prevailing position; that is, concessions that reduce the boundaries of a position make the position stronger.

Perhaps many lawyers do not realize that the strongest position strategically is the one that is positionally most moderate. In other words, they think that a trenchant, uncompromising line of argument is somehow overpowering because of its tendentiousness. In this supposition they may be bringing into adjudication a form of argument that is more suitable to negotiation. Under some circumstances tendentious argument may make sense in negotiation because that kind of argument conceals openings for concessions. Tendentious argument may also make sense if one assumes that judges can be intimidated by verbal assault. This form of argument, however, makes no sense if it is assumed that verbal assault generally does not intimidate judges, but merely turns them off, and if it is recognized that a judge, unlike an opposing party in

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[17] This point is a counterpart of the familiar proposition that a court, in deciding a question of law, generally rests on the narrowest available ground. *See* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

[18] Kaplan, Book Review, 95 HARV. L. REV. 528, 531 (1981) (reviewing F. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE APPELLATE BENCH (1980)).

negotiation, does not have to seek concessions but can impose them.

Many lawyers apparently fail to comprehend this strategic logic. Perhaps, as suggested earlier, it is because they are blinded by the fear of candidly examining the legal uncertainty of their position. Perhaps their briefs are exercises in assuaging self-doubt. Perhaps the brief is addressed to the client and tries to give reassurance and to demonstrate loyalty by means of belligerence. At any rate, many lawyers seem to approach the court with this position in mind: "I have a legal problem that the court will have to solve." The strategically sounder proposition for the advocate to have in mind is, "The court has a legal problem that I have to solve." That problem is how the court can decide the case in favor of the advocate's client with the least encroachment on the authorities and values that militate in the opposite direction.