THE ATTORNEY AS ADVOCATE: "ARGUING THE LAW"

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The term advocacy inherently suggests an orientation toward winning. One is not just an advocate—one is an advocate *for* something. Professor Hazard presents a stimulating question: What happens when advocacy for a client causes "bad" results? His solution is simple—make the advocate less adversarial by instilling a duty to advocate in favor of "good" law. This approach stops short of transforming the attorney from a client's advocate into the law's advocate, but it takes a few long strides in that direction. The issue we raise is also relatively simple: Is this the right approach?

I. THE SCOPE OF DEBATE: THE IMPORTANCE OF THE CLIENT'S INTEREST

The initial perception of a problem is often crucial to its ultimate resolution. Professor Hazard is a consumer of judicial opinions, and his starting point demonstrates a certain dissatisfaction with the quality of his diet. As an esteemed academician, Professor Hazard is doubtless frustrated by the end product of judicial decision making. Many of the decisions rendered by the American judiciary are disappointing intellectually. Thus, if the purpose of our legal system is to create an internally consistent, intellectually defensible body of law, then the system has failed in part.

We start with a different perspective.[1] Assigning the practitioner a significant part of the fault is too severe and represents too narrow a perspective. In its broadest sense, the legal system encompasses all three major branches of government; indeed, some would

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[1] While the only "practitioners" in this discussion, we resist the urge to speak as an "advocate" for all practitioners, although the temptation is certainly present.

say it also includes administrative functions as a fourth branch. The judicial system, even with the best advocates, would never be able to create a coherent body of law without the other branches intruding and creating new sorts of disorder. It is inappropriate, therefore, to focus on the judicial branch and its dispute resolution system without considering the other structures of government.

Professor Hazard's "law" perspective is too narrow in another sense as well. Within certain bounds, the purpose of the judicial system is not to set forth legal wisdom, but to resolve disputes between parties. While much has been written about public law litigation,[2] the vast majority of cases involves private disputes between individual parties before a particular judge at a given time. By far the majority of the citizens in this country becomes interested in the judicial branch only when it directly affects them. If there *is* a failure of advocacy, it must be examined in large part within the context of private litigation.

We start then with an observation that is hardly radical: At least a significant percentage of the attention in a lawsuit should be focused on the needs of the parties before the court. Just as the notion of a justiciable case or controversy is a cornerstone of proper judicial decision making by courts, advocates should be able to enjoy a similar sense of purpose. In the vast majority of litigation, the litigants' purpose is to obtain a favorable decision from the court, regardless of the effect on the "big picture."

Attorneys are primarily involved with analyzing economic problems. While some cases involve only matters of principle, most do not. As such, the cost to the client is usually important, even when dealing with major corporations in multimillion-dollar litigation. The first job of the advocate is to analyze thoroughly the judicial decisions that support the client's position. There are instances in which the limited economic resources prohibit further research, regardless how desirable more research would be.

The demands of clients in a private law system are felt most strongly at the appellate level—the very level where the problem of poor legal advocacy is most apparent. The reasons are obvious. At the appellate level, the stakes between the parties are likely to be quite high. Quite naturally, therefore, the litigant wants an advo-

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[2] *See, e.g.*, Chayes, *The Role of the Judge In Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

cate who attempts in good faith to win, not merely to educate the judge or the attorney for the other side in what the law ought to be. This is not to suggest that attorneys should not "rise above" the demands of their clients in certain instances. The increased frequency of both ethical complaints and malpractice litigation, however, suggests that attorneys may already have gone too far in "rising above" the demands of their clients.

In line with our focus on private law adjudication, it must be remembered that few disputes are ultimately resolved by written judicial opinion. For example, in last year's Supreme Court term, about 140 cases were decided following oral argument before the Court. Undoubtedly, many of those cases were prepared and argued with less skill than would be desirable. Yet, how many of those advocates knew from the outset that the Supreme Court would someday consider the claims? Who, for example, would have thought that a lawsuit contesting the validity of a city ordinance prohibiting minors from playing electronic games in Mesquite, Texas, would result in a Supreme Court case involving the first amendment right of minors?[3] Without question, if advocates had the ability to know the future, cases would be better focused legally. Without the benefit of hindsight, the legal issues ultimately deemed relevant by a court are often quite obscure at the beginning of a case.

Indeed, at the outset of representation, the work of advocates often does not involve the judicial system. Advocates' work typically involves a wide variety of dispute resolution systems, running the gamut from informal negotiation through administrative boards to reasoned legal debate of the type upon which Professor Hazard focuses. The problem of advocacy cannot easily be confined to a consideration of problems of advocacy relating to the presentation of legal issues, a problem that is practically unique to formal appellate judicial decision making. To be sure, one might be legitimately frustrated with the present state of law as expressed in judicial opinions, but this frustration may or may not be indicative of problems with advocacy. Attorneys should not be so quickly blamed for arguing the law poorly when so few of their cases ultimately turn on judicial application of legal principles.

It is interesting to note that Professor Hazard, citing Justice

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[3] City of Mesquite v. Aladdin's Castle, Inc., 102 S. Ct. 1070 (1982).

Cardozo, states that eighty percent of the cases should not be in court. This observation is made to support the following contention—If an advocate cannot put together a decent legal argument, why is he wasting the court's time? The answer is simple: Some client wants him to. Why is this a waste of time? To be sure, eighty percent of the cases may not pose good legal issues; yet those cases involve real disputes between opposing parties. Clients do not care sometimes if the law is against their position, so long as there is a reasonable possibility that the law could be changed. In addition, they may be willing to litigate to obtain a settlement or simply to avoid paying someone they refuse to cooperate with voluntarily. This situation does not necessarily suggest a breakdown of the legal advocacy system. It is far better to have eighty percent of the litigants in this country raising issues viewed by judges as marginal than it is to have them shooting each other. The system is not designed to provide judges with intellectually stimulating legal questions to resolve. The system is designed to resolve disputes and more generally to regulate societal conduct.

The focus of the private law model raises a second important point of reference. Professor Hazard defines the problem of poor advocacy in terms of arguing *legal* and not *factual* issues and thus leaves for another day the "complex subject of advocacy" of facts. This concentration underscores Professor Hazard's overriding concern with the end product of the system, namely judicial opinions. Again, we believe that this perspective is too narrow.

Few advocates create a sharp distinction between the facts and the law in a case. These elements develop simultaneously as a case progresses. Indeed, a good advocate will highlight or de-emphasize facts on the basis of his legal research. Thus, the law and facts form a type of equilibrium where changes in the known law or facts cause a concomitant balancing of the other.

The suggested bright line between law and facts is deceiving even if one considers only the legal principles involved in a case. Few legal doctrines involve clear "rules" of law. The positivistic notion that law can be reasoned from a small number of given principles has long been discarded. Rather, most legal doctrines dictate results based on a judge's view of the facts of a case. In other words, most legal principles involve some sort of reasonable person standard—the contract is a security if the investor relied on others for his profit; the action can proceed as a class action if the

plaintiff is an adequate representative; or the doctor is not liable for malpractice if he made a reasonable, good-faith medical judgment. In a world where reasonableness is the standard, existing precedents in a field are neither uniformly controlling nor wholly irrelevant. The good advocate can either distinguish adverse cases or make helpful cases irrelevant by selective use of facts. There are very few "pure" legal questions in cases these days.

As debaters, however, we must accept the definition of the basic problem. Thus, we now turn to Professor Hazard's Article on its own terms.

II. THE HAZARD VIEW

Professor Hazard begins by describing the "parlous state of advocacy," showing, convincingly so, that the general level of advocacy is "not very good." He concludes that this deficiency leads to an undesirable result: a great deal of judicial time "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."[4]

Our own familiarity with the same reliable sources of information—law clerks, judges, and personal experience—confirms this central, disturbing observation. Virtually any competent advocate is frequently surprised, and usually pleasantly so, when his or her opponent does not cite some case that was expected to rear its ugly head in opposition to some legal proposition fashioned by counsel. Thus, we agree that advocacy too often is inadequate and results in a waste of judicial resources because courts are spending too much of their scarce time and effort simply figuring out what a case is about.

Professor Hazard then opines that the problem with advocacy is that the advocates are not giving the courts enough good information. By overarguing their own cases, advocates are forcing the courts to choose between two extremes, when the actual dispute would be better resolved if the court could consider the issue without the rhetoric of overly partisan debate. From this perception of the problem, Professor Hazard then presents a number of logical

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[4] Hazard, *Arguing The Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821, 822 (1982).

solutions.

First, he suggests that the disciplinary rules should require the "balanced advocacy" approach. While the Kutak Commission's model rule on the subject has been tabled for political reasons, Professor Hazard makes it clear that he favors its adoption. Like a good advocate, Professor Hazard also suggests that "balanced advocacy" is advisable for tactical reasons. A good advocate is likely to win more often than not by avoiding the "I win on every point, and every case helps me" approach. Thus, according to Professor Hazard, the problem of advocacy is in essence a problem of bravery—attorneys are too fearful of letting the courts decide the true legal issues put before the court in a proper perspective. Dangling the carrot of improved tactics from the stick of the model rule, Professor Hazard thus concludes his statement in favor of "balanced advocacy."

III. Redefining the Problem

We agree with much of Professor Hazard's position. Legal advocacy is too often bad, and it does result in poor judicial decisions. Where we disagree with Professor Hazard is *why* and in *what fashion* legal advocacy is inadequate. The following passage best exemplifies Professor Hazard's description of the problem:

> 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 authority deal therefore merely with the surface of the controversy. Going below the surface, however, requires direct recognition that the case is chancy.[5]

Unlike Professor Hazard, we believe that the problem of advocacy is better understood in light of the difficulty most attorneys have in making the arguments in favor of their case in the proper light, rather than as a problem of balance. It is not that attorneys fail because they will not give both sides of the story—the problem

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[5] *Id.* at 828-29.

is that too many cannot present their own side very well. We believe that the legitimate interests of the judicial system, including cost-efficiency to the litigants, would be better served by a theory of advocacy that embodies, as its major principle, the belief that an advocate should present a client's legal position in a proper perspective in as concise a manner as possible.

The difference of opinion on the nature of the problem is crucial. Essentially, the difference can be expressed by the following choice. The question is which of the following two types of advocacy would better serve the judicial system: (1) a thorough forty-page brief covering both sides of the legal debate fairly, but suggesting meaningful distinctions and fine points working to the advocate's advantage (the Hazard Approach) or (2) a ten-page brief setting forth the advocate's position accurately, but in a totally "adversarial" position, focusing on three or four "winning" cases. Under Professor Hazard's view, the first option would be preferred. We believe, however, that the second alternative would better serve the competing demands of the judicial system and result in as good, if not better, legal advocacy at a far lower cost.

Both views presuppose good execution. A balanced approach is of no use if it is poorly done. Miscited contrary authority is likely to be as misleading as miscited supporting authority. Similarly, highlighting two or three irrelevant cases will not be of much use.

We believe that our approach has significant advantages. As a general proposition, the longer the brief, the less time will be spent by a particular judge or law clerk on the most important parts of that brief. The authority that directly supports the position of one's client is almost always more important to the judge than the distinguishing authority that could conceivably be raised by the adversary. A judge or clerk is looking for your argument—the cases that demonstrate that you should win. While judges differ, we believe that most see themselves not as creators of the law, but as umpires with the responsibility of deciding cases. We are confident that most judges and clerks want little more than to be quickly given an accurate statement of the facts, cued into the relevant area of law, and given a handful of "best" cases that they can read and analyze on their own. If both sides do this much, the court can efficiently perform its purpose of making an independent review of the most appropriate law and reaching a decision.

Thus, the problem of advocacy, as we see it, is not a failure to

provide briefs comparable to law review Articles to judges. The problem is how to present the issues clearly and concisely. The failure of advocacy is not the failure to say it all, but the failure to say the important things well.

Our approach also has other benefits. It is certainly less expensive than writing a long brief, especially a long one filled with legal citations and analysis. In addition, arguments will tend to focus on the main issue and not esoteric fine points. Finally, clients will no doubt feel better reading a short, more easily understood brief. The system will thus make more sense to the litigants.

Essentially the problem is one of judicial overkill. Professor Hazard suggests that the role of the advocate be broadened to include a "help the court" function, which requires a duty of disclosure. This type of duty, similar to the duty of disclosure applied to counsel before the Patent & Trademark Office,[6] is based on a model of an overworked governmental official who is unable to keep up with the whole body of relevant material. But the question always remains: Is someone who is charged with a decision better off just because more material is put before him? The answer, we believe, is no. Because he cannot possibly read all of them, a patent examiner is not aided by a patent applicant who submits seventy prior art references. He would be much better served if the applicant submitted three very relevant patents that he could read. So long as a duty to cite relevant material exists, however, the applicant is forced to submit anything and everything or risk being accused of violating his duty of disclosure because someone else decided that the three prior art references he cited were not as relevant as some other reference. Exercising judgment becomes risky.

As long as we expect the judiciary to exercise independent judgment, there is no good reason to require, or even hope for, advocates to feel obliged to "do the court's work." Instead, we need to find ways to give the judges more time to consider the law in the context of the adversarial positions presented by the opponents.

IV. Solutions to Bad Advocacy

Choosing between options one and two is crucial in determining

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[6] It is significant that the comment to DR 7-106(B) expressly mentions the duty of an attorney to disclose prior art in a patent application.

what to do about bad advocacy. If Professor Hazard is correct and if one cares about the state of the written law, it makes sense to change the Model Code of Professional Responsibility to require citation of a wide variety of adverse authority.

Professor Hazard suggests that the change is minor, a categorization with which we must take exception. Of course, even if the purpose of an advocate is to obtain the goals of a client, there are still limits within which the advocate's activity must occur. One generally accepted limit is contained in Disciplinary Rule 7-106(B)(1), which requires that an attorney "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." This formulation should be compared to the Kutak Commission's Discussion Draft, Rule 3.1(c), which provided that "[i]f 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."

We believe that the results under these two alternatives would be quite different. There is almost no difficulty in complying with the current language. The phrase "legal authority in the controlling jurisdiction" in DR 7-106(B)(1) is a concept readily identifiable by any advocate. While the term "directly adverse" is less clear, it would likely be agreed upon by a high percentage of practitioners faced with a specific example.

On the other hand, the language in the Discussion Draft places a practitioner in the position of playing a game of chess against himself. The phrase "that would have a substantial effect" is, at best, open to considerably more doubt than "directly adverse." The Discussion Draft also would lead a practitioner to ask many difficult questions. Determining what cases to cite is largely a function of defining the legal issue. What if an adversary does not define the legal issue in the best light and the advocate is aware of potentially significant authority? What then is a "material issue" as used in the Discussion Draft?

Most practitioners have cited material under the existing rule infrequently. Even less competent attorneys usually find some direct authority in their favor. The new rule would, in our opinion, cause the advocate to consider citing "bad precedent" in practically every case. The results of such a rule are predictable. Rather

than encouraging candor, the proposed rule would more likely serve to discourage research. The research question would change from "research the law of *X*" to "find me only good authority."

The wisdom of the Kutak Commission rule can best be explored in terms of how the system should function. Essentially, we propose that the judicial system has two interests that should be protected: (1) Each side should be represented by "adequate" counsel, and (2) the court should arrive at decisions that are defensible with respect to its own prior precedent. The present disciplinary rule reasonably protects these two interests. By enforcing an obligation on the adversary to cite harmful precedent only in those limited situations where the other side has in a sense defaulted, the present rule goes far in assuring that the first condition is met. An attorney who does not cite a case from the controlling jurisdiction that is directly adverse to the opponent is not "adequate." The present rule protects against this form of inadequacy by putting the burden on the opposing attorney to become the other side's advocate only to the extent of the lowest acceptable level of "adequacy" in light of the inherent conflict. By knowing this information, the court will necessarily make a defensible decision in light of its own prior precedent and thus not violate the principles of stare decisis. The system works.

An advocate is not inherently inadequate because he fails to cite relevant authority from other jurisdictions. To be sure, the advocate may not be "good," but so long as he cites controlling authority, he probably is adequate. By telling his attorney to keep the cost down, a client may have accepted the risk of losing because of inadequate research. So long as authority from the controlling jurisdiction directly supporting the opponent is cited, the court will not violate the principle of stare decisis. The parties got what they wanted: a decision. The public may not get a well-reasoned decision, but the opinion is at least in line with that court's own precedent. To require the advocate in this case to make the other side's case is unjustified. Why should one party underwrite a potentially costly exercise so long as the court is informed of any binding precedent? A party simply cannot be made the insurer of the best legal result. That burden, should it exist at all, must be borne by the court.

Beyond the proposed change in the Code, Professor Hazard simply suggests that, for tactical reasons, advocates would be better

off if they argued more completely. To be sure, there are many tactical reasons for anticipating a possible counterargument regardless of whether your opponent is likely to raise it.[7]

What if our position on the problem, and not Professor Hazard's view, is correct? If we are right, how then do we improve advocacy? Part of the solution is to recognize the increased complexity of our legal system. An increasing number of attorneys readily admit that they have no intention of mastering anything but a narrow spectrum of law. Even the most ardent general practitioners, upon closer examination, cover only relatively few discrete areas. The legal system's complexity has many significant ramifications. Research, so essential to Professor Hazard's solution, becomes more expensive on a day to day basis as new precedent is added to the body of law. Attorneys must continue to recognize the limitations that this complexity places on our role as advocates. If legal matters are handled by "specialists," we believe that the issues would be better framed before the courts.

Part of the answer, and indeed a distressing part for many of us, is that we simply have to tolerate a greater level of inconsistency and bad reasoning in judicial decisions, acknowledging that the "cost-efficient" advocate is a cause. If more and more people turn to the judiciary and we cannot afford the increased commitment of resources to handle it, we will just have to tolerate the intellectually less satisfying result. We do not suggest that this is inherently undesirable; it probably is not. "Justice" is often done even in those cases where judicial opinion is unsatisfying. A dispute between two or more parties is resolved. If that resolution is done fairly, quickly, and reasonably inexpensively, then the advocacy may well be more deserving of commendation than the written decision might suggest. Just because written judicial opinion is bad, it may not be indicative of bad advocates.

In any event, the problem of advocacy quality is more complex than Professor Hazard suggests. Neither an ethical viewpoint nor a tactical-opportunity viewpoint will suffice to analyze the question.

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[7] Indeed, the tactical advantages with respect to anticipating possible counterarguments are quite complex. Many cases offer a number of different opportunities in which legal argument may be raised. For example, in a bankruptcy proceeding, there may be at least three levels of appellate review of a decision in the bankruptcy court. At each stage, an advocate has to make decisions about how to structure legal argument and what cases to cite. There may be reasons to raise certain issues at one point but not another.

The issue must be addressed with respect to the client's interests and the inherent purposes of the judicial system as a means of resolving disputes.