

## **Creating Opportunities for Advocacy and Preserving the Adversarial Tradition**

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For as long as I can remember, litigation counsel have talked about how the opportunities for getting into court have decreased significantly, but nobody has done anything about it. This is a particular problem for young counsel and it is not a static concern -- It has grown significantly over the past decade. While we may have the same number of trials on an annual basis year over year, we have a significantly greater number of lawyers that considers themselves litigation counsel. There is now a very real concern that we are creating a generation of "litigation solicitors," a generation of litigators that doesn't know where the courthouse is and that considers discovery as the ultimate "adversarial" experience.

It is incumbent on The Advocates' Society to take up the challenge of examining this issue and to develop a concrete plan for attempting to deal with it. If we are going to preserve our litigation traditions and the skills inherent in an adversarial system of justice, then we need to stop talking and start doing something about it. We need to create opportunities for advocacy.

### **The Problem**

A review of The Advocates' Society Journal over the past dozen years helps to define the problem.

1. In his 1991 interview with John J. Robinette, David Stockwood, Q.C. noted that litigation counsel used to practise both criminal and civil law, but today many juniors work in large firms on massive commercial cases and rarely, if ever, have an opportunity to get into court. In response, Mr. Robinette noted that "the problem is that they do not learn basic advocacy skills, which lawyers used to develop by appearing in criminal cases ... The young lawyer should go to the head of the litigation section and ask if something can be arranged to allow him or her to gain courtroom experience." Further, in response to Mr. Stockwood's comment that "many firms argue that it is uneconomic for young lawyers to take on criminal cases," Mr. Robinette stated, "...that is short-sighted because you are not encouraging the young lawyer to improve advocacy skills. The young lawyer with experience before a court or tribunal is going to be worth more to the firm in two or three years than the one who always stays in the office."

2. Writing in 1992 as president of The Advocates' Society, Eleanore Cronk (now the Honourable Justice Cronk of the Court of Appeal for Ontario) commented on the important role of the Society in the maintenance and improvement of advocacy skills through advocacy skills training. She observed, in relation to the improvement of the professional abilities of advocates, that "this will become increasingly important over the next several years, as the number of

graduates from the bar admission course continues to rise and the opportunity for courtroom experience for young lawyers continues to decline."

3. In David Stockwood's 1993 interview with Ian Scott, he posed the question "Do young lawyers get into court enough these days?" Mr. Scott responded, "I don't think so. Life in the 1960s was very different ... it was a time before legal aid, and you could get into court quite easily if you were young. I was in one court or another at least once or twice a week from the day I was called to the bar. Although the courts tended to be provincial criminal courts and Small Claims Court, it was great experience. I sense that in large firms, perhaps even in small firms, young lawyers don't get that experience. Maybe they get better experience. I don't know, but I like the way it happened to me."

4. Guy Pratte, in his provocative 1994 article "To Be or Not to Be An Advocate," lamented that:

"The opportunities to train as an advocate have all but vanished. Thus many disillusioned candidates quit the profession, or resign themselves to a life of unfulfilled ambitions and shattered dreams. Some become "litigation solicitors", so infrequently called on to practice their craft that they become "gun shy" or else perform well below their true capabilities ... The complaints from younger litigators are as well known as they are universal. The level of frustration is palpable, and no wonder. What other occupation does not offer a clear way to learn the craft?"

Mr. Pratte went on to propose that the paucity of advocacy opportunities be addressed head on, given that this reality "is the product of numerous factors, including the proliferation of lawyers, the high cost and increasing complexity of litigation, and the long delays involved in getting cases adjudicated." He suggested that in order for firms to provide the best advocacy for their clients, consideration should be given to reserving court and tribunal appearances to a relatively small number of litigators who have the ability or who are "willing to devote their full energy to achieving proficiency" in order to give these litigators "as many opportunities as possible to practise the art of advocacy." He was quick to point out that he was not advocating formal rules to limit the number of barristers but that we recognize the reality and have those whose skills lie more in the direction of the preparation and organization of cases develop those important talents as litigation solicitors.

5. In 1996, in his speech accepting The Advocates' Society Medal, Earl Cherniak, Q.C. commented on how young litigators no longer have the opportunity to apprentice for experienced counsel while waiting to have their cases heard in Magistrates Court and Weekly Court:

"The reason is economics. High overheads and the salaries paid to young lawyers make it uneconomical for law firms to allow young lawyers to do this kind of work and the same factors have made small sum litigation impractical. These costs make it essential for junior lawyers to do productive work right from the start, which is often incompatible with adequate training. More and more tasks that used to be performed by young lawyers are being performed by paralegals, inside or outside of the firm ... The sad fact is that the legal profession has priced

itself out of those proving grounds for young advocates. The result is the lack of opportunity for young counsel to train and prove themselves in the crucible of a trial ... The traditional proving ground has not been replaced by something better. ... If we do not do something to arrest this trend, not only the profession, but the bench and the public, will ultimately suffer.”

6. In his 1999 "Reflections," the Honourable Justice Colin Campbell echoed many of the same concerns:

“Even in large firms, the day of a junior lawyer working closely for a significant period of time with a senior has given way to teams, where lawyers have been assigned non-courtroom tasks and thereby lose the opportunity for some of that practical advice in action ... In addition, with the current emphasis on negotiations and mediation, younger lawyers have fewer opportunities to develop and use advocacy skills. The profession is missing a great opportunity for training that could take place if more senior lawyers were willing to supervise younger lawyers in pro bono work.”

7. Finally, in his 1999 "Mid-life Ramblings of a Litigator," John Callaghan highlighted the same sentiments:

“The biggest impediment to good advocacy is experience. There is clearly an economic reality that makes litigation an expensive venture. As a matter of economics, cases have to be settled. The result is too few court appearances. This is a common complaint not only of newly minted lawyers, but also of mid-level and senior lawyers.”

Mr. Callaghan goes on to note that "advocacy is the skill of persuasion, and the ability to persuade lawyers occurs each and every day. More importantly, it occurs in a number of different forums." He notes that the opportunity for advocacy exists before a number of administrative tribunals, Small Claims Court, Landlord and Tenant Court, By-Law Court and Provincial Offences Court. Further, "with the introduction of the Simplified Rules, there is an opportunity to take trials at less expense to your client" and these "provide a good opportunity for young litigators."

### **The Solution**

I do not know if there is one, but what I do know is that we must examine the problem and use our best creative minds to see whether there is something that can be done. The above commentators put forward several suggestions that might constitute a good starting point. Are there opportunities to get younger lawyers before administrative tribunals and other courts? Can greater use be made of younger lawyers in simplified trials? Can we create opportunities for supervised pro bono work?

Similarly, can we set up a program, like the Dallas Bar Association, and have "lawyers on loan" - with young litigation associates serving as deputy assistant district attorneys in trying minor criminal cases -- thereby giving them opportunities to develop trial skills in a courtroom? Can

we set up a program, like the Chicago Bar Association, and put young lawyers in touch with defendants who would not otherwise qualify for legal assistance in criminal matters where such defendants would otherwise go unrepresented?

On a more general level, can we develop a rationale, within the context of modern law firm economics, that will permit the case to be made for allowing young litigators to get the courtroom experience they need in order to develop into strong and effective litigation counsel? And, perhaps most importantly, can we change the perception that leads some to suggest that going to trial, because of an inability to resolve a dispute, represents a failure on the part of counsel? Indeed, this is not only an issue for young advocates; it is an issue for advocates at all levels of seniority.

To this end, The Advocates' Society has formulated a Task Force on Advocacy. Over the coming year, I will be working with Michael Barrack (Chair), Mark Lerner, (Vice-chair), Michael Brown, Peter Cronyn, Neil Finkelstein, Brian Foster, Allan Sternberg, Bonnie Tough and Peter Wardle in addressing these issues. We will be adding younger advocates to the Task Force and we will be soliciting the views of our members through discussions, submissions, workshops and the like with a view to presenting a report to the Society before June, 2004. In my view, this is perhaps the most fitting way to acknowledge and celebrate the 40th Anniversary of our great Society.

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