Rethinking How We Litigate to Ensure We Continue to Litigate

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Since first raising the issue in late June 2003, I have had numerous opportunities to participate in discussions of the impact of decreasing opportunities for courtroom and hearing room advocacy on our litigation profession and, in particular, on younger members of the bar. The Advocates' Society is not alone in its concern: the American Bar Association has a project underway on "The Vanishing Trial" and the American College of Trial Lawyers has created an Ad Hoc Committee on the Future of the Civil Trial.

It is apparent that there are no easy answers in our quest to give litigation lawyers their days in court. It is important to continue to focus on this issue in order to raise the consciousness of the profession and, one can hope, to generate ideas that will promote increased advocacy opportunities.

This is not a matter of lawyers attempting to feather their own nest by increasing business opportunities, whether for money or for self-gratification. If one believes in the symbolic and very real importance of a vibrant trial system as being the cornerstone of our civil and criminal justice systems, then this goes to the heart of our concerns to foster access to justice and to ensure that users of the system receive professional, competent and effective service.

This is all "highfalutin" talk, but it is at the centre of who we are, what we do and how we do it. There are some very important and difficult issues that we need to come to grips with if we are serious about creating advocacy opportunities. I will comment on four of the issues.

First, for many years, we have been content with the notion that if we offer advocacy skills training programs then we are doing enough. Indeed, The Advocates' Society takes justifiable pride in the quality and scope of the skills training programs it offers. Such programs are an essential component of teaching young advocates -- but they are not enough. Lawyers have to understand the pressures and responsibilities that arise in trials or hearings, where the result can have great importance and where the result often depends on one's own decisions made in real time in the course of a trial or hearing.

Second, it is understanding the trial or hearing process that is the unique skill of the litigator. Our justice system is premised on a process ultimately leading to a trial in order to resolve disputes. As we all know, few cases ever get to trial. Yet it is the experience derived in the courtroom or hearing room that makes a litigator effective in giving advice on litigation strategy to achieve a particular result. It is the same experience that allows a litigator to be effective in the mediation or settlement contexts, through the ability not only to evaluate what a case is worth but also to allow for a real alternative -- trial -- if mediation cannot produce an appropriate settlement.

Third, we must acknowledge that, from an ethical perspective, the issue is one that goes to the essence of competence. We hold ourselves out as trial lawyers. If we are not prepared to go to court, because we don't know how, we are letting the "fear of trialing" distort our judgment. We are not providing competent service to clients. We need to acknowledge this fear factor and deal with it.

Fourth, a failure to appreciate and understand the trial or hearing process can have a negative rebound effect, particularly in the civil justice context. Nowhere is this more apparent than in the way we approach and conduct documentary and oral discovery. Not having had to prove a document at trial or not having had to use a discovery transcript at trial affects counsel's ability to know what to do in the discovery process. The problem is not only, as I previously suggested, that discovery becomes the ultimate adversarial experience; it goes beyond that to not understanding how to analyze a case before discovery, not understanding the concept of relevance and not understanding the importance of precise, thoughtful questioning.

As will be discussed below, one result of this phenomenon is massive production of documents and prolonged, if not endless, questioning on discovery. Indeed, it is this process that increases the cost of litigation, which we then use as one of the primary reasons why clients should settle rather than go to trial.

What then can we do about this situation? Can we make changes that will create opportunities for advocacy? Here are four possibilities:

(1) We have to commit ourselves in a significant way to giving young lawyers the opportunity to supplement their skills training with real experience in courtrooms and hearing rooms. We have to invest in this complete training process in order to derive future benefits from having effective litigators available to give advice and resolve disputes whether inside or outside of a courtroom or hearing room. These opportunities exist. For example:

(a) allow juniors to attend and participate in trials at reduced rates or at no cost to the client;

(b) promote opportunities for pro bono work by allowing younger lawyers to represent the under-represented -- those who need and want representation but are forced to proceed to trial without representation for economic reasons, including: civil cases, minor criminal cases (especially those that do not require the specialized skills of the criminal lawyer in Charter and other issues), and some types of family cases, particularly in areas such as child protection;

(c) offer the services of younger lawyers on a reduced or no-rate basis in order to allow clients to use the trial process to resolve minor civil disputes on an economic basis through small claims or simplified rules trials.

(2) We have to create mechanisms to facilitate the access of lawyers to these opportunities. Increased use of the Lawyer Referral Service is one possibility. An expanded pro bono organization that would put lawyers in touch with those who need representation is another. The Advocates' Society should take a lead role in this regard.

(3) On a more general and long-term basis, we have to re-think the way in which we provide litigation services to our clients. Let me be the first to admit: "My name is Jeff and I ask too many questions on discovery." We need to put an end to our approach to litigation that makes it uneconomical for a client to litigate. As litigators we have never come to grips with the technological changes and the information explosion that have forever altered the way we practise law. Leaving aside the professional considerations, if we view the matter just from a business perspective, we have priced ourselves out of the market by making the "trial alternative"

too expensive. The cost of getting to and conducting a trial becomes the reason to settle. This distorts the settlement process because if settlement is not "voluntary" and if the merits of a case have little to do with outcome, then the results of settlement will not be accurate in the sense of approximating the results of a trial based on the merits of a case.

The time has come to change our litigation culture -- to teach advocates how to litigate on a cost-effective basis. How many of us have really stopped to think about the cost to a client of a particular line of questioning on discovery relating to some tangential point? When is the last time we actually found that smoking gun? We need to identify the ways we can attract clients back to using the trial alternative by giving value proportionate to cost. I would submit that this should become the key issue on both a professional and a business perspective. We can and should develop best practices and new ways of doing things that will bring our clients back to the courtroom. The recent report of the Task Force on the Discovery Process in Ontario is a first step that provides several ideas in this regard.

(4) We should not overlook what I have described as the fear factor. We don't really talk about the frustration and demoralization experienced by lawyers who want to be trial counsel but can't be because of lack of opportunity. We should talk more about this. We should do something about this. Indeed one reason suggested for the reluctance of firms to invest in providing litigation opportunities for young lawyers is the increased mobility in the profession: we train them and then they leave. Once again the process is circular. If as a profession we can provide increased job satisfaction perhaps lawyers would not be so quick to give up and leave to look for better opportunities elsewhere.

All of these comments must be viewed in the context of our common law system. We need trials not only to resolve disputes but also to develop the law in a modern context - - to develop common law principles that reflect current social economic and business reality. Mediation and private arbitration are important components of a dispute resolution system, but they do not serve this additional, very important function.

I hope that the work of The Advocates' Society Task Force on Advocacy will be a first step. Our Society has been at the forefront of promoting our traditions of advocacy. We should re-focus our efforts to remain at the forefront of the future of advocacy.

References:

Janet Alexander Cooper, "Do the Merits Matter? A Study of Settlements in Securities Class Actions," (1991) 43 Stanford Law Review 49.

ABA Section on Litigation, "Report of the Task Force on Training the Trial Lawyer," (June 2003)

Keven C. McMunigal, "The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers," (1990) 37 UCLA Law Review 833

Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," Symposium on the Vanishing Trial, ABA Section on Litigation, San Francisco, California (December 2003)