

TO: [The Advocates' Society Task Force on Advocacy](#)
FROM: D. Michael Brown (Young Advocates)
RE: Policy Forum Summary
DATE: March 23, 2004

The following is a point form summary of the remarks of the panel members at The Advocates' Society Task Force on Advocacy Policy Forum, which was held on Tuesday, February 17, 2004. I am grateful for the assistance of Alka Kundi, an articling student with our firm, in preparing this summary.

SUMMARY OF TRANSCRIPT:

Opening Remarks- Chairman

The Task Force on Advocacy (the "task force") has examined considerable literature on the issue of advocacy opportunities. The purpose of the panel discussion was to deal with four main questions:

1. Are there reduced advocacy opportunities?
2. Why are there fewer trials?
3. Is fewer trials a problem from the perspective of:
 - a. the profession;
 - b. individual clients, i.e. are there negative consequences to clients as a result of fewer trials
 - c. society, i.e., is it problematic if we do not have a body of public jurisprudence

Against developing these questions and answers the Task Force then asked what the Advocate's Society could do to deal with the problem from each of these perspectives. Each speaker reviewed these to provide a springboard for discussion.

Summary of Presentation- D. Michael Brown:

- background omitted
- presented the perspective of young advocates and spoke on the problem of reduced opportunities for trial advocacy.
- lack of trial opportunity is a reality for young lawyers. When interviewing he discovered litigation associates of five years often had minimal trial experience. MB sought a position which would afford opportunities to get to court as often as possible. It seemed that in larger firms little trial work trickled down to junior lawyers. By staying with

smaller firms he was able to have four trials in the first six years of practice; for those on Bay Street, this is on the high end.

- lack of available trial has gotten worse in the last two to three years. This affects the entire field of litigation.
- uncertainty and fear associated with the unpredictability of trial outcomes may spur counsel to settle. Uncertainty and fear comes from lack of experience. It is difficult to predict the course of a trial, e.g. how persuasive a key witnesses will be or how cross-examinations will go.
- lack of experience also often compels junior advocates to leave no stone unturned, lengthening trials. Although CLE training etc. play a role in remedying this, there is no substitute for trial experience.
- biggest impediment to providing junior advocates with trial experience seems to be the rising cost of litigation and increasing docket rates. To give juniors more opportunities, their services could be offered at a reduced rate, or on a pro bono basis. MB's experiences with Community Legal Services in law school demonstrates that there are advocacy opportunities for law students to represent clients in trials; these opportunities should also be available to juniors.
- the ultimate forum for oral advocacy is the trial. Hundreds of juniors want more trial experience. If one way to do this is to pair juniors with litigants in need of representation at a reduced cost or on a pro bono basis, firms should seriously consider it.

Summary of Presentation- Adrian Lang:

- two questions that needed to be answered:
 - does the average advocate today really wants to do more trials?
 - why do we still cling to the trial process if litigation files are shifting their focus from trial as the ultimate goal?
- background omitted
- watching a good advocate is next best thing to actually doing a trial.
- it is difficult to get advocacy experience and much more difficult to get trial experience in a commercial practice.
- training courses, particularly where senior members of the Bar and judges can critique individual style and content, provide excellent training. The drawback is that such training comes at a cost. Costly training programs could result in a disparate group of well-trained advocates.
- can juniors, who have not had much trial experience, actually speak to the issue of whether they need more trial experience or not? There is no question that juniors say

they want more trial experience. How much of this is a misconception about what trials really involve? Cases which do go to trial are massive. A junior's life, and the balance they attempt to preserve, may be overtaken by a case. This has a significant impact on one's personal life, other files and professional endeavours. It may not necessarily be a good thing to create more advocacy opportunities for junior members. Moreover, there always opportunities available in other forums.

- if the focus of litigation is shifting away from trials, advocates may need to shift the focus of the way cases move through the system. Instead of assuming that the trial is the end result, a two-step process could be implemented. All cases could funnel into mediation at the end of discovery. Only if that fails, would a case go to trial.
- Pro bono work is an important way to provide training to junior advocates. However, it raises difficulties for associates trying to reach billing targets and developing a niche practice.
- In addition to providing more practical training courses, at a more modest cost, there is a need for mentoring and/or apprenticeship programs. Juniors could be apprenticed to firms to work on files that are about to go to trial. Such programs would likely require Law Society involvement.

Summary of Presentation- Guy Pratte

- notes that some element of fear is good and should always be present.
- three main points:
 - traditional oral advocacy is still relevant.
 - there are three necessary conditions for becoming a good advocate.
 - there is a fourth necessary and sufficient condition for becoming a good advocate.
- advocacy is still relevant for two reasons: First, it provides the opportunity to persuade decision-makers. Judges admit that if their minds aren't changed by oral advocacy they are at least assisted by it. Second, oral advocacy gives clients the ability to see how their lawyers perform; this is the best way to ensure a client will accept whatever results comes from litigation.
- there are three necessary conditions for becoming a good advocate: talent, opportunity and mentorship. Most senior advocates are not involved in mentorship programs in a deliberate way. If senior advocates spent 1 hour a week with a small group of juniors; attending trial together and debriefing them on it, a huge service would be done. The Advocate's Society should help design such a senior mentorship program.
- The fourth and necessary condition is cultureship. Litigation has to regain the perception that it has value; it has been devalued in a number of ways. As the commercial Bar becomes more specialized, there are fewer senior corporate commercial counsel who have done litigation. Second, in large firms litigation is not as profitable as are big commercial deals, and this creates a tension. Creating a separate Bar would not be enough. Litigation boutiques are successful, but it would be sad if all litigators looking for a way to offer opportunity and training felt that they had to merge to leave large firms.

- large firms and corporate departments must be convinced that advocacy is important; juniors should be advocating firm sponsorship of such programs. GP described a recent pro bono case in which he was able to involve juniors with the support of the firm. This gives GP hope that firms may be receptive to creating opportunities to promote litigation experiences.

Summary of Presentation- Marlys Edward

- background omitted.
- many of the same issues presented also face practitioners in the criminal courts. Although theoretically there may be opportunities for advocacy, there are structural problems to creating them. Current levels of Legal Aid funding and the fact that most criminal law practices are small make it hard to provide adequate opportunities for juniors. There is also an absence of young people coming to do criminal defence work, and issues with respect to the viability and economics of criminal practice.
- what kind of work is available in the criminal defence Bar? Attitudes towards criminal trials are opposite to those of the civil Bar. Lawyers retain decision-making powers; for example, to decide which issues are put before the criminal court for a Judge or jury to decide.
- it would be extraordinarily wrong and ethically unprincipled for the civil Bar to seek to train juniors on the backs of the criminal accused. Thus training or participation in the criminal justice system would require intense mentorship and supervision. This in turn requires financial backing.
- the criminal Bar has an obligation to provide experience and mentorship to those who want to practice criminal law. If others want to participate, they must be prepared to pay for the additional costs which are incurred as a result. Moreover, there are extreme risks associated with such a system; including the effect of incompetent counsel.
- unless there is a mechanism to protect the interests at stake, providing opportunities for advocacy using the criminal Bar is not an avenue to pursue.

Summary of Presentation- Sheila Block

- advocacy is continuously changing, for example, training opportunities have vastly improved and are now available both to law students and to practitioners once they get out.
- should the concept of advocacy also be adjusted to reflect these changes?. If clients are better served by fewer trials, the practice must adjust. There are fewer oral advocacy opportunities such as motions or applications. The increased expense makes it uneconomic to go to court on small matters. As a result, there is a perception that juniors are less able to cope.

- advocacy skills are learnable. Analytical ability is more important than advocacy skills. Advocates must know how to get to the heart of the matter and how to analyse what counts in a case. Strategy and tactics can be learned outside the court room, for example at discovery.
- an advocate doesn't need lots of trials. They need enough to understand the discipline of the trial, and to learn about the consequence of choices. They need enough to gain exposure to witnesses.
- the goal should be to find a way to provide juniors with courtroom experience. Pro bono projects achieve this. Developing programs which can provide representation to the under served, and provide opportunities to juniors are necessary. SB agreed that there are huge ethical issues to consider in developing such programs. However, there are many who would benefit from having juniors on their case. It must be kept in mind that there are liabilities associated with such programs. These must also be thought through.
- a voluntary system in which firms could participate in such a program would marry the needs of the underserved with the needs of young advocates. Such a program will require a great deal of organization; this issue should be explored at the small groups today.

Summary of Presentation- Justice Blair

- reality is that there is an increasing number of lawyers who wish to become involved in a decreasing number of cases. Based on other presenters, Justice Blair wonders if the challenge isn't to find a substitute for trial experience.
- in the dispute resolution environment lawyers need to embrace a broader approach to advocacy. There are a wide variety of forums in which to acquire skills: all levels of civil and criminal courts, administrative tribunals, ADR etc. Although the skills differ between forums (particularly in the criminal context), they still provide opportunities for advocacy. Because trial techniques are not necessarily the same between forums, advocates must know the forum in which they speak.
- it is also important that the legal culture across the profession validate the idea that lawyers developing their skills are real advocates. I would ask the breakout sessions to consider how to ensure that juniors develop the variety of skills required in the different settings, and the ability to know which skills to employ on which occasion.
- continuing legal education and skills programs need to be continued. However, they are not the only answer. Advocates who go through a training program without ever having the opportunity to test those will not develop. Programs such as pro bono and mentoring, which bring juniors before Courts and tribunals are important.
- We have all heard that mentoring and pro bono work is economically underproductive; is it therefore discouraged? Juniors who spend x hours preparing for a pro bono case may be perceived as not have the same chance to make partner as juniors who spend those same number of hours generating billable time and therefore revenue. This is a short sighted attitude; juniors can only become proficient with the opportunity to do so.

Summary of Presentation- Chief Justice Smith

- background omitted.
- in order to preserve our litigation traditions and the skills inherent in an adversarial system opportunities for real advocacy must be encouraged and created for juniors.
- feedback from Judges indicates that our current system is still producing fine advocates.
- good advocacy is not confined to the courtroom. It begins when the file comes into the office. It is practiced at mediation, settlement conferences etc.
- the role of the advocate has changed and advocates must change with it. The way in which law is practiced today requires good advocacy skills and preparation at all stages. Counsel should take advantage of every opportunity to appear before any judicial body as the tools and skills they will acquire are transferable. Regardless of the forum, the trier of fact's procedure is the same; hearing facts, making assessments about the problems presented, reading background material etc. The advocate must figure out how the decision maker reacts to the problems presented therein. From the Judge's perspective, also, it does not matter which forum advocacy skills are learned in.
- the preparation, evidentiary and advocacy skills learned in tribunals, Small Claims Court, Provincial Offences Court etc. are the same as those needed in every adversarial forum.
- trial experience is not the only way to become a great advocate. Continuing education and training also improve such skills. As the number of graduates from the Bar Admission Course continues to rise, continuing education for advocacy will be critical to producing good advocates. The problem of inexperienced or untrained advocates is not solely a problem for the Bar. It is a problem and a challenge for the entire administration of justice. Suggestions for improving advocacy training have already been discussed by other presenters. In addition, courts should make information available which would allow individuals to observe senior counsel at trial.

Conclusion of Chairman – Instructions for Breakout Groups

- the break out groups are to focus on two questions:
 - what can be done to increase the opportunities for clients that have their disputes resolved at trial if this is their desire? Consider the perspective of changes within the system and changes to the practice within the profession.
 - what can be done to increase the opportunity for members of the profession to obtain the skills necessary to address the challenges posed by the reduction in the number of trials?

Summary of Reports from Breakout Session - Adrian Lang

- increasing opportunities for clients that want to go to trial:
 - increase the efficiency of the process.
 - increase monetary limits on Small Claims and Simplified Rules to ensure these systems get better use.
 - streamline discovery by limiting the number of days for discovery. Although this would speed up the process, it would also remove advocacy opportunities for junior litigators.
 - involve the Attorney General in improving the process.
 - enforce stricter time estimates for motions and for trial. Judges must also recognize that some cases do need to get to trial.
 - There may be a need for more judicial expertise in specific areas.
 - increase judicial intervention and control of the trial process so limits are adhered to.
- increasing advocacy opportunities for juniors:
 - implement a matching program between firms with trials who do not have staff for them and firms with staff who do not have a trial. Costs would be subsidized by the person's firm as part of their training.
 - more specialized litigation Bar.
 - unrepresented litigants could be represented through another matching program.
 - a shadowing program where litigators have an opportunity to shadow a Judge for the day and get a better understanding of the process.
 - seniors have to get better about making sure they give part of a trial or a file to juniors and give them the opportunity to examine or cross-examine.
 - firms need to be better at tapping into pro bono programs. For example the pro bono Court of Appeal program that the Advocates' Society is working on. One way to do this may be to have firms bank certain hours that they commit to a central pro bono program and then divide that time up amongst their associates.

Additional Comments – Sandra Forbes

- In order to have excellent litigation counsel at your firm you have to pay the price. Firms should understand that there is an extra cost to producing leading advocates. While there is a cost associated with having a young associate give up a day of their time to do a tribunal hearing in a pro bono program there is also a wealth of experience the person will attain which is unmatched. It is a matter of seeing such experiences not as a loss of time but a gain in experience. Personally, being given part of a case from a senior litigator provided immeasurable trial experience. Seniors must try to give opportunities to juniors.

Summary of Breakout Session – D. Michael Brown

- increasing opportunities for clients that want to go to trial:
 - plaintiff and defence counsel have differing views on whether there are clients out there who do not want to go to trial. In one view, Plaintiffs almost never go to trial because of the associated cost and risks.
 - it is important for clients to see the court process in action. Cases are generally settling earlier because of ADR. Case management is effective for narrowing the issues at early stages and getting the case ready for trial. It may be that the system needs to be streamlined further so that cases which do not settle at ADR and are ready to go to trial can get there more quickly and with fewer impediments.
 - clients who want to get to trial are faced with several problems. Because of the loser pays system, some Plaintiffs can not afford the risk of trial no matter how strong their case is. Delays in getting to trial and the associated costs often outweigh the benefit of trial.
 - our current rules of procedure favour those who stall. There is too much detail in the trial process and something needs to be done to focus the issues more narrowly before trial. For example, Rule 14 applications and trials on the Commercial List are sometimes conducted with written evidence in chief being entered. Such procedures could help to focus or narrow a case and shorten its length.
- increasing advocacy opportunities for juniors:
 - smaller firms are not experiencing as much difficulty in getting their younger lawyers into court. Big firms identify the problem as being one of the attitudes of senior members of the firm and the impression of what is expected from younger members of the firm. Although big firms may have the variety of programs for training, such as pro bono programs, associates in the firm must know of these policies and know that such work is reinforced and appreciated. Such communications must be explicit. It is not enough to tell an associate not to worry too much about billable hours. Rather, doing pro bono work must be actively encouraged.

- there is often a tension between corporate and litigation groups at large firms. Litigation groups may be following corporate groups by taking larger billable files; thus small files are being squeezed out. Moreover, it is difficult for litigation groups to get support from the corporate department to justify the expense associated with training their associates. One suggestion was taking on Simplified Rules cases at a flat rate. Litigators may also need to accept that their practices bring in less money than the corporate side.

Additional Comments - David Morrill

- within big firms, educating partners is key. They must understand how important advocacy opportunities are to ensuring a firm will have competent litigators. Firms need programs in place where non-chargeable codes are available to charge training time. Firms must also ensure that individuals have the experience of coming to trial, or some other advocacy opportunity. It must also be understood that a firm needs certain types of files in order to gain or provide certain advocacy experiences. Firms will have to be creative in providing advocacy opportunities, because of the number of cases which settle before trial. We touched on the earlier suggestion of civil litigators moving into criminal cases. It is possible to create these opportunities at least where less serious criminal cases are concerned. It is the responsibility of senior litigators to see the value in that.

Summary of Breakout Session –Kimberly Morris

- increasing opportunities for clients that want to go to trial:
 - work with judiciary to shorten the trial time. A specialized bench could also be beneficial to speeding up the process.
 - increase the limits of Simplified Rules cases and for Small Claims Court cases.
 - eliminate hourly fees which sometimes promote inefficiency. Instead we could adopt a model similar to the U.K. – the brief fee concept, where price is negotiated at the beginning of the case. This fee would have to be across the board such that it was known to the other side and applied to the loser of the case as well.
 - it is important to know the needs and interests of the client and to have those in the forefront. This is achieved by talking to them and understanding what they hope to achieve from the litigation process.
- increasing advocacy opportunities for juniors:
 - Senior lawyers have to give up work to more junior lawyers. They must explain to juniors what is happening

- Firms should be encouraged to engage in programs where they second associates to clients. Although these opportunities exist, firms have not made a commitment to participate in them. Everyone talks about the commitment to pro bono however, practically, these programs are often offloaded onto a junior without any kind of supervision by senior counsel. This experience however is not universal.
- In addition to providing opportunities to shadow a Judge for a day, junior members should have the opportunity to talk with the judiciary about their views on cases and sit in courtrooms alongside a Judge to observe the effect of advocacy at the bench. There a number of different tribunals particularly those which are made up of lay people who would likely be willing to have junior members of the Bar assist them in hearing cases.

Additional Comments- Bonnie Tough

- One issue that consistently surfaces is the financial considerations involved in providing opportunities. There is a concern that we are putting ourselves out of business. For example [increasing the](#) Small Claims Court limits will not provide increased opportunities for young lawyers. It will result in more paralegals becoming involved as they can deliver more cheaply than young lawyers. Cost factors such as this need to be built into the discussion.
- The training of young advocates, and the culture that makes such training happen must come from senior people who have the power to make it happen.

Summary of Breakout Session – Kim Mullin

- increasing opportunities for clients that want to go to trial:
 - one of the key issues was reducing the cost to clients. The easiest way to do this would be to reduce our operating rates so that matters which would be otherwise uneconomical can be brought to trial.
 - implement a system of aggressive trial management which would be conducted by the trial Judge. A date would be set for trial and then a schedule devised by working backwards. This system would reduce delays and involve the trial Judge in management of the case allowing them to understand what went on during the pre-trial process.
 - Increase the limits of Small Claims Court and Simplified Procedure trials from \$50,000.00 to \$100,000.00.
- increasing advocacy opportunities for juniors:
 - senior lawyers must give juniors the opportunities and experience. To do so, juniors should not be penalized and in fact should be encouraged to do things

like observe trials even if it means taking a day of non-billable time to do so. Senior lawyers must also learn to share the trial work. If a junior is working on a file and is present at the trial they should at least be doing one of the examinations of one of the less important witnesses. This kind of involvement also creates an opportunity for getting feedback from someone experienced.

- junior lawyers must also take responsibility for creating these opportunities. Juniors should take on the files that nobody wants to do, rather than turning them down for fear of not having enough billable hours.
- reducing hourly rates in certain cases may also be a way to allow younger lawyers to get to trial.
- similarly, increasing the limit for Simplified Rules trials would also increase opportunities for juniors.
- need for a mechanism which allows young lawyers to develop trial-like skills outside the trial setting, for example an administrative tribunal. If juniors were able to develop relationships with courts, tribunals or other lawyers in areas where people are unrepresented or underrepresented such work could be funnelled to the juniors.
- In response to the concerns raised about young lawyers developing their skills on the backs of the disadvantaged we suggested that there be a roster of senior lawyers who work for these types of clients and could be mentors for young lawyers.

Additional Comments - Mark Lerner

- The message to take back to management teams and senior litigators in your firm is that creating oral advocacy opportunities is a fundamental problem in litigation departments today. Firms that do not accept this reality run the risk of jeopardizing the future of their litigation departments. Moreover if there is no plan to address the inexperience issue, your department will fall behind. We have a responsibility to develop this kind of expertise. We owe it to the profession and to the public to develop a body of expertise that will serve the public and that will develop a body of jurisprudence that will serve the public.

Closing Remarks - Jeffrey Leon

- The Advocates' Society is committed to report on the proceedings here today and what the Task Force has learned generally in order to provide the information that you will need to develop the business case within your firm for creating advocacy opportunities. We are also committed to developing an action plan to see whether the Advocates' Society can provide the organizational structure needed to create some of these opportunities. This is something that will take time. One theme that has come out of the discussion today relates to the cost of litigation. We must start to think about whether we can develop a no-frills litigation based on value billing.