

Report
of
The Advocates' Society
TASK FORCE
on
ADVOCACY



**THE ADVOCATES' SOCIETY
TASK FORCE ON ADVOCACY**

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INTRODUCTION

In June 2003, upon assuming the Presidency of The Advocates' Society, I indicated that the Society would be focusing on the preservation and creation of opportunities for advocacy in the coming year. This effort was a logical extension of the work done by the Society in the areas of civility and mentoring. While complaints and concerns about the lack of opportunity for trial and hearing-room experience for advocates, and particularly junior advocates, are nothing new, there was the sense that the fundamental nature of the problem had changed. Changes in the way that we practise litigation, changes in law firm economics and structure, changes in alternative dispute resolution and various other factors appear to have had both a qualitative and a quantitative effect on litigation counsel.

The fact is that many senior litigation counsel find that they have fewer and fewer trials and hearings. This is the case even more so for junior counsel, and for those beginning their career, the prospect of getting into a courtroom or a hearing room within a reasonable period of time, if ever, has become a real concern.

The work done by our Task Force made it clear not only that the problem is serious and widespread, but also that it exists throughout our profession -- for litigation counsel in major urban centres, medium-size centres and smaller locales. It is a problem for lawyers in big firms and in small firms. Indeed, unknown to the Society when we began our work, this problem has been the subject of significant investigation and commentary in an international context by the Litigation Section of the American Bar Association through its "Vanishing Trial Project." The American College of Trial Lawyers also has formed an Ad Hoc Committee on the Future of the Civil Trial.

In raising the profile of this issue, The Advocates' Society struck a chord with the profession and the public. If junior lawyers do not get adequate trial and hearing experience, there is a danger that the adver-

sary system as we know it will be jeopardized and we will lose the vitality of the trial and hearing process as the cornerstone for resolving disputes within our justice system. From the perspective of the public, this issue is also one of access to justice. Having a strong litigation bar that has the knowledge and the desire to take on cases and to see them through to their resolution is critical to the vitality of our dispute resolution system.

The main function of our Task Force has been to raise the consciousness of the profession and the public and to encourage steps to be taken to reverse the trend. As President, I wrote articles on the subject that appeared in "The Advocates' Brief" ("Creating Opportunities for Advocacy and Preserving the Adversarial Tradition," Vol. 15, No. 1, July/August 2003) and in "The Advocates' E-Brief" ("Rethinking How We Litigate to Ensure We Continue to Litigate," Vol. 15, No. 5, January/February 2004). I also incorporated reference to this issue and encouraged discussion of it when addressing various legal audiences across the province.

The Task Force itself, comprised of talented and experienced counsel, discussed the issue both in terms of attempting to define the problem and in terms of attempting to devise responses and solutions. The issue was further discussed at meetings of the Board of Directors of the Society, with the heads of other Ontario legal organizations, with the judiciary, with the Attorney General of Ontario and with others. The Advocates' Society should be proud of the leadership role that it has taken in relation to this matter. The near universal response has been one of concern, recognition and expressions of willingness to work to find solutions.

The Task Force has attempted to collect relevant data. While the quality of the data is inconsistent, at a general level it confirms that there are decreasing opportunities as a result of a decreasing number of trials. Discussions with members of the profession and the judiciary support this clearly and consistently.

In examining this issue, we have been careful to emphasize that our concern does not represent a shift away from support for mediation and early dispute resolution. Rather, it recognizes that, in order to be effective at mediation, counsel must have the trial experience that enables him/her to evaluate the case and to hold out the potential for a trial as a realistic alternative if a reasonable settlement cannot be achieved.

In February 2004, The Advocates' Society sponsored a Policy Forum, which was well attended by a cross-section of counsel and judges. Speakers included the Honourable Chief Justice R. Roy McMurtry, the Honourable Chief Justice Brian W. Lennox, Thomas G. Heintzman, Q.C., myself, and a panel chaired by Michael E. Barrack and composed of the Honourable Chief Justice Heather J. Forster Smith, the Honourable Justice Robert A. Blair, Sheila R. Block, Guy J. Pratte, Marlys Edwardh, D. Michael Brown and Adrian C. Lang. The discussions were invaluable and led to a lively and informative exchange of ideas. A remarkable level of enthusiasm was expressed regarding the need to decisively address and rectify the problem. The materials from this Forum are available on the Society's website at <http://www.advocates.ca/pro%20bono/AdvTaskForce.html>. The ideas generated are reflected in the recommendations that appear in this Report.

Smaller discussion groups were held in Ottawa and London and these too produced significant ideas and generated discussions about what can and should be done. It became clear that there is no single or easy answer. The profession in general and law firms in particular must recognize the problem and take steps to ensure that junior advocates receive practical training in the courtroom and in the hearing room. Senior advocates must fulfil their mentoring role to make opportunities for junior lawyers, and junior advocates must take responsibility and show the desire, the drive and the enthusiasm to take advantage of opportunities where they exist. The Advocates' Society and other legal organizations must explore ways to create programs that will

provide opportunities on an organized basis. We all may have to re-think the way we provide our litigation services with a view to making the trial -- as a means of dispute resolution -- an economic, timely and accessible alternative.

The recommendations that follow provide a blueprint for action. We must foster real-time litigation and the development of trial skills and experience in order to stem the move away from civil trials and restore vitality to the trial process.

We also must help younger lawyers in particular to avoid the "fear of trialing." This is an issue of competence. Junior litigation lawyers are held out to the public as being trial lawyers. If they are reluctant to go to court because they do not know how to try a case, then their judgment becomes distorted and they are not providing competent service to clients. In the end, trial lawyers will not want to try cases because of their lack of courtroom exposure.

Understanding not only the pressures and responsibilities that arise in the trial context, but also how real-time decisions can have a serious impact on the outcome of a client's case, is essential to equipping a lawyer to handle a trial. An understanding of the trial process is the unique skill of the trial lawyer and that skill is derived from the courtroom. It is that skill that allows the trial lawyer to be effective outside as well as inside the courtroom in giving strategic advice and in evaluating cases. It is trial experience that helps the trial lawyer know what is relevant and on what to focus during the pre-trial phase of litigation. Trial experience allows the trial lawyer to understand how to analyze a case and how to use that analysis in formulating a strategy.

As an organization, we need to commit ourselves in a significant way to ensuring that junior lawyers have increased opportunities to supplement their continuing education and skills training with real courtroom experience. The Advocates' Society needs to continue to study this issue and to find ways to create opportunities for advocacy on a

systemic basis. We need to find ways to put our members in touch with those who require representation in the courtrooms and the hearing rooms. This is a logical extension of our skills training programs and represents what should be the future direction of our Society.

As part of the process, we need to consider ways to help lawyers deal with the frustration and demoralization experienced by those who want to be trial counsel but cannot because of a lack of opportunity. In doing so, we may be able to assist lawyers in breaking out of the vicious circle that is created. Lack of trial experience discourages counsel from taking advantage of the opportunities to go to trial even where those opportunities exist.

The next phase of our work on this issue must involve the judiciary in a significant way. Many lawyers believe that judges take the view that the lawyer has failed his/her client if a settlement is not achieved and if the parties end up at the courtroom door. Now, however, judges also are expressing concern about the need to revitalize the trial process, and are expressing the desire to spend more time trying cases and less time managing them. They recognize that lawyers who become judges must have an understanding of the trial process. If lawyers can hear from judges that there continues to be a strong belief in the efficacy of the trial process for resolving disputes then there will be significant positive reinforcement for our initiatives.

We have captured the attention of the profession and the public. It is my hope that the information and recommendations that follow will provide the basis for a long-term commitment by The Advocates' Society to making opportunities for advocacy an integral part of our work and our mission. After all, this is really what we are about.

JEFFREY S. LEON
PRESIDENT
THE ADVOCATES' SOCIETY
JUNE 1, 2004

DISCUSSION POINTS

ARE ADVOCACY OPPORTUNITIES REDUCED?

There appears to be substantial data to support the hypothesis that the number of trials being conducted in publicly-funded courtrooms is on the decline. Statistics from the Ministry of the Attorney General of Ontario indicate that the number of civil trials held in the Superior Court fell from 2,280 in 1998/99 to 1,321 in 2002/03 -- this despite the fact that new proceedings commenced declined only marginally, from 92,792 to 91,165. This represents a 42% decrease in civil trials over a five-year period.

The number of trials occurring in other Ontario courtrooms is not declining at the same rate. In the Ontario Court of Justice, the number of criminal trials decreased from 25,590 to 22,150, a decline of only 13%. While Superior Court criminal trials fell from 1,372 to 963, a decline of 30%, Small Claims Court trials declined from 13,605 to 11,273, or 17%. Superior Court family trials actually increased in the same period from 1,285 trials in 1998/99 to 1,836 trials in 2002/03, an increase of 42%.

While the number of cases tried in publicly-funded courtrooms has dropped most dramatically in Superior Court civil proceedings, this does not automatically mean that there are fewer opportunities for the profession to practise advocacy in disputed hearings. In order to fully answer this question the data would have to be examined for the number of contested proceedings that were conducted privately by arbitrators. In addition, the number of adversarial proceedings conducted by administrative tribunals, such as securities commissions, professional regulatory bodies and other administrative tribunals, would have to be considered.

The number of advocacy opportunities has to be measured against the number of lawyers who hold themselves out as litigation lawyers.

LawPRO statistics indicate that the number of lawyers who advise that they spend 50% or more of their time in the areas of civil litigation (plaintiff and defence), family law and/or criminal law has remained relatively flat. In 1998/99 there were 7,129 lawyers falling into these groups and in 2003 there were 7,098. Over the same time, the practising profession increased from 17,350 to 19,400, an increase of 12%.

There is, however, a perception that advocacy opportunities, especially among young lawyers in some large firms, are declining. This may not be the result of fewer opportunities, but rather the result of the economics of large firm practice, including the salaries paid to associates.

WHY ARE THERE FEWER TRIALS?

A review of the literature on this subject reveals that there is no definitive explanation for the decline in the number of trials, especially the number of civil trials. A number of theories are put forward. One theory suggests that a societal and judicial attitude views the trial as a failure of the system to resolve disputes. This attitude is said to result in changes to the rules that encourage resolution prior to trial through mandatory case management, mediation and the introduction of the summary judgment procedure. It has been suggested that one consequence of a more expansive discovery process is that parties know the strengths and weaknesses of all parties' cases. The result of this increased knowledge is more settlements prior to trial.

Another explanation is that many disputes, which formerly were resolved by courts, are being diverted to other adjudicative bodies such as administrative tribunals, including securities commissions, labour relations boards, professional regulatory committees and municipal boards. These cases may result in trial-like experience but not the traditional form experienced in a courtroom.

Several areas of the law have been clarified in a way that has reduced both the number of disputes and the number of those disputes going

to trial. Legislative reform such as land titles legislation has reduced the number of disputes over title matters. Similarly, the development of the common law in areas such as wrongful dismissal provides the parties with a level of certainty about the outcome that makes most trials unnecessary.

In addition to changes in the substantive law, there have been changes to procedural law. Changes that have encouraged the growth of class actions have resulted in a great deal of litigation lawyer and judicial time being directed to an area of practice that is largely a motions practice.

Some of the American literature on this subject suggests that the decline in the number of trials is driven by a reduction in the number of judges relative to the number and complexity of cases that are being commenced. It is not clear that Canadian experience has replicated the American experience in the Federal Courts, in which over the last 40 years the number of filings has increased by 500% and the number of tried cases has declined by 20%.

Another theory reasons that the increased sophistication of both clients and lawyers in resolving disputes has contributed to the decline in the number of trials. This proficiency is due, in part, to the ability to assess the potential outcome of a case, including the costs of trial, by parties who frequently are involved in litigation, such as insurance clients. This, combined with the increased familiarity of clients and their lawyers with alternative dispute resolution mechanisms, both inside and outside the court process, results in fewer trials.

Stating it another way, some commentators suggest that the reduction in trials is simply a reflection of an increased productivity over time in the civil dispute resolution business. It has been suggested that over the past 20 years most service and non-service industries have reduced their costs and increased their efficiency. It is suggested that those providing the service of dispute resolution simply are responding to competitive pressures as part of a larger economic pattern.

If the alternative forms of dispute resolution are more economically efficient than the trial, does it follow that the trial has become inefficient? One measure of this would be to determine if the cost of resolving disputes through to trial has risen disproportionately to the amount at issue in the dispute. Anecdotal evidence would suggest that this is the case

The growth of complicated litigation in which large amounts are in dispute means that parties will devote substantial resources to resolving these disputes. The dispute resolution models that may be appropriate for these cases may be too cumbersome and expensive for the resolution of disputes involving smaller amounts. On the other hand, a court system designed to resolve a large number of smaller disputes may become blocked by a few large disputes that absorb a disproportionate share of the available resources.

IS THIS A PROBLEM?

The reduction of trials in publicly-funded courtrooms is a problem only if holding more trials in these courtrooms would result in better outcomes for clients and society. It has been suggested that barriers to trial have the potential to cause negative outcomes for both individual clients and society generally.

From the perspective of individual clients, if the cost of dispute resolution dissuades them from even entering the public court system, this may mean that legitimate grievances have no forum for resolution. In addition, it may mean that clients are accepting sub-optimal outcomes of those disputes that do enter the system, because the cost of pursuing those disputes through to trial is prohibitive.

There is another possible adverse effect on clients. If a client's lawyer does not have experience in conducting trials, then that lawyer may be trial-phobic and may encourage sub-optimal outcomes in order to avoid going to trial. Additionally, if through lack of experience the

lawyer does not know how to conduct the entire litigation process through to trial efficiently, then the client may be denied the opportunity to achieve an optimal outcome by means of a trial, since the costs will be artificially increased. In fact, the over-represented client may be under-represented in terms of outcome.

From the perspective of our society, our legal system depends on the development of the common law through precedent. The substantial reduction we have seen in trials in publicly-funded courtrooms means that the development of the law is being arrested. In a world of increasing complexity in every sphere from bioscience to commerce, the need for a nuanced approach to legal issues is heightened. Much of this nuanced approach is being conducted by conjecture in the absence of precedent.

In addition, one of the great strengths of our justice system is that it is a public system. This is required to ensure that justice is done and that it be seen to be done. Public faith in the rule of law and respect for the rule of law require that its workings be open. The perception that special interests can pervert outcomes within the legal system is heightened when the resolution of disputes occurs in private. The courtroom is the only public room for dispute resolution, even in the courthouse.

There are disputes that, regardless of the cost involved, are of such a fundamentally public nature that they should not be settled through private compromise. These cases demand that our profession supply to them the highest quality of advocate and that those advocates have the experience to present these cases with the utmost skill.

In response to these perceived problems, The Advocates' Society has developed a set of recommendations that follow in this Report.

MICHAEL E. BARRACK
CHAIR, TASK FORCE ON ADVOCACY

INTRODUCTION TO THE RECOMMENDATIONS OF THE TASK FORCE ON ADVOCACY

Over the course of the year of investigation, the Task Force on Advocacy canvassed the views of the profession and the judiciary to determine what could be done to address the issues surrounding the reduction in the number of civil trials. Based on the many useful suggestions that were made, the Task Force developed the following list of recommendations. What became clear is that the task of ensuring that the legal profession continues to provide society with skilled advocates is a shared responsibility.

These recommendations are aimed at identifying ways in which The Advocates' Society and its members, both senior and junior, and their firms can contribute to improving the situation. It is our hope that, by example, we can lead change in all of the quarters in which it is required. We encourage our members to disseminate these recommendations with their firm and to share their comments and success with us.

RECOMMENDATIONS

WHAT CAN BE DONE AS A FIRM?

Outside training

- Although they are not a substitute for actual advocacy experience on behalf of clients, continuing legal education programs such as those offered by The Advocates' Society and other organizations can play an important role in advocacy training.
- Firms should encourage participation in hands-on training programs that allow young advocates to try out their skills in a court-like setting.

In-house training

- Larger firms should consider employing their existing pool of advo-

cacy talent to create in-house skills training programs for junior advocates.

- Such programs not only provide training opportunities for junior advocates but also provide an opportunity for the ongoing assessment of the junior advocates' skills in order to focus training in areas where needed.

Mentorship programs

- Mentoring is key to the training of any advocate. To the extent that such programs are not already in place, firms should consider implementing formal mentorship programs with junior advocates assigned to a particular senior advocate.
- Mentoring also should be encouraged outside the formal mentorship programs. Firms should encourage senior advocates to involve junior advocates in trials or other advocacy opportunities, even if the junior's time is not entirely billable. Taking a junior advocate to trial as an observer can provide an excellent learning opportunity.
- Firms should consider a means of recognizing time spent by both the mentor and the junior advocate in the mentoring relationship, whether through the creation of specific docket codes or otherwise.

Special billing arrangements

- Firms may be able to provide more practical advocacy experience to their junior advocates by offering their services to clients at a reduced billing rate or on a *pro bono* basis.
- Before rejecting a mandate on purely economic grounds, firms should consider whether it might have some value to the firm as a training file.
- A number of different billing arrangements could be considered for such training files, including reduced hourly rates, flat-fee arrange-

ments, contingency fees, or *pro bono*.

- Firms should consider whether any of their existing clients might provide a consistent source for such training files.

Pro bono work

- Firms should be aware of, and encourage participation in, existing *pro bono* programs such as those of The Advocates' Society, Justice for Children and Youth, and Pro Bono Law Ontario.
- All firms should have a written policy with respect to accepting *pro bono* mandates and that policy should be communicated to members.
- Aside from *pro bono* programs sponsored by external agencies, firms should consider whether there may be opportunities for further *pro bono* work through the firm's existing relationships with its clients, government agencies, charitable organizations, or other law firms in different practice areas where opportunities for advocacy might be greater (such as a criminal law firm).

Time spent training should be recognized, not penalized

- No advocacy training opportunity, whether it be formal CLE, mentorship, work at a reduced billing rate or *pro bono* work, will succeed unless it is fully supported by the firm.
- Junior advocates should be encouraged by the firm to take advantage of these training opportunities. Neither junior nor senior advocates will participate in these training opportunities if they are not assured that the time spent on such training opportunities will be recognized by the firm and that they will not be penalized for any reasonable reduction in billable work that results.
- To the extent that a firm develops a policy in respect of such training opportunities, it is important that the policy is communicated to all members of the firm on a regular basis.

WHAT CAN BE DONE AS A SENIOR ADVOCATE?

Mentorship

- Mentoring is essential to the development of advocacy skills. Consider participating in your firm's formal mentorship program, if one exists. If no such program exists, consider whether one should be implemented at your firm.

- Any opportunity to work with a junior advocate can be viewed as an opportunity for mentorship. If the participation of junior counsel on a fully-billable basis is not a viable option, consider whether junior counsel could participate at a reduced rate or on a *pro bono* basis as a training exercise.

Share or delegate

- Consider the advocacy opportunities you have on existing files that may be delegated to a junior advocate under your supervision.

- If delegation of the entire matter is not an option, consider whether there might be some advocacy opportunities you can share with a junior advocate, such as splitting the argument on a motion or an appeal or allowing junior counsel to examine one or two witnesses at trial.

Advocate for advocacy

- The members of your firm in other practice areas may not be aware of the challenges faced in training young advocates. You may have to educate them with respect to the need for, and the benefits of, such training.

- Other members of your firm may have to be convinced that the short-term financial sacrifices required to ensure that young advocates are properly trained will benefit the firm and its clients in the long run.

- You also may be required to persuade your client as to the benefits of having junior counsel actively participate as an advocate on a file.

WHAT CAN BE DONE AS A JUNIOR ADVOCATE?

Continuing legal education

- Take full advantage of the skills training programs offered by legal organizations as well as your firm's in-house training program.

- Try to participate in programs that offer hands-on experience and require you to employ your advocacy skills as you would for a client. Many of these programs give you the opportunity to practise your advocacy skills in a court-like setting, often before a senior member of the bar or a sitting or retired judge.

Look for advocacy opportunities

- Ultimately, the person who is best able to increase a junior advocate's opportunities for advocacy is the junior advocate. You will not increase your opportunities for advocacy unless you are actively looking for files that will afford you more advocacy experience. This may mean taking on less attractive or smaller files for which you will not be able to bill all of your time. Make it known to the other members of your firm that you are willing to take on any matter that might get you into court and be prepared to take on such work on short notice.

- Look for opportunities for advocacy outside the traditional court setting, including advocacy before administrative tribunals or in alternative dispute resolution. Many advocacy skills are transferable among the different venues.

- In addition to files you are handling on your own, you should seek out opportunities for advocacy in the files you are working on with senior counsel. In the appropriate circumstances, ask if you can take part of the argument on a motion or examine one of the witnesses on discovery or at trial.

Mentorship

- Take every opportunity to work with senior counsel on a file.

- Take full advantage of your firm's mentorship program. To the extent that no such program exists, seek out senior counsel at your firm or elsewhere to whom you can go for advocacy advice.

- If possible, take the opportunity to observe senior counsel in court. If a senior advocate in your office is going to trial, ask if you can attend a portion of the trial to observe on a non-billable basis as a training exercise.

Pro bono work

- If your firm has a policy that allows you to take on *pro bono* work, take advantage of it. If no such policy exists, ask whether your firm would allow you to take on *pro bono* work for advocacy training purposes.

- Sign up to participate in existing *pro bono* programs offered by legal organizations.

WHAT CAN THE ADVOCATES' SOCIETY DO?

Legislative and court reform

- There appeared to be consensus at the Task Force on Advocacy Policy Forum that a significant cause of the reduction in opportunities for advocacy is the increasing cost of litigation. A number of recommendations of possible systemic reforms were made by those participating. The Advocates' Society will be soliciting the opinions of its members with respect to particular areas of reform with a view to working closely with the legislators and the courts on initiatives aimed at reducing the costs of litigation and making it easier for clients who want to get to trial to have their day in court.

- Issues that The Advocates' Society is now considering include the following:

- reduce the time to get to trial once a matter has been set for trial;
- encourage the use of Rule 14 applications to increase the

efficiency in the process;

- increase the monetary limits for Small Claims and/or Simplified Rules matters;
- streamline the discovery process by limiting the number of days for discovery;
- enforce strict time limits for the hearing of motions and trials with increased judicial intervention to ensure that such time limits are adhered to;
- consider modifications to the loser-pay system of awarding costs (seen by some to discourage individual plaintiffs from going to trial);
- create greater specialization in the judiciary;
- create greater specialization in the litigation bar (litigation barristers and litigation solicitors), and
- eliminate the attitude that a matter proceeding to trial represents a failure of the system.

CLE, pro bono and other programs

- The Advocates' Society will continue to offer CLE programs, including its advocacy skills training program.

- The Advocates' Society already is coordinating two *pro bono* programs: the Child Advocacy Program and the Court of Appeal Program. The Society will continue to coordinate these programs and will seek to develop further *pro bono* programs that match unrepresented or under-represented litigants with advocates seeking more advocacy experience who are willing to donate their time.

The Task Force is grateful for the work done by D. Michael Brown in formulating these recommendations.

Additional copies of this Report are available from The Advocates' Society or are downloadable at <http://www.advocates.ca/publications/advocacy.html>.

Papers and a summary of the oral presentations from the Policy Forum are available at <http://www.advocates.ca/pro%20bono/AdvTaskForce.html>.

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