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## WE NEED MORE ADVOCATES

John Alan Appleman\*

SOME MONTHS AGO, when it became known that my new partners as well as I were limiting our practice exclusively to litigated cases, a number of lawyers expressed their surprise to me. The trend, it seems, is away from the trial lawyer. True, this is an age of specialization; no lawyer can be expert in all things. Perhaps that is the reason why we have specialized in the "hot air" rather than in the "brain" field. No longer does the conscientious attorney attempt to handle all matters, whatever might be their nature; he associates with him patent attorneys, tax counsel, and specialists in any particular phase of the law who can better help his clients to a more successful result—and the field of trial law is no exception. But, partly because of the constantly shrinking number of attorneys in proportion to the population, and because of the great demands upon the time of attorneys as counselors and business advisors, the number of advocates tends to diminish.

In Chicago, there is no question but that much of the delay incident to the trial of cases may be blamed upon a shortage of courtrooms and a shortage of judges. Part of the responsibility, at least, lies with the trial bar. For over a quarter of a century,

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approximately eighty percent of my time has been spent in the handling of litigated matters, primarily in downstate Illinois. It has been my observation that no trial lawyer, however qualified he may be, can handle over one hundred litigated matters a year. If sixty percent of such cases are settled before trial starts, and an additional twenty percent are settled during the course of a trial, when one takes into consideration the time required for the preparation of evidence, preparation of instructions, pre-trial conferences, depositions and preliminary matters, plus post-trial motions and appeals following trials, his available time is wholly consumed. In our firm, even with three of us constantly in trial or preparing for trial, three hundred cases a year would keep us working day and evening. Yet, in Cook County, many firms will take cases in multiples of this figure and then insist that only lawyer "X" can properly try a particular case.

In the downstate areas, the judges and attorneys cooperate to avoid conflicts—and, where a lawyer is known not to be a procrastinator, a continuance will always be given in the instance of a first conflict. Through such cooperation, the court calendars are kept well up-to-date except in a very few counties—and in those a twelve-month lapse from filing to time of trial may occur. But, in Cook County, along with the need for more judicial assistance, and with the judges working longer hours and employing their time more efficiently, there is a need for more advocates, particularly upon the defense side.

As we all know, it is popular in this day to urge the abolition of the institution of jury trial, in favor of hearings by commissioners. Particularly in the forefront of this movement has been a law professor trained in the laws of continental Europe, where jury trials are less highly regarded. Serious students of the matter, however, have come up with different conclusions. Professor Alfred F. Conard, after a three year study of the relative efficiency of Workmen's Compensation tribunals and jury trials of Employer's Liability cases, cast his ballot in favor of the latter.<sup>1</sup>

<sup>1</sup> Conard, "Is Workmen's Compensation More Efficient Than Employer's Liability?" *American Bar Association Journal* (Dec., 1952), p. 1058.

Five years of research resulting in a legal-scientific publication found that the abolition of jury trials in personal injury cases in New York City would save the time of less than two judges per year, and the recommendation was against the destruction of our system of jury trials.<sup>2</sup>

Most of us feel that the adversary system of jurisprudence has a substantial value. The trial of lawsuits has grown out of the old "trial by combat." Centuries ago, it became apparent that if "right" was always with the strong, the weak would always be imperiled. The weak then hired champions of strength to protect their rights.

When civilization developed courts to protect the rights of individuals, it became apparent that the untutored could not cope equally with the educated and glib of tongue. So they hired others of greater education to present logically and persuasively their contentions—in order to stand upon a plane of equality before judges and juries.

That is still the task of the advocate—to search out the facts favorable to the position of his client, to present the law supporting that position, and to argue with all persuasiveness at his command the rightness of such position. If he is not convinced such position has merit, or that there is a need to defend against overzealous contentions of the opposition, the attorney will ordinarily decline the case. But many lawsuits arise upon closely balanced equities. When both adverse positions are urged by professional champions of skill, a court and jury is enabled to see the strengths and the weaknesses of each position. They, being impartial, may judge where justice lies. No better system of attaining justice has ever been devised.

Frequently, advocates may take on as their own burdens the burdens of their clients. As a general rule, this should not be done. But, yet, when the advocate associates his cause with the cause of

<sup>2</sup> Zeisel, Kalven and Buchholz, *Delay in the Court* (Little, Brown and Co., Boston, 1959).

justice, that may be absolutely vital in preventing a manifest wrong. In such instance, a lawyer will risk public disfavor, judicial censure, and even death. That is why in the forefront of all social and historical activity, when leadership and action are demanded, irrespective of the risk entailed, one will find the lawyer.

Hitler said that the first thing a nation must do if it is to be a successful totalitarian state is to purge itself of independent advocates. All dictatorships have first stilled the voices of those persons, or those nations could not remain dictatorships. The man who will not sit silently by while he sees freedoms disappear, and who is eloquent and courageous in his battle against such encroachment, finds ears to hear him and this no dictator can tolerate.

Yet, there are in all nations efforts made from time to time to steal from the people their right to courts of justice and their right to representation by advocates. The movement in the United States is steadily gaining strength, under the espousal of at least one politically adventurous figure and one or two insurance executives. Such men say that we Americans have outgrown the system of trial by jury—that advocacy is no longer needed. These are golden notes which sound sweet music. Justice, they point out, is too often delayed—and in a few cities, as in Chicago, this is true, and we lawyers owe an obligation to our fellow citizens to help to solve those problems, whether the fault lies with the judiciary or with us, or both. But these same reformers sing sweet songs also of uniform justice, where all are treated alike, where the doctrine of fault will disappear, where justice will be automatic.

The space limitations of this discussion will not permit pointing out all of the fallacies of these contentions. For my part, I sincerely hope that no automatic system will ever come into being, where the drunken driver who causes the death of an innocent man will be compensated as fully as the widow and children of his innocent victim. No trial lawyer will ever claim that juries never make mistakes, because they do—as do we, the trial lawyers—but

those instances are in the minority and can be corrected by courageous trial judges and by reviewing courts. Distinguished barristers from Canada have warned us for some years. "Stop this before it begins. We failed to do so in Canada, and we have almost lost our right to trial by jury." A nation which has lost something as precious as this can appreciate the magnitude of its poverty in dealing with human rights. We must not permit our citizens of the United States to suffer a like loss.

That the field of litigation remains vast, and that there is abundant need of advocates, is clear from an examination of the constantly increasing size of the Advance Sheets. Not only those cases which we term colloquially as "blood and guts" cases demand representation, but all controversies presented to reviewing courts must arise through litigation, and that requires advocacy.

I urge the young lawyer who enjoys associating with people, who has a highly developed competitive sense, and a strong sense of wanting to see justice prevail to consider advocacy as his career. It is an arduous and demanding phase of legal work, of that there is no doubt; there is no time clock to punch, and work upon evenings and week-ends is the rule, rather than the exception. But it has its compensations, in the pleasure of association with one's fellow counsel and adversaries, in the development of an embryonic case to a completed and (we hope) successful result, and in helping to secure justice for people who place their faith in you.

There are disappointments, of course, as stated earlier; juries may err ten percent of the time in arriving at substantial justice. This percentage could be reduced if we abandoned the antiquated unanimous verdict rule in civil cases, as many jurisdictions have now done. A 10 to 2 system would avoid the unconscionable situations where one or two jurors are able to override the considered judgment of the overwhelming majority of the jurors. It is to be hoped that we, as attorneys, may help to modernize this facet of trials, and thus reduce the number of hung juries and retrials resulting from miscarriages caused in this manner. But, even

with its failings, it is apparent that the errors of jurors occur less frequently than the errors of lawyers. We may be wrong fifty percent of the time, since at least one lawyer must lose where another wins. And reviewing courts frequently must walk around or overrule their former errors.

One of the rich rewards of advocacy is the broad perspective which it gives the trial lawyer of many facets of the law, at least in downstate counties. Whereas the Chicago trial counsel may limit his activities solely to a specific type of personal injury case, the professional advocate who tries his cases before the bar of smaller counties will try cases arising from automobile collisions of all shapes and sizes; pedestrian injuries; suits against carriers by passengers before they have boarded the conveyance, while in transit, or after alighting; railroad crossing cases; slipping and falling or tripping cases against municipal corporations, stores, or private citizens; assault and battery, libel, right of privacy, unfair competition, false arrest, false imprisonment, and malicious abuse of process actions; suits by a servant against his master in situations not covered by the Workmen's Compensation laws; suits against a contractor for the creation of private dangers or public hazards; suits against manufacturers or retailers of dangerous instrumentalities, or resulting from the sale of tainted foods; explosions and malpractice cases.

Most of the foregoing are ordinarily in a category of common law cases. There are many which arise from statutes, such as dram-shop cases of all varieties, such as habitual intoxication, injury, death, and dozens of other situations; suits under the Scaffolding Act, under the Public Utilities Statute, railroad suits based upon statutory violations, food and drug, patent infringement, eminent domain, divorce, F. E. L. A., anti-trust, Robinson-Patman, N. L. R. B., minimum wage, and income tax cases. There are the criminal cases which I abhor after securing, in my youth, acquittals for several persons whom I thought more properly belonged behind bars, and which I since refuse. And there are a thousand and one other situations related more closely to the more dignified facets

of the law, such as negotiable instruments, resulting and constructive trusts, partition, mortgage foreclosures, objections to drainage assessments, hearings before administrative tribunals, declaratory judgment suits upon the construction of insurance policies and other contracts, suits for the construction of a will, will contests upon multiple grounds, claims against estates for personal services, suits for wrongful discharge, actions for breach of contract, suits against banks for improper payment of a depositor's funds, actions for accounting, suits between landlord and tenant, actions for breach of warranty, and many other matters.

It is apparent that this merely brushes the surface of litigation, yet it illustrates the vast scope of matters with which a trial lawyer may come intimately in contact. This broadens his perspective and helps to make him a better read man, a more thoughtful man—perhaps even capable, in some small way, of helping to mold the jurisprudence of his time. Advocacy, accordingly, while demanding, offers to him a vast challenge.

By this, I do not mean to underrate the great work of the legal counselor. His services are perhaps even more valuable to most clients. He has either innately or through experience developed patience and wisdom, able to view all aspects of a given situation, and thus to counsel the involved parties dispassionately as to their course of action. He becomes a business advisor and a personal mentor. His decisions help to guide both the great and the smaller affairs of life. His disposition and temperament are, of necessity, quite different from the restless, competitive temperament of the advocate. It is difficult for either to assume the role of the other. The law and our fellow citizens are best served when both work closely together for the maximum benefit to the profession and to the public.

I do not, in my desire to attract younger men to the practice of trial law, want to make it appear overly simple. That it is not. Certain aptitudes and abilities are important. A great deal of study is a requisite in certain facets of information—particularly in such matters as medical science, psychology, and forensics.

And it may take a rather lengthy apprenticeship to do justice to the causes of clients. Each year I am brought into some situations where an attorney, unaware of the legal pitfalls in the trial field, has filed suit in the wrong court, failed to give notice to a municipality, permitted the Statute of Limitations to run, failed in some matter of pleading or proof to substantiate a case simple of proper handling—or in a thousand other ways mishandled the case, either in the preparation, handling, or settlement of it. Some of such mistakes are curable; some are not. Frequently, when waiting for oral argument in a reviewing court, I will hear the court question counsel as to where the instructions are contained in the Abstract, only to find they have been omitted—or see other errors made fatal to a consideration of the cause upon its merits.

There is no question but that the field of trial practice is a specialty of its own, with many pitfalls. One should not dabble in it—he should either enter it to become professional in his handling of cases, or leave it alone and associate an advocate with him when one of his clients becomes involved in a situation where the help of an expert is indicated. But for one who is willing to take the time to prepare himself properly in that field, it offers substantial personal rewards and great opportunities for public service. Even as a tailor must master his craft before he can turn out well-tailored clothes, so must the embryonic lawyer develop his aptitudes to qualify as a professional advocate.

Some of the younger members of our bar have become discouraged from entering the field of advocacy by one simple fact which constitutes a continuing disgrace to the Bar. That is the fact that these young men feel they have no assurance of being able to secure clients in the field of their interest, because of the fact—and this is not limited to Cook County—that ambulance chasers are successful in lining up the more lucrative cases, thereby preventing such persons from seeking counsel independently and securing the assistance of able counsel, rather than the assistance of shysters.

The Federation of Insurance Counsel appointed a committee

to study this problem and to submit recommendations. This committee reported in 1960 and came up with the following recommendation: they stated that at the present time the layman had no way of ascertaining the names of attorneys capable of handling with skill a personal injury case. Instead, such person is easy prey to the ambulance chaser who, armed with photostats of drafts supposedly received in settlement of cases, invades the hospital rooms or homes of injured persons and signs them up, for the purpose of peddling such cases to the highest bidder or to some shyster whom he represents. The committee report then states that if an adequate means were at hand from which the potential plaintiff could obtain accurate data with respect to the background, ability, and integrity of available lawyers, how many would be foolish enough to sign up with the inexperienced or incapable "runner"?

The committee suggests two things: first, that a system of qualifying an attorney in such specialty be recognized, even as physicians have their Boards and their specialties. Perhaps by a combination of experience, examination, and demonstrated ability attested by the judges before whom such attorney practices, he could be given a rating as "trial counsel" or some such designation. Second, it is their recommendation that attorneys specializing in a specific branch of the law be permitted to carry such designation in the classified section of the telephone directory, whether such individual be a tax lawyer, patent lawyer, trial counsel, or probate lawyer. The committee states that we cannot be hypocritical enough to feel that the standard of ethics of our legal profession is, or should be, higher than that of the medical profession.

The committee concluded its report, which was unanimously adopted by the Federation, by stating that until the members of the Bar adopted a more realistic approach toward the solution of these problems, the Bar itself was maintaining in business the ambulance chasers and shysters against whom we rail constantly—even as the bootleggers were brought into business by Prohi-

bition. Perhaps the committee is right; perhaps it is wrong. At least, it is a considered effort to attack the problem upon a basis which has much to recommend it. We need advocates; we need to encourage young men to enter this profession—but we must at least offer them some opportunity of success if they dedicate their lives to this phase of legal practice. Those of us who have spent years at the Bar need no such help—our cases come from lawyers, counselors if you will, who associate us with them for the better handling of cases in which their clients are involved. But the younger man who would make an outstanding advocate must be given some opportunity to enter this phase of the profession with the reasonable assurance that his potential business will not be stripped away by the unscrupulous, the unethical and the incompetent—or with the realization that he need not demean himself by like practices.

Advocacy is worth preserving. Without it, the practice of law will suffer sadly, as will the general public and the future of this nation. May I urge that we, of the organized Bar, dedicate ourselves to a serious study of this matter and an improvement of the existing situation?