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Wanted: Advocates Who Can Argue in Writing

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SPECIAL COMMENT

WANTED: ADVOCATES WHO CAN ARGUE IN WRITING

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> For centuries most societies have used performance standards for entry into certain human activities that affect large numbers of people. Standards, varying in effectiveness, have long been used in an attempt to assure qualified teachers, doctors, lawyers, electricians, and a host of others essential to a modern society. Yet, in spite of all the bar examinations and better law schools, we are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians. We have no testing or licensing process designed to assure that those engaged to protect and vindicate important rights by trial advocacy are genuinely qualified for their crucial role in society. This is a curious aspect of a system that prides itself on the high place it accords to the judicial process in vindicating peoples' rights.[1]

This was the call to arms issued by Chief Justice Warren E. Burger in his now famous Sonnett Lecture in 1973. This beginning prompted increasing concern by the bench, bar, and law schools toward the quality of trial and appellate advocacy. The focus, however, has been upon oral advocacy, leaving written advocacy virtually without a champion. The efforts directed to the improvement of oral advocacy have been very worthwhile and remain critically needed. In today's courts, however, written advocacy is at least as important as oral advocacy and its importance will continue to grow. In contemporary court practice, effective oral advocacy cannot be viewed as synonymous with effective advocacy. Neither current law school curricula nor postgraduate programs offer the student or the practitioner

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[1] Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 230

adequate opportunities to develop skilled written advocacy, the crucial complement to skilled oral argument.

To explore this thesis, I will first review the increasing reliance upon written advocacy as a methodology for decision-making in our judicial process. Second, I will examine the present quality of writing skills. Third will be a brief review of the contribution of law schools and continuing legal education courses to the improvement of written advocacy skills. Finally, I will propose concerted action by law schools and the legal profession to improve the preparation of lawyers to advocate in writing.

I. THE INCREASING DEPENDENCE OF COURTS UPON WRITTEN ARGUMENTS

Each year courts are further inundated with litigation. This ever-growing workload has made it clear that, in many respects, court business cannot be handled in the traditional way. As a result, attention has been directed toward the development and testing of various timesaving methods to speed the decisionmaking process.

A striking example of the heightened press of litigation is presented by the federal courts of appeals. Since 1970, filings in the circuit courts of appeals have increased from 11,662 to 18,918, an increase of 62.2%.[2] These figures translate to an increase from 361 filings per three-judge panel in 1970 to 585 filings per panel in 1978.[3] Figures for the Ninth Circuit are even more striking. Since 1970, filings have increased from 1,585 to 3,099, an increase of 95.5%.[4] Unlike the aggregate 1% decrease in circuit court filings between 1977 and 1978, filings in the same period in the Ninth Circuit increased 6.7%.[5]

Ninth Circuit judges have attempted to increase their

(1973) (Fourth annual John F. Sonnett Memorial Lecture, Fordham Law School, New York (Nov. 26, 1973)).

[2] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1978 ANNUAL REPORT OF THE DIRECTOR 2, 44. A decrease of about 1%, however, occurred between 1977 and 1978, the first since 1958. *Id.* at 2. Twelve month periods of measurement referred to in this discussion ended on June 30 of each year.

[3] *Id.* at 3.

[4] *Id.* at 44.

[5] *Id.*

productivity. Although case terminations per judge have increased 134.8% since 1966 and 301.9% since 1961, the backlog of cases pending at the end of 1978 was 207.8% higher than in 1966 and 575.6% higher than in 1961.[6]

Looking for additional ways to save time, judges have considered the elimination of oral argument. Statistics for 1978 show a 4.4% decrease in the actual number of oral hearings from 1977, the third decrease in the past eight years.[7] In 1978, 34.31% of cases involving hearing or submission[8] were disposed of without oral argument, compared to 13.73% in 1971.[9] In 1978 in the Fifth Circuit, 52.25% of cases involving hearing or submission were disposed of without oral argument.[10] These statistics make it clear that effective appellate advocacy increasingly requires effective written skills. Nor is the increasing dependence on written skills limited to the appellate court. District courts decide more and more cases through the use of summary procedures, frequently without oral argument. The many cases decided without oral argument afford no second chance to the attorney whose writing skills are ineffective.

Even without the continuing decrease in opportunities for oral argument, normal trial and appellate practice requires effective writing techniques. In most appellate courts today, the judges read the briefs prior to oral argument. This means that not only is the judge familiar with the general facts of the case, but usually that he or she has reached a tentative decision prior to oral argument. The submission of a poor brief on the supposition that oral persuasion can win the case is foolhardy. Lawyers must provide their very finest advocacy before a tentative decision is made. Similarly, a lawyer must file many required pleadings in the trial court for consideration by the judge. Effective representation demands a workmanlike product.

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[6] *Id.* at 45.

[7] *Id.* at 48-49.

[8] This category, cases involving hearing or submission, excludes cases disposed of by consolidation as well as those disposed of without hearing or submission.

[9] These percentages were calculated from numerical data furnished to me by the Administrative Office of the United States Courts. Percentages for the intervening years were: 43.16% (1977), 31.78% (1976), 32.47% (1975), 31.74% (1974), 28.31% (1973), and 27.71% (1972).

[10] This statistic was derived from the same source as were those in note 9. Other Fifth Circuit percentages for this decade were: 59.10% (1977), 56.49% (1976), 53.92% (1975), 58.88% (1974), 55.50% (1973), 59.83% (1972), and 24.26% (1971).

Not only is there a need to write clearly to be understood, but there is also a need to write intelligently to persuade. Thus, writing skill is an indispensable part of the well-rounded advocate.

II. THE PRESENT LEVEL OF WRITTEN SKILLS AMONG LAWYERS

In addition to the Chief Justice of the United States, many other judicial leaders have directed attention to the critical need to improve the quality of advocacy in our courts.[11] A concrete effort toward improvement occurred in January 1975, when Chief Judge Irving R. Kaufman, on behalf of the Judicial Council of the Second Circuit, appointed a committee with a mandate to provide "a general impetus for improving the quality of representation" in all the federal courts of the Second Circuit.[12]

Following more than two years of study, the committee, chaired by Robert L. Clare, Jr., Esq., submitted its first report to the Judicial Council of the Second Circuit. In the area of appellate advocacy, the committee concluded in part that:

> 1) The law school training of appellate advocates is good and experience, such as is gained in moot court programs, is essential to good advocacy.
>
> 2) There are deficiencies in our educational system in the areas of writing and logic which neither the law schools nor the courts can correct.
>
> 3) To achieve minimal improvement the Court of Appeals should insist on more experience in oral advocacy, such as that provided by moot court experience.[13]

With one exception, I am unaware of any current empirical studies that review the level of advocacy in written presentations. One's conclusion as to whether the level of advocacy in writing is adequate, therefore, is largely subjective, depending

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[11] *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1,2 (1973) (observing that some criminal defense lawyers are " 'walking violations' " of the sixth amendment); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175, 176 (1974) ("Too many lawyers come into court today with only a diploma to justify their claims to be advocates. They are untrained and unsupervised in the immensely practical work of litigation.").

[12] *Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, in *Qualifications for Practice Before the United States Courts in the Second Circuit*, 67 F.R.D. 159, 161 (1976) [hereinafter cited as *Proposed Rules*].

[13] *Id.* at 183.

upon the type of writtten advocacy encountered and reports made by others.[14] My own personal observation at both the trial and appellate levels is that, with some welcome exceptions, the level of written advocacy leaves much to be desired. In addition, my growing interest in this subject over the past few years has prompted discussions of this subject with other judges, who have indicated a similar frustration.

One study provides some empirical data on the status of written advocacy in the United States courts of appeals. In September 1976, the Chief Justice of the United States appointed the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts.[15] Acting in cooperation with this committee, the Federal Judicial Center engaged in a wide-ranging study completed in 1978. The report on the study indicates that one of the areas of the greatest need for improvement in federal appellate advocacy is that of brief writing.[16] Among the categories of deficiency mentioned most often by appellate judges responding to a questionnaire were the written presentation of the important facts and issues in a comprehensible manner and the ability to focus upon the important issues.[17]

Unfortunately, the report does not suggest any specific method for the improvement of written skills. The Second Circuit committee concluded that there is no bar or law school requirement which would accomplish this goal.[18] I am hopeful that the further study suggested in this article will lead to a different conclusion.

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[14] Numerous articles discuss particular failings in oral and written advocacy and offer suggestions for improvement. *See, e.g.*, Block, *What Did You Say: What Did You Mean?*, 28 J. LEGAL EDUC. 542 (1977); Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976); Raymond, *Legal Writing: An Obstruction to Justice*, 30 ALA. L. REV. 1 (1978).

[15] Devitt, *Improving Federal Trial Advocacy* (part 2), 78 F.R.D. 251, 252 (1978).

[16] A. PARTRIDGE & G. BERMANT, THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS, A REPORT TO THE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS 8-9 (1978). *See generally id.* at 76-82.

[17] *Id.*

[18] *Proposed Rules, supra* note 12, at 181.

III. PROGRAMS AVAILABLE FOR THE IMPROVEMENT OF WRITTEN ADVOCACY

Both law school and postgraduate programs offer opportunities for the improvement of advocacy. Nonetheless, generally only a small portion of the law school curriculum focuses on written advocacy. No widespread program to improve written advocacy appears to exist at the postgraduate level.

A. *Law School Programs*

In connection with the work of the Committee to Consider Standards for Admission to Practice in the Federal Courts, a subcommittee surveyed law school catalogs to determine course offerings in appellate advocacy and brief writing.[19] The survey showed that law schools utilize five principal methods of training in appellate advocacy: a moot court program; advanced appellate advocacy courses; national or international moot court competitions; on-the-job training or externship programs providing for student practice under a licensed attorney in appellate courts;[20] and law review participation. The subcommittee reported that the first three types of programs are available at almost every school surveyed but indicated that the externship concept is still in an evolutionary stage. Moot court or law review participation may be voluntary.[21]

The subcommittee concluded that several curriculum features are essential to the training of effective appellate advocates: training in such basic lawyering skills as research and writing; required participation of students in at least intraschool moot court competition; an advanced program in appellate advocacy; and an externship program.[22] The subcommittee found, however, that programs in written advocacy comprised

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[19] Final Report of the Subcommittee to Consider Standards for Admission to Practice in the Courts of Appeals (undated) (on file with the Administrative Office of the U.S. Courts) [hereinafter cited as Final Report].

[20] However, see People v. Perez, 147 Cal. Rptr. 34 (1978), *hearing granted,* Crim. No. 20630 (Cal. Sup. Ct. Aug. 16, 1978). The court held that the representation of a felony defendant, at least in a jury trial, by a law student certified under state bar rules and working under the supervision of an attorney violates the sixth amendment right to effective assistance of counsel absent an appropriate waiver, and that a state bar rule cannot permit a person to practice law without state supreme court permission. Ed. note: On April 26, 1979, the California Supreme Court approved such representation.

[21] Final Report, *supra* note 19, at 11-12.

[22] *Id.* at 12-13.

only a small portion of the total law school curriculum.[23]

Two other recent surveys have reviewed curricula in advocacy. In one survey of law schools, 72% of 119 respondents indicated they believed their student body would profit from courses in communication skills.[24] Greater concern was expressed about student writing ability than about speaking skills.[25] A review of bulletins from 28 law schools indicated that 12 schools required no written work after the first year.[26]

It appears that the amount of written advocacy coursework required or available in law schools is unduly low when compared to the role such advocacy must play in the all-important trial and appellate settings.

B. *Postgraduate Programs*

There does not appear to be any widespread effort to educate lawyers in written advocacy after their graduation from law school. The Practising Law Institute, after exploring for many years the possibilities of presenting a course in written advocacy, has concluded that its facilities are inadequate to meet such a challenge.[27] I am not aware of any continuing legal education course specifically focused on this topic.[28]

IV. A PROPOSAL FOR THE IMPROVEMENT OF WRITTEN ADVOCACY

Writing skills are, I believe, at least as important as oral skills and in many instances perhaps more important in safeguarding the rights of litigants. The time has come to broaden the spotlight placed upon oral advocacy to allow written skills

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[23] [A]ll [schools surveyed] had some coursework related to written advocacy or brief writing, but few had anything beyond a legal writing course or moot court. These programs, which also included credit for oral advocacy, averaged only 2% of the coursework required for graduation. Extracurricular programs provided another possibility, but most are offered only by invitation and those restricted opportunities, even if available, represent only 4.6% of the total credit required for graduation.

Final Report, *supra* note 19, at 13.

[24] Stone, *Communication Skills Offerings in American Law Schools, A Survey by the Howard University School of Law,* 29 J. LEGAL EDUC. 238, 242 (1978).

[25] *Id.* at 243.

[26] Bridge, *Legal Writing After the First Year of Law School,* 5 OHIO N.U. L. REV. 411, 428 (1978).

[27] Letter from Richard Joannides, Program Attorney, Practising Law Institute, to the author (October 31, 1978).

[28] PLI had no information on such a course. *Id.*

also to come to center stage.

It appears that a method of improving written advocacy is not currently available at the post-law school level. Indeed, it may well be that such an approach is impractical.

With respect to the law schools, it is clear that more can be done in emphasizing the skills and style required to be a successful written advocate. Because written advocacy is so critical to the eventual decisionmaking process, it would be a mistake not to make the needed studies and the appropriate recommendations in this area. While we should not look to the law schools alone for the total answer to the problem, it would be unfortunate if we did not work with law schools in an effort to reevaluate and improve the teaching of written skills. I suggest that the problem of inadequate writing be jointly considered by the American Association of Law Schools and the American Bar Association.

In such a project, it may well be concluded that the most effective first step toward the improvement of written advocacy would be the establishment of prerequisites for law school admission. This factor figured importantly in the Final Report of the Subcommittee to Consider Standards for Admission to Practice in the Courts of Appeals, in which it was observed:

> We believe that law schools should seriously consider specific prerequisite classes to be taught at an undergraduate level. One law school already has established such an admission requirement. Law schools, in cooperation with undergraduate institutions, could develop required coursework to teach basic written as well as oral skills prior to law school. Such a cooperative effort might evolve a more effective educational partnership in the training of lawyers. Not only are undergraduate schools in a better position to teach basic written skills through English classes and basic oral skills through debate and public speaking, but they may be able to advance legal education through the teaching of other subjects such as logic, communication, etc. The addition of legal vocabulary and specific skills could then be taught more effectively in law schools. While law schools must still bear the burden of preparing attorneys to practice, that preparation, as in the case of medicine, can be shared with undergraduate institutions.[29]

[29] Final Report, *supra* note 19, at 22.

In my judgment, the subcommittee is correct. This is indeed a practical, worthwhile, and necessary starting point. Additional methods of improvement include the expansion of the law school curriculum to include more courses designed to perfect writing skills, required participation in these courses or in an equivalent, such as law review or externships, and post-graduate programs in legal writing. I believe the proposed bench-bar-law school effort will result in the improved written advocacy so necessary to improvement in the administration of justice at this critical time in the history of our courts.