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John F. Sonnett Memorial Lecture Series: The Special Skills of Advocacy

Warren E. Burger
United States Supreme Court

THE SPECIAL SKILLS OF ADVOCACY

Are Specialized Training and Certification of Advocates Essential to Our System of Justice?

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Chief Justice of the United States

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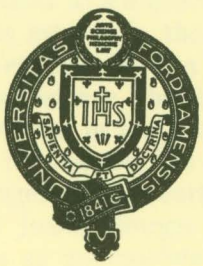

Fordham University School of Law

PREFACE

Sarah Wetmore Story's chronic ill health is said to have been aggravated by her husband's long absences from home. In those days Mr. Justice Story spent more time riding circuit as a trial judge than he spent on the business of the Supreme Court in Washington, D.C.

It would be difficult to call Daniel Webster a male chauvinist, either in his day or in ours. Yet Webster, who in *Dartmouth College v. Woodward* could promote a tear for "a small college" in New Hampshire, shed no tears for Mrs. Story. In 1826 Webster turned a congressional tribute to Story into an indorsement of circuit riding: 'I would ask . . . if, fifteen years ago, on receiving his commission, he had moved to this City, had remained here . . . with no other connection with his profession other than an annual session of six weeks in the Supreme Court, would he have been the Judge he is now?"

Webster was a litigator. He was a pragmatist, too. In his view, experience in the trial courts had something to offer, even to a justice of the Supreme Court, and it compensated for the rigors of circuit riding. Webster's ideal of a Supreme Court Justice was popular in 1826. Indeed, it was the popular image through the first hundred years of our country's history. Even after circuit riding was abolished, it took many years for this image to change.

In modern times, however, the Court became in the public eye nine gods —nine old gods at that—who sat on an imaginary Olympus immured from the market place and from the personal problems which beset the rest of the nation. In the public mind, the Court seemed to sit to consider only abstract problems of Constitutional Law.

The fifteenth Chief Justice of the United States shall never ride circuit as did his early predecessors. But Warren Burger does not sit on Olympus contemplating only the problems which bedevil the gods. He is, like Webster, a realist. That much is evident in the pages that follow. Properly analyzed, his premise is self-evident. We can agree that, if we are to distill professional error, and incompetence, the distillation must begin in the trial courts and, even before that, in the education of the legal advocate. But, the distillation process he proposes has already provoked debate.

What follows in these pages is the fourth annual Sonnett Memorial Lecture, delivered by Chief Justice Burger at Fordham Law School on November 26, 1973. It was an appropriate occasion for this particular lecture: the Sonnett Memorial Lectures honor the memory of John F. Sonnett, a trial lawyer who all his life championed perfection in trial and appellate advocacy.

Realist though he is, Chief Justice Burger is a perfectionist too. His

address at Fordham Law School has already prompted the legal profession to look in upon itself. Critical self-evaluation by the profession, honestly acted upon, is certain to improve the practice of the law—improvements which will serve the interests of advocate, court and client alike. The Chief Justice has said things that required saying to spark an evaluation of the educational process and of the structure of the American aspect of our Anglo-American system of law.

His dissertation deserves broad dissemination, not merely by reason of the eminence of his office—embellished, as it is, by the experience, in Webster's sense, which he brought to that office—but also by reason of the substantive merits of what he says here. The Fordham Law Review has performed a public service in publishing the Chief Justice's lecture as the lead article in its December 1973 issue and in seeking to give it still wider circulation in this bound volume.

For myself and for the Fordham Law School and for Fordham University, I extend to Chief Justice Burger our appreciation and our gratitude.

JOSEPH H. MCLAUGHLIN
Dean

Fordham University
School of Law
December, 1973

THE SPECIAL SKILLS OF ADVOCACY:

Are Specialized Training and Certification of Advocates Essential to Our System of Justice?

*WARREN E. BURGER**

THIS occasion is one on which friends of John F. Sonnett undertake to pay tribute to him as a person, as an outstanding advocate and as a distinguished public servant. It seems an appropriate occasion, therefore, to raise for the consideration of our profession a problem of large scope and profound importance to all judges, to all lawyers, to the public and, of course, to law schools. I believe that John Sonnett, as a skillful advocate and one deeply committed to our system of justice in all its manifestations, would have shared some of the anxieties I express concerning the quality of advocacy in our courts.

To say we have a "crisis" in the availability of adequate legal services may go too far, but sober, careful and responsible observers of the legal profession have posed the need in almost precisely those terms.[1] My objective in this discussion is not to canvass the swiftly growing need for all kinds of legal services, but to discuss narrowly the need for skilled courtroom advocacy with a special emphasis on the administration of criminal justice. I submit that we can deal with this critical situation if we direct our attention to the causes and think imaginatively about a remedy. We will not lack patterns or precedents.

What I will propose later in this discussion is that some system of certification for trial advocates is an imperative and a long overdue step. Beyond any particular system, however, is the fundamental fact that how lawyers are trained—during and after law school—will determine their skills as advocates and ultimately the quality of our justice. That fundamental fact is nowhere better revealed than in the English experience.

Although our system is a child of the common law, the legal profession has developed in ways that do not parallel England's. Our wide expanses

of territory, our heterogeneous and turbulent diversity, and our more than fifty jurisdictions with 150 accredited law schools would make it impossible to transplant the English system here, and I do not suggest it by any means. But simply because we cannot adopt the English system does not mean that we cannot learn much from its operation.

I

Several aspects of the English legal profession stand out clearly when we look for causes of effective advocacy:

1. England separates its trial lawyers—the barristers—into a separate branch of the profession and they engage exclusively in trial work.[2]

2. Of the 30,000 lawyers in England, 3,000 are barristers.

3. England has about sixty-five lawyers per 100,000 population; the United States has about 160 lawyers per 100,000 population.

4. All English barristers are trained in a centuries-old school conducted by the four Inns of Court. After training in this school of advocacy, a barrister must spend a period of "pupilage," or apprenticeship, with an established barrister.

5. The four Inns of Court occupy quarters in or near the Royal Courts of Justice, and barristers' offices are situated in the same area, thus creating a unique professional community.

I will not try to compare a barrister's productivity with that of an American trial lawyer. That would be unfair in part because the methods and procedures in English courts are generally conducive to speedier justice than we manage to deliver.

Every qualified observer of the English system with whom I have discussed this subject makes the same observation that I have made, drawing on twenty years of rather close contact with the British system, namely, that their trials are conducted in a fraction of the time we expend in the United States for comparable litigation. This is a generalization that has a solid basis and can be readily documented. At once I must note another difference in that, except for libel, fraud and a few other kinds of cases that arise infrequently, civil cases in England are tried without a jury, and

judgment is almost invariably rendered forthwith at the close of trial. Appeals are the exception and are only by leave.

Another difference is that judges of trial courts of general jurisdiction are selected entirely from the ranks of the ablest barristers. Thus, there is little or no on-the-job learning for trial judges as is all too often the case in the United States courts, both state and federal. Only the highest qualifications as a trial advocate enter into the selection of English judges. As a result, an English trial is in the hands of three highly-experienced litigation specialists who have a common professional background. Each advocate has also served an intensive "apprenticeship" before he or she is permitted to appear in court as lead counsel.[3]

The English training in advocacy places great stress on ethics, manners and deportment, both in the courtroom and in relations with other barristers and solicitors. The effectiveness of this training is reflected in their very high standards of ethics and conduct. Discipline is strict, but disciplinary actions for misconduct average about three a year for all of the 3,000 barristers in England. My own personal observation, based on forty years of professional exposure, is that in any multiple-judge American courthouse, there are numerous daily offenses that would bring severe censure if committed by an English barrister. How many serious errors of counsel are made in trials, I would not venture to say.[4]

I have heard it said occasionally by critics of the English legal system that it tends to be "clubby" and "establishment-oriented."[5] For twenty years, I have watched advocates conduct trials in more than a dozen countries, and nowhere have I seen more ardent, more effective advocacy than in the courts of England. English advocacy is generally on a par with that of our best lawyers. I emphasize that their best advocates are no better than our best, but I regret to say that our best constitute a relatively thin layer of cream on top while the quality of the English barristers is uniformly high, albeit with gradations of quality inescapable in any human activity.

What, then, can we learn from the English legal profession? We should first recognize three implicit and basic assumptions about legal training that permeate their system. First: lawyers, like people in other profes-

sions, cannot be equally competent for all tasks in our increasingly complex society and increasingly complex legal system in particular; second: legal educators can and should develop some system whereby students or new graduates who have selected, even tentatively, specialization in trial work can learn its essence under the tutelage of experts, not by trial and error at clients' expense; and third: ethics, manners and civility in the courtroom are essential ingredients and the lubricants of the inherently contentious adversary system of justice; they must be understood and developed by law students beginning in law school.

These three basic assumptions are sound and sensible, whether applied to the English system or to our own. Simply because we cannot implement the assumptions in the same manner as the English have done does not mean we cannot recognize their validity. Even though we cannot have, and most emphatically do not want, a small elite, barrister-like class of lawyers does not mean we cannot take positive steps to promote qualified courtroom advocacy skills in those attorneys who choose to specialize in trial advocacy. Indeed, our failure to do so has helped bring about the low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice. The high purposes of the Criminal Justice Act[6] will be frustrated unless *qualified* advocates are appointed to represent indigents.

For centuries most societies have used performance standards for entry into certain human activities that affect large numbers of people.[7] 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.

II

Our failure to inquire into advocates' qualifications—as is done, for example, in separating surgeons from doctors generally—reveals itself in the mounting concern of those who see the consequences of inadequate courtroom performance and look for its causes.

First, and perhaps overriding other causes, is our historic insistence that we treat every person admitted to the bar as qualified to give effective assistance on every kind of legal problem that arises in life, including the trial of criminal cases in which liberty is at stake, civil rights cases in which human values are at stake, and myriad ordinary cases dealing with important private personal interests. It requires only a moment's reflection to see that this assumption is no more justified than one that postulates that every holder of an M.D. degree is competent to perform surgery on the infinite range of ailments that afflict the human animal.

There is no parallel in any other area of life's problems having serious consequence to our naive assumption that every graduate of a law school is, by virtue of that fact, qualified for the ultimate confrontation in a courtroom.[8] No other profession is as casual or heedless of reality as ours. We know, however, that the successful law firms do not expose their clients to on-the-job training: they operate their own private "apprentice" or "intern" systems in which the young lawyer who is to engage in litigation is trained by assisting a partner in preparing cases for trial and then by assisting in the second or third chair. If these law firms were to allow the very bright, but inexperienced, young lawyers to roam at large in the courts without close supervision, they would soon lose clients in droves. But, we need shed no tears for the large law firms: necessity has long since forced them to develop their own in-house training comparable to that used in England for barristers.

So, we see that clients who can afford such lawyers—in the big firms or in the many excellent medium-size firms or indeed among this country's skilled sole practitioners—are well served by lawyers. But this is because those lawyers are not assigned tasks beyond their reach—something that happens regularly on both sides of the table in criminal cases today.

We must acknowledge, I submit, that good advocates are made, much as good airplane pilots are made—by study, by observation of experts and by training with experts. To pursue that analogy, an aspiring pilot who can fly a Piper Cub has learned something about flying, but he is surely not ready to fly large commercial planes or a modern jet airliner. The painful fact is that the courtrooms of America all too often have "Piper Cub" advocates trying to handle the controls of "Boeing 747" litigation. (I should add that by no means are all the "Piper Cub" advocates recent law graduates.)

A second cause of inadequate advocacy derives from certain aspects of law school education. Law schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquette as things basic to the lawyer's function. With few exceptions, law schools also fail to provide adequate and systematic programs by which students may focus on the elementary skills of advocacy. I have now joined those who propose that the basic legal education could well be accomplished in two years, after which more concrete and specialized legal education should begin. If the specialty is litigation, the training should be prescribed and supervised by professional advocates cooperating with professional teachers, for both are needed. A two-year program is feasible once we shake off the heritage of our agricultural frontier that the "young folks" should have three months vacation to help harvest the crops—a factor that continues to dominate our education. The third year in school should, for those who aspire to be advocates, concentrate on what goes on in courtrooms. This should be done under the guidance of practitioners along with professional teachers. The medical profession does not try to teach surgery simply with books; more than 80 percent of all medical teaching is done by practicing physicians and surgeons. Similarly, trial advocacy must be learned from trial advocates.

After the third year, those who wish to be advocates should begin a pupilage period, assisting and participating in trials directly with experienced trial lawyers.

Today we spend on the education of a lawyer only a fraction of what is devoted to educating a doctor. If we want an adequate system of jus-

tice, we must be prepared to spend more for it—and we cannot train truly effective advocates without spending more.

We know that in the past few years much of what I am suggesting has had small beginnings in some law schools. So-called clinical programs have been developing rapidly, as reflected by the recent survey by the Council on Legal Education for Professional Responsibility. Many of these programs focus on trial advocacy. Recent rules, adopted by a number of state courts and some federal courts, allow students to appear in court as aides to lawyers.[9]

Another development is the growing number of law schools that are finally offering courses in trial advocacy. These are most effective when they provide training which students then use in so-called "clinical" programs. The National Institute for Trial Advocacy has, for the past two summers, offered an intensive training program in trial advocacy designed to channel effective laboratory techniques into law schools as well as into professional circles.[10] The law school, however, is where the groundwork must be laid.

We do not disparage the law as a profession when we insist that, like a carpenter or an electrician, the advocate must know how to use the tools of his "trade." Regrettably the development of these small beginnings in teaching elements of advocacy in law schools is offset somewhat when we see the subject of evidence become an *elective* rather than a *required* course. We might, with as much justification, try to make a lawyer without teaching contracts and wills as to omit the law of evidence.

The third cause is the inevitable inability of prosecutor and public defender offices to provide the same kind of apprenticeships for their new lawyers as, for example, the large law firms provide. The prosecution offices and public defender facilities have neither the wealthy clients nor consequent financial resources of the large law firms to enable them to develop whatever skills they need to carry out their mission. Prosecutors and public defenders often learn advocacy skills by being thrown into trial. Valuable as this may be as a learning experience, there is a real risk that it may be at the expense of the hapless clients they represent—

public or private. The trial of an important case is no place for on-the-job training of amateurs except under the guidance of a skilled advocate.

III

Time does not allow a recital of the myriad points of substantive law and procedure that an advocate in criminal cases should know in order to perform his or her task. Suffice it to say that in the past dozen or more years a whole range of new developments has drastically altered the trial of a criminal case. To give adequate representation, an advocate must be intimately familiar with these recent developments, most of them deriving from case law.

Whether we measure the recent changes in terms of one decade or three, we see that the litigation volume, particularly in criminal cases, has escalated swiftly. The Criminal Justice Act[11] and the Bail Reform Act,[12] the extension of new federal standards to state courts, rising population, increased crime rates, creation of new causes of action and expanded civil remedies have contributed to the literal flood of cases in state and federal courts.

Whatever the legal issues or claims, the indispensable element in the trial of a case is a minimally adequate advocate for each litigant.[13] Many judges in general jurisdiction trial courts have stated to me that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent.[14] I draw this from conversations extending over the past twelve to fifteen years at judicial meetings and seminars, with literally hundreds of judges and experienced lawyers.[15] It would be safer to pick a middle ground and accept as a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation. The trial of a "serious" case, whether for damages or for infringement of civil rights, or for a criminal felony, calls for the kind of special skills and experience that insurance companies, for example, seek out to defend damage claims.[16]

Let me try to put some flesh on the bones of these generalizations concerning the function and quality of the advocates. I will try to do this

by way of a few examples observed when I sat by assignment as a trial judge, while serving on the U.S. Court of Appeals:

1. The thousands of trial transcripts I have reviewed show that a majority of the lawyers have never learned the seemingly simple but actually difficult art of asking questions so as to develop concrete images for the fact triers and to do so in conformity with rules of evidence.

2. Few lawyers have really learned the art of cross-examination, including the high art of when not to cross-examine.

3. The rules of evidence generally forbid leading questions, but when there are simple undisputed facts, the leading-questions rule need not apply. Inexperienced lawyers waste time making wooden objections to simple, acceptable questions, on uncontested factual matters.

4. Inexperienced lawyers are often unaware that "inflammatory" exhibits such as weapons or bloody clothes should not be exposed to jurors' sight until they are offered in evidence.

5. An inexperienced prosecutor wasted an hour on the historical development of the fingerprint identification process discovered by the Frenchman Bertillon, until it finally developed that there was no contested fingerprint issue. Such examples could be multiplied almost without limit.

Another aspect of inadequate advocacy—and one quite as important as familiarity with the rules of practice—is the failure of lawyers to observe the rules of professional manners and professional etiquette that are essential for effective trial advocacy.

Jurors who have been interviewed after jury service, and some who have written articles based on their service, express dismay at the distracting effect of personal clashes between the lawyers. There is no place in a properly run courtroom for the shouting matches and other absurd antics of lawyers sometimes seen on television shows and in the movies. From many centuries of experience, the ablest lawyers and judges have found that certain quite fixed rules of etiquette and manners are the lubricant to keep the focus of the courtroom contest on issues and facts and away from distracting personal clashes and irrelevancies.[17]

A truly qualified advocate—like every genuine professional—resembles a seamless garment in the sense that legal knowledge, forensic skills,

professional ethics, courtroom etiquette and manners are blended in the total person as their use is blended in the performance of the function.

There are some few lawyers who scoff at the idea that manners and etiquette form any part of the necessary equipment of the courtroom advocate. Yet, if one were to undertake a list of the truly great advocates of the past one hundred years, I suggest he would find a common denominator: they were all intensely individualistic, but each was a lawyer for whom courtroom manners were a key weapon in his arsenal. Whether engaged in the destruction of adverse witnesses or undermining damaging evidence or final argument, the performance was characterized by coolness, poise and graphic clarity, without shouting or ranting, and without baiting witnesses, opponents or the judge. We cannot all be great advocates, but as every lawyer seeks to emulate such tactics, he can approach, if not achieve, superior skill as an advocate.

What is essential is that certain standards of total advocacy performance be established and that we develop means to measure those standards, to the end that important cases have advocates who can give adequate representation. Law school students are adults who can contribute once they are persuaded of the need for training in this area. Rather than being "lectured" on ethics, they should be invited to discuss with the faculty and the best advocates the ethical element in the practice of law so as to impress them with the reality that courtroom ethics and etiquette are crucial to the lawyer's role in society—and indispensable to a rational system of justice. Woven into the seamless fabric of effective advocacy, professional ethics and professional manners are no less important than technical skills.

Lawyers are—or should be—society's peacemakers, problem solvers and stabilizers. The English historian Plucknett suggests that England and America have been largely spared cataclysmic revolutions for two centuries, in part because the common law system lends itself to gradual evolutionary change to meet the changing needs of people. Lawyers can fulfill that high mission only if they are properly trained.

IV

The focus on the inadequacies of advocates has tended to center on the criminal process, and it is plainly correct that this be given close attention and high priority. The first conviction of an accused person may be a determinant that shapes his entire future. Some convicted criminals do not need confinement in prison; neither they nor society can genuinely benefit from it. Effective advocacy can sometimes lead to other alternatives for a first offender—such as a suspended sentence or deferred prosecution.[18]

The contemporary literature tends to focus on the plight of the defendant and the inadequacy of defense counsel. For all too long we grossly neglected the needs of defendants, but the inadequacy of defense counsel is not by any means the whole story. Since we are discussing the problems of a system of justice, it is important to bear in mind that criminal justice is not a one-way street. Judge J. Edward Lumbard observed in a speech about ten years ago that the public is also entitled to due process and justice and that a just conviction is as important to the public interest as a just acquittal.[19]

The enormous demands on criminal courts naturally reflect themselves in the burdens on prosecutors' offices. I observed this in terms of one large prosecution office where the legal staff doubled in five years. The records in appeals handled by that prosecution office, confirmed by personal observations of the judges and experienced trial lawyers, strongly suggested that there was a steady decline in the prosecutors' performance before and after the increase in staff. Countless times in that jurisdiction, a prosecutor, on coming into the courtroom, would ask for a ten-minute recess so he could review a file he had never seen.

In some places it is the observation of judges that the Criminal Justice Act has not brought about improvement in the general quality of criminal defense and that performance has not been generally adequate—either by assigned private counsel or by the public defender office. I am sure that the situation varies from place to place, and the observation of other judges is that the institutionalization of defense work in defender offices

holds the best promise for the future. For my part, it is probably too early to reach firm conclusions on the subject, but a choice may be compelled before long.[20]

We have long since institutionalized the prosecution of criminal cases because it best serves the public interest to discharge the function in that way, and the public interest in adequate defense representation is of equal order. Fifteen or twenty years ago, some otherwise sensible people tended to regard the idea of a public defender office as a form of "creeping socialism," but I am confident that attitude no longer has significant acceptance.

However, even placing the defense of indigents largely if not entirely in the jurisdiction of a staff of career public defenders with the necessary auxiliary facilities does not in itself guarantee adequate advocacy skills. In fact, at present, the rapid expansion of both the prosecution offices and public defender facilities has been accompanied by a trend to use either of these functions—or both—as a means for young lawyers to learn how to try cases. It would be instructive to assemble the data on the tenure of staff lawyers in prosecution and public defender offices. To have bright young men and women "flit" in and out of these offices for two or three year apprenticeships may possibly be useful to them and their future clients, but it is a high price to pay if it results in inadequate performance for either side of a criminal trial. It is a matter of history that some prosecution offices—of which New York is a notable example —have been a proving ground for some of our most outstanding advocates, so I do not disparage the idea of a tour of duty as a prosecutor—or as a public defender.

In our proper concern for criminal justice, we must not forget that the rights and interests of civil litigants should not be brushed under the rug. In nearly eighteen years on the bench and more than twenty years of general practice, I have had occasion to review literally thousands of records—civil, criminal and administrative—and I have observed as many miscarriages of justice in civil cases from inadequacy of counsel as in criminal cases. To borrow some lines from Gray's "Elegy," the injustice in some civil cases becomes part of "the short and simple annals of the

poor."[21] In some of those cases, the human tragedy was very real to the principals.

V

If there is substantial validity to this analysis of the problem, what should we do about it?

Some system of specialist certification is inevitable and, as we know, it has been discussed in legal circles for a generation or more. Dean Robert B. McKay of New York University Law School has observed that the legal profession has "marched up the hill of specialist certification only to march right down again in the face of opposition from practitioners not discontent with the absence of regulation."[22] Our commitment to the public and to the system of justice must not let us be marched down that hill any longer.

I see nothing for lawyers, litigants, or courts to fear, and on the contrary I see a great potential gain, by moving toward specialist certification to limit admission to trial practice, beginning in courts of general jurisdiction where the more important claims and rights are resolved. When we have succeeded in that limited area we can then examine broader aspects of specialization. Furthermore, while the legal profession must obviously lead in this effort, the interests of the public dictate that the views of practitioners who are affected cannot be controlling any more than we allow the automobile or drug industry to have complete control of safety or public health standards. There are more than 200 million potential "consumers" of justice whose rights and interests must have protection, and it is the duty of the legal profession to provide reasonable safeguards—unless lawyers prefer regulation from the outside.

Our traditional assumption that every lawyer, like the legendary Renaissance man, is equipped to deal effectively with every legal problem probably had some validity in the day of Jefferson, Hamilton, John Adams and John Marshall, but that assumption has been diluted by the vast changes in the complexity of our social, economic and political structure.

The experience of the medical profession affords some guidance in its first step in specialty certification. That step was identifying those

doctors genuinely competent to perform serious surgery and limiting access to the operating room to such doctors. Obviously there are and probably always will be sparsely populated areas in which some doctors and lawyers must be jacks-of-all-trades. But, the fact that this is a necessity imposed in some areas of the country by geography and population density does not mean that in the metropolitan centers where courts deal with thousands of cases we need or should tolerate ineffective representation.

The American Bar Association has wisely cautioned that in undertaking certification programs, "it is not desirable for a large number of states to embark upon even experimental programs in specialization before uniform standards can be established lest unnecessarily divergent programs become prematurely crystallized."[23] The ABA committee, however, is carefully monitoring pilot or experimental programs commencing in California and Texas, among others. Those states certify three specialties, and quite appropriately, the one they have in common is criminal law.[24]

It is in this spirit of cautious progress that I urge that we should concentrate where, in the view of most judges, the greatest need exists. For the initial stage, moreover, we should limit ourselves to certification of trial advocates until we learn more about the problems of evaluation and selection. There is danger, as the ABA report stated, in trying to do too much too soon, without knowing enough about the pitfalls. The limited step of certifying trial advocates first will be a large enough task to tax our best efforts. Given the difficulty in terms of dealing with fifty separate state systems, perhaps the prudent thing to do is to begin with the United States District Courts. After experimenting in several representative federal districts and in state courts, the Judicial Conferences in the several circuits should consider this problem.

Proposal

What I propose is a broad, four-point program as a first step in specialist certification. We should:

First: Face up to and reject the notion that every law graduate and

every lawyer is qualified, simply by virtue of admission to the bar, to be an advocate in trial courts in matters of serious consequence.

Second: Lay aside the proposals for broad and comprehensive specialty certification (except where pilot programs are already under way) until we have positive progress in the certification of the one crucial specialty of trial advocacy that is so basic to a fair system of justice and has had historic recognition in the common law systems.

Third: Develop means to evaluate qualifications of lawyers competent to render the effective assistance of counsel in the trial of cases.

Fourth: Call on the American Bar Association, the Federal Bar Association, the American College of Trial Lawyers, the American Association of Law Schools, the Federal Judicial Center, the National Center for State Courts and others to collaborate in prompt and concrete steps to accomplish this first step in a workable and enforceable certification of trial advocates.

The fate of this proposal, as with any relating to progress in our profession, depends on the members of that "great partnership" of the law made up of lawyers, judges and law teachers—and I have great confidence in that partnership.

FOOTNOTES

* Chief Justice of the United States. This article was delivered as the Fourth Annual John F. Sonnett Memorial Lecture on Nov. 26, 1973, at Fordham Law School in New York. The text remains substantially as it was delivered.

1. H. Packer & T. Ehrlich, New Directions in Legal Education 6 (1972).

2. Although the majority of barristers are primarily experts in advocacy, there is a good deal of further specialization within their ranks. There are those who confine their practice to the Chancery Division or the Family Division or who do nothing other than criminal work. In addition to these, there are the smaller specialist bars that confine their practice, for example, to taxation, patents, company law, planning or building contracts. A considerable part of the work of members of the smaller specialist bars is concerned with advising on matters that do not result in litigation.

3. It is widely accepted by England's bench and bar that these factors provide more expeditious determinations without impairing fair and just results. Whether a non-jury system for civil cases would be feasible in a geographically large and diverse country with a heterogeneous society like ours is open to serious question. There is no significant pressure to adopt the English non-jury system and I do not advocate it.

4. See generally ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (Final Draft 1970); and ABA, Report of Special Committee for National Coordination of Disciplinary Enforcement (Aug. 1973).

5. At one time there was concern among England's solicitors over the exclusivity of the barristers profession, but this has dissipated since transfer from solicitor to barrister was made possible. A prime example is found in the present Lord Chief Justice of England, John Widgery—incidentally the son of a working man—who was a solicitor for many years before transfer to the ranks of barrister, from which he was appointed to the Bench.

6. 18 U.S.C. § 3006A (1970).

7. For example, in the era of sailing vessels, masters and mates were licensed or certified on the basis of their skills in the very difficult task of navigating a ship. The measuring process was quite primitive but highly pragmatic. The traveling public wanted basically the same kind of assurance that we want about today's commercial airline pilots. Today we have more sophisticated and orderly processes to measure the total skills of an airline pilot—his coordination, poise, emotional stability and, of course, technical capacity. The care used as to airline pilots is illustrated by the fact that a graduate of the U.S. Air Force Academy would be required to meet FAA standards before being allowed to operate commercial aircraft. Qualifications are not taken for granted.

8. Too few lawyers acknowledge the great difference between trial and appellate advocacy as does one leading American trial lawyer who engages a specialist in appellate work to conduct appeals in his cases. On another occasion I hope to discuss the declining quality of appellate advocacy. For now I note that approximately two-thirds of the lawyers who currently appear before the Supreme Court of the United States are there for the first time—and most of these for the last.

9. For clinical programs, see Council on Legal Education for Professional Responsibility, Inc. (CLEPR), Survey of Clinical Legal Education 1972-1973, May 15, 1973. For recent

rules permitting student practice in court, see CLEPR, State Rules Permitting The Student Practice of Law: Comparisons and Comments (Including Selected Federal Rules) (2d ed. 1973).

10. The National Institute for Trial Advocacy is sponsored jointly by the American Bar Association, American College of Trial Lawyers and the Association of Trial Lawyers of America.

The American Bar Association Project on Standards for Criminal Justice has promulgated Standards Relating to The Prosecution Function and The Defense Function (Approved Draft 1971) and the American College of Trial Lawyers has developed a Code of Trial Conduct (Jan. 1963). These are valuable resources to form the basis for training advocates in professional conduct.

11. 18 U.S.C. § 3006A (1970).

12. Id. §§ 3146-52.

13. Burger, Foreword to L. Patterson & E. Cheatham, The Profession of Law at v (1971).

14. One former colleague of mine on the Court of Appeals, Judge Edward A. Tamm, puts the figure at two percent. Tamm, Advocacy Can Be Taught—the N.I.T.A. Way, 59 A.B.A.J. 625 (1973).

15. A Sick Profession, Address by then Judge Burger, Winter Convention of the American College of Trial Lawyers, in Hollywood Beach, Fla., Apr. 11, 1967, in 27 Fed. B.J. 228 (1967), 5 Tulsa L.J. 1 (1968), and 42 Wis. B. Bull., Oct., 1969, at 7.

16. The techniques of advocacy in appellate courts, before regulatory agencies including tax tribunals, workmen's compensation tribunals and others, present separate and distinct subjects and should not be treated in a discussion of trial advocacy, which usually involves a lay jury.

17. For 200 years in this country (and in other civilized countries for much longer), all deliberative processes—the legislative in particular—have recognized that certain rules and formalities must be observed. Indeed, Thomas Jefferson, hardly one to restrain free speech, wrote the original manual of etiquette and behavior for the United States Congress, drawing on the tradition of the English Parliament. See The Necessity for Civility, Address by Chief Justice Burger, ALI Opening Session, in Washington, D.C., May 18, 1971, in 52 F.R.D. 211, 216-17 (1971).

From time to time, a Member of the English Parliament or the House or Senate of the United States violates the rules and traditions of those bodies, and when that has happened, various sanctions can be directed against the offending Member. His colleagues may subject him to public scolding on the floor of the house in which he sits, or he may be formally censured after hearings before a committee. These things do not occur often, but frequently enough to remind Members that there are certain lines which may not be crossed with impunity. Unfortunately, in the courts today, for the most part, lines are crossed often and with impunity except in rare instances.

18. As the ABA Committee on the Standards for Criminal Justice emphasized, the most important role and the most unsatisfactory performance of advocates may be at sentencing. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968).

19. Judge Lumbard stressed this point repeatedly in speeches at the time. See in particular The Administration of Criminal Justice, 35 N.Y. St. B.J. 360 (1963); The Responsibility of the Bar for the Performance of the Courts, 34 N.Y. St. B.J. 169 (1962); The

Lawyers' Responsibility for Due Process and Law Enforcement, 12 Syracuse L. Rev. 431 (1961).

20. A detailed overview of this problem is found in Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1 (1973). We know much less than we should about the comparative quality of assigned and public-defender-office lawyers. An American Bar Foundation-sponsored comparison is L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts (1965).

21. The Complete Poems of Thomas Gray 38 (H. Starr & J. Hendrickson ed. 1966).

22. Role of Graduate Legal Education in the Development of the Legal Specialist, Dec. 10, 1970, at 2 (paper prepared for symposium of ABA Special Committee on Specialization, New Orleans) (footnote omitted).

23. 95 A.B.A. Rep. 329 (1970). The ABA's Special Committee on Specialization in its 1973 Annual Report cited the avalanche of state projects and once again urged states yet to undertake pilot programs to refrain from doing so until there has been an opportunity to evaluate those already in existence. ABA Report of Special Committee on Specialization 3, 6 (Aug. 1973).

24. On November 20, 1973, the first 1,182 certificates of specialization were awarded by the State Bar of California under its pilot program in legal specialization. The specialties were divided as follows: criminal law, 391; workmen's compensation, 311; and taxation, 480. The first three certificates, one in each specialty, were issued by ABA President Chesterfield Smith.

One innovative attempt to assure adequate counsel for criminal defendants is under way in the United States District Court for the Southern District of New York, which has started to certify informally those defense attorneys considered eligible for appointment by the court under the Criminal Justice Act, 18 U.S.C. § 3006A (1970). A program of certification may not have been intended when this plan was initiated, but it in fact appears to be an important first step toward the certification of trial advocates. Accompanying the court's power to certify Criminal Justice Act attorneys is the power to decertify attorneys for lack of qualifications or refusal to accept three consecutive appointments. The Southern District Committee on the Criminal Justice Act Panel, composed of judges, has established a subcommittee of lawyers to conduct interviews, evaluate applicants' credentials, and then make a recommendation to the committee and to the Chief Judge. The applicants whose paper credentials are sufficient but who lack adequate trial experience are encouraged to serve as assistants to approved Criminal Justice Act attorneys and Legal Aid attorneys for one year and then reapply for certification. This may also be true for those who have the threshold knowledge of criminal litigation but lack trial experience. I am informed by Chief Judge David N. Edelstein that competition for these assignments is rigorous and, interestingly enough, one finds many alumni of the United States Attorney's Office in their ranks.

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NOTES