San Diego Law Review

Volume 18 | Issue 2 Article 3

3-1-1981

The Decline of the Adversary System and the Changing Role of the Advocate in That System

Stephen Landsman

The Decline of the Adversary System and the Changing Role of the Advocate in that System

STEPHAN LANDSMAN*

For approximately 150 years the behavior of American lawyers has been governed by ethical precepts premised upon an adversary system of justice. These precepts have emphasized zealous representation of clients even at the expense of the discovery of material truth. In January 1980 the American Bar Association Commission on Evaluation of Professional Standards proposed a series of Model Rules challenging adversarial emphasis on zealous advocacy. This article suggests that adoption of the Model Rules would interfere with a lawyer's ability to effectively perform his part in the judicial process. Such interference would threaten the entire adversary system and the rights it vindicates.

This article will contend that the adversary process presently utilized in American courts is being seriously challenged and that the Model Rules of Professional Conduct proposed in January 1980 by the American Bar Association Commission on Evaluation of Professional Standards constitute a significant part of that challenge. The first section of this article will sketch the major premises, advantages and disadvantages of an adversary system. It will be followed by a discussion of the genesis of two ethical principles fundamental to such a system—zealous representation of clients and limitation of candor to the court. After briefly analys-

* Associate Professor, Cleveland-Marshall College of Law; A.B., Kenyon College, 1969; J.D. Harvard Law School, 1972. The author wishes to acknowledge the financial assistance of the Cleveland-Marshall Fund in the preparation of this article. A somewhat different version of these materials was presented at the International Conference on Ethics and Responsibilities of the Legal Profession, Tel Aviv, Israel, August 17-20, 1980.

ing the nature of the challenge to the adversary process, the article will examine the anti-adversarial implications of the Commission's proposals. The article will conclude by suggesting that non-adversary standards of conduct should not be accepted unless the value judgments implicit in their adoption have been carefully considered, that reform which involves ethical precepts alone is inadequate because it creates serious conflicts for the practicing lawyer, and that the adoption of a non-adversary approach may undermine fundamental human rights.

The American judicial system has for several hundred years been committed to an adversary theory of litigation. This theory holds that the sharp clash of proofs presented by adversaries in a forensic setting is the method most likely to produce the information upon which a neutral and passive decisionmaker can base the resolution of a litigated dispute that will be acceptable to both the parties and society.[1]

In the American setting the adversary process requires at least three participants—two contending advocates and a decisionmaker. Each of the advocates is charged with the task of presenting the strongest available evidence to sustain the claims of the party he represents. The decisionmaker is to remain a neutral and passive auditor while the advocates make their presentations and is thereafter to fashion a decision.

To insure the neutrality and passivity of the decisionmaker the adversary process employs a variety of measures. First, responsibility for the development and presentation of evidence is placed entirely upon the shoulders of the advocates. Second, the litigation process is regulated in such a way that it culminates in a single- or multiple-session confrontation that affords the trier little time or incentive for independent inquiry. Third, a strict evidence code excludes potentially misleading or prejudicial material. Fourth, the use of lay juries is encouraged so that disputes will be decided by arbiters with few preconceived notions about the law and no responsibility for the management of the case. Finally, appellate review insures that the various adversary regulations are honored.

A variety of advantages has been ascribed to the adversary process. Professor Lon Fuller has argued that such a process significantly reduces the likelihood of decisionmaker bias.[2] In their

1. This definition and much of the descriptive material concerning the adversary system is drawn from my article, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 485 (1980).

2. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961).

psychological studies, Professors Thibaut and Walker have supplied some empirical data that tend to support this claim.[3] Further, adversary process is said to enhance the likelihood of litigant and societal acceptance of decisions. This occurs because each party can air his case fully and obtain a decision from an arbiter who has retained an appearance of neutrality by remaining aloof from the contest.[4] Finally, it is said that adversary process tends to individualize the law.[5] It does so by allowing each litigant maximum control over the kinds of claims he can assert and the way in which they will be asserted. This individualization is also said to enhance the likelihood that the rights and dignity of each litigant will be respected.[6]

The adversary process is not without its costs. Because of the emphasis on party control and decisionmaker passivity, the litigants may pursue their own ends without endeavoring to uncover or present evidence indicative of material truth. Judge Marvin Frankel, among others, has argued that this "low rating" of material truth threatens the ability of the system to achieve just results.[7] A second serious cost of adversary process is delay. The adversary system is not designed to proceed at great speed. Strict rules of evidence, juries and appellate review dramatically slow proceedings. It has been argued by prestigious members of the bench and bar that adversary system delay threatens the very survival of the courts.[8]

While adversary notions have been extensively relied upon in the structuring of the American judicial process, certain non-adversarial elements have been introduced in an apparent effort to minimize the likelihood that material truth will be overlooked or that dilatory procedure will be allowed to bring the process to a standstill. To ameliorate the danger that truth will not be exposed, a system of pretrial discovery has been instituted. To com-

3. J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 49-51 (1975).

4. *Id.* at 68; W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 5 (1968).

5. *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

6. *See* D. LOUISELL & H. WILLIAMS, THE PARENCHYMA OF LAW, 403-04, 412-13 (1960).

7. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

8. *See, e.g.*, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 3-4 (1973); Burger, *The State of the Judiciary-1970*, 56 A.B.A.J. 929, 932 (1970).

bat delay, various techniques including pretrial conferences and the like have been adopted. In both cases reform was premised upon a careful balancing of adversarial and non-adversarial considerations.[9] The primacy of the adversary process was preserved in each case by placing the new procedure exclusively at the disposal of the adversaries or by using it to facilitate preparation for the adversary contest.

Advocates obviously play a central role in the adversary process. Both the litigating parties and the decisionmaker depend on their efforts. To insure that this dependency is not improperly exploited advocates have, from the earliest times, been subject to restraint concerning their in- and out-of-court conduct.[10] Various ethical proscriptions supply that restraint.

The formal ethical proscriptions Americans rely upon today had their beginnings in the early and middle years of the nineteenth century. These proscriptions were shaped by adversary doctrine which, along with *laissez-faire* economics, was reaching the zenith of its influence during those years. Evidence of the seminal influence of adversary doctrine may be seen in both the English and American experience. In a series of dramatic trials that occurred between 1820 and 1840 the English bench and bar struggled over two fundamental ethical questions. The first concerned the proper limits of zealous advocacy on behalf of a client, and the second concerned the duty of candor to a court. The classic exposition of the adversarial notion of maximum zeal on behalf of a client was provided by Lord Brougham during his defense of Queen Caroline on a charge of adultery. Brougham declared:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patroit from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[11]

Brougham's words were never accepted as authoritative, but they did establish a standard that has proven extremely influential.

The second English trial to serve as a watershed experience in the formulation of ethical principles was the *Queen v. Courvoisier*.[12] There the question of an advocate's duty to be

9. For an excellent example of this balancing process at work in the context of discovery see Hickman v. Taylor, 329 U.S. 495 (1947).

10. *See, e.g.*, H. DRINKER, LEGAL ETHICS 14-15 (1953).

11. 2 Trial of Queen Caroline 8 (1821), quoted in D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 189 (1973).

12. 173 Eng. Rep. 869 (1840), noted in THE CONSCIENCE OF A LAWYER 15 (1973)

candid with the court was presented when, in the midst of a hotly contested murder trial, the defendant privately ackowledged to his attorney that he was guilty. Despite serious reservations, Courvoisier's counsel thereafter vigorously attacked the prosecution's key witness and made a dramatic closing argument premised upon the possibility of Courvoisier's innocence. The eventual disclosure that counsel had pressed his client's case notwithstanding the confession provoked a public outcry that extended over a number of years. Despite adverse public reaction, the case has come to be viewed as establishing the proposition that in the adversary system an attorney's obligation to his client may supersede his duty to be candid with the court and that any other conclusion would undermine the vitally important bond between attorney and client.

These notions about zeal and candor were formally incorporated into American doctrine by Judge George Sharswood in his classic *Essay on Professional Ethics*,[13] first presented as a series of lectures at the University of Pennsylvania in 1854. Sharswood viewed zeal and confidentiality as necessary ethical accoutrements to the adversary system and saw the adversary system as the best available for conducting judicial business. Sharswood's work was the basis for the three most important American ethics codes: the 1887 Code of Ethics of the Alabama State Bar Association,[14] the 1908 American Bar Association Canons of Professional Ethics,[15] and the 1969 American Bar Association Code of Professional Responsibility.

The drafters of ethical standards concerning zeal and candor have never adopted a purely adversarial position. Brougham's notion of the *exclusivity* of a lawyer's duty to his client was not widely shared even in his own day. Sharswood specifically rejected Brougham's position because it ignored the lawyer's responsibility as "an officer of the court."[16] Later codes tracked Sharswood's approach rather than Brougham's. Both Sharswood

D. MELLINKOFF, (My discussion of Courvoiser's case is based primarily on Mellinkoff's book.).

13. G. SHARSWOOD, ESSAY ON PROFESSIONAL ETHICS (1854), *reprinted in* 32 A.B.A. REP. 1 (1907).

14. CODE OF ETHICS OF THE ALABAMA STATE BAR ASSOCIATION (1887), *reprinted in* H. DRINKER, *supra* note 10, at 353.

15. ABA CANONS OF PROFESSIONAL ETHICS (1908), *reprinted in* H. DRINKER, *supra* note 10, at 309.

16. SHARSWOOD, *supra* note 13, at 83-85.

and the American codes, however, did accord primacy to the client's interest in most circumstances and uniformly demanded zealous advocacy on the client's behalf.

With respect to the question of candor to the court, the drafters of the codes followed a similar course. Although no code contained a blanket rule forbidding disclosure in all circumstances, each did establish a fairly broad zone in which candor was considered improper. Such rules have been the subject of extensive debate. At least twice, reformers seeking greater candor succeeded in placing their views in a code. On both occasions the requirement of candor was subsequently limited.[17]

Over the past ten years or so there has been a growing challenge to adversary principles and procedure. Almost all aspects of the adversary process have been scrutinized and many have been altered. The percentage of cases tried in adversarial proceedings has steadily declined and settlement has played an increasing role. The adversary notion of the judge as passive arbiter has been modified in several respects. Both by rule and practice judges have become more active in settling cases, managing litigation and questioning witnesses. At the same time, the use of lay juries, one of the most effective means of insuring decisionmaker passivity and neutrality, has been limited. The number of jurors has been reduced,[18] the requirement of unanimous verdicts abandoned,[19] and the scope of *voir dire* questioning narrowed.[20] Various rules of evidence and procedure have been modified and, pursuant to the doctrine of harmless error, appeals concerning these rules have been curtailed.[21] Most of these changes have been made without discussion of their implications for the future of the adversary process. But analysis suggests movement in the direction of the adoption of a fast-paced, judge-dominated, non-adversarial process.

The challenge to adversarial mechanisms has carried over into

17. With respect to the modification of the 1969 Code, see ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 7-102(B)(1) as amended in 1974 pursuant to the action of the A.B.A. House of Delegates detailed in ABA SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES 3 (1974) (exempting from disclosure "privileged communications"). With respect to the modification of the 1908 Canons, *compare* ABA CANONS OF PROFESSIONAL ETHICS Nos. 22, 29, 41 *with* ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 287, at 613 (1953) ("Neither the duty of candor and fairness to the court, as stated in *Canon 22* [n]or the provisions of Canon [sic] *29* and *41* [duty to disclose fraud]. . . are sufficient to override the purpose, policy and express obligation under *Canon 37* [duty to maintain client's confidences].").

18. *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970).

19. *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356 (1972).

20. *See* Ham v. South Carolina, 409 U.S. 524 (1973).

21. *See* Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973).

the field of legal ethics. Perhaps the most significant manifestation of this challenge is the proposed Model Rules of Professional Conduct put forward in revised form in January of 1980 by the A.B.A. Commission on Evaluation of Professional Standards.

Judge Sharswood's commentary and the various American ethical codes were all premised upon an adversary system of justice. Each envisioned the primary function of lawyers as advocacy on behalf of clients who were involved in litigation or situations looking toward litigation. The proposed Model Rules take a radically different view. They are divided into a series of sections that address different lawyer functions including advisor, negotiator, intermediary between clients, and legal evaluator as well as advocate in adversary proceedings. The advocacy role is isolated in a single section of the proposed Model Rules and the concerns which arise out of the adversary process do not inform most of the other sections of the Rules.

The proposed Model Rules do more than simply isolate and deemphasize the advocacy function. In the "Scope and Definitions" section they seem to adopt the view that adversary procedure is not entirely trustworthy and should seldom be used by litigants to resolve a controversy arising under the Rules. The idea that the Rules should not become an integral part of the procedural fabric of the adversary contest is novel and seems to express a lack of confidence in the efficacy of that contest. This refrain is repeated in the official commentaries on Rule 1.8 concerning conflicts of interest and Rule 3.9 concerning cases in which an attorney is likely to be a witness as well as an advocate.

The proposed Model Rules directly challenge a number of premises integral to the adversary process. Neither Sharswood nor the various codes required lawyers to expedite litigation.[22] Indeed, speed is not a natural attribute of the adversary process and the choice of an adversary system gives priority to deliberation rather than celerity. In proposed Model Rule 3.3 this traditional position is rejected in favor of a requirement that the advocate "make every effort . . . to expedite litigation."

An even more fundamental challenge to adversary premises is embodied in the Model Rules' treatment of the questions of attorney zeal and candor. Zeal is the term that has traditionally been

22. G. SHARSWOOD, *supra* note 13, at 116 ("the suitor has a right to all the delay . . . which is incident to the ordinary course of justice.").

used to describe the duty owed by a lawyer to his client. It was coined by Sharswood, and used in each of the codes that relied on his work.[23] The term zeal symbolizes the strength of the bond between lawyer and client in the adversary process.

Rule 1.5 of the proposed Model Rules abandons the concept of zeal in describing the attorney's duty to his client. In place of zeal the Model Rules adopt the far less compelling term "diligence." Further, the entire tenor of the lawyer's relation to clients has been altered. Rule 1.5 places particular emphasis on those occasions when an attorney can refuse service to a client or limit the scope of the service provided. The lawyer who acts in accordance with Rule 1.5 is not the adversary advocate who commits, in Sharswood's words, "[e]ntire devotion to the interest of his client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability;"[24] he is a counsellor who is entitled to keep his clients at arms length and reject any course of action he considers "repugnant or imprudent."[25]

A similar change of emphasis has taken place with respect to the issue of candor. The very first duty of an advocate according to Rule 3.1 of the proposed Rules is that "a lawyer shall be candid toward a tribunal." Outside the criminal context, Rule 3.1 requires that an attorney: file no papers unless he believes that "there is good ground to support" them; refrain from offering evidence without explanation if the lawyer knows it is "substantially misleading;" disclose the use of any and all false testimony even if doing so will require disclosure of a client's confidences; disclose all adverse legal authority "that would probably have a substantial effect on the determination of a material issue;" and, disclose any fact known to the lawyer that would have the effect of correcting "a manifest misapprehension resulting from a previous representation."

Rule 3.1 challenges the traditional adversarial priorities of loyalty to a client and maintenance of his confidences. The proposed Rule significantly increases the emphasis on the search for material truth. In this search the attorney, at the risk of ethical sanction, is compelled to judge the merit of the client's claims, the persuasive value of precedent, and the potential for misapprehension posed by each act he takes in the courtroom. Rule 3.1 moves

23. *See* CODE OF ETHICS OF THE ALABAMA STATE BAR ASSOCIATION § 10 (1887), *reprinted in* H. DRINKER, *supra* note 10, at 355; ABA CANONS OF PROFESSIONAL ETHICS No. 15 (1908), *reprinted in* H. DRINKER, *supra* note 10, 313-14; ABA CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 7-101 (1969).

24. SHARSWOOD, *supra* note 13, at 78-79.

25. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (proposed January 30, 1980).

advocacy toward the "amicus curiae" model described and rejected by the United States Supreme Court in *Anders v. California*,[26] a case involving an attorney's rejection of an indigent defendant's appeal because he felt it did not have sufficient merit to warrant the assistance of counsel compensated by the state.

A number of objections may be made to the changes proposed in the Model Rules. The Rules, at least implicitly, reject adversary procedure and appear designed to limit its application. Adversary methodology may be outmoded and change may be appropriate; however, before such a conclusion is warranted the system must be forthrightly assessed. Its values as well as its defects must be identified and weighed. In the official commentary accompanying the proposed Model Rules no such weighing process is evident. Without it wholesale rejection of adversary concepts is not defensible.

If, after thorough debate, it is concluded that the adversary process should be abandoned or drastically altered, then the entire system should be reformed. Revising only the rules governing attorney conduct will not, by itself, achieve the desired results. Piecemeal change will create serious conflicts for practicing lawyers. Attorneys will often be forced to choose between the use of perfectly legitimate adversary procedures and obedience to non-adversary standards of conduct.

An example may help to clarify the nature of the problem. Various adversarial rules of evidence, including the hearsay, best evidence, and authentication rules, insulate the decisionmaker from information that has been determined, as a matter of law, to be potentially untrustworthy or misleading. Such evidence, however, may be highly relevant to the determination of material truth. In cases where an attorney has previously offered proofs at odds with such evidence how is he to proceed? If the attorney invokes the evidentiary rule and excludes the evidence, truth may suffer and, in some instances, the candor requirement of proposed Rule 3.1 may be breached.[27] If the attorney refuses to invoke the evidentiary rule, both the client's interests and the evidentiary rule will be defeated.

A system with non-adversary ethics and adversary procedures

26. 386 U.S. 738 (1967).

27. *See* ABA MODEL RULES, *supra* note 25, Rules 3.1(a)(3) (the duty to explain misleading evidence), 3.1(d)(2) (correction of manifest misapprehensions).

will frequently produce such conflicts. Many attorneys will be thrown into confusion in such circumstances. Undoubtedly, some will choose to evade the ethical requirements thereby weakening the moral force of the ethical rules. Others will choose to obey the ethical precepts and thereby weaken the adversary process.

The adversary system, at least in part, is predicated upon the idea that each participant should play only a single role in the adjudicatory process. This proposition is clearest in the case of the decisionmaker. Considerable effort is expended to insure that the arbiter remains neutral and aloof from the contest. It is presumed that requiring the decisionmaker to develop the evidence or manage the case would detract from the likelihood of successful performance of the judging function. I would suggest that precisely the same principle applies to the advocates. Each advocate is charged with the duty of gathering and presenting the evidence that best serves his client's interests. To do this the lawyer must be committed wholeheartedly to his client. As in the case of the judge, the imposition of a conflicting function would undermine the attorney's ability to do his assigned job.

The proposed Model Rules create a significant number of situations in which the attorney is to serve the court's or his own interests rather than those of his client. For example, Rule 3.1 repeatedly requires the lawyer to be the judge of his client's case. The attorney must carefully weigh the merit of his client's claims, determine the persuasive value of every precedent, and assess the potential of each piece of evidence to mislead. Whenever the attorney perceives a possible problem he must put his committment to his client to one side and assist the court. The attorney is obliged at all times to serve two masters, court and client. The Gospel according to Matthew says of such a situation:

> [n]o one can serve two masters. For either he will hate the one and love the other, or else he will hold to the one and despise the other.[28]

Although compromise may be possible if conflict arises infrequently, placing the attorney in a continuously conflicted environment, like that created by Rule 3.1, will undermine his ability to serve his clients.

The adversary process affirms human individuality. It mandates respect for the opinions of each client rather than those of his attorney, the court, or society at large. It provides the client with a neutral forum in which to air his views. Encouraging lawyers to judge each client's case or reject cases because of feelings of "repugnance" undercuts the individualizing mechanism. It

---

28. *Matthew* 7:24.

suggests that in all close cases the system or its functionaries are more important than the litigants.

By the strength of their advocacy and zeal on behalf of each client, attorneys in an adversary system affirm the proposition that individuals have rights that antagonists cannot ignore. A society that encourages a profession devoted to the vindication of private rights is likely to be a society in which such rights will be respected. Where zeal is curtailed the attorney is no longer free to serve as the champion of any citizen's rights and the value of the rights themselves is called into question.

The adversary process is not perfect nor is it capable, by itself, of insuring a humane and effective court system. However, in a time when human rights are constantly threatened and claims involving the common good are ever more vigorously pressed, I would argue that there is good reason to preserve the adversary process. Reasonable men could reach the opposite conclusion, but the utmost care should be exercised before such questions are decided. What is lost may not be easily regained.