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FAIRNESS IN TEACHING ADVOCACY

Charles W. Joiner*

The questions I address are these: Is fairness related to advocacy? Is fairness a concept that law teachers should address in their teaching, in particular in courses involving advocacy? By "courses involving advocacy" I mean courses that teach both law and practice techniques involving the direct protection of the rights of clients, particularly in the courts—for example, civil and criminal procedure and evidence.

I will first define what appears to me to be what society expects from those who teach. Ours is a civilized society; we live by rules. Some rules express minimum standards of acceptable behavior. The *minimum* standard rules are codified in statutes, regulations, codes of conduct, or constitute the common law. These minimum standards are usually expressly agreed upon refinements based upon the commonly transmitted moral values. They state express standards which, if violated, will result in punishment or some other adverse result. Other rules express aspirations and desires, what we hope behavior will be—goals for which we strive. These latter rules arise from a broad-based consensus. Sometimes this consensus is found in religious tomes such as the Bible or the Koran. Sometimes it is based on philosophical writings and broad principles of conduct.

Both the minimum rules of conduct and the rules that mirror our aspirational goals have foundations in the ideas and concepts handed down from generation to generation as a part of

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the common learning of society. In addition to families, schools and their teachers are the major organized institutions that transmit an understanding of both the minimum rules and the ideals and aspirations we hold for our society. We learn not only how to avoid trouble but also how to value things. We learn what is good, what is better. We learn this in relation to the values others hold in our society.

Society on the whole and individuals within society generally try to improve. Our goal seems to be to reach toward the aspirations as society understands them and to raise the minimum standards. This goal applies to all aspects of conduct, i.e., conduct concerning property, wealth or poverty, individual freedom, or relationships with one another. In other words, each generation is attempting to improve on what its predecessors have done. I suggest that improvement generally means moving the express rules of conduct closer and closer to those standards that society has defined as its aspirations. Teachers are intimately involved in this process.

IS FAIRNESS RELATED TO ADVOCACY?

Fairness has two meanings as applied to the legal system. First, does the decision correspond to the result society expects through application of the defined minimum standard—does the result comply with the law? For example, is it fair, in western society, to cut off someone's hand who has committed a theft? Most of us in this country would not find this to be a fair result. It does not accord with any of our generally accepted standards.

A second sense of fairness applies to the procedure used to reach the decision. Is the procedure used one that society, with its minimum standards and its goals and aspirations, considers appropriate? Is it a procedure that enables our adversary system to reach the truth?

I intentionally inject into this discussion the concept of truth because, among all our underlying values, we have indicated in many different ways that we want our decisions based on the truth. First, our procedures permit broad discovery of facts to discover truth. Second, we condemn perjury. Third, we condemn fraud and chicanery. Fourth, we require witnesses to state that they will "tell the truth, the whole truth, and nothing but the truth." All of this suggests that truth in the fact-finding process is a strong and fundamental underlying premise of our society. Our society urges that the court, in its efforts to resolve dis-

putes, should try to arrive at solutions that accord with the truth.

It seems to me, however, that fairness involves more than a process to reach the truth. It also involves the concepts of expedition and economy. Society expects that the process we substitute for sticks and clubs to resolve disputes should be accomplished rapidly and without undue expense. Society expects this process to work effectively; it does not want the prize to go to the person who can keep the process from working. Fairness in trials, to me, means application, economically and without undue delay, of a process to search out facts that leads to decisions that accord with truth. From everything I know about us, we do not want a process that resolves disputes based on false information and half-truths. We want results as close to whole truth as possible. Nor do we want a process that will not come to a solution until the clients are in the poorhouse or are old and decrepit. Society could put the question: "Will the process or procedure give those involved the opportunity to sort out the facts quickly and inexpensively and reach the truth?"

A caveat is necessary at this point. A criminal trial presents a different problem. Society has accepted a different goal in a criminal than in a civil trial. In the criminal trial we modify our fundamental definition of fairness with two specific requirements that affect the search for the truth. First, the government must prove guilt beyond a reasonable doubt. Second, the defendant is not required to testify. These special rules express society's greater goal of never subjecting an innocent person to punishment for a crime. The fear that the government, with all its resources, could easily, albeit inadvertently, convict an innocent person, lies behind the reasonable doubt standard. This standard embodies society's concern for one particular truth to the detriment of all others.

Each of these constitutionally protected rights is so well-developed and engrained in our societal approach to the protection of the individual that we must modify the definition of fairness.

Fairness in the criminal trial requires not a search for abstract truth but a search for an artificial truth expressed by the reasonable doubt standard. A criminal trial seeks not to determine whether the fact is "A or B," or whether "D" mailed the threatening letter, which would be a real search for truth, as would occur in a civil action. A criminal trial involves a decision about whether "government" has shown the fact to be "A" beyond a reasonable doubt, or whether the prosecutor has proved the mailing of the threat beyond a reasonable doubt. This process is

not a real search for the truth at all, but a higher artificial standard established to prevent innocent persons from being found guilty of a crime. In addition, in criminal trials we do not require that all the evidence be used. The defendant cannot be forced to give evidence. We require the decision maker to sort out the facts to determine if the defendant has been proven guilty beyond a reasonable doubt, without the defendant's evidence if the defendant decides not to testify.

Because we, as a people, accept this artificial standard of fairness in a criminal case, the lawyer's tactics in an adversary system must be judged against that standard rather than against the standard of a truth-seeking process applied to a civil action.

The civil trial, on the other hand, involves a determination of which side predominates; the defendant wins if both sides appear equal to the decision maker. This can fairly be classified as an honest search for the truth, and I believe that this is the way in which all of my friends and neighbors think about it. In the civil case, therefore, fairness involves a process designed to provide the opportunity to sort out the facts and reach the truth.

Fairness in the criminal case, however, does not differ from the civil case with regard to expedition and economy. In the criminal case we expect both that persons will not wait a long time to have their guilt determined and that the prosecution will proceed economically. We reject the concept that persons charged with crime should lose because of delay, and we do not believe that those who can indefinitely postpone proceedings should, because of that fact, be declared the winners.

Although the criminal trial differs from the civil trial in some aspects, the following discussion of truth-seeking, expedition, and economy applies to both types of trials.

How do I test whether the adversary process we use in the civil case is fair by the standards of truth-seeking, expedition and economy? I am not an empirical researcher. My response to this question comes from the seat of my pants, a seat that has become quite glossy from sitting on the bench for more than twelve years, watching all kinds of lawyers try all kinds of cases.

Advocacy in the adversary system can and does powerfully influence the search for the truth. A few examples illustrate this point. People temporize. People dissemble. People tell only partial truths. People lie. The fact that each side of a lawsuit has a champion aids in the search for truth. The tool of cross-examination uncovers the truth. The combined efforts of lawyers on each side working diligently for their clients will, I am sure, find more facts in total than would one impartial inquisitor.

But cross-examination is sometimes abused and witnesses, without reason, are subjected to abusive and factually unsupported innuendo. Examiners create issues out of irrelevancies, issues that could mislead juries. Even if one side discovers facts, if that side dissembles or tries to hide the facts from the other, truth will likely not be reached.

Lawyers use many tactics, in the name of what they call the adversary process, that impede the search for the truth, cause delay, and add costs. Lawyers occasionally hide facts and encourage clients not to disclose facts fully. Lawyers direct attention away from controlling facts on which their client is weak and toward non-controlling facts where he is strong—"throwing chaff in the air to get in the eyes of the jury." Lawyers delay. Lawyers of the economically strong have been known to increase pretrial costs to drive the economically weak out of the legal marketplace. Lawyers have brought suits to force settlements. Lawyers more than occasionally take depositions to increase costs to the other side and force settlement. Advocacy sometimes subverts the process of finding facts expeditiously and inexpensively and sometimes diverts the search for the truth.

Lawyers respond that, "We do only what the law allows." That may be true in some cases; in others it is not. Even when lawyers remain within the minimum standards of the law they may subvert the process. Do advocates who merely comply with the minimum standards of the law meet our expectations in this society? Are those who do not commit perjury, who do not bribe, who do not violate any of the many criminal statutes on the books, who do not directly violate any one of the canons of professional responsibility, but who increase costs through excessive discovery to drive an opponent to settle, who bring suits without merit in hopes of a small settlement, or who direct juries away from the truth, the kind of lawyers that society wants to run our finely tuned dispute resolving system? Is conduct that skates along the borderline of the criminal or unethical, conduct that accords with our version of how the fact-finding process should work? Does advocacy of this sort support a process that will reach the truth?

Clearly not. This kind of action subverts the process. Society looks foolish. Individual clients do not receive decisions in accordance with the truth. They may never get a decision because of delay or cost. They win because they have retained an abuser of the adversary system. We used to have words for this type of conduct: "mouthpiece," "shyster," "pettifogger." I am not sure they are appropriate today. If they are not proper in today's cli-

mate that discourages ethnic references, we should invent a new name that would not condemn the advocate who uses the system to uncover truth efficiently but would condemn the person who, in the name of advocacy, attempts to win cases by trick, delay, or the richness of his or her pocketbook.

FAIRNESS AND TEACHING

How does all this relate to my second question: "Is fairness a concept which law teachers should address in connection with their teaching, in particular in courses involving advocacy?" A law teacher must relate to the society in which he or she lives. Such a teacher has an obligation to try to understand society's aspirations and to relay to students both those *aspirations* and society's minimum standards. These aspirations should be communicated to students within discussions of how lawsuits should be tried.

In other areas of the law, teachers have always analyzed and communicated society's aspirations. In torts, for example, the law teachers were in the vanguard of those who critically evaluated the doctrine of contributory negligence, because they believed that society really did not accept the effect of this doctrine, even though it had been the law for more than one hundred years. Law teachers wrote and taught that other doctrines (comparative negligence, no fault) ought to be considered as substitutes. Lawyers, judges, and legislators finally became convinced of the shortcomings of this doctrine and its harshness has largely disappeared. Fairness came to this aspect of tort law in part through the efforts of law teachers.

In the field of contracts, largely through law teachers' writing and class discussions, a new way of enforcing understandings was developed—the theory of promissory estoppel. Law teachers became convinced that society was willing to accept such ideas. Those teachers taught students who became advocates and judges who applied the doctrine of promissory estoppel.

In criminal law, law teachers criticized many statutes creating status crimes and defining as crimes many acts between consenting individuals in private. These teachers believed that society really did not want such activity to be criminal. Largely as a result of the law teachers' efforts to articulate what they believed society desired, lawyers, judges, and legislators acted, modifying such laws.

In the field of criminal procedure, law teachers have been pre-eminent in communicating what they believed to be society's aspirations and goals. Their teaching and argument helped develop fairness in the conduct of a criminal trial. As a result of this teaching, judges required persons charged with crime to be told about their rights, to have the right to counsel, to be tried on evidence not seized as a result of an illegal search, etc.

Law teachers have values. And law teachers have always used their sense of values to influence the legal system for the better. Good law teachers have always attempted to improve the minimum standards to make them more in accord with what the teachers perceive to be the aspirations of society.

Teachers of courses affecting advocacy should discuss the types of tactics that advocates use, to make certain that students understand which of these tactics promote the search for the truth and which subvert it, which tactics impede expedition of trial, and which tactics increase costs and delay. If it is true that the role of the advocate is to assist in the expeditious search for truth, it seems important, to me, that law teachers devise ways of conveying this assessment to students.

Specifically, by way of example, students need to be taught that clients are not entitled to use the tactics of delay. Nor are they entitled to wear out the other side economically. Students need to be shown that the discovery process must be approached with the same attitude of fairness I have suggested for the trial. Ninety-three percent of all cases never get to trial. Unfairness causes far more harm in pretrial discovery proceedings than it does during trial.

When law teachers attempt to shape attitudes toward fairness and cooperation, students go into the real world supported by the perspectives of a distinguished mentor as they represent clients when they assist the court in finding the truth, and when they attempt to be fair and to oppose tactics that impede the search for truth.

Some students and perhaps some teachers might respond to this plea with a concern that such advocates will not be hired, will not win, will lose to the person who subverts the fact-finding process and diverts the attention of the fact finder from the real issues of the case. This is not true. The best advocates that I have seen in my court are the advocates who help the jury and the judge ascertain the truth. They cooperate with each other in the pretrial discovery proceedings and during the trial. They do not try to eliminate one party because of lack of funds. They do not take extra depositions or abuse discovery. They cooperate

with the court.

Many lawyers want to control abuses of the advocacy system. Some time ago I attended a major conference on discovery abuse. This conference was not sponsored by judges; it was sponsored by the lawyers directly involved in trying lawsuits. The conference urged the courts to step in and help lawyers prevent discovery abuse. At this conference I again observed that the kind of lawyers who win lawsuits and understand the true meaning of the adversary system are striving to find ways to prevent others from abusing the process in the name of advocacy.

The law, too, is developing in ways that raise the minimum standards of conduct toward the aspirational goal of truth seeking. The recent amendments to the civil rules for the federal courts expand the view of the pretrial and trial as a search for the truth. The rules promote disclosure prior to trial and attempt to control costs and delay. Lawyers are required to certify that, after reasonable inquiry, the pleading or motion is well-grounded in fact and law and is not interposed for improper purposes such as harassment, delay or increased costs. Judges conduct pretrial conferences to guide the search for the truth before the trial to prevent some problems resulting from a non-refereed discovery system. The conference should expedite cases, discourage wasteful actions, improve trial preparation, eliminate frivolous claims and defenses, identify witnesses, identify documents, develop stipulations, and require an outline of detailed steps to be taken at the trial to prevent surprise.

The thrust of the new federal rules of civil procedure, although of substantive value, are more valuable as a signal to the bar that a substantial shift has occurred in the thinking of the managers of the adversary system, a shift away from the criticized tactics and toward tactics that will lead to a search for truth.

CONCLUSION

To conclude, two levels of rules govern all aspects of our conduct. Some rules create minimum standards. Other rules identify what is good, excellent, or best. These latter rules mirror the goals to which we aspire. This discussion has focused on rules that reflect aspirations, that I think society desires, but that the profession has not yet been able to define as the minimum required conduct.

Tort teachers, contract teachers, constitutional law teachers,

and criminal law teachers do not aim to turn out lawyers who merely meet minimum standards. They strive for the best lawyers as they interpret what is best for society. Teachers of advocacy should do no less. This suggests to me that a much greater effort should be made to develop lawyers able to hold their heads high and say proudly, as a result of their own individual actions:

I am in a profession that searches for the truth. My client is entitled to have his case heard on all of the facts, not just those favorable to my client. I am here to see that this search for the truth is done quickly and without undue expense. I cannot be hired to obstruct or subvert this search for the truth. I will cooperate with the court and my opponents in that search.

Fairness must be addressed in teaching courses involving advocacy.

