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ARGUING THE LAW IN AN ADVERSARY SYSTEM

Monroe H. Freedman*

Professor Geoffrey C. Hazard, Jr., has made significant contributions to the field of lawyer's ethics.¹ His Sibley Lecture, *Arguing the Law: The Advocate's Duty and Opportunity*,² however, falls short of Professor Hazard's own best work, the quality of other Sibley Lectures,³ and even the standard of advocacy that he postulates in his lecture.

Professor Hazard makes three principal points. First, there is "strong reason to believe that the state of present advocacy is pretty bad, and that it has not been a lot better in the past."⁴ Second, the advocate has, and should have, a professional obligation, enforced by disciplinary rules and penalties, to cite authorities that have been overlooked by opposing counsel and that are harmful to one's own client.⁵ Third, it is always tactically advantageous to concede the weaknesses of one's own case;⁶ thus, "the chances of victory can be improved by frank dealing with the law, adverse as well as favorable."⁷

The oddest thing about Professor Hazard's lecture is that it does not comport with the very strictures that he would impose upon the advocate. If a legal question is not genuinely arguable, he tells

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¹ *E.g.*, G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978).

² Hazard, *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821 (1982).

³ *E.g.*, Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539 (1981); McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

⁴ Hazard, *supra* note 2, at 823. Professor Hazard devotes about one-third of his lecture to circumstantial and anecdotal evidence in support of that conventional wisdom.

⁵ *Id.* at 825-29.

⁶ *Id.* at 830.

⁷ *Id.* at 829.

us, there is no point in litigating it; conversely, if a legal question is indeed genuinely arguable, one must acknowledge the existence and the strength of a contrary view.⁸

On that standard, Professor Hazard's lecture was hardly worth delivering, for he cites no contrary authority, and he acknowledges no strength in a thesis contrary to his own.⁹ Criticism of his view, he says, derives from ignorance,¹⁰ or from the simple-minded notion that "an advocate should cite *only* favorable authority"¹¹ (which, of course, is not the issue), or from a failure to comprehend strategic logic because of a blinding fear of candidly examining the legal uncertainty of one's own position.¹² Thus, disagreement with Professor Hazard's position derives from ignorance, stupidity, and irrational fear—or so says the scholar who counsels the advocate to eschew "tendentious argument" and "verbal assault."¹³

In fact, there are citations and arguments, adverse to Professor Hazard's thesis, that he has not acknowledged in his lecture.¹⁴

Harold Leventhal was a judge widely admired for his wisdom and moderation. He was also a respected advocate. While a member of the United States Court of Appeals for the District of Columbia Circuit, Judge Leventhal reflected on his earlier experience in the Office of the Solicitor General of the United States.¹⁵ "Engraven in my memory," he said, "is an incident that concerns the problem whether a lawyer should cite adverse precedents."¹⁶

While he was in the Solicitor's Office, Judge Leventhal related, he had occasion to work on a Government brief in a case relating to the interpretation of naturalization treaties.¹⁷ Relevant to that issue were State Department rulings that fell into two distinct lines of authority, one line supporting the Government's position,

⁸ *Id.* at 830.

⁹ Professor Hazard states the opposing arguments in two inadequate sentences, just after characterizing them as "splenetic." *Id.* at 826.

¹⁰ *Id.* at 827.

¹¹ *Id.* (emphasis added).

¹² *Id.* at 829.

¹³ *Id.* at 831.

¹⁴ Since I have been asked for an informal comment with few citations, I have not researched the issue thoroughly, but have relied only on materials ready at hand.

¹⁵ See Leventhal, *What the Court Expects of the Federal Lawyer*, 27 *FED. B.J.* 1, 4-5 (1967).

¹⁶ *Id.* at 3.

¹⁷ *Perkins v. Elg*, 307 U.S. 325 (1939).

the other contrary to it. Those rulings contrary to the Government's position were readily distinguishable, because all but one arose in cases that did not involve naturalization. That one ruling, however, had been missed both by opposing counsel and by the court below.

The Assistant Legal Adviser of the State Department urged that the inconsistent ruling be omitted from the Government's brief before the Supreme Court. Judge Leventhal was adamant about keeping it in his brief, however, along with a "suitable explanation" of why, properly understood, it did not undercut the Government's argument. The Supreme Court held against the Government, "not only [using] the citation but [featuring] it," and expressly rejecting the Government's attempt to explain it away.¹⁸

Then came Judge Leventhal's judgment, based upon careful reflection: "I have thought about this many times. In all candor, I would say that as a *counsel in private practice I might not have volunteered adverse references*. But I do hope that Government counsel will continue to do as I did as Government counsel in that case."¹⁹

Judge Leventhal wrote that in 1967, just before the 1969 promulgation of the present Model Code of Professional Responsibility and DR 7-106(B)(1). From 1949 until 1969, however, the official position of the ABA had been significantly stricter than that in the present Code. The ABA required the advocate to apply the following test in every case: Is the decision that opposing counsel has overlooked one "which the court should obviously consider in deciding the case"?²⁰ Obviously, Judge Leventhal, having thought about the issue many times, tended to disagree with the official ABA view regarding the obligation of private counsel.

So too did the ABA itself when it subsequently adopted the Model Code of Professional Responsibility. Disciplinary Rule 7-106(B)(1) is so narrow as to be wholly ineffectual. First, the requirement of disclosure relates only to legal authority "in the controlling jurisdiction." Second, the legal authority must be "directly adverse" to the position of the lawyer's client. Most important, the legal authority in question must be "known to [the lawyer] to be

¹⁸ Leventhal, *supra* note 15, at 4.

¹⁹ *Id.* (emphasis added).

²⁰ ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1957).

directly adverse" to the client's position. Further, that subjective knowledge requirement²¹ is in the context of a code that tells the advocate to resolve any doubts about the law in favor of the client.²²

It will be the infrequent case in which it can be shown that adverse authority was in fact known to the lawyer; it will be the extraordinary case in which it can also be established that the lawyer, while resolving doubts in favor of the client, knew the legal authority to be directly adverse. For example, Judge Leventhal knew about the adverse authority, but is it clear that the adverse authority was "known to him to be directly adverse"? After all, he was able to provide the court with a "suitable explanation" that the case was not in fact inconsistent with the Government's position. Assuming that his argument to the Supreme Court was made in good faith, did he then "know" that the authority was "directly" adverse to his argument?

Consider how Professor Hazard expresses the lawyer's duty. The advocate is to cite adverse authority, but that means only "having to think why and how that authority can be distinguished or otherwise neutralized."²³ If the authority is indeed capable of being distinguished or neutralized, however, then it cannot be "directly" adverse. Certainly, at least, legal authority cannot be "known to [the lawyer who distinguished it] to be directly adverse" if the lawyer can make a good faith argument that the authority is inapplicable to the case.

Professor Hazard acknowledges that there is "some difference" between the language of the present Model Code of Professional Responsibility and that of the initial discussion draft regarding the duty to divulge adverse authority. Comparing the two provisions, however, Professor Hazard concludes that "[t]he important fact is that only a small difference was involved" between the present DR

²¹ The way in which standards of "knowing" are used in the Model Code of Professional Responsibility, sometimes disingenuously, sometimes erratically, is discussed in M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* ch. 5 (1975). For a discussion of the same problem in the MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1981), see AMERICAN LAWYER'S CODE OF CONDUCT introductory comment on "knowing" (Reporter's Draft 1981).

²² MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1979).

²³ Hazard, *supra* note 2, at 828.

7-106(B)(1) and proposed rule 3.1(c).²⁴ That conclusion is incorrect, or at least arguable.

As we have seen, DR 7-106(B)(1) is virtually meaningless; I doubt that there has been a single disciplinary action under it, anywhere, in the dozen years since it was adopted.²⁵ Proposed rule 3.1(c), on the other hand, would have extended beyond authority that is directly adverse, and embraced any legal authority "that would probably have a substantial effect on the determination of a material issue." I submit that lawyers who see a major difference between those phrases are not being irrational. Most important, there would no longer be a need to show that the lawyer knew the authority to be directly adverse. Thus, even if the lawyer could venture a good faith argument that the authority was not adverse, it might still be said that the authority would "probably have a substantial effect" on the court's consideration of the case. Contrary to Professor Hazard, therefore, proposed model rule 3.1(c) might indeed have imposed a new burden on the advocate.

The question remains whether such a requirement is inconsistent with the advocate's role—or, at least, whether there are any legal authorities and arguments in support of that proposition that were omitted by Professor Hazard.

One authority, already noted, is Judge Leventhal's position. An argument, also noted, is that the present rule, DR 7-106(B)(1), has obviously been drafted in such a way as to make it ineffectual in practice; however, the previous rule was broader, easier to enforce, and much closer to the proposed model rule 3.1(c). One inference, therefore, is that the bar has chosen to maintain the appearance of such a requirement but not the substance. In addition, a 1972 survey of the District of Columbia Bar found that 93 out of 100 lawyers would not disclose adverse authority that was not cited by opposing counsel, while only 7 out of 100 would do so.²⁶ We need not find such statistics conclusive on our judgments of lawyers' ethics, but surely it would be arrogant to consider such a heavy preponderance of professional viewpoint to be wholly irrelevant.

I would suggest further that proposed model rule 3.1(c), had it

²⁴ *Id.* at 827.

²⁵ Professor Hazard characterizes the rule as "rarely operative" and at variance with prevailing practice." *Id.* at 828.

²⁶ Friedman, *Professional Responsibility in D.C.: A Survey*, 1972 RES IPSA LOQUITUR 60.

been adopted, would have placed the advocate in a conflict of interest that is inconsistent with the zealous representation of the client required by the Model Code of Professional Responsibility under Canon 7 and with the undivided loyalty to the client required by Canon 5. As stated in EC 5-1, "The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client" Moreover, as an advocate, I am directed by the Code to resolve any doubts about the law in favor of my client.²⁷ Under my reading of the rules, therefore, writing a brief that is harmful to my client is inconsistent with the fidelity and zealousness to which my client is entitled. Professor Hazard probably disagrees. Since he did not cite or discuss Canons 5 and 7, however, we cannot be sure; he might simply have overlooked their relevance to the issue of the advocate's duty in arguing the law.

Before concluding, let me say that I agree with Professor Hazard to the extent that frequently it is *tactically desirable* for the lawyer to cite and refute uncited authorities that are arguably adverse. Even if opposing counsel has overlooked the adverse authority, the court (or the judge's law clerk) might find it after briefs and arguments have been submitted. I do not believe, however, that it is or should be *ethically required* that the advocate do so.

My ultimate point, though, is that the best and most appropriate assurance that adverse authorities and arguments will come out is the adversary system itself. This is not to say that the adversary system is flawless. For example, my casebook on Contracts²⁸ includes materials selected specifically to alert the student to the fact that the adversary system will occasionally fail to bring out facts or arguments that might be highly relevant to the court's decision.²⁹ One illustration is *Davis v. Jacoby*,³⁰ where the contest was between parties claiming under a will and parties claiming under a contract to make a different will. A material fact was that the testator/contractor was very likely incompetent during the period of time when both instruments were executed. Accordingly, neither party appears to have argued the legal relevance of the tes-

²⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1979).

²⁸ M. FREEDMAN, CASES AND MATERIALS ON CONTRACTS (1973).

²⁹ *Id.* at 7, 364-71, 608-14; see also M. FREEDMAN & A. RESNICK, TEACHER'S MANUAL 7-8, 185-258 (1978); Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 21 J. LEGAL EDUC. 569, 572 (1969).

³⁰ 1 Cal. 2d 370, 34 P.2d 1026 (1934), reprinted in M. FREEDMAN, *supra* note 28, at 364.

tator/contractor's mental condition, one side because they did not want to impeach the will, the other side because they did not want to impeach the contract.³¹

Despite occasional lapses of that sort, I am persuaded that the adversary system is successfully designed to encourage each side of a legal dispute to search out and to present to the court the relevant facts, law, and policy considerations bearing upon matters in dispute. Professor Hazard's Article and this one illustrate my point in a significant way with regard to the presentation of adverse authorities and arguments. Compare the inadequate exposition of one who favors the compelled citation of adverse authority—Professor Hazard himself³²—with the adversary exposition provided by our two papers together. Moreover, I trust that Professor Hazard's response to my adversary presentation will serve not only to refute my arguments, but also to supplement and improve upon his original Sibley Lecture—all to the benefit of anyone attempting to resolve the issue.

In short, the adversary systems lives. And it works.

³¹ I wonder: would Professor Hazard really favor disciplinary action against the lawyers for both sides in *Davis v. Jacoby*?

³² The comments to the Model Rules make several serious misstatements and omissions of legal authorities. The New York State Bar Association has noted the irony that some of the most egregious of those misstatements and omissions are in the comment to Rule 3.3, which forbids the lawyer to misstate or to omit legal authorities. NYSBA, REPORT OF THE SPECIAL COMMITTEE TO REVIEW ABA DRAFT MODEL RULES OF PROFESSIONAL CONDUCT 8 n.6 (1981).

