



September 1987

## Advocacy and the Adversary System

Herb Kutchins  
*California State University*

Stuart Kutchins  
*Inverness, California*

Follow this and additional works at: <http://scholarworks.wmich.edu/jssw>

 Part of the [Social Work Commons](#)

### Recommended Citation

Kutchins, Herb and Kutchins, Stuart (1987) "Advocacy and the Adversary System," *The Journal of Sociology & Social Welfare*: Vol. 14 : Iss. 3 , Article 9.

Available at: <http://scholarworks.wmich.edu/jssw/vol14/iss3/9>

This Article is brought to you for free and open access by the Social Work at ScholarWorks at WMU. For more information, please contact [maira.bundza@wmich.edu](mailto:maira.bundza@wmich.edu).



# ADVOCACY AND THE ADVERSARY SYSTEM

HERB KUTCHINS

California State University  
Sacramento

STUART KUTCHINS

Inverness, California

*If advocacy is to be a significant aspect of social work it is necessary to distinguish it from other forms of action in which social workers engage, and it must be practiced methodically. This paper offers an approach to advocacy as a technique applied to conflicts resolved within the adversary system. The elements of the adversary system are identified and discussed; then the use of this model is illustrated with an example of its successful application.*

Although individual and class representation of the poor and other disadvantaged groups is an important part of the history of social work,<sup>1</sup> contemporary interest in advocacy and currency of the term itself were generated by the activity of lawyers working for Mobilization for Youth and, later, in the War Against Poverty.<sup>2</sup> The aggressive, adversarial approach of poverty lawyers produced dramatic results in struggles for increased rights and benefits for clients. Social workers, who often participated in these disputes, recognized the utility of this approach not only in securing individual entitlements but as a tactic for interesting potential participants in the community organizations they were developing to combat poverty.<sup>3</sup>

In these conflicts, lawyers, whose professional training led them naturally to embrace an adversarial approach to client problems, simply changed their traditional clientele, not their professional activities. Social workers, whose professional ideology took its shape from the concepts of turn-of-the-century

Progressives that they were to promote the “public interest”<sup>4</sup> and whose skills were largely restricted to psychoanalytically-oriented casework,<sup>5</sup> had more difficulty. Not only did they have to learn new skills (persuasion) and master new information (laws, rules of procedure, rights, etc.) but—most difficult of all—they had to redefine their relationship to their clients.

In the controversy over restructuring client relationships,<sup>6</sup> social workers often lost sight of the context in which advocacy had been successfully practiced. Advocacy became a banner for a rededication of social work to serving the disadvantaged rather than servicing social programs,<sup>7</sup> but the significance of the specifically adversarial stance of poverty war advocates seemed lost on many social workers who took up the cry for advocacy. If anything, the social work discussion led away from advocacy toward the more conventional forms of social work practice.

The Family Service Association of America<sup>8</sup> produced a manual on the practice of advocacy which illustrates the problem. Advocacy was described as

. . . professional service designed to improve life conditions for people by harnessing direct and expert knowledge of family needs with commitment to action and the application of skills to produce the necessary community change.<sup>9</sup>

This description seemed to equate advocacy with community organizing, and the examples used in the manual underline this equation. However, when an attempt was made so summarize the knowledge and skills necessary for family advocacy, the FSAA reported that “As in casework, there are six essential parts of the advocacy process: definition of the problem, case study, diagnosis, treatment plan, implementation of the plan and evaluation.”<sup>10</sup>

One could quarrel with the use of terms like “diagnosis” and “treatment plan” to describe the advocacy process, but the major issue is deeper than semantics. The question of how to do advocacy as distinct from other types of social work, especially casework or community organizing, remained unchanged.

Nor was the FSAA alone. Panitch’s<sup>11</sup> description of how to

practice advocacy consisted of fifteen unconnected paragraphs detailing "techniques of intervention," including studies and surveys, interagency committees, education, demonstration projects, petitions, *etc.* Some of these involved advocacy, but again there was no guidance on performing advocacy as a specific intervention technique.

Davidson and Rapp<sup>12</sup> offered a systematic discussion on how to do advocacy, describing a multiple-strategy approach that was an even more general problem-solving model than the casework paradigm offered by the FSAA. It included the following steps: 1) assessment of needs, resources, and control of desired and available resources, 2) strategy selection and 3) implementation. They also discussed the need for evaluation and feedback.

They addressed the need to be systematic in developing a rational approach to problem-solving, but there is no advantage in equating advocacy with the total problem-solving approach they described. One still does not know how to engage in advocacy as distinct from other forms of social action.

How does one do advocacy? One way to answer this question is to return the discussion to the circumstances in which advocacy generated interest among social workers, the practice of advocacy in adversarial settings. The argument of this paper is that social workers can become effective advocates by employing the elements of the adversary system in a methodical way to help clients achieve their goals.

A great deal has been written about adversary systems<sup>13</sup>, particularly about the courts, and certain aspects have been described and discussed in detail<sup>14</sup>, but heretofore no description of adversary systems has been generally available. What follows is an analysis of the elements of the adversary system and of the advocate's role within it. If social workers employ the elements of the adversary system, they can enhance their skills and transform their work into professional practice.

## THE ELEMENTS OF THE ADVERSARY SYSTEM

In an adversary system, conflict is met and resolved in a (I) *forum*. In some cases, as in legal conflicts, the forums are well defined—courts or administrative hearings. Social work advo-

TABLE 1

---

 ELEMENTS OF THE ADVERSARY SYSTEM
 

---

- I. A Forum
  - II. A Decision-Making Mechanism
  - III. Specific Procedures
  - IV. Issues
  - V. Specific Determination
  - VI. Injury
  - VII. Remedy
  - VIII. Adversaries
  - IX. Equality
  - X. Helpers
    - A. Character Witnesses
    - B. Combatants
    - C. Pleaders-Advocates
- The Advocate's Role
- I. Find or Develop an Adversary System
    - A. Gather Information
      - i. Substantive
      - ii. Procedural
  - II. Persuade
- 

cates sometimes have well defined forums available to them, e.g., in fair hearings, but sometimes forums must be searched out or created on an *ad hoc* basis.

Some examples of found or created forums are: stimulating a legally mandated but moribund Juvenile Justice Advisory Commission to hold hearings and make findings on a series of reports of brutality and abuse in Juvenile hall; forming a "Citizen's Tribunal" of socially and professionally prominent people to take testimony and make findings which publicized abuse by a welfare agency; using the annual conference of the American Institute of Planners to mobilize professional opinion against developers in an urban renewal fight<sup>15</sup>; using an accreditation team from the Council on Social Work Education as a forum to air complaints of racism at a school of social work;

submitting a landlord-tenant dispute to a rabbinical court convened under traditional Hebraic codes.

An important feature of the forum is its (II) *decision-making* mechanism. In the case of a court system this is a judge, a jury or both. In sporting events, the referee fills this role. Whatever its form and nature, some clear entity or instrument is required which can make final decisions.

Another essential feature of a forum is a set of (III) *specific procedures*. Conventions must be adopted to guide the conduct of the participants in the conflict. In courts, these are the rules of procedure and of evidence (as distinct from substantive laws). In sporting events, these are the rules of the game.

Very often social workers have found, when acting as advocates in disputes with welfare departments, public housing agencies and similar institutions, that the procedures by which conflicts are resolved are not spelled out or are unavailable for scrutiny and are often conflicting or outdated. It is a matter of critical importance that a set of procedures is promulgated and fully known to all participants. Advocates have frequently achieved victory simply by getting agencies to promulgate procedures. Once this is accomplished, the agency is committed to follow its rules and often yields without further struggle over the individual problem.

The (IV) *issue* is the substantive matter in dispute. Although there may be many compromises involved in the preliminary stages of a conflict, there must be some matter, at least one issue, which has to be adjudicated if the adversary system is to be invoked. If the dispute can be resolved by compromise or conciliation, it is not necessary to complete an adversary proceeding.

The importance of clearly defining the issue is illustrated by the problem of a social worker whose attempts to place two mentally retarded clients in a promising residential program had been frustrated by a county coroner who was the public guardian. The clients had been adjudicated incompetent and placed under his supervision, but they both appeared to be capable of functioning in a normal or near-normal way—one had even scored 100 on an IQ test. Despite the promising

nature of the placement for the clients, the coroner refused to house them there. The social worker felt that the coroner did not want to relinquish control over them and the funds they generated.

There are at least three ways of defining the issues in this case:

1. "The coroner is not the appropriate public guardian." If this is the issue, the remedy is to remove the coroner as the public guardian and the forum to decide the matter is either the county board of supervisors, which could directly remove this coroner, or the state legislature, which could pass a law establishing another public guardian for every county (a good alternative particularly if such problems occur in many counties throughout the state).
2. "The client was wrongly adjudged incompetent." In this case, the forum would be a court and the social worker would have to enlist the aid of a lawyer.
3. "The decision to refuse the placement is incorrect." If this is the issue, the decision maker is the coroner and an effort must be made to persuade him to change his mind through the presentation of arguments or, perhaps, through the employment of other strategies, such as political pressure. On this formulation, it would be extremely imprudent to attack or offend the coroner as one might necessarily do if the problem were formulated in one of the other two ways.

This example illustrates the close interdependence of the definition of the issues with the selection of a forum, the formulation of a remedy and other elements of the adversary system.

The issues must be defined as clearly and narrowly as possible to permit a (V) *specific determination*. This is a simple declaration of the yes-or-no type, a decision for or against one of the disputants—someone is judged right or wrong, guilty or innocent. The famous story of the two women who disputed the maternity of a child before Solomon is a perfect illustration of the "either/or" quality of specific determination.

The issues must entail a clear and measurable (VI) *injury*. It must be demonstrable that something substantial is at stake, that one party has suffered a measurable loss. For a social work advocate to show only that clients have rights that are ignored or abused is insufficient; it must also be shown that some harm or deprivation is suffered as a result.

The suitability of an issue to the adversary process is in some measure determined by whether a (VII) *remedy* can be provided. The adversary system is not simply a mechanism to determine which party is correct or what is true, but is a means of establishing formulae for action applicable to the disputing parties.

The matter of remedy is too often overlooked. For instance, a citizens' committee for juvenile justice acting as advocates for children detained in a juvenile facility made a convincing presentation to the county board of supervisors which demonstrated the institution's inadequacies very clearly. When one of the authors asked what should be done about it, the group's leader responded that they needed only to expose the immorality and the injustice of the situation that existed. The supervisors could figure out how to remedy the problem. But members of the Citizen's Committee were unable to make progress until they finally proposed a remedy, which was simply to close the facility and to provide group foster homes.

An analysis of the adversary system could not be complete without mention of the contestants or (VIII) *adversaries*. Although the inclusion of these participants seems obvious, it has been observed that sometimes attempts are made to initiate an adversary proceeding when there are no clear-cut adversaries. There are two contestants in the adversary system or, in case there are more than two, the opponents are arranged on two sides.

Care must be taken to distinguish between one's adversaries and the decision-maker. For example, in the course of appealing a welfare worker's decision to deny benefits, that worker's supervisor may be a decision-maker at an early stage and an adversary later. When supervisors are adversaries, it may be a legitimate tactic to attack their judgment, attitudes,



*etc.*; but when they are decision-makers, it is the advocate's job to persuade them, not to attack them.

(IX) *Equality* is necessary if the adversary system is to function properly. This is not meant to suggest that the contestants must be equal in all respects, but equality is required in all matters which might influence the decision. For example, if two teams are fielded in a sports contest, one team cannot have twice as many people as the other. Nor can one party have some power over the decision-maker that the other does not have (for example, the power to hire or fire). Such inequalities invalidate the decision-making process. It is this more than any other factor which leads to failure in the operationalization of an adversary system.

One of the functions of (X) *helpers* is to rectify certain inequalities. An inequality caused by the greater prestige of one party is often balanced by the introduction of character witnesses who can attest to the good character of the less well-established.

Another function of helpers is the provision of specialized technical services. Where conflicts were decided in trial-by-combat, champions—knights specially trained in the arts of combat—were introduced. In the Common Law tradition, lawyers were first introduced into legal proceedings because some contestants were unable to master the technical aspects of legal procedures. Although their functions were initially strictly limited to formulating technical pleadings, their roles expanded as the outcomes increasingly came to depend on procedural questions. As a result, lawyers moved from a rather secondary position to one where they dominate the proceedings.

The concept of the advocate as a helper is contained in the etymology of the word (from the Latin, *ad vocare*). The term was applied originally to "one who is called to help".

## THE ADVOCATE'S JOB

It should be abundantly clear by now the advocate's job is to help his or her client win when there is a conflict. To this end, the advocate is primarily charged with two functions: first, to find or develop an adversary system which will be most

beneficial to the client; second, to present the client's case as persuasively as possible.

To fulfill these functions the advocate must assemble and organize information of two types. Some of the information is about substantive matters—this includes information about the situation surrounding the injury. The second type is information of a technical nature—the rules of procedure and the customs which determine how the decision will be made.

### CREATING AN ADVERSARY SYSTEM TO FIGHT THE FEDERAL BUREAU OF PRISONS

The following example illustrates the way in which the elements of the adversary system can be used by social workers to analyze an advocacy problem and to shape a systematic campaign. The Citizens' Criminal Justice Committee, a coalition of professionals and laymen interested in criminal justice reform, was organized two years before the events described took place by a coalition of social agencies in which the Family Service Agency took a major role. During the year immediately preceding the events described, a graduate social work student was assigned to do field work with the group and helped increase participation tremendously. Later, during the formative stages of the advocacy campaign described here, a social worker was a member of the board of directors and, using the model described in this paper, helped shape the Committee's advocacy strategy.

A conflict began with a series of vague newspaper reports that the federal government planned to build a Metropolitan Diagnostic and Treatment Center in San Francisco. The Citizens' Committee invited a representative of the Federal Bureau of Prisons (FBP) to describe the plan. He explained that the detention center was to be an eleven to fourteen-story, multi-million dollar building in the heart of the city. It would serve many functions: house prisoners in pretrial detention; be a center for testing, evaluation and classification; and also house some sentenced prisoners engaged in special rehabilitation programs.

Opposition to the plan surfaced immediately. The FBP rep-

representative tried to meet the criticism; using the rhetoric of prison reform, he argued that they were promoting community-based corrections. The citizens argued that bringing a prison into the community defeated the goal, which was to eliminate confinement wherever possible.

### The Search for a Forum

When asked whether there were to be public hearings or any other solicitation of public opinion, the speaker informed those assembled that the decisions had already been made and that there was no avenue for the general public to influence the plan. The general response was incredulity and anger. The Director of the Mayor's Criminal Justice Planning Council, who had experienced difficulty gaining community support and wanted to curry favor, offered on the spot to provide assistance.

The opposition explored several possibilities. A major public interest law firm was contacted, one which had waged a successful fight against the Mayor and the city's major business interests, stopping a huge downtown development project. The lawyers felt that the case was not ripe; they would have to wait until the Bureau of Prisons started to build and then initiate legal action to halt construction.

Many felt, however, that a valuable advantage would be lost by not starting early, before momentum created by the expenditure of large sums of money had solidified the commitment to build.

The U.S. Congress was considered. On the one hand, Congress did have the power to make a binding decision on the FBP; on the other hand, it was remote from the community, had already approved the masterplan and appropriated the funds for a whole system of such centers, and, in those law-and-order days, might not have been sympathetic to anti-prison efforts.

The Mayor, who saw the prison as a job-producing construction project, had from the outset indicated that he favored the prison and that the building was a *fait accompli*. To use his office as a forum would have been worse than futile. Despite

this, the Director of the Mayor's Criminal Justice Planning Council arranged a special meeting of the council which went on record in opposition to the plan. This was of limited value, however, because the council's role was only advisory to the Mayor.

Members of the Board of Supervisors were contacted, and they agreed to hold a meeting. Their meeting would provide the forum, and they would act as decision makers. Since the Board was an established forum, they had specific procedures which were generally understood and relatively simple—open hearings.

### Equality

The choice of the Board of Supervisors was significant in regard to the issue of equality. They enjoyed no special relationship to the FBP and had no stake in the previous decision by the federal government to adopt the plan. Unlike the Congress, the Board was apt to take the perspective of local citizens as seriously as that of the federal bureaucrats.

### Adversaries

On the one side was the Bureau of Prisons. The opposition now had the task of putting together the broadest and most powerful coalition it could muster. Opposition came from many quarters—criminal justice reformers, local property owners, ex-offenders, the Sheriff, planners and environmentalists.

Obviously, there were a multiplicity of interests, some of them contradictory, and it was a considerable challenge to keep the coalition together. Some wanted a different approach to prisons, others just wanted the prison elsewhere. Some of the reformers objected to being united with the property owners who, they felt, were opposed to the prison for the wrong reason.

The coalition was threatened on one occasion by the local bar association which attempted to initiate separate negotiations with the FBP about alternative facilities. Their efforts evoked little support from other opponents, and did not weak-

en the opposition; but the most important strategy for maintaining the coalition was in the careful management of the issues.

### Issues

There were a number of different perceptions of the injury threatened by the prison plan. These ranged from environmental concerns to property values, from an opposition to all prisons on principle to a commitment to other types of prisons, from concerns about the implementation of the Bail Reform Act which mandated pretrial release whenever possible to concerns about coordinated planning of correctional facilities through all levels of government.

The one issue that united all the opposition, however, was that all opposed building the proposed prison at the proposed site. The common thread was stopping the FBP from executing its plan. By defining the issues in this way, the coalition was preserved.

There were three other advantages in defining the issue in this narrow way. First, because all of the threatened injuries pertained to this definition of the issue, the various decision makers had a wide range of reasons for opposition. Second, it was conducive to specific determination—the Board could simply find for or against the plan. Third, the remedy was plain—don't build the prison.

### Helpers

Since the matter was being presented before the Board of Supervisors, the procedures were relatively simple, and it was possible for the citizens to present their own arguments without lawyers or other specialized pleaders. Furthermore, many of the members of the coalition were already known to the Board so that character witnesses were unnecessary.

### Gathering Information and Persuasion

The major information gathering task was the accumulation of substantive information about the planned prison. With the exception of the initial meeting with the FBP representa-

tive, no information was given directly and freely to the citizens. In fact, for much of the time, the FBP representative was unavailable to callers.

This created some difficulty. Since many of the specifics of the plan were unknown, the opposition had to work hard to develop enough information to fashion arguments sufficiently sophisticated to impress the Board of their credibility.

To increase the persuasiveness of the citizens' coalition, an effort was made before the hearing to orchestrate the arguments, to promote variety and coherence and to minimize repetition. Care was taken to appeal to the interests of all the members of the Board—neighborhood development for some, an opportunity to challenge the Mayor for others, and prison reform for others.

### The Outcome

The mobilization of community support and the presentation of arguments were successful. The Board adopted a resolution opposing the prison. Then, to everyone's surprise, the Mayor vetoed the resolution. It was not even suspected he could do this, since the resolution was no more than an expression of sentiment on the part of the Board as representatives of the community; the veto was a matter of specific procedure that apparently only the Mayor was familiar with. His move turned out to be a tactical error, however, because the Board voted to override his veto for the first time in his incumbency. Shortly after that, the FBP announced they were abandoning their plans.

### CONCLUSION

It should be evident from the examples that social worker advocates (unlike lawyers) do not usually operate in fully articulated adversary systems. However, the imperfections of a particular adversary system are not necessarily fatal; the San Francisco Board of Supervisors had no power to direct the policy of the Bureau of Prisons, but their decision had sufficient authority to stop the prison project.

Analysis of adversarial struggles in terms of the elements

of the adversary system can help the advocate proceed in a rational way to the resolution of conflict, avoiding many of the common errors and pitfalls on the way. By the thoughtful and creative use of the adversary system, advocacy can be transformed from a rallying cry to a manageable and effective technique in the practice of social work.

## FOOTNOTES

1. Walter Friedlander and Robert Apte, *Introduction to Social Welfare* (Englewood Cliffs, N.J.); Nathan Cohen, *Social Work in the American Tradition* (New York, Dryden, 1958); *Encyclopedia of Social Work*, Seventeenth Edition (New York: NASW, 1986) see, especially, biographical entries for "Dorothea Dix", "Jane Addams" and "Florence Kelley".
2. Charles Grosser and Edward V. Sparer, "Social Welfare and Social Justice" in George Brager and Francis Purcell, (eds.) *Community Action Against Poverty* (New Haven: College and University Press, 1967) pp. 292-301; Charles Grosser, *New Directions in Community Organization: From Enabling to Advocacy* (New York: Praeger: 1973).
3. Richard Cloward and Richard Elman "The Store Front on Stanyon Street, Advocacy in the Ghetto" in Brager and Purcell, (eds.) *Community Action Against Poverty*, pp. 253-279.
4. Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955) Roy Lubove, *The Professional Altruist The Emergence of Social Work as a Career, 1880-1930* (New York: Atheneum 1967)
5. Scott Briar "The Current Crisis in Social Casework" in *Social Work Practice, 1967* (Columbus: NCSW) p. 22
6. Herb Kutchins and Stuart Kutchins "Social Work Advocacy" in George Weber and George McCall, *Advocacy and the Social Sciences* (Beverly Hills: Sage, 1978); NASW Ad Hoc Committee on Advocacy, "The Social Worker as Advocate: Champion of Social Victims," *Social Work* 14 (April, 1969) pp. 16-22; George Brager, "Advocacy and Political Behavior," *Social Work* 13 (April, 1968) p. 6; George Hoshino "The Public Welfare Worker: Advocate or Adversary?" *Public Welfare* 29 (January, 1971) pp. 35-41; Willard Richan "Discussion Paper: The Public Welfare Worker: Advocate or Adversary?" Unpublished paper presented at the Northeast Regional Conference of the American Public Welfare Association (September 1, 1970); Neil Gilbert and Harry Specht "Advocacy and Professional Ethics," *Social Work* 21 (July, 1976) pp. 288-293; Willard Richan "Serving Clients and Society Simultaneously," *Social Work* 22 (January, 1977) pp. 64-65.
7. NASW Ad Hoc Committee on Advocacy, Op. Cit.
8. Ellen Manser, (ed.), *Family Advocacy. A Manual For Action* (New York: Family Service Association of America, 1973)

9. *Ibid.*, p. 3
10. *Ibid.*, p. 9
11. Arnold Panitch, "Advocacy in Practice" *Social Work* 19 (May, 1974) pp. 330–331.
12. William G. Davidson II and Charles A. Rapp, "Child Advocacy in the Justice System" *Social Work*, (May 1976) pp. 225–232
13. Lon Fuller, "The Adversary System," in *Talks on American Law*, Harold J. Berman (ed.), (New York: Anchor, 1955) Chapter III.
14. Jerome Skolnick, "Social Control in the Adversary System," *Journal of Conflict Resolution*, (1969) 11 (1), pp 52–70.
15. Chester Hartman, *Yerba Buena: Land Grab and Community Resistance in San Francisco* (San Francisco: New Glide:, 1974).



