

Chapter 1

The nature of advocacy

The essence of advocacy

[1000] Advocacy is winning cases. Nothing more and nothing less. It consists in persuading a court to do what you want. The court may have serious misgivings, but the good advocate gives them no choice.

[1005] Court work involves the advocate in all sorts of duties. You must do everything legal to win your client's case. You must keep up to date with the law in your field of practice.¹ You must not mislead the court.² You must not cross-examine falsely or lead evidence that you know to be untrue. In your private life you are not required to be totally abstemious, but of course you must never commit a crime.

The qualities of advocacy

[1010] Advocacy is a craft. Like every craft it can be learned. The techniques have to be acquired, practised and constantly honed. The competent advocate can employ these techniques, but the good advocate is a master of them, and moves beyond the craftsmanship of simply appearing in court. The advocate practising at a higher level is an artist.

[1015] Advocacy is played out in a setting that makes it quite different from any other specialty. First, it is done in public. People watch and they judge. Second, every case is different. Not even the newcomer will find the same issues and aspects in every case. Each

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case has to be custom built. The good advocate will treat every case as the most important ever. It will be prepared and conducted as if it is the last and the one on which the advocate's reputation hangs – as it does. There will be a different approach to each witness. The strategy is prepared to the finest degree but the good advocate will watch the witness constantly, be ready to adapt the plan and be alert for the opportunity to improvise. It will look effortless.

The qualities of an advocate

[1020] The basic quality an advocate needs is the wish to be an advocate. You must love and need the court work. How many disciplines are there where you can write a script and play a leading part? But you must be able to survive its demands.

And first, has he a healthy frame, capable of enduring long-continued exertion of mind and body, the confinement of the study, the excitement of practice, the crowded court by day, the vigil of thought by night? Can he subsist with a sleep of five hours? Can he, without dyspepsia, endure irregular meals — hasty eatings and long fastings? If he is not blessed by Nature with the vigorous constitution that will bear *all* this, and more, let him not dream of entering into the arena of Advocacy.³

And you must do more than just survive. You must embrace it, love it, live for it. Every old advocate will tell you that the best and worst times of life have been inside a courtroom, from euphoria to misery. The most you can hope for is to do the best professional job. The result is not within your power.

[1025] Good physique is not a necessity. Advocates are tall, short, fat, thin, good-looking, plain. No doubt the good-looking advocate has some attraction, but being well-favoured is probably the least of the qualities an advocate needs. An unhappy physique or unusual looks are never a handicap to one who has the necessary attributes.

[1030] To be a good advocate in court you need the following qualities:

1. **Voice** You will sound good. Your voice will be well modulated and you will talk slowly. Quality is more important than volume.
2. **Words** You will have a good command of words. When questioning a witness you will use simple language that everyone can understand. Your submissions to the judge will be of the same cast. You will express complex propositions simply without being superficial or simplistic. Your talk will have clarity at least, and often eloquence.
3. **Order** Your submissions and dealings with witnesses will be well ordered and logical. The detailed preparation will be apparent.
4. **Courage** Court work is civilised warfare, and as an advocate you are the champion of your client. Tenacity will be evident. You will not relinquish a central position without a fight. You will be polite but firm, and never belligerent. You want to win. You are not afraid to be silent.
5. **Presence** Every good advocate seems to have a presence. It probably derives from confidence. Many advocates battle nerves before court. You would never know it because the fear falls away when the case starts for the day.
6. **Observation** You will be watching the witness and the judge intently. You will rarely make a note – all the noting should have been done long before.
7. **Wit** You must be quick-witted. If you have a sense of humour you will never use it for its own sake. An advocate with this quality will use humour sparingly and to help win the case. Never crack jokes.
8. **Emotions** You have a good knowledge of human affairs and of human nature. You will not be afraid to use emotions to advance your client's cause.
9. **Law and evidence** You will know the statute law that applies to the case and the earlier relevant decisions of the courts. The rules of evidence seem second nature.
10. **Honesty** Your word is your bond. You never take permanent offence at anything said by your opponent in court or out of it, except for perfidy.

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[1035] A good advocate will also possess the qualities of wisdom and judgment. These qualities are often employed in ways that could never be discerned by an observer in court. It is impossible for an onlooker to know what argument the good counsel has decided not to put, what evidence not to call, what issues to omit from cross-examination. In the running of the case the good counsel will have the intuition to touch on a subject and then perhaps leave it alone. Some of those hard judgments are made in preparation and some are made in the instant. Clarence Darrow, the revered American advocate, said:

The trying of cases in courts calls for an acute intelligence, the capacity for instantaneous thought and for deciding what to do in the twinkling of an eye.⁴

Cases won on admissible evidence

[1040] In an adversary system the judge's role is to hold the balance between the contending parties without taking part in their disputations.⁵ A trial or hearing is not a pursuit of truth, not even in a criminal case.⁶

[1045] Cases are won on evidence accepted by the court. There is a difference between facts and evidence. Evidence on an issue may never be put before a court and thus can never be proved. It is your role to use your best endeavours to have the evidence in your own case admitted, and the evidence in your opponent's case excluded.

[1050] A few examples illustrate the point. Documents may be available to prove a defence but they cannot be obtained. A witness may refuse to give evidence on the ground of self-incrimination. In a bigamy case the prosecution may not be able to provide the strict proof of the earlier marriage.⁷ A confession may be excluded because of improprieties by the police,⁸ or because it was not recorded by an audio machine.⁹ An accused may say that the confession is true, and it can still properly be excluded.¹⁰

[1055] Thus there may be facts which can never be proved because they can never be put in a legally admissible form. It is your duty to object to your opponent's evidence which should not or cannot be admitted and which does not advance your own case.

[1060] Evidence may be given on which the fact-finder places no reliance. It may come from a witness who has been effectively cross-examined. The witness could be quite disreputable, but in this case may be telling the truth.

[1065] Many cases win or lose themselves because the evidence and the law that is applied are all one way. In these cases advocacy is rather like an exercise in damage control, for damage control is part of the art of advocacy.¹¹ But a good advocate will win a difficult case. A poor advocate will lose a case that should be won.

How and what to learn

[1070] There is no quick way to learn the skills of advocacy. There is probably no true starting point. One approach is to watch the advocates in the superior courts, particularly in cases where there are witnesses. You will learn how to start and stop a witness, and how to direct a witness from one topic to another. This handling of the witnesses never seems to appear in the reports of cases or in the books on advocacy. There are special reasons for learning how to guide a witness. The witness is not a lawyer. The witness will not know what evidence is relevant and what evidence is admissible.

[1075] Watch how the good advocate does this so easily.

Can I just stop you there for a moment . . .
Thank you for that. May I now ask you about . . .

And to avoid inadmissible hearsay:

I don't want you to tell us what was said, but did you then speak to Mr Black?

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See how the experts do it. Then try it on your friends in ordinary conversation and find out what works for you.

[1080] Watch the examination and the cross-examination of a witness. You may never be able to discern why a witness was asked about a particular subject, or why not. That is because you have not seen the brief of either advocate, and you have not done the preparation and made the necessary fine judgments. You will, however, learn some techniques on how to handle witnesses of different sorts. Then go away and recall how it was done, and how you could do it. You will be surprised at the profit of this reflection.

[1085] There is a limit to what a new advocate can learn from watching senior advocates in the appellate courts: style in addressing the bench, yes; detail of the case or handling witnesses, no. In these courts all the evidence and the submissions are in writing and filed with the court well before the hearing. The facts are a given. Spoken submissions are designed to advance the advocate's position and reduce the opponent's. Since so much is already known to the court and the parties, even the argument can be hard to follow.

[1090] Be cautious about the advocacy you see in your lowest courts. There is a huge range in quality. Some of the old timers are magnificent. A few have been in practice for 30 years but with the experience of one year repeated 30 times. There are newcomers still learning the skills. Check to make sure that what you see and hear in those courts are not the errors that seem to be passed on from one generation of lawyers to the next.

[1095] Read the advocacy books. Keep your eye out for the reports of cases where the questions and answers are quoted with or without approval. Few of the biographies of prominent advocates quote the questioning of a witness except for some stunning remark or brief exchange.

[1100] When I was a young advocate I was often told that it was necessary to develop my own style. I distinctly recall not being able to understand what the advice meant. Should I ask questions in a way nobody else did? Should I try to be different in court from

anyone I had seen and admired? I started to put this advice to the test. In the lower courts where I first appeared I tried different styles at different times. Slowly I must have found a style that suited me. You will too.

Good habits

[1105] No knowledge is wasted in an advocate, although some knowledge is of more immediate importance. It is worth developing a habit of acquiring particular forms of knowledge. Every good advocate will tell you that learning never stops.

[1110] The following are some of the more important habits:

1. **Law** Keep up to date with decided cases, the authorities. Often enough a superior court will make a decision that will strike you as important. Make a note of it. Soon after I began as an advocate I started taking note of cases under their most obvious subjects, and keeping the notes in a loose-leaf folder. It became an alphabetical index of topics. Others have different ways of noting, but all advocates do it. We have to. We would find it too hard to absorb a case and to find the law on the subject from scratch, even with internet resources.
2. **Evidence** You must be thoroughly familiar with the rules of evidence. Evidence consists of the rules and principles that govern admissibility. The rules of evidence are often exclusionary by preventing the proof of some issues. Obvious examples are hearsay, improperly gained confessions, and all manner of documentary evidence.
3. **Rules of procedure** For the young advocate the rules and formalities can be quite intimidating. Has the case come to the right court in the right way? And in court, when do you stand and sit? How do you announce your appearance? What is the procedure for examining witnesses? In what situations can you lose the right of last address?
4. **Court propriety** Stand when spoken to by the judge, be respectful in word and demeanour, and be silent when the oath is taken. There is a list of do's and don'ts in the last chapter.

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5. **Ethics** These rules have been developed by the profession and occasionally by judges when an advocate makes a serious mistake. You will have to learn them. Nearly all the ethical problems are likely to arise during the first five years of practice. Again, see the last chapter.
6. **Logic** Logic crops up in court more often than you would expect. One example is the so-called “bootstraps” argument where the fact to be proved assumes the existence of that fact. Another good example is the wrong argument on DNA evidence. A profile may be shared by a party and only 10 other people in a population of 10 million. Is the probability that the DNA belongs to the party 1 in 10, or 1 in 10 million? Or is it 11 in 10 million? The solution is complex and is only solved in a given case by reading what the judges say about it.¹²
7. **Language** Practise speaking simply and slowly. Give up phrases that mean little: “in relation to”, “in terms of”, “with regard to”. Practise the short question that contains only one issue. Try to do what the best advocates do by speaking concisely and with accuracy.

Duties of the advocate

[1115] These are the duties of an advocate:

1. If you are free you have a duty to accept every case within your area of practice where a reasonable fee is offered. That duty is sometimes referred to as the “cab rank” rule.¹³ The metaphor is that the advocate is like a taxi which must accept anyone prepared to pay the fare.
2. You have no right to refuse to defend in a criminal case, for example, when you believe your client is guilty. There are good reasons for this. Counsel’s belief is not relevant. The judgment of guilt or non-guilt is the province of the fact-finder alone. An experienced advocate finds it quite easy not to form a decided opinion, except, of course, in calculating the reaction of the fact-finder to certain pieces of evidence. “How can you represent someone you know to be guilty?” is the question you often hear. The answer would be: “How would I know, I wasn’t there. Even

if I were there I couldn't have seen from all angles at once, or seen inside people's minds."

3. You must do your best.

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case.¹⁴

4. The advocate is not a mouthpiece. You must exercise independent judgment. You cannot be an instrument of fraud, or be a party to misleading the court. No evidence can be led which you know or believe to be false. Nor can there be such a suggestion to a witness, for that amounts to the same thing. If the client charged with a crime tells you he was at the scene but only as an onlooker, you must not suggest to a witness that he was not there. If the instructions change and he tells you that he was not at the scene at all, you will not judge the truth of the instructions. But if he goes on to say that he was at the scene but that he will give sworn evidence that he was not at the scene, then you must withdraw from the case. That is not judging the instructions, but the two versions are contradictory and one of them must be false. If it is any comfort, the need to withdraw because of changed instructions happens so rarely that many advocates will pass a professional lifetime without ever seeing it happen.
5. You must keep up to date with the law in your area of practice.¹⁵

Perfection is not possible

[1120] An advocate is a human being. So are fact-finders. In the nature of things perfection is not possible in either. "Counsel of perfection" has theological origins. It does not derive from any advocate. The highest level to which any advocate can aspire is excellence. Even that standard is elusive. The best cross-examinations and final addresses are in reflection after the case is over. No counsel worth his salt is ever fully satisfied.

Chapter 2

Preparation

Overview

[2000] You occasionally hear of an advocate who never prepares a case but can win it in court through sheer brilliance. If such advocates exist outside film and television they are out of my class, and out of the class of every advocate I know.

[2005] It is not easy to set down principles of preparation that can be applied to all cases. Every case is unique and must be custom built. Each has its own special aspects, its own idiosyncrasies. The preparation for every case will be slightly or substantially different from any other.

[2010] The main purposes of preparation are to develop a case concept, and to work out what you want to do and how you can do it. You should also be able to put your hand on any given document at a moment's notice. While you are preparing you will assemble all the necessary law: precedential, statutory, and evidential. Find all the procedural rules and practices that apply. All these things will work together. Each is essential.

[2015] Preparation can be fearfully demanding. Most cases are won on your effort between 10 pm and 2 am. It is solitary work.

Case concept

[2020] The primary purpose of preparation is to develop a concept of the case; that is, how you want the evidence to be by the time