Guide to Advocacy

January 2016

INTRODUCTION

A fundamental truth, not to be lost sight of, is that in the common law adversarial system the advocate is not concerned to arrive at the truth. That is, or may be, the job of the judge or jury. The advocate is there to persuade the tribunal that his client's case should prevail. This demands a measure of detachment from the client and the case, in order to assess, more or less sceptically, any suggestion advanced by client, instructing professional or witness, and the likely impact on the audience. Lose that detachment and perdition awaits.

In one sense, it is impossible to teach the art of advocacy. No matter how long or thorough the advance preparation, the unexpected keeps breaking in, and instinct has to take over. Nevertheless, there are ground rules which make the advocate's task easier and lessen the chances of an emergency turning into a disaster. What follows is a guide to those rules, aiming to take the traveller from the first receipt of written instructions to the end of the case and beyond.

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THE INSTRUCTIONS

Even in the heaviest and most complex case, there is usually one vital point on which the whole revolves. Occasionally there may be two, but there are seldom more. The first task is to discover what the point is. This can often be achieved by a quick preliminary reading of the papers. The emphasis is on the word ‘preliminary’, since much will remain to be done once the crucial point has been found.

A second reading should follow, with a view to finding out whether there are any deadlines which have to be met. It cannot be assumed that the instructions will have covered this, for the draftsman of the instructions may have missed the point

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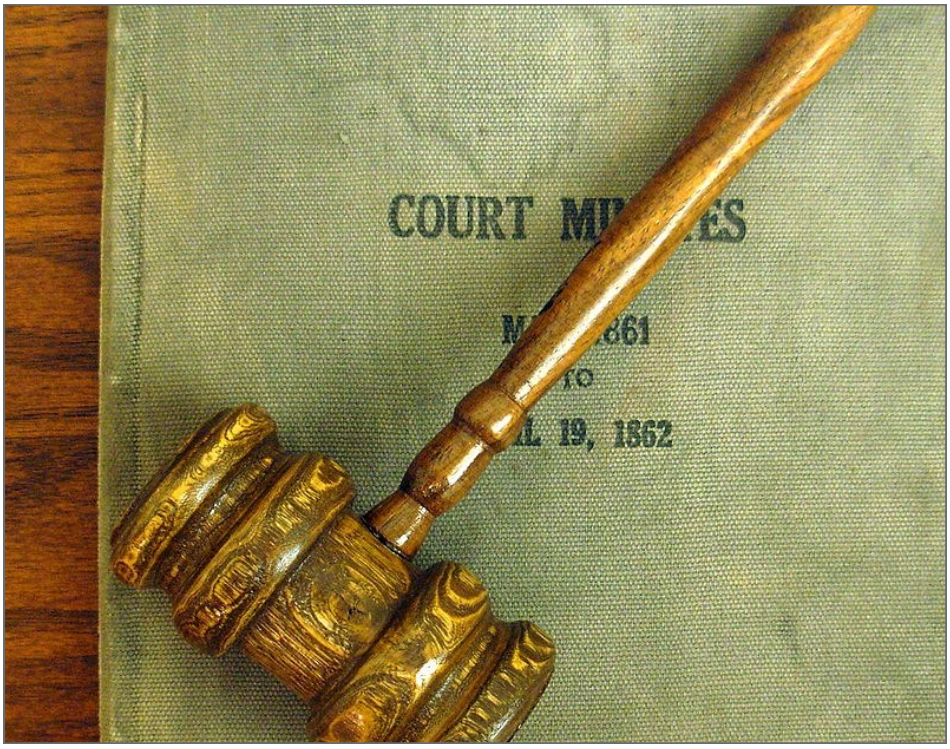
altogether. Missing a deadline for lodging pleadings, a skeleton argument or a notice of appeal can have serious consequences, resulting in criticism from the court, an order for costs against the party or the advocate personally, loss of the case, or even to proceedings for professional misconduct or negligence.

The familiarisation process should follow. This will demand careful reading through the papers, marking and annotating as one goes. Each individual has an idiosyncratic method of doing this, and there is no formula which works for everyone. One valuable tool is to prepare a timetable of salient events in the history of the case, showing the day, month and year of each. Many Practice Directions require these to be produced for the court in any event, but even where not obligatory a chronology is almost indispensable. A useful addition is to show at which page in the documentation the reference to the relevant occurrence can be found. A document on these lines should provide an instant answer to questions put by the tribunal during argument or speeches.

Page references cannot of course be given unless each page in the bundles is individually numbered. In well-drafted instructions this will always be done, but not all instructions are well-prepared, and it is sometimes necessary to undertake the



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task oneself. However, the time and labour involved will pay off, because it helps the smooth progress of the case and will reap dividends with the court.

SKELETON ARGUMENTS

These are becoming increasingly important as pressures on court time build up, compelling judges to rely on written material as much as on oral argument. Therefore, the skeleton argument must be drafted with care and, as has already been seen, must be with the court on time. The deadline can vary from court to court – not less than two days before the hearing in Queen's Bench actions, twenty-one days before in applications for judicial review, and in the Court of Appeal, the time when the Notice of Appeal is lodged.

The skeleton argument gives a second opportunity to paint the picture which one wishes to leave with the court, the pleadings being the first. As the name suggests, however, the skeleton is no more than an outline. The guidance in the White Book states that a skeleton argument should not exceed 20 pages of double -spaced A4 paper, which many might think grotesquely long. The contents are prescribed. A skeleton must contain a summary of the submissions on each main point in contention;

FURTHER READING

Advocacy edited by Robert McPeake, 17th ed., 2014

The Art of the Advocate by Richard Du Cann, 2nd ed., 1993

Advocacy in Court: a Beginners' Guide by Keith Evans, 2nd ed., 1995

Common Sense Rules of Advocacy for Lawyers by Keith Evans, 2004

Effective written advocacy by Andrew Goodman, 2nd ed., 2012

Advocacy Skills by Michael Hyam, 4th ed. 1999

Evidence and advocacy by Peter Murphy, 5th ed., 1998

Mooting and advocacy skills by David Pope, 2nd ed., 2011

SKELETON ARGUMENTS

a list of the authorities relied on, with copies attached; an essential reading list; a list of core documents; and an estimate of the time which the case will take. The argument should also be divided into numbered paragraphs and paged consecutively.

If time allows the lay and professional instructing client should be given the chance to see and comment on the skeleton while it is in draft. They may well have helpful comments and, in any case, courtesy demands that they be kept in the picture if possible.

The shortcomings of court administration should never be under-estimated. Therefore, even if the skeleton was sent to the court in good time, it may well not have found its way through the system to the judge or judges, and spare copies should be taken to court, one for each member of the court, with one or two spares, since there may be others, like reporters, who want copies.

BEFORE THE HEARING

At this stage, many logistical questions need answers. Where exactly is the venue, and how does one get there? Will an overnight stay be necessary, and if so has accommodation been arranged? How does one travel and how long will the journey take? If no-one knows, or in case of doubt, it is wise to make the journey a day or two before the hearing to be on the safe side. Does one robe or not? Where are the robes, and is there a clean pair of bands with them? Have you got the papers, your notes, your mobile phone, and is it charged in case there is delay and the court has to be warned? Have you got the court's phone number? These mundane matters need sorting out in advance so that there is no last minute rush which distracts from the all-important business of arguing the case.

Are your papers arranged so that you can find what you need quickly? Under no circumstances should they be left loose. Many find that lever-arch files or ring-back binders are best for holding the case documents. Ring-back binders can open spontaneously during transit or even in court itself, spilling their contents in confusion.

THE HEARING

The court order setting down the hearing date and time (and any subsequent offers) should be checked in case the hearing

date and/or time has been changed by the court without Counsel being informed of it. Aim to arrive at least 30 minutes before the time set down in the cause list. The other side may have sprung last minute surprises which need attention, although this ought not to happen. Allow 30 minutes more for the journey than it ought to take; railway points and signals fail and motorways get blocked.

Take care to dress appropriately. Tribunals tend to distrust flamboyance, both in dress and behaviour. If in doubt stick to dark plain coloured suits (skirt or trousers for ladies) and white or pale shirts (both sexes). Ladies should beware of wearing

"Tribunals tend to distrust flamboyance, both in dress and behaviour."

"too short" skirts, overly tight or plunging necklines, too much dangly, jangly jewellery and/or inappropriate shoes remembering this is a court appearance, not a night out. Hair for both sexes should be pulled back from the face and long hair pulled back into a pony tail so when the wig is in place it covers the hairline and no tufts of hair protrude from the front or sides of the wig. If you use an alarm clock set it for 30 minutes before you would normally need it.

On arrival at court the first task is to find the courtroom if not already known. Then the usher in charge of the courtroom needs to be told that you are present and why. Next, find the clients and make sure that they are ready to start and have no last minute difficulties or questions.

THE OPENING

By this stage it will be clear which side is to open the case. In court the advocate who opens will begin by saying for whom he appears, introducing each of his opponents and identifying their clients. After this there is no set pattern, and the content of the opening will be determined by the circumstances.

As with everything else, it should be thoroughly prepared. There is no set formula as to content, but there are ground rules. As with skeleton arguments, brevity is a virtue. Few audiences, lay

THE OPENING

or professional, have the stamina to listen to an opening speech lasting several days with undivided attention. Again, do not lose sight of the rule that there are seldom more than one or two important areas of dispute.

There is much to be said for limiting the opening to a narrative of the salient facts, with an indication of the evidence which is said to establish those facts. Excessive comment or exaggeration at this early stage offers too many hostages to fortune. Any comment should be low key.

One point not to be overlooked is to make sure that the opening is audible. With a single judge or two there is no difficulty, since

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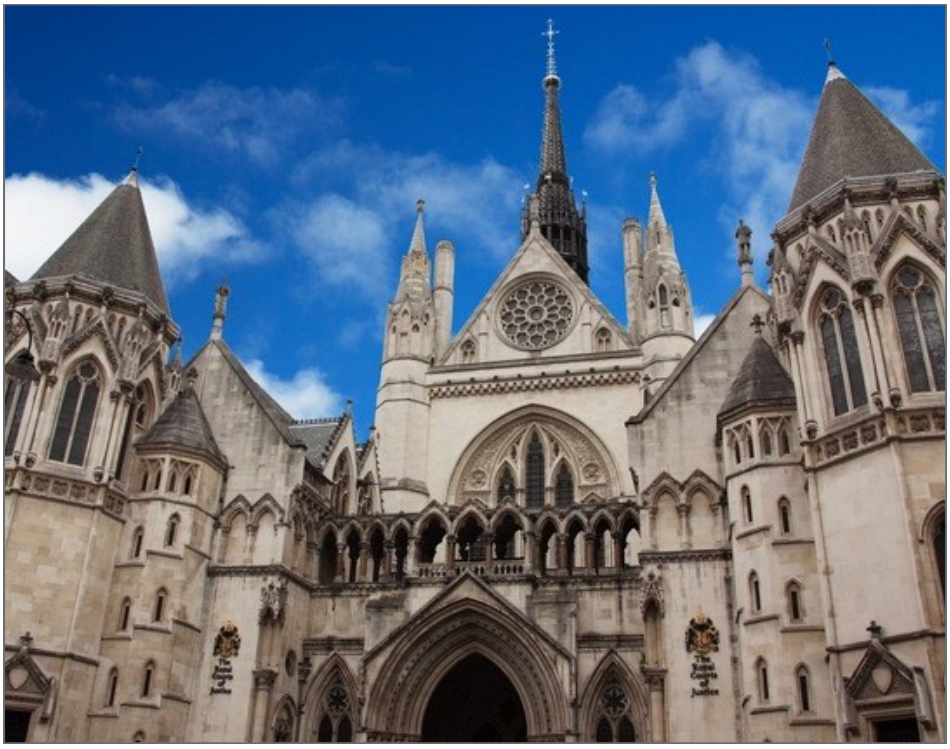
they will leave no doubt on the matter if they cannot hear. Where, by contrast there is a full room, with most perhaps strongly, even indignantly opposed to the case which is being opened, animosity will only be increased if the public feels left out. If necessary, there is no harm in asking, through the presiding official, judge or otherwise, whether those who wish to follow the proceedings can hear. This can disarm even the most intransigent opposition.

EXAMINATION IN CHIEF

Undeservedly, this element in the presentation of a case is largely neglected in the textbooks on advocacy. At this stage the advocate's task is twofold. First, he must coax his story out of a witness who may be reluctant, nervous, bewildered, or all three. This has to be done without leading, that is, asking leading questions which put the answer into the mouth of the witness. 'Were the traffic lights red?' will usually be a leading question, while 'What colour were the traffic lights?' will not. 'Have you stopped beating your wife?' is highly improper, but is not actually leading. Here it is good practice, although not obligatory in UK courts, to lay the foundations by establishing where he was in relation to the lights, and how he could see them. Apparently these paving questions are essential in most courts of the USA;



Royal Courts of Justice, London

without them the evidence of the colour of the lights would be inadmissible.

CROSS-EXAMINATION

Unlike examination in chief, cross-examination is not designed to elicit information. Its purpose is first, to bring out the evidence on which the cross-examiner's final submission will be based. Second, it is there to show the tribunal what the cross-examiner's case is without stating that case directly. Third, it gives the witness the opportunity to comment on evidence which contradicts his version of events. Lastly, it is a chance to undermine the evidence of the witness, if necessary. The last two words are important.

To those ends there are rules which should be observed. Only very rarely should one ask a question to which the answer is not immediately obvious, if not well-known already. For that reason, it is imperative to listen carefully to the answer.

If, as often happens, and especially when the witness thinks that his answer will not serve his cause, it is necessary to persist until an unequivocal answer is given to the question put. This then enables the evidence to be relied on during closing submissions. Also, the chances of a satisfactory answer are

ONLINE RESOURCES

Advocacy Training Council (ATC): information on all aspects of advocacy training, from its history and methods to calendars of training events and information on the continuing development of policy.

www.advocacytrainingcouncil.org/

The Advocate's Gateway: free access to practical, evidence-based guidance on vulnerable witnesses and defendants.

www.advocatesgateway.org.uk

The BSB Handbook: the Code of Conduct for barristers may be found in part two.

www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/

much increased if all cross-examination questions are closed, admitting only one of three possible answers – ‘yes’, ‘no’, and ‘I don’t know’. In practice, therefore, nearly every question in cross -examination will be leading.

All cross-examination questions should be short and clear. They should invariably contain one query only. It will almost always be unhelpful and counter-productive to read out a long quotation followed by an invitation to the witness to agree or disagree. This gives him an opportunity to deliver a lecture on the proposition put to him, and hands him the initiative.

Some general rules apply as well. Cross-examination is not the same as examining crossly. Even an appearance of bullying or hostility to the witness risks losing the tribunal’s sympathy. For much the same reason, it is a mistake to comment on a witness’ answer. That is best left until the final speech, when the witness no longer has an opportunity to argue. It is also vital to move on immediately once a helpful concession has been secured, and never to return to the point. Given a chance to repair or lessen the damage which their evidence has inflicted, witnesses avail themselves of the opportunity with disconcerting frequency.

It is a mistake to approach cross-examination with the supposition that all witnesses are dishonest. Some are, but many are unknowledgeable, honestly mistaken, or forgetful. And when in a hole, stop digging. An unhelpful answer should usually have been anticipated, since the questioner will or should have known what the witness would say. In any case, the best tactic is to move on, not to compound the difficulty by harping on it.

Finally, a cross-examination should always be fair. Unfounded allegations should not be put, as should misrepresentations of the evidence of other witnesses. Either will generally bring down judicial rebuke and/or a storm of protest from one’s opponent. Both will be deserved. Being fair is the concomitant of being polite, which is enjoined by the Bar Code of Conduct as well as by ordinary good manners.

RE-EXAMINATION

If possible, re-examination should be avoided altogether. To do so creates the impression that cross-examination has done so little damage to his cause that the advocate is wholly relaxed. If needed at all, the re-examination should be as short as

practicable, and confined to correcting errors of fact occurring during cross-examination, whether by advocate or witness, or to explaining answers given. Leading questions are not allowed in re-examination, as in evidence in chief.

Many witnesses mistakenly believe that their ordeal is over when the cross-examiner sits down, and they are tempted to relax, unwittingly torpedoing the case during re-examination or in answering questions from the tribunal. For this reason alone is desirable to keep re-examination short, so as to minimise the chances of disaster. Explanations can often be proffered and excuses made by counsel in his final speech, unhampered by inconvenient intervention from the witness.

"Cross-examination is not the same as examining crossly."

FINAL SPEECH

The importance of this is obvious. It is the last and may be the only occasion on which the advocate can hope to lead the court to the desired result. Its general content and arrangement should have become clear long before the close of the evidence in the case, since all the previous preparation and presentation will have been done with this in mind.

In a long case, lasting many days, weeks or even months, of which there will be few during the early years in practice, it is best to write at least notes for the final speech as one goes along. In this way the evidence which supports the submissions and comments to be made will be fresh in the mind. Where, as often happens, there is no daily transcript of proceedings, this is the only guarantee of accuracy and completeness in the closing submissions.

As at every other stage, brevity is highly desirable, but may be sacrificed in the interests of completeness at this juncture. In a long jury trial, a good judge will ensure that the jury is not burdened with over-long sessions listening to final speeches. In other cases the over-zealous advocate who is taking too long will probably be left in no doubt of this fact.

AFTER THE JUDGMENT OR VERDICT

The counsel who never lost a case has not yet been born. By contrast the victorious advocate has a relatively easy task, of disabusing his lay client of any belief that he is an infallible miracle worker. The lot of the loser is less enviable.

The best that can be hoped for is that the disappointed litigant will accept that everything possible was done and said on his behalf. That should have happened in any event, but on occasions, inevitably, the barrister is blamed for the result. On such occasions one can only hope that the blame was unfair.

Even successful litigants have been known to complain that they could have ended up with more. Perhaps that is why they became litigants in the first place.

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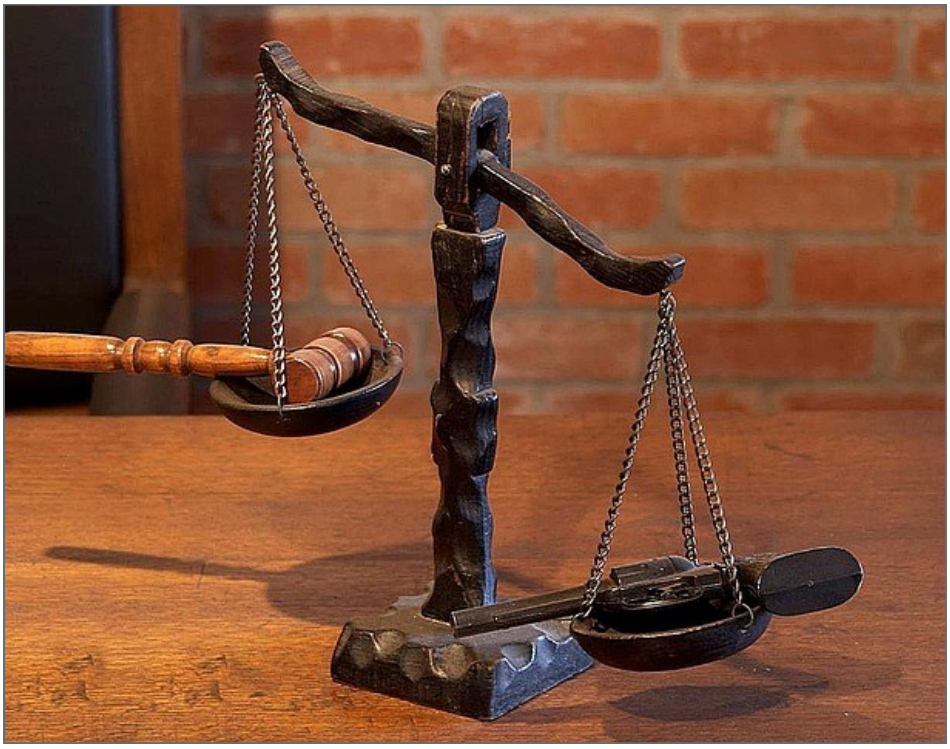
EXPERT WITNESSES

Rule 33.3 of the Criminal Procedure Rules 2012 contains a template for the contents of an expert's report and evidence in criminal cases. This derives from the principles laid down for civil proceedings in *The Ikarian Reaper*.[1] These are - the expert must give details of his qualifications, experience and accreditation; identify the literature and other documentary sources relied on to support the evidence; set out the facts on which the opinion is based; identify the facts within his own knowledge; state what research underlies the evidence, who undertook it and what that persons qualifications were; where there is a range of opinion, summarise the differences and give reasons for preferring one over the other; identify any reservations or qualifications to the conclusions offered; and end (or begin) with a statement that he understands his duty of impartiality as between the parties and the truth of the content of the evidence.

With appropriate adaptation, those rules govern all expert evidence. Therefore, pre-trial preparation should ensure that the witness does not overstep the marks laid down. In cross-examination the opposite applies. If the evidence is to be challenged this will probably be by showing a failure to meet the requirements. Here it is well to remember that the witness will



almost invariably know more about the topic than the questioner. It is all the more important to leave the witness with no choice but to accept the points being put to him. It is often a good idea to begin with the strongest point available, in the hope of persuading him to follow where the questioning leads.

Experience suggests that experts are more adroit than laymen at avoiding answering inconvenient questions. The need to listen to all answers with care and to persist until the question posed has been answered is the more pressing.

VULNERABLE WITNESSES

There is insufficient room here to do justice to the question of witness handling in respect of vulnerable witnesses. The concept of the 'vulnerable witness' was established in the late 1990s and enshrined in statute in the criminal law in the regime of 'special measures'. Vulnerable witnesses will equally be found in family and civil cases though there is no statutory regime in respect of them. In essence they are anyone whose ability to give the best evidence is likely to be diminished because of age, a physical or mental disability or condition, or fear of giving evidence (broadly defined and including complainants in sexual offences).

1. [1993] 2 Lloyds Rep. 63 at 81-2

VULNERABLE WITNESSES

The Equal Treatment Bench Book states 'courts have safeguarding responsibilities in respect of children and vulnerable adults'. The recommended approach to witness handling (set out above) must therefore be put to one side when there is a vulnerable witness. It is entirely consistent with counsel's duty to his lay client to follow the court's approach in adapting the trial process in order to allow the particular witness to give the best evidence, with provision being made for comment at the appropriate time. This may exclude some otherwise accepted modes of questioning. For instance, the 'tag question' ('You like James, don't you?') is not permitted. Anyone dealing with vulnerable witnesses should consult the judicially-approved Advocate's Gateway (www.advocatesgateway.org.uk). This contains extensive guidance and also links to relevant Rules, Directions, and Court of Appeal authorities.

It is likely that the procedure rules will change so as to provide that vulnerable witnesses will not have to give their evidence in court, and may be absolved from the need even to go to the building.[1]

APPELLATE ADVOCACY

The fundamentals are the same as those discussed above. Once more, there is no substitute for thorough preparation and command of the papers, the facts and the law. Most appellate courts, and the Court of Appeal in particular, are over-burdened with work, and it is therefore imperative to hold the court's attention from the start. This can often be achieved by putting the best point first, followed by the others in descending order of merit.

Be ready to be interrupted, more or less peremptorily. When the court goes quiet (the 'wall of silence') all is lost. Notes for the hearing should be just that, not a prepared speech. When interrupted, deal with the point at once, having made sure that you understand it, and only then move on. Do not be jocular or obsequious. Take time to think before answering a question from the bench.

In reality, by the time the young barrister appears in the higher appellate courts without a leader, most of the foregoing will be superfluous, since it will be second nature by then.

[1] See, further, *Counsel* February 2014, page 27, April 2014, page 28

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