ADVOCACY MANUAL

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Foreword by the Hon Murray Gleeson AC, Chief Justice of Australia

The Complete Guide to Persuasive Advocacy

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Foreword

The Hon Murray Gleeson AC
Chief Justice of Australia

In our everyday lives, we are surrounded by advocacy. In politics, commerce, and personal relations of all kinds, we are observers, and targets, of persuasion. We can see that some persuasion is done well, some is not done so well, and some would be better left undone. If we take the trouble, we can see what it is that makes some attempts at persuasion more effective than others. For example, tact in advancing an argument is likely to increase its persuasiveness. Insensitivity to the context in which an argument is put (the nature of the subject matter, the characteristics of the target audience, the competing interests or considerations to be taken into account) is likely to impede acceptance. In court, an experienced advocate will always welcome a tactless opponent. There can be a certain pleasure in watching an adversary alienate a potentially helpful witness, irritate a judge, or otherwise employ the arts by which some lawyers seem to snatch defeat from the jaws of victory. As professional advocates, lawyers ought to be interested and careful observers of all the advocacy that they see practised, whether well or badly, not only in the courts, but everywhere. Nevertheless, as the contents of this manual demonstrate, translating the general principles of good advocacy to the particular context of litigation requires attention to a number of aspects of that context.

Most judges are suppliers-turned-consumers of advocacy services. As consumers, they notice and value the qualities that distinguish the better suppliers from the others. The suppliers, for their part, learn by trial and error, and by observing their competitors. While observation, and trial and error, are useful practical guides, it is now recognised that legal advocacy is a specialist skill, which may be understood and taught as an organised body of practical knowledge.

Throughout Australia and in most common law jurisdictions, in recent years within the judiciary there has been a general acceptance of the importance of judicial training, and ongoing judicial professional
development. Judges are no longer thrown in at the deep end, on the assumption that their experience as practitioners will have taught them all they need to know about being a judge, and left to keep their knowledge and skills up to date through their own devices. The same applies to legal advocacy. Within the legal profession, it is now accepted that formal training in advocacy, with an appropriate emphasis on the practical nature of the subject, has an important role in legal education and continuing development.

The Australian Advocacy Institute was established to promote this aspect of professional formation. The authors of this manual are to be congratulated for taking the work of the Institute to the next level by its publication. It is a most impressive work. The use of case studies as a means of relating theory to practical knowledge reinforces the practical emphasis of the work.

It is now twenty years since I was a barrister, but I have spent a large part of those twenty years watching advocates at work. Perhaps I could make myself useful, and support the work of the Institute, by taking this occasion to make a small suggestion about legal advocacy. It is always worthwhile to take time out from the detailed preparation of a case to stop and think: if I were the judge (or jury) what would I make of this case, or this issue; what would I regard as a just result; what problems would I have with this or that argument; what would persuade me? Five minutes spent thinking like that could be worth an hour’s reading. It falls under the rubric of preparation, although a monk might call it meditation. Meditation is undervalued. Talk commonly has greater impact if it is preceded by some reflection. The best legal advocates I knew thought carefully about their topic and their audience before they began to speak or write. This is not surprising. It is typical of successful advocacy in most areas of life.

I commend this valuable work to all aspiring legal advocates.

Murray Gleeson
Chief Justice’s Chambers
High Court of Australia,
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- Trial management experience as judge in charge of the Victorian Supreme Court criminal lists
- Judicial training for NSW Judicial Orientation courses
- Training of magistrates and tribunal members
- Training of litigation solicitors in case management
- Educational management and training as Chairman of the Australian Advocacy Institute, Leo Cussen Institute and the Victorian Bar Readers’ Course
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ABOUT THIS MANUAL

The purpose of this manual is to provide a practical guide to the philosophy, practice and teaching of advocacy developed by the Australian Advocacy Institute.

Advocacy is an art, not a science. It is the art of persuasion. There is no one correct way of performing any advocacy task, but there are more effective ways. There are important fundamental principles, which are generic and which underlie the practice of all good advocacy.

The challenge is to learn to avoid fundamental error and then to continue developing as a skilful, persuasive and ethical advocate.

Effectiveness of an advocate cannot be measured by results in court, as the performance of a competitor in sport can be measured by scoring results. The only measure is the persuasive quality of the performance.

Many interesting books have been written about advocacy, great advocates and famous cases. They all have something to add to our understanding of advocacy, and some are useful teaching and learning aids.

The most useful ones for learning advocacy are those that have a practical focus and provide illustrations, such as Thomas Mauet's Fundamentals of Trial Techniques, the second Australian edition of which is co-authored by Professor Les A. McCrimmon and published by LBC Information Services (2001).

However, the only means to truly effective learning and teaching of the disciplines, skills and techniques of advocacy is the workshop method—that is, coaching.

Although the very talented may improve quickly without coaching, most self-learners will improve only to a certain level.

Self-learning of skills has a number of disadvantages:

- no objective assessment
- no basis for constructive self-analysis
difficulty in identifying error
- difficulty in remedying error, even if identified
- entrenchment of error, making progress difficult.

What is much more effective is practical skills training, which involves performance, objective assessment, review, and methods for change provided by competent trained teachers who can explain and demonstrate.

This manual is a guide to the fundamentals of advocacy and its teaching by practical training. It is designed to enhance the workshop experience, but there is no substitute for workshop instruction. Skills can be described, but the learning process must be supplemented by demonstrations of each skill by instructors and performance by the pupils. This applies particularly to communication skills, as the style and manner of performance are so important in persuasive advocacy.

In this manual there are two case studies that will be used as illustrations, as well as other practical examples. The main case study is *DPP v Daniel Jones*, on which most of the illustrations are based. The second case study is *DPP v Lucia Gonzales*, which is used to illustrate pleas in mitigation (Chapter 8).

Because communication skills are fundamental to good advocacy, we could well have put the chapter on communication at the start of the manual. However, we have placed it at the end because skills must come first. For example, it is unhelpful to focus on communication in the leading of evidence and cross-examination until the advocate is able to ask non-leading and leading questions.
ACKNOWLEDGMENTS

The information in this manual on effective advocacy and the teaching of advocacy is based on the combined knowledge and experience of many advocates and judges, in Australia and overseas, over the past thirty years.

The AAI and the profession acknowledge this valuable contribution, which lends the manual its authority. We especially acknowledge the work of those who reviewed and contributed to this manual. They are:

Judge Felicity Hampel SC, County Court of Victoria
Judge Ann Ainslie-Wallace, District Court of New South Wales
Judge Frank Gucciardo, County Court of Victoria
Professor Les McCrimmon, Australian Law Reform Commission
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Mara Ray, Victorian Bar
Adrian Finanzio, Victorian Bar
and many others who have contributed useful advice.

We acknowledge the contribution of the AAI General Manager, Scott Wallace, in producing this manual on behalf of the Institute.

We also acknowledge the work of the editor, L. Elaine Miller (BA (Hons), MA, MA, LLB), whose legal background allowed her to contribute to the substance of the work as well as to its clear expression.
In the adversary system, the parties are responsible for the conduct of the litigation, subject to the court’s procedural rules and case management.

The independent judge or jury has no investigative role and no position on the merits of the case until the evidence and submissions are presented by the parties.

The court’s role is to decide the case on what it finds to be the facts established by the evidence and the legal consequences that flow from such facts. Ultimately, after evaluating the evidence and argument, the court makes its decision by asking whether or not the party making the allegation or claim has proved its case to the required standard.

The system depends on each party presenting its best case, on the understanding that ‘truth is best discovered by powerful statements on both sides of the question’.¹

The advocates’ role is crucial because they decide how to conduct their case, what evidence to present, and what arguments to put. Their role is not to judge but to present and argue a case, consistently with their clients’ instructions, their ethical obligations and in their clients’ best interests.

In the adversary system, where in contested cases there are often different versions of events, each side contends for its version of the facts upon which the decision should be based.

¹ Denning LJ in Jones v National Coal Board [1957] 2 QB 55, 63, quoting Lord Eldon LC in Ex p Lloyd (1822), Mont 70, 72 n.
An advocate's responsibility is to deal with the facts and submissions skilfully and ethically to persuade the court to accept the version of events and legal consequences that best suits his or her client's case.

ADVOCACY TRAINING AND THE ESTABLISHMENT OF THE AAI

For centuries there was a widespread belief that advocacy could not be taught. Lawyers who wanted to practise as advocates relied on observation, trial and error, experience and some form of osmosis to learn their art. All this was often done at the expense of the client and without any defined standards or assessment of even minimal competence in advocacy.

This was not a professional approach. Advocacy is a specialised activity for lawyers, which requires the development of discipline and particular skills. A competent advocate must be more than someone performing ‘to the best of his or her knowledge, skill and ability’.2 A minimum standard of competence should be required.

The realisation that advocacy can and should be taught as a set of skills and techniques by the workshop method came about in the 1970s. The philosophy and teaching methods were first developed during that decade in the United States and Australia.

In Australia, this approach was adopted by the Victorian Bar Readers’ Course, which in 1979 was the first course of its kind, and later by the New South Wales Bar Practice Course. It has since been adopted generally in advocacy training in all common law countries.

In September 1991 at the Australian Legal Convention, the Australian Advocacy Institute (AAI) was launched. Alex Chernov QC, the then President of the Law Council of Australia, was a strong advocate for and prime mover in the formation of the AAI. Present at the launch was Jim Seckinger, the director of the National Institute for Trial Advocacy (NITA) in the United States, who supported the establishment of the AAI and encouraged its cooperation with NITA.

The AAI was born in response to the Australian profession’s growing demand for advocacy training, which could no longer be met by a handful of enthusiastic, committed individuals. It was established under the auspices of and with the financial assistance of the Law Council of

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2 Part of the admission oath/affirmation.
Australia. The AAI’s patrons were Chief Justices Sir Gerard Brennan, Sir Anthony Mason, and now Chief Justice Murray Gleeson.

The AAI is now an independent, not-for-profit body governed by a board of directors appointed by the Law Council. Since 1996 the Institute has been financially self-sufficient.

The first board members were:

Hon Justice George Hampel QC, Chairman (Victoria)
Geoffrey Davies QC (Queensland)
Barry O’Keefe AM QC (New South Wales)
Alex Chernov QC (Victoria)
Christopher Crowley (Australian Capital Territory)
John Chaney (Western Australia).

The aims of the Institute are to:

- improve the standards of advocacy skills throughout Australia
- provide an Australia-wide forum in which ideas and experience in advocacy training can be shared and developed
- design and develop methods and materials for training lawyers in advocacy, and
- train lawyers to teach advocacy skills.

AAI TEACHING PHILOSOPHY

The AAI teaching philosophy is based on the following thirteen principles:

1. Competent advocacy in the adversary system is essential to serve the best interests of clients, the interests of the community, and the interest of justice.

2. Advocacy is characterised as the art of persuasion.

3. The practice must be in accordance with professional ethics and etiquette.

4. Advocacy consists of developed discipline, skills and techniques applied with such talent as each advocate has.\(^3\)

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\(^3\) As Justice Michael Kirby put it: ‘... there may be a gene or two in the 36,000 genes on the human genome that is labelled “top advocate”—“skills of communication and persuasion”’ (‘Appellate Advocacy—New Challenges’, Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006).
5. Effective courtroom communication skills are essential to advocacy as the art of persuasion.

6. Advocacy skills, techniques and discipline can be taught, learned and developed at basic and advanced levels.

7. Advocacy skills are best taught and learned by the workshop method of:
   - instruction
   - demonstration
   - performance
   - review.

8. The focus of teaching is on methods of:
   - preparation
   - analysis
   - performance.

   This enables advocates to develop their own style and approach free of fundamental error.

9. The advocacy skills and techniques taught are generic and cross-jurisdictional.

10. Experience as an advocate alone is usually not sufficient. The approach to preparation, analysis and performance helps advocates to learn from their experience and develop their talent.

11. The emphasis in teaching is on:
   - complete familiarity with factual and legal materials
   - a method of analysis of those materials to produce a consistent case theory
   - a method of preparation for the performance of specific advocacy tasks
   - development of skills in:
     - legal argument
     - opening and closing addresses
     - evidence in chief and re-examination
     - cross-examination
     - written advocacy
     - communication skills.

12. The instructors are:
   - experienced and competent advocates
   - trained in the skills method of teaching by the AAI in accordance with its philosophy
   - able to explain and demonstrate advocacy skills to the pupils.
13. The AAI is committed to the pursuit of excellence in advocacy and advocacy training by:

- encouraging advocates at all levels to continue learning and developing their skills
- equipping advocates with the ability to analyse their work and critically assess their performance
- identifying members of the profession as potential instructors
- training its instructors
- continuing to develop the instructors’ skills in order to maintain quality and consistency in advocacy training.

EDUCATION, TRAINING AND RESEARCH BY THE AAI

The work of the Institute includes:

- researching and developing advocacy techniques and advocacy training methods
- developing workshop materials
- providing general advocacy skills workshops open to all lawyers who have a right of audience in courts and tribunals
- designing and conducting in-house workshops for law firms and institutions such as the offices of the Director of Public Prosecutions and the Government Solicitor, and Legal Aid Services
- conducting advanced and specialised workshops in appellate advocacy, expert evidence, advanced cross-examination techniques and jury advocacy
- providing instructor training workshops for Australian, English, Scottish, Hong Kong, Singaporean and South African advocacy teachers according to the AAI method
- giving advice and instruction in advocacy training to the College of Law (London), the English Bar, the Scottish Bar, the Singapore Bar, the Oxford Institute, and the Hong Kong, Malaysian and South African professions
- structuring and providing workshops in conjunction with Monash, Melbourne and Bond Universities, Australian National University, University of Hong Kong and the Leo Cussen Institute
- training of the war crimes prosecutors in the Hague and Tanzania
- supporting undergraduate and postgraduate courses at universities
- supporting and teaching at the bar readers’ courses in Australia
- presenting seminars and demonstration sessions at the Australian Legal Convention and other national and international conferences
- conducting international conferences on advocacy and advocacy training.
The AAI is now recognised as a world leader in advocacy training. Its work would not be possible but for the contributions of all of the AAI Board members and instructors whose ideas and teaching have enabled the philosophy of the Institute and the teaching of advocacy to develop.

In developing its philosophy and methodology, the Institute has benefited from its interaction with the National Institute for Trial Advocacy (USA), the Scottish Faculty of Advocates, the English Bar and the many committed individuals in Australia and overseas.

Special mention must be made of the inspiration and the work of Jim Seckinger, of the National Institute for Trial Advocacy, whose original thought about advocacy, its teaching and the training of instructors helped to set our course of advocacy training in Australia.

Judge Felicity Hampel SC has made an invaluable contribution for over twenty years to the teaching of advocacy in Australia and overseas and to the work of the Institute as a senior instructor, Chair of the Management Committee, and Board member.

Judge Ann Ainslie-Wallace has made a significant contribution as a senior instructor, moderator, Board member and Chair of the Management Committee.

Dr Ken Byrne has provided the inspiration and expertise that have enabled the Institute to develop its work in the most important area of communication skills.

Elizabeth Brimer's contribution has been of great assistance to the Institute, in her work as an instructor and in devising case studies.

The first AAI Executive Officer, Anne Craig, the current General Manager Scott Wallace, as well as Christina Rubina and Nina Massara as personal assistants to the Chairman, have provided excellent administrative and organisational support to the Institute.

We acknowledge the continuing support of the Law Council of Australia and the profession as a whole.

Finally, we acknowledge the work done by the many judges and practitioners who have contributed to the development of advocacy training by donating their time, ideas and energy as instructors.
The current Board of the Institute is:

Professor the Hon George Hampel AM QC (Chairman)
Fabian Dixon SC (Tasmania) (Deputy Chairman)
Judge Ann Ainslie-Wallace (New South Wales)
Judge John Chaney SC (Western Australia)
Judge Felicity Hampel SC (Victoria)
David Grace QC (Victoria)
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The purpose of including this case study in the manual is to provide illustrations and exercises in the skills and techniques of advocacy, and to do this in a practical way by examining the case as a whole.

Although the case is criminal, the advocacy principles and issues that arise from it are generic and adaptable to other cases in other jurisdictions.

The case study is concise but is an effective and challenging advocacy teaching tool.

The name of one of the witnesses is Maria Stojkowska. For speakers of English who are not familiar with Slavic names, it is not an easy name to pronounce.

The name is used intentionally to make the point that in multicultural societies, it is important that advocates learn to pronounce all names correctly. This can be done by finding out what the correct pronunciation is, by listening to the witness pronounce his or her own name in court, or by asking the witness how to pronounce his or her name correctly.

The correct pronunciation of ‘Stojkowska’ is stoy-kov-ska.

INSTRUCTIONS

Daniel Jones is charged with an offence pursuant to section 5 of the *Public Order Act*, which provides—

s 5(i) Any person who knowingly supplies alcoholic beverage to an intoxicated person shall be guilty of an offence.
This charge would normally be dealt with by a magistrate.

However, for the purpose of this exercise, assume that:

- the case is being tried before a judge and jury;
- the accused has been committed for trial on the basis of a hand-up brief. He was not represented and witnesses were not cross-examined;
- the defence has provided the prosecution with the accused’s instructions, in an attempt to persuade the prosecution to withdraw the charge.
CONSTABLE JAMES BIER’S STATEMENT

I am a Constable of Police attached to the Licensing Squad. On 24 December last year I was on duty with Constable Fisher.

At about 8.45 p.m. we were parked near the Royal Oak Hotel on the corner of Wide Street and Jackson Avenue, when I saw a man I later recognised as Walter Watkins attempting to cross Wide Street. I saw him initially through the rear view mirror of the car. It was a hot night. He was wearing dark jeans and a light-coloured t-shirt. He was staggering and had great difficulty in making it to the other side. He stumbled and almost fell at the southern kerb of Wide Street. I then turned and watched him through the side window of the police car. He walked to the entrance of the bottle shop and paused for a few moments before entering.

I then observed him approaching the counter. He appeared to have a short conversation with the attendant, who I now know to be Daniel Jones. I could see Watkins’ and Jones’ heads and shoulders above the displays and advertising, which covered the lower portion of the plate glass windows of the bottle shop. I did not lose sight of either of them in the shop.

A short time later Watkins emerged from the bottle shop. He was carrying a brown paper bag, which I later ascertained contained a bottle labelled Mildara Cream Sherry. Watkins was stumbling all over the place. Constable Fisher and I approached Watkins a short distance down Jackson Avenue. He smelt of intoxicating liquor, his eyes were bloodshot and his speech was slurred. When we approached him and identified ourselves, he began singing in a loud and tuneless fashion. He mumbled what sounded like ‘I tricked Danny again’.

We arrested him for being drunk and disorderly, an offence against section 4 of the Public Order Act, confiscated the bottle of sherry and took him back to the police station, where we lodged him in the cells. He was not in a fit state to be interviewed.

He was released next morning by the Duty Officer and we have not been able to locate him since. The police records show that Watkins is about 60 years of age. He has three previous convictions for minor thefts. On the last occasion the court ordered an alcohol treatment program, which Watkins did not complete. He also has twelve previous court appearances over twenty years in three states on charges of being drunk and disorderly.
Later that night, at about 9.00 p.m., I had a conversation with Daniel Jones, in the presence of Constable Fisher, in the bottle shop of the Royal Oak Hotel. After he gave me his name and address, I cautioned him and then the following conversation took place:

I said:  ‘Were you on duty in the bottle shop tonight?’
He said:  ‘Yes. It was a busy night and I was all on my own.’
I said:  ‘Do you know Walter Watkins?’
He said:  ‘Yes, he is a regular here.’
I said:  ‘Was he in the bottle shop tonight?’
He said:  ‘I can’t remember—hang on—yes, he was. Another customer bumped into him. Don’t tell me the old bastard has knocked off another bottle from me.’
I said:  ‘What condition was Watkins in tonight in the bottle shop?’
He said:  ‘I don’t know. Nothing special. I didn’t really take much notice.’
I said:  ‘I put it to you that Watkins was obviously drunk tonight in the bottle shop.’
He said:  ‘Was he?’
I said:  ‘I put it to you that he walked up to the counter and you sold him a bottle of Mildara Cream Sherry tonight, knowing he was drunk.’
He said:  ‘If you say so, but I don’t remember selling him anything tonight.’

I then informed him that I wanted to conduct a formal interview with him. He agreed to attend at the police station the following morning for that purpose.

I made notes of this conversation with him when I returned to the police station.

Daniel Jones attended the police station the next morning and I conducted an interview with him which was tape-recorded and later transcribed. I produce an accurate transcript of the interview.
I later drew up the attached plan and made the markings on it. They accurately depict the scene of these events. The police car was parked approximately 10 to 12 metres from the corner of Wide Street, and approximately 8 to 10 metres from the counter of the bottle shop. Wide Street is approximately 6 to 8 metres wide.

Constable Fisher took a statement from a witness, Ms Stojkowska, who came to the station at about 9.30 p.m.

The contents of the bottle were analysed and found to contain sherry. Mildara Cream Sherry is an alcoholic beverage to which the provisions of section 5 of the Public Order Act apply, and I produce a certificate to this effect.
RECORD OF INTERVIEW

Record of interview between Constable James Bier and Daniel Jones, conducted on 25 December last year.

Interview commenced at 9.30 a.m.

Constable James Bier asking questions. The interview was tape-recorded.

Q1 Your full name is Daniel Jones and you live at 360 Little Dorritt Street, Clifton Hill. Is that right?
A Yes.

Q2 How old are you?
A 34.

Q3 I wish to interview you in relation to selling liquor to an intoxicated person at the Royal Oak Hotel at approximately 8.50 p.m. yesterday. Before I do so I must inform you that you are not obliged to say or do anything and that anything you do say or do may be given in evidence. Do you understand that?
A Yes.

Q4 I must also inform you that you may communicate with a friend or relative to inform that person of your whereabouts, or a legal practitioner. Do you understand those rights?
A Yes.

Q5 Do you wish to exercise any of those rights?
A No.

Q6 Do you understand why you are here today?
A You asked me down.

Q7 It is alleged that last night you sold Walter Watkins a bottle of Mildara Cream Sherry knowing that he was drunk. What do you say to that?
A Is that what he said? He’d have to be lying. I can’t remember him buying anything off me.

Q8 Well, you were on duty last night, weren’t you?
A Yes, you know that.
Q9 And I observed you speaking to Watkins at the counter.
A  If you say so.
Q10 Do you know Ms Stojkowska?
A  Yes. She was in the store last night. If she’s put me in, it’s because she’s got it in for us. She’s trying to get a licence for a restaurant diagonally opposite the Royal Oak to compete with us, but we have objected and I know you have too.
Q11 Do you feel sorry for Watkins?
A  Yes, in a way, but I wouldn’t break the law by selling anything to a drunk because it could blow the boss’s licence.
Q12 Are you saying that you know the law?
A  Of course I do. Anyway I don’t know why I’m worried. I never sold anything. I refuse to make any further comment.
Q13 If you are not prepared to answer any further questions I now propose to terminate the interview. OK?
A  OK.

Interview terminated 9.42 a.m.
MARIAN STOJKOWSKA'S STATEMENT

On 24 December I was in the bottle shop of the Royal Oak Hotel at about 8.45 p.m. I was choosing a bottle of wine from a stand of specials near the window. Daniel Jones was behind the counter at the other end. There are shelves behind the counter where spirits and fortified wines are kept. There is a cash register on the counter with brown paper bags stacked beside it. The cash register is an old-fashioned one, which makes a loud ringing noise when a sale is recorded.

I was thinking what to buy, and several people came in and out while I was there. After I had been there for a few minutes a man came in through the door and bumped into me on his way to the counter. I remember I was quite annoyed because he glanced at me and didn't apologise. I noted a strong smell of alcohol about him. I watched him approach the counter and have a conversation with Daniel. I could hear their voices but not what was said.

A short time later the man who bumped into me came back past me as if to go out. He walked straight into the door, bounced off, almost fell but recovered, as if he was used to falling and recovering his balance. He then opened the door and left. I kept watching him through the windows. As he walked down Jackson Avenue he was staggering. Then I saw the two policemen approach him and take him away. In my opinion, he was drunk.

I was still there when the police arrived and spoke to Jones. I overheard only some of the conversation between the police and Jones about the matter. I didn't really follow it.

When the police left, I walked over to the bar and said to Daniel: 'Just as well the police have arrested that old drunk; I wonder what they will do with the bottle they took from him—probably drink it for Christmas.'

He said, 'The poor old bugger. I suppose I shouldn't have sold him the grog if he was so drunk. I feel sorry for him. I hope this doesn't blow the boss's licence.'

I left the hotel and went over to the police station across the road.

Signed—Maria Stojkowska
10.30 p.m., 24 December
INSTRUCTIONS FROM DANIEL JONES

I have been charged with ‘knowingly supplying alcoholic beverage to an intoxicated person’.

The police evidence of the conversation with me and the record of interview sound right, but I cannot remember all the details. It sounds right.

I do not remember anything about Walter Watkins on that evening except that I noticed him when a customer bumped into him and Watkins nearly lost his balance.

It was a very busy night. I was working alone, as the other barman had taken ill. I was serving people from the counter who came up from the bottle shop, the lounge and the bar area. There was a lot of noise from people making orders and there was a smell of beer around the counter. Fortified wines, like Mildara Cream Sherry, are kept only on the shelves behind the counter.

I recall the conversation with Ms Stojkowska. She made some nasty comment about the police. I did not say to her ‘The poor old bugger. I suppose I shouldn’t have sold him the grog if he was so drunk. I feel sorry for him. I hope this doesn’t blow the boss’s licence.’

I recall her saying that the hotel will soon not be the only place with a licence in the area.

I know that she is an applicant for a restaurant and liquor licence diagonally opposite the Royal Oak Hotel, which is opposed by the police and the hotel on the ground that she has two convictions for being drunk and disorderly. The Royal Oak is also opposing it on the ground that it is an unnecessary additional liquor outlet.

I have never been in trouble with the police before.

If I did supply the bottle to Watkins, which I do not recall doing, I would not have done so if I had known he was drunk.
THE ETHICS AND ETIQUETTE OF ADVOCACY

ETHICS

IMPORTANCE OF BEING ETHICAL

We have emphasised the need for and the importance of competent advocacy in the adversary system. Such a system also places great emphasis on the need for ethical conduct by advocates in assisting their clients and the court, as its officers, in the administration of justice according to law.¹

Ethical conduct is as much a hallmark of the profession as is competence. This means not only complying with the various rules of professional bodies, which vary from one jurisdiction to another, but also acting honestly and in accordance with the spirit of those rules.

As members of a profession, advocates have an obligation to practise ethically, but also have wider ethical obligations to:

- help and teach fellow advocates
- contribute to professional organisations
- contribute to law reform
- behave in a manner appropriate to their professional status.

¹ George Hampel and Elizabeth Brimer, Hampel on Ethics and Etiquette for Advocates, Leo Cussen Institute, Melbourne, 2006.
The advantages to be gained by an ethical advocate who also contributes to the profession include:

- helping to build public confidence in the administration of justice
- gaining the trust of the courts
- gaining the trust of fellow professionals
- gaining a good reputation and standing in the profession
- having a satisfying career
- having a successful career.

DUTIES TO THE COURT

The paramount duty of an advocate is to the court.

There is sometimes tension between this duty and the advocate’s other most important duty, that is, to the client. The resolution of any tension or conflict must always be in favour of the duty to the court.

Duties to the court include:

- Duty to maintain the dignity of the court by:
  - respecting the authority of the court
  - respecting the process and those involved in it
  - not behaving so as to undermine the court's authority
  - complying with rulings and directions

- Duty of candour, which encompasses the duty not to mislead the court and entails:
  - not adducing evidence which is known to be false
  - not withholding authorities
  - not misstating the evidence
  - not presenting clearly inadmissible evidence
  - not making unfounded objections
  - not presenting a clearly unmeritorious argument

- Duty of fairness, which includes:
  - not making allegations or assertions without foundation
  - not cross-examining merely to harass and insult witnesses
  - not withholding argument or evidence at trial in order to gain advantage on appeal

- Duty of cooperation, consistent with the client’s legitimate interest, which includes:
  - complying with time limits and directions
  - identifying agreed facts and areas of dispute
  - presenting evidence and argument concisely
  - cooperating with case management requirements.
OTHER DUTIES

There are a number of other ethical obligations, which include:

■ Duty of competence and diligence:
  □ acquiring and maintaining a level of professional competence
  □ competently informing and advising the client
  □ competently preparing to present the case in court
  □ competently presenting the client’s case in court

■ Barristers’ duty to comply with the ‘cab rank’ principle, that is, to accept briefs:
  □ within their area of practice
  □ within their level of competence
  □ with sufficient time to prepare
  □ for a reasonable fee
  □ except where there is a conflict of interest or inability to act for other reasons

■ Duty to act on instructions

■ Duty to continue to act, especially in a criminal case, even with insufficient fees

■ Duty of confidentiality:
  □ not breaching the client’s confidence
  □ not using confidential information to the detriment of the client

■ Duty of loyalty, that is:
  □ having no other interest than that of the client

■ Duty of advocates to each other:
  □ ensuring that ‘your word is your bond’
  □ cooperating with each other
  □ not interfering with opponents’ ability to perform their task

■ Special duty of prosecutors as ‘ministers of justice’, which involves:
  □ disclosing relevant factual and legal material irrespective of interest
  □ assisting the court in sentencing
  □ acting fairly towards opponents
  □ acting fairly towards witnesses including the accused
  □ acting as a prosecutor, not a persecutor.

An ethical advocate will have a good reputation. Such a reputation takes time, effort and vigilance to acquire—but is easily lost.
ETIQUETTE

Ethical conduct by advocates, in and out of court, is of first importance, but observing the rules of etiquette is also important.

Observing the rules of etiquette will:

- ensure that court proceedings are dignified, orderly and respected
- preserve courteous professional relations with the Bench
- enhance confidence in and out of court
- enhance the advocate’s standing in the profession
- gain the respect of clients, opponents, and the courts.

The fundamental rules of etiquette are common to all jurisdictions. However, some specific rules of etiquette may vary from one jurisdiction to another.

FORMS OF ADDRESS IN AUSTRALIA

- All judges of Supreme, Federal and High Courts are ‘Justice’ (some retain the form ‘Mr Justice’ in the Supreme Courts).
- All judges of District and County Courts are ‘Judge’.
- Masters are ‘Master’ and in some jurisdictions ‘Your Honour’.
- Magistrates are ‘Your Honour’ in some states, ‘Your Worship’ in others.
- Tribunal members, unless they are also judges, do not have titles.
- All judges of state and federal courts are addressed as:
  - ‘Your Honour’ (direct), not ‘you’
  - ‘His/Her Honour’ (indirect), not ‘he’ or ‘she’
  - ‘Judge’ (informally—even for retired judges)
  - ‘the trial judge’ or ‘the judge at first instance’ (in appeals).
- Heads of jurisdictions are addressed as:
  - ‘Your Honour the Chief Justice’
  - ‘President’
  - ‘Chief Judge’
  - ‘Chief Magistrate’.
- Judges must be addressed formally in public and privately, but may be addressed informally and by name only at their invitation.
- Judges must be referred to formally in all documents.
- Opposing counsel are:
  - ‘my learned friend’ (traditionally reserved for barristers only)
  - ‘the learned prosecutor’ (traditionally reserved for members of the legal profession)
  - ‘counsel for plaintiff/defendant, appellant, applicant, respondent’.
CHAPTER 1: THE ETHICS AND ETIQUETTE OF ADVOCACY

CITING AUTHORITIES IN COURT

- Use authorised reports wherever possible.
- Use the correct case names and citations.
- Unreported judgments are referred to by date and court.
- Judges of the House of Lords deliver ‘speeches’, not ‘judgments’.
- Judges of the Privy Council deliver ‘opinions’, not ‘judgments’.

ATTENDANCE ON JUDGES AND JUDICIAL OFFICERS

- There can be no private communication with a judicial officer before or during a hearing.
- There should be no social contact between counsel and a judicial officer during a hearing.
- It is customary to have social contact with counsel on circuit at the invitation of the judge. Counsel for all parties must be present.
- Judges’ chambers may be attended only by invitation.
- Unrepresented litigants cannot attend the judge’s chambers.
- Judges cannot see counsel in chambers where a party is unrepresented.
- Communications with judges must be through their associates.

DRESS AND APPEARANCE

Robes appropriate to the jurisdiction must be worn unless leave is given otherwise.

Neat and appropriately formal dress and appearance, both in robes and without, are important because they help to preserve:

- the formality of the court process
- the formality of the tribunal process, even if the hearing is said to be ‘informal’ (for example, a medical tribunal)
- the seriousness and decorum of proceedings.

PRECEDENCE AND SENIORITY

- The Attorney-General and the Solicitor-General have precedence.
- Queen’s Counsel and Senior Counsel have precedence over all junior counsel of whatever seniority.
- In duty courts, where cases are not listed:
  - the order in which cases are mentioned is dictated by seniority;
  - matters concerning the liberty of the subject have precedence over civil matters.
At the bar table, space should be given to Senior Counsel. Senior Counsel usually sit closer to the centre of the bar table. In non-jury trials, the prosecutor or plaintiff's counsel sits closest to the witness box. In jury trials, the prosecutor or plaintiff’s counsel sits closest to the jury.

CONDUCT

Formalities in court include the following protocols, to which all must adhere:

- Stand as the court is opened.
- Remain standing until the court sits.
- Sit down when directed by the court officer.
- Bow before sitting down.
- Bow to the court when entering and leaving while the judge is in court.
- Stand when being addressed by the court.
- Sit down while an opponent makes an objection.
- Stand and bow before the judge leaves the court.

The custom of announcing appearances varies from court to court. For example, the first party may announce the names of all others, all parties may announce their own names, or instructing solicitors’ names may or may not be announced.

Senior Counsel announce the names of their juniors. If Senior Counsel is not present, his or her name is announced first by the junior.

Announcement of all parties’ appearances must be made clearly so that they may be entered correctly in the court records. Difficult names should be spelt and/or written down for the court staff.

BAR TABLE

- Counsel must occupy the bar table before the judge comes into court.
- During the hearing, counsel must remain at the bar table unless given permission to do otherwise.
- If counsel is given permission to leave the bar table for a purpose, he or she must return to the bar table.
- Counsel must remain at the bar table until counsel in the next case occupy it. The bar table should not be empty when the judge is in court.
CHAPTER 1: THE ETHICS AND ETIQUETTE OF ADVOCACY

- The bar table must not be used as a storage area for briefcases, umbrellas, etc., but it may be used for computers, with leave of the court.
- If the bar table is crowded, counsel may obtain permission to sit elsewhere in court.

LANGUAGE

Courteous and respectful language does not detract from frank and courageous conduct by counsel; it enhances it.

- Language in court should be clear and simple.
- Language should not be flowery, flamboyant or unnecessarily formal.
- In argument counsel ‘submit’; they do not ‘think’ or ‘believe’.
- The plural ‘we submit’ should be used only when there are two or more counsel.
- The term ‘with respect’ should be used economically and not in a way that conveys the opposite.
- In taking issue with the court in argument, examples of correct form are:
  - ‘in my submission Viro’s case does not support that proposition’
  - ‘with respect, that is not the evidence given by Mr Smith’
  - ‘I submit that the evidence does not support such an inference’.
- Phrases such as ‘I hear what you say’ or ‘that may be so’ are not appropriate.
- Examination or cross-examination should be concluded by ‘I have no further questions’.
- Counsel ‘tender’ a document, not ‘seek to tender’.
- In moving the court (for example motion on admission), the correct form is ‘I move that …’, not ‘I appear to move that …’.
- ‘If Your Honour pleases’ or ‘if the court pleases’ is a correct acknowledgment of a ruling or other indication.

MAKING AND ANSWERING OBJECTIONS

- Objections should be formally made and answered (see Chapter 3, ‘Evidence in Action’).
- Only one counsel should be standing and speaking at any one time.

PRESERVING DECORUM

Advocates’ conduct must be appropriate to the solemnity of the proceedings and sensitive to opponents, litigants, witnesses and court staff.
Courageous, effective advocacy does not require rudeness, unnecessary aggression or insensitivity.

The following behaviour is unacceptable and counter-productive to good advocacy:

- interrupting or speaking over the judge
- interrupting or speaking over the opponent (except for formal objections)
- interrupting a judge in the course of a ruling or judgment (except to correct an obvious slip or error)
- continuing to argue after a ruling has been made
- bickering between counsel at the bar table
- ‘sledging’ during the opponent’s presentation
- yelling at the opponent or the judge
- by comments or body language, demonstrating disapproval of the opponent’s argument or the opponent’s way of dealing with evidence and rulings by the judge
- making personal attacks on opponents
- frivolous, insensitive and disruptive behaviour which is incompatible with the solemnity of the occasion.

Humour by advocates has a limited place in the courtroom because:

- the issues and consequences are grave
- the proceedings are solemn and formal, and
- people are under stress.

Some humour may be used sensitively to relieve tension, but not at others’ expense.

Apart from those basic rules, courtroom etiquette is all about respect, consideration and sensitivity.
Thorough preparation is essential as a foundation for competent advocacy.

There are four components of, or steps in, preparation:

- Knowledge of case materials
- Knowledge of current relevant law, evidence and procedure
- Analysis to develop a case theory (what to do)
- Performance preparation (how to do it).

Preparation is best approached in this way because these steps follow a logical order.

For instance, analysis is not possible without knowledge of all available relevant materials from all parties, and the current relevant law. Performance preparation is not possible without a developed case theory, because the performance would lack direction and could even be counter-productive.

Although it is useful to approach preparation under these four steps, you will need to return to earlier steps to reassess the materials as you progress in preparation, refine the case theory and prepare for performance.
KNOWLEDGE OF CASE MATERIALS

Become thoroughly familiar with:

- all available and potentially relevant factual materials in your case
- the available and anticipated material in the opponent’s case.

In a criminal case, this will include:

- witness statements
- police statements
- recorded interviews
- depositions
- exhibits
- expert reports
- records of surveillance
- results of tests
- telephone intercepts
- documents and records in the possession of the prosecution
- documents and records in the possession of third parties
- pre-trial proceedings and conferences.

In a civil case, this will include:

- pleadings
- further and better particulars
- discovered and subpoenaed documents
- witness statements or affidavits
- expert witness reports
- affidavits in interlocutory proceedings
- pre-trial decisions, directions and orders.

It is important to assess the quality of the evidence in your case, by:

- conferring with witnesses
- examining all original documents and other real evidence
- visiting relevant sites.

CONFERRING WITH WITNESSES

- Confer with the client and witnesses well before the hearing. This will give you the opportunity to shape your case further, and to obtain further evidence if necessary.
- Use the opportunity to correct and clarify your impressions from the instructions or written material.
- In conference with each witness, explore:
  - the witness’s personal background, if relevant
CHAPTER 2: PREPARATION AND ANALYSIS

- his or her full version of events, particularly in light of other versions and obvious gaps
- the witness’s explanations or reasons for his or her behaviour
- the witness’s instructions about documents that he or she prepared or can identify
- further information to assist in cross-examination (see further Chapter 6, ‘Cross-examination’, and Chapter 8, ‘Pleas in Mitigation’).

Have the witness prepare any visual aids like plans, diagrams, charts or graphics to explain his or her version of events.

EXAMINING ALL ORIGINAL DOCUMENTS AND OTHER REAL EVIDENCE

- Copies of documents can obscure important annotations.
- Photographs or descriptions of real evidence can mislead.

VISITING RELEVANT SITES

- Visit in conditions similar to those described by witnesses, such as:
  - same time of day
  - similar weather conditions
  - similar lighting conditions.
- Bring witnesses who can help you better to understand the scene and the events.
- Take measurements to check relevant distances.
- At the scene, consider whether the various versions of events are realistic based on the features of the scene, and the location of the parties or witnesses at the time.

ORGANISING THE MATERIALS

This can be done by arranging information according to:

- events, by preparing chronologies
- sources of evidence, such as witnesses or documents
- particular scenarios
- factual issues
- legal issues.

Each method has its benefits in the preparation process.¹

¹ For a detailed explanation of these marshalling techniques, see A. Palmer, *Proof and the Preparation of Trials*, Law Book Company, Sydney, 2003, Chapters 3 and 4.
ILLUSTRATION

For the accused in *DPP v Daniel Jones*, preparation includes the following tasks.

1. **Collecting material**
   
   Obtain copies of:
   - presentment or charge sheets
   - committal depositions, including records of interview and witness statements from police and Stojkowska.

2. **Check documents**
   
   - certificate of analysis of the contents of the bottle
   - presentment and other court documents.

3. **Prepare a chronology**
   
   For example:
   
   24 December, last year
   
   8.45 p.m. Police in car on Jackson Avenue, outside Royal Oak Hotel
   
   Police see Watkins stumble across Wide Street to hotel
   
   Stojkowska at hotel
   
   Police follow and arrest Watkins, take him to station
   
   9.00 p.m. Police conversation with Jones at hotel
   
   After 9 p.m. Stojkowska conversation with Jones at hotel
   
   9.30 p.m. Stojkowska attends police station to make statement

4. **Confer with Daniel Jones**
   
   Find out from Jones:
   - his recollection of the events
   - what were his duties on the night?
   - what were the conditions: temperature, noise level, lighting, smell of beer?
   - explanations for his inconsistent statements to police about supplying the liquor to Watkins (at first he does not remember, but then denies any sale to Watkins)
   - what information can he provide about Stojkowska and Watkins?

5. **Visit the Royal Oak Hotel**
   
   - in conditions similar to the night of the alleged offence if possible, for example busy evening, warm weather
   - check distances and take measurements, for example between wine racks, from police car to counter, from behind counter to where fortified wines are kept
   - examine the view that the police, Jones, and Stojkowska would have had from their positions: for example, sit in car where police were parked
   - have Daniel Jones demonstrate where and how he was serving.
KNOWLEDGE OF RELEVANT LAW, EVIDENCE AND PROCEDURE

Become familiar with the relevant current law applicable to the issues in the case.

Consider where the onus of proof lies.

You should then identify and consider any evidentiary issues that may arise. It is important to understand the principles behind the rules of evidence. Even in tribunals which are not bound by the rules of evidence, those principles can assist in argument about the weight of the evidence. See further Chapter 3, ‘Evidence in Action’.

ILLUSTRATION

The prosecution must prove beyond reasonable doubt that Daniel Jones:
- supplied
- an alcoholic beverage
- to an intoxicated person
- with knowledge that the person supplied was intoxicated at the time of supply.

Check the law to determine:
- whether supply includes a gift
- whether ‘knowingly’ includes ‘recklessly’ or ‘negligently’
- meaning of ‘an intoxicated person’.

Consider the evidentiary issues:
- Is ‘I tricked Danny again’ admissible in evidence in chief, in cross-examination, or not at all?
- Is Jones’ alleged admission to Stojkowska admissible?
- To what is it an admission? Sale? Knowledge of intoxication?

ANALYSIS TO DEVELOP A CASE THEORY

First, analyse the factual and legal issues in the case from all the available material in your case and from what you know of your opponent’s case. Then choose and develop an overall case theory or case theories.

A case theory can be described in various ways as:
- the thesis of your case
- a set of conclusions or propositions about what happened or might have happened
a system of ideas providing an explanation, which is essential for your client to succeed.

CHARACTERISTICS OF A GOOD CASE THEORY

A good case theory should be:

- consistent with your instructions
- a positive construct
- simple
- balanced, taking into account the strengths and weaknesses of your case
- logical
- credible and realistic:
  - makes sense in the light of human knowledge and experience
  - realistic and not fanciful; based on evidence and rational inferences, not on mere supposition or speculation
  - consistent with as much evidence as possible; where it is inconsistent, those inconsistencies are explicable
  - has an appropriate emotional quality and is empathetic
- directed to the desired outcome.

A positive construct

A construct is a conceptual synthesis, or the drawing together of the various circumstances into an overall thesis. A positive construct has the following features:

- It is a positive explanation of the circumstances.
- It is expressed in propositional form.
- It is not simply the proposition that the defendant did or did not commit the crime, or that the prosecution or plaintiff has not proved its case to the relevant standard.
- It is not simply a narrative of the circumstances or a summary of the arguments.

CASE THEORIES AND THE ONUS OF PROOF

The case theory developed by the party that bears the burden of proof will be essentially different from that of the defence, which generally does not bear the onus of disproving the case against him or her, or of proving his or her own case.

Prosecution/plaintiff’s case theory

The case theory developed by the party that bears the onus of proof must be:
CHAPTER 2: PREPARATION AND ANALYSIS

- a positive construct of what happened, why and how
- built from all available evidence and inferences
- which leads to proof of each element of the case or claim to the required standard.

So, the prosecution in a criminal case must prove what happened to support the elements of the charge (beyond reasonable doubt), while the plaintiff in a civil action must prove what probably happened (on the balance of probabilities).

**Defence case theory**

The defence case theory can be described as:

- a Realistic Alternative Theory (‘RAT’), which must also be rational (that is, supported by facts or inferences), and not fanciful or unfounded
- a theory that sufficiently undermines the theory of the party bearing the onus of proof, so as to create a reasonable doubt or shift the balance of probabilities.

So, the defence theory explains what might reasonably have happened, by providing an alternative possibility that arises from the evidence.

In a criminal or civil case where the defendant advances a positive defence (rather than simply the direct negative of the prosecution or plaintiff’s case), the defence theory of the case must be consistent with that positive defence, and the range of realistic alternatives may be constrained by the evidential demands of that positive defence.

**DEVELOPING THE CASE THEORY OR THEORIES**

The development of a case theory is a continuing process. From the first impressions of your brief, a possible case theory or theories may emerge. The final case theory, however, will emerge only after thorough analysis and consideration of possible alternatives.

To develop the case theory, you must:

- thoroughly evaluate the available factual material in your case
- thoroughly evaluate the available and anticipated material in your opponent’s case
- assess the factual and legal foundation for each side’s case
- consider the likely evidentiary issues
- assess the strengths and weaknesses of each side’s case
- identify the available case theories on each side
- select a case theory or theories that provide the easiest and most consistent path through all of the factual and legal issues.
For instance, where a witness gives evidence that does not support your case, one case theory may be that the witness is mistaken about what he or she perceived. This would be simpler and easier for the decision-maker to accept than a case theory that the witness is lying. This is so unless there is a basis to support the conclusion that the witness is lying.

If several theories are potentially available, then you may choose one or more, provided they are consistent with each other. To be consistent, the factual foundation for one must not be destructive of the factual foundation of the other.

**Methodology for developing the case theory**

One method of developing a case theory is to begin by setting out in table form all available facts, and classify them into what appear to be ‘good’, ‘bad’ and ‘neutral’ facts from the perspective of your case and from your initial impressions.

The table below is designed to identify which evidence may support or negate the elements of the offence or claim.

<table>
<thead>
<tr>
<th>Element</th>
<th>Good</th>
<th>Bad</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supply</td>
<td>Police see Watkins’ head and shoulders only</td>
<td>Police see Watkins go to counter</td>
<td>Police don’t lose sight of Watkins or Jones</td>
</tr>
<tr>
<td></td>
<td>No evidence of Stojkowska hearing the cash register bell ring</td>
<td>Police see Watkins and Jones having a short conversation at the counter</td>
<td>Shortly after the conversation, Watkins left shop</td>
</tr>
<tr>
<td></td>
<td>No evidence of Stojkowska seeing any handing over of a bottle or money</td>
<td>Fortified wines located behind the counter</td>
<td>Watkins says ‘I tricked Danny again’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Brown paper bags at counter</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Watkins leaves shop carrying sherry in brown paper bag</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Stojkowska hears admission as to sale from Jones</td>
<td></td>
</tr>
</tbody>
</table>
### CHAPTER 2: PREPARATION AND ANALYSIS

<table>
<thead>
<tr>
<th>Alcoholic beverage</th>
<th>Watkins leaves shop with bottle of Mildara Cream Sherry</th>
<th>Bottle analysed and found to be sherry</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Intoxication</strong></td>
<td>Police see Watkins before he entered the shop:</td>
<td>Watkins pauses before entering bottle shop</td>
</tr>
<tr>
<td></td>
<td>- stagger across Wide Street</td>
<td>Police see his head and shoulders, don’t lose sight</td>
</tr>
<tr>
<td></td>
<td>- difficulty walking</td>
<td>Police do not report seeing Watkins bump into anyone in shop</td>
</tr>
<tr>
<td></td>
<td>- stumble at the kerb</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Police see Watkins after he left the shop:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- stumbling ‘all over the place’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- smelling of liquor</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- eyes bloodshot</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- speech slurred</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- singing loud and tuneless</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Watkins unfit to be interviewed</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Stojkowska says Watkins bumped into her and didn’t apologise</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Stojkowska thinks Watkins is drunk and smells of alcohol</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Stojkowska sees Watkins bump into door when leaving</td>
<td></td>
</tr>
<tr>
<td>Knowingly</td>
<td>Jones was the only staff member serving on that night</td>
<td>Behaviour of Watkins described above under ‘Intoxication’</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td></td>
<td>Jones was serving to people from the bar, lounge and bottle shop area; there was a smell of alcohol all around</td>
<td>Jones would have to have heard and understood what Watkins asked for</td>
</tr>
<tr>
<td></td>
<td>Busy night; Christmas Eve; noisy</td>
<td>Jones was close to Watkins—over the counter</td>
</tr>
<tr>
<td></td>
<td>Conversation with Watkins was ‘short’</td>
<td>Jones would have been keeping an eye on Watkins, as he had stolen before</td>
</tr>
<tr>
<td></td>
<td>Stojkowska was closer to Watkins when she smelt alcohol on him</td>
<td>Jones knew Watkins as a regular customer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Jones had an obligation not to serve alcohol to an intoxicated person</td>
</tr>
</tbody>
</table>

You will note that in this case, we have not included Jones’ instructions in the table. We cannot assume that his story will be relied upon by the court, and so the case theory should at first be constructed around an interpretation of the other evidence. However, the case theory must be consistent with his instructions, and the evidence that he may ultimately give. In other cases, it may be possible or even essential to rely on your instructions in formulating the case theory.

Consider in what categories you would place the remaining facts.

From this table, different case theories may be constructed.

Once the possible case theories have been identified, go back to the table, where the facts have been categorised into ‘good’, ‘bad’ and ‘neutral’, re-evaluate them and select the best case theory.

The best case theory will often be one that applies the principle of Ockham’s Razor, the principle of ‘economy of hypothesis’. That is, the correct explanation of any problem is usually the one that makes the simplest use of all available information. This will help to avoid unnecessary confrontation.

Before selecting your final case theory or theories consider the likely case theory on the other side. How will your opponent best put their case?
CHAPTER 2: PREPARATION AND ANALYSIS

What are the strengths and weaknesses of the case against you? How does your case theory sit with the opponent’s theory? How can you develop your case theory to conflict with the opposing theory as little as possible?

Almost invariably, there will be gaps in the information available. The process of analysis will help to identify where those gaps are and will often also suggest to you the lines of further inquiry that are required. Before finally deciding on your case theory or theories, you may be assisted by further conferences.

Using that approach, select a case theory or theories that provide the easiest and most consistent path through all of the factual and legal issues.

Your chosen case theory should:

- be consistent with your instructions
- contain a higher proportion of ‘good’ or ‘neutral’ facts
- sit most comfortably with your opponent’s case theory
- have fewer witnesses to contradict
- allow any remaining ‘bad’ facts to be explained credibly and realistically or to be weakened or destroyed in cross-examination.

ILLUSTRATION

Possible case theories for the defence

The available information suggests four possible defence case theories:

- That Watkins was not intoxicated.
- That Watkins brought the bottle with him.
- That Watkins stole the bottle of sherry.
- That even if there was supply and Watkins was intoxicated, Jones did not know Watkins was intoxicated.

Once you analyse the facts categorised in the table, you will see that the case theory that will most effectively undermine the prosecution’s case relates to Jones’ lack of knowledge of Watkins’ intoxication.

The case theory that Watkins was not intoxicated is not viable on the police evidence because:

- the police evidence before and after Watkins was in the bottle shop shows intoxicated behaviour and appearance;
- Stojkowska’s evidence supports the police evidence;
- there is not sufficient material to contradict or challenge the police evidence; and
- Jones is not able to contradict the police evidence.
The case theory that Watkins already had the bottle is not viable because:
- the police saw Watkins approach the hotel;
- Watkins was wearing only a t-shirt and jeans;
- it is unlikely that he concealed the bottle or carried it in his hands without the police noticing it;
- no one saw him with the bottle in the hotel;
- Watkins’ behaviour is inconsistent with his having brought the bottle with him;
- Jones is not able to deny that he supplied the bottle; and
- although the police in their statement do not refer to Watkins having or not having the bottle, a cross-examination of them to suggest that he did have it before entering the bottle shop is unlikely to be productive.

The case theory that Watkins stole the bottle is not viable because:
- the police did not lose sight of him or of Jones in the hotel;
- the fortified wines are kept behind the counter;
- the police did not see Watkins go behind the counter so as to be in a position to steal it;
- at the time the police saw Watkins at the counter, he was in the presence of Jones, engaged in a short conversation;
- the bottle that Watkins later had was in a brown paper bag;
- there is not sufficient material to contradict or challenge the police evidence;
- Stojkowska’s evidence supports the police evidence; and
- Jones is not able to deny the police evidence because he does not remember.

ILLUSTRATION

Case theory for the defence

The following defence theory is the one that is most realistic in the circumstances of this case, particularly in light of Jones’ alleged admission to Stojkowska that he sold the bottle to Watkins. It is based on a challenge to the element of knowledge, which is the weakest part of the prosecution case.

Watkins set out to trick Danny by briefly disguising the state of his intoxication. He composed himself at the door and was seen by the police to be steady in the bottle shop.

The conversation was short, with a busy barman in a busy bar. The bar was noisy and there was a smell of alcohol, thus limiting the barman’s opportunity to notice the symptoms of intoxication.

Stojkowska’s evidence is exaggerated when compared with the police evidence. If Jones made the comments to Stojkowska that she attributes to him, it may amount to an admission of supply, but not of knowledge because of the expression ‘if he was so drunk’.
This case theory:

- requires no challenge to the police evidence;
- undermines the weakest part of the prosecution case;
- does not fly in the face of the admission alleged by Stojkowska (as this is not an admission of knowledge);
- does not contradict Stojkowska’s observation of the conversation between Watkins and Jones;
- is consistent with your instructions that Jones had no knowledge of Watkins’ intoxication, even if he did sell him the bottle; and
- is most realistic in the circumstances.

The selection of this case theory may allow you to abandon a challenge to the other elements of the offence.

PREPARING EXPERT EVIDENCE

Choice of expert

The choice of expert is important in preparation when you will be calling an expert as an independent consultant to support your case.

In choosing the consultant expert, you should consider:

- what aspect of the case requires expert opinion
- whether the expert has the specialised knowledge in his or her own discipline to express that opinion, based on his or her training, study or experience
- whether the expert is sufficiently independent, open-minded and credible
- whether the expert is of good standing among his or her colleagues and among lawyers and judges
- how thorough and well-prepared the expert will be
- how the expert’s qualifications, experience and opinion will compare with those of any opposing expert
- how the expert will withstand cross-examination
- how experienced the expert is in giving evidence in court
- whether the expert is able to communicate in such a way as to be an effective witness, and to explain technical concepts to a lay audience.

Conference and expert witness preparation

To prepare expert evidence effectively, you should:

- inform the expert of the issue about which the expert opinion is sought
- ensure that the expert is instructed in a way that does not affect the expert’s objectivity
ADVOCACY MANUAL

- provide all relevant material to the expert
- give the expert sufficient time to conduct a comprehensive assessment and prepare a report
- understand the expert’s report
- assess the strengths and weaknesses of the expert opinion.

The conference is necessary:

- for you to become familiar with the expert’s qualifications, research or experience (or lack of it) and how this supports or diminishes his or her opinion
- to give you a better understanding of the expert’s opinion and the reasoning that supports it
- for the expert to help you to ascertain the strengths and possible weaknesses of his or her opinion
- to equip you to cross-examine the opposing expert.

During the conference, you will:

- review with the expert how you will elicit his or her qualifications
- prepare the expert for examination in chief by you and cross-examination by your opponent
- identify weaknesses in the opinion of any opposing expert
- instruct the expert in the need to:
  - answer the questions
  - use as little technical language as possible
  - have all relevant materials available in court, organised and ready to produce if required
- if the expert is not experienced, inform the expert of relevant legal terminology, procedure and the manner in which the expert will give evidence
- explain that the expert is limited to answering the questions asked in cross-examination, but that you may re-examine if necessary
- ensure that you see the original working notes, lab records, interview schedules and any other reports
- ensure that the expert prepares any helpful visual aids, such as graphs, charts, or simple illustrations, in a way that clearly communicates the point to be made.

PRESENTATION OF EXPERT EVIDENCE

Expert evidence may be adduced in a number of ways, depending on the rules and practice of the jurisdiction:
In criminal trials before a jury, the expert will have to give oral evidence in chief, although he or she would usually be able to refer to the report and other notes.

In non-jury trials, and in most civil cases, the expert’s report is usually used as evidence in chief.

If the report is used as evidence in chief, there may still be oral evidence to supplement or explain the report, or, by leave of the judge, to give further evidence.

**PERFORMANCE PREPARATION**

Knowing what to achieve in your case does not prepare you for how to achieve it during the hearing. Performance skills and techniques require performance preparation. After preparing a case theory, you will know what you need to achieve in the case. Then you should prepare how you will achieve this during your performance, consistently with your case theory.

The normal contested hearing will have four main stages, which are performed in this order:

- opening addresses
- examination in chief
- cross-examination, possibly followed by re-examination
- final address.

In preparation for performance, these four stages must be prepared in a different order. The starting point must be the final address.

This approach is necessary because a trial is a purposive process. Each advocate tries to achieve a specific result based on his or her case theory and the arguments available to support it. A trial is not an inquiry or investigation.

The most useful order of preparation for performance therefore is:

<table>
<thead>
<tr>
<th>Prepared</th>
<th>Opening</th>
<th>Examination in chief</th>
<th>Cross-examination</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Last</td>
<td>Second</td>
<td>Third</td>
<td>First</td>
</tr>
</tbody>
</table>

The closing address must be prepared first because:

- When prepared first, argument as to facts and law, based on your case theory, will give you the direction needed for the other steps in the trial.
ADVOCACY MANUAL

- It will serve as a guide to what needs to be done in order to support your case theory, on which the result will depend. This is like an architect preparing final plans before the building starts.
- This approach will enable you to focus and organise your case in chief, to identify what needs to be done in cross-examination, and to decide on the most effective opening address.

Examination in chief is prepared next because:

- it usually provides the foundation for your final factual argument. Your case theory and final argument are usually based on your client’s instructions and evidence to support the desired outcome.

Cross-examination is prepared next because:

- the need to cross-examine and the nature and scope of cross-examination of the other side’s witnesses will be dictated by the argument prepared first in support of your case theory; and
- having prepared your final address, you will know what you need to add or weaken by cross-examination.

The opening address is prepared last because:

- in preparation, the trial is not shaped by the opening address. The opening address is shaped by the way you will conduct the trial.

Note that re-examination cannot be prepared effectively in advance:

- It is limited to matters arising from cross-examination.
- It can be prepared only during cross-examination of your witnesses.
- However, it is possible to consider in advance the likely line of cross-examination and therefore the evidence that may have to be dealt with in re-examination. This is so particularly with expert witnesses.

This approach to the trial process is the same in a criminal case (and in the less common circumstance of a civil case) in which you do not propose to call evidence. Although you will not be preparing evidence in chief for presentation, it will still be necessary to identify the material that supports your case theory and your final argument, and to build that into your argument prepared in advance. This approach is helpful in identifying the need for and the direction of cross-examination.
Prosecution preparation for final address

After analysing the Jones case you will be able to prepare in advance an argument for the prosecution.

**As to intoxication:**

The following factors support the clear conclusion that Watkins was intoxicated.

1. Evidence of two experienced police officers in a specialised squad:
   - seeing Watkins crossing the road, staggering and stumbling
   - after he leaves the bottle shop, they observe tuneless singing, slurred speech, smell of liquor, bloodshot eyes and mumbling

2. Evidence of Stojkowska:
   - Watkins bumps into her
   - he smells of liquor
   - he does not apologise
   - he bumps into the door

**As to supply:**

The following factors in combination lead to the conclusion that Jones supplied liquor to Watkins.

1. Circumstantial evidence supports an inference of supply:
   - Watkins walks into the bottle shop
   - goes to the counter
   - speaks to the busy barman
   - short conversation—not a social chat
   - he comes out with a bottle of sherry
   - of the kind kept only behind the counter
   - in a paper bag—paper bags are on the counter
   - says ‘I tricked Danny again’—that is, got the bottle from him by a trick

2. Admission by Jones to Stojkowska—unlikely to be invented:
   - recalled by Stojkowska
   - a short time later
   - recorded by the police
   - contains Jones’ sentiment—feeling sorry for Watkins
   - contains Jones’ words as used in the police interview: ‘blow the boss’s licence’

3. Jones’ inconsistent accounts:
   - ‘I don’t remember selling him anything tonight’
   - ‘I can’t remember him buying anything off me’
   - ‘I never sold anything’
4. Watkins did not bring the bottle with him:
   - hot night—Watkins wearing jeans and t-shirt
   - trained police watching carefully for considerable time
   - unlikely to have concealed a bottle in a paper bag—why would he?
   - if he had brought it, why go to counter and speak to Jones?
   - Watkins’ comment ‘I tricked Danny again’ would be meaningless

3. Watkins could not have stolen the bottle:
   - Fortified wine is stored only behind the counter.
   - To steal he would have had to go behind the counter, through the one opening, or he would have had to lean or jump over the counter.
   - If Watkins has stolen before, Jones would be watching him carefully.
   - Watkins would have to have put the bottle in a paper bag, which he would have had to get from the counter.
   - All this while Jones is there.
   - During this time the two of them are seen by the police having a short conversation.
   - This is supported by Stojkowska.

As to knowledge:

Even if Watkins steadied himself before entering the hotel, Jones had to have noticed that Watkins was intoxicated when he supplied the bottle, given the high level of intoxication as seen by the police and Stojkowska:

   - Jones was under an obligation to take notice.
   - He is an experienced barman.
   - He is aware of signs of intoxication.
   - He knows Watkins as a regular customer.
   - He would watch him, as Watkins had stolen before.
   - He saw the bump with Stojkowska.
   - Watkins would have been close to him across the bar.
   - Watkins spoke to him.
   - Jones would have had to hear Watkins and look at him.
   - He had to notice slurred speech, bloodshot eyes, smell of liquor.

Defence preparation for final address

Having analysed the case from the defence point of view, you may consider that:

   - the argument that Watkins was not in fact intoxicated is difficult because of the police evidence and Stojkowska’s observations of Watkins’ actual condition. There is nothing with which to attack the credibility of the police that is relevant to their observations.
   - the argument that there was no supply is difficult because of the circumstantial evidence and the likelihood that Stojkowska’s evidence of Jones’ admission to a sale will be accepted. This is because the comments attributed to him by Stojkowska are unlikely to have been invented, given the similarity between the words used by Jones in the police interview and the words attributed to him by Stojkowska.
the real weakness in the prosecution case is Jones’ knowledge of intoxication. Watkins paused before entering and composed himself, with the intention of tricking Danny. He was seen by the police in the bottle shop and the police, who saw his head and shoulders at all times, do not suggest that he was unsteady. This is in contrast to his behaviour before entering the shop and after leaving.

You will be able to prepare in advance an argument as to knowledge. The following circumstances in combination raise a reasonable possibility that Jones did not notice that Watkins was intoxicated. This reasonable possibility may detract sufficiently from proof beyond reasonable doubt that he knew Watkins was intoxicated.

1. Circumstances likely to lead to Jones not noticing Watkins’ bloodshot eyes, slurred speech and smell of alcohol:
   - busy night—Christmas Eve
   - only one barman serving
   - people coming from bar, lounge and bottle shop
   - short conversation with Watkins—may only have been a short request
   - noisy bar: Jones may not have detected Watkins’ slurred speech
   - he would have had no reason to look at Watkins for long, or carefully, when he was at the counter
   - liquor being served around the bar, smell of alcohol in the air
   - Jones had no opportunity to carefully examine the colour of Watkins’ eyes, and there is a reasonable possibility that Watkins’ eyes were not normally clear.

2. The bump with Stojkowska, however it occurred, was not significant enough to indicate intoxication, from Jones’ perspective:
   - narrow space
   - other people
   - Jones’ perception was that Stojkowska bumped into Watkins
   - near loss of balance is a natural result of a bump
   - not necessarily indicating intoxication
   - the bump was not so significant or obvious: police did not see it.

Having chosen your case theory and prepared the final address by setting out all the available arguments in support of your case, and identifying all the facts that support each argument, you are now in the best position to order and prepare:

- the evidence in chief to support your arguments;
- cross-examination:
  - to elicit further facts or add emphasis to support your arguments, and/or
  - to discredit evidence that contradicts your case and argument;
- an opening that will persuasively introduce your case, limit the scope of the disputed issues, and defuse the opponent’s case; and
- argument about evidentiary issues.
Each of these steps, and the method of preparation for its performance, is described in the chapters which follow.

THE PHYSICAL PROCESS OF PERFORMANCE PREPARATION

The method of performance preparation will differ from person to person. Some people will write out what they intend to perform; others will make brief notes, use diagrams, highlight passages of text, or use other methods.

The important point to remember is that you prepare to perform; you do not perform your preparation. You perform on the basis of your preparation.

PREPARING AND USING NOTES

During the earlier steps of preparation and in the process of preparing your case theory and deciding what to do, you will produce notes such as chronologies, lists and propositions in argument.

These are not the notes that will assist you during your performance in court, because the court performance is not a presentation of your preparation.

Notes must be prepared as triggers to assist you during your performance. They must be:

- brief
- clearly set out
- easily referred to at a glance, and should
- include clearly identified references to documents or other matters to be referred to during performance.

Use of notes during the performance should be minimal and they should be used only as a prompt when necessary. There should be no reading of notes, although in a complex case, notes may be necessary for details such as figures, tests or dates. Performance without notes is best, particularly when dealing with the basic story of your case and the main arguments that you wish to advance.

ORGANISING YOUR MATERIAL

At trial you must have all of your materials well organised and readily accessible. This may be done by preparing a trial notebook or folder, clearly indexed and tabbed with headings such as:
CHAPTER 2: PREPARATION AND ANALYSIS

- indictment (or statement of claim)
- particulars (or pleadings)
- exhibit lists
- list of authorities
- chronology
- performance notes for each stage of the trial.

Such a notebook should be kept separately from other materials, especially if the materials are voluminous, as in a complex case.

Thorough preparation, as described, will help you to:

- significantly reduce performance anxiety
- present with confidence
- be more creative in your style because you know what to do
- communicate more effectively
- gain the respect and confidence of the judge and jury
- be a more credible advocate
- impress your clients and those who brief you.

The importance of preparation and the amount of time that must be devoted to it are encapsulated in an American advocacy teacher’s comment: ‘One hour of preparation for every minute on your feet.’
To be effective as an advocate both in preparation and in court, you must know the rules of evidence relevant to your jurisdiction. Some evidentiary issues can be anticipated in preparation, but others can arise quickly, when there is no opportunity to research and prepare.

This chapter does not aim to teach the rules of evidence. While there are several references to the rules of evidence and illustrations of how those rules are applied, the rules and practices differ between jurisdictions. There is now a trend towards uniform evidence law in Australia, but not all states have adopted it.

This chapter will help you to:

- understand the cycle of evidence
- identify evidentiary issues that commonly arise
- understand when and how to make submissions about admissibility before and during a trial
- argue about the form and fairness of questions.

You must distinguish between admissibility of evidence and the weight of evidence. Courts will not consider evidence that is found to be inadmissible. However, once evidence is admitted, the court will consider its weight or probative value, that is, whether the court should rely on the evidence.

During preparation you must:

- consider evidentiary issues apparent from the materials
- assess the admissibility of potential evidence on both sides
- prepare to argue about the admissibility of evidence
- consider which evidentiary issues should be dealt with before trial.
Evidentiary issues typically arise in relation to:

- relevance
- admissibility
- form of questions
- fairness.

Common admissibility issues include:

- hearsay and its exceptions in jurisdictions where the proposed uniform evidence legislation does not apply
- opinion evidence
- privilege
- confessions
- identification evidence
- similar fact evidence
- propensity evidence
- res gestae
- discretionary exclusions
- statutory exclusions
- evidence that can be adduced only with leave of the court.

You might make submissions about the admissibility of such evidence:

- on a voir dire in which there are evidentiary and legal issues before or during trial, or
- by making or answering objections during the course of a trial.

A question may be objectionable if the form of the question is:

- leading
- argumentative
- compound or multiple
- a comment or statement.

A question may also be objectionable as unfair if it is:

- misleading, ambiguous, confusing, or unintelligible
- harassing, intimidating or oppressive
- repeated if it has already been asked and answered
- an inappropriate conclusion from evidence already given
- vague or lacking content about the subject matter
- a misstatement of evidence already given
- asking for speculation or a guess
- hypothetical, except in the case of experts.
Chapter 3: Evidence in Action

Some further common evidentiary issues include:

- dealing with a hostile witness
- refreshing a witness’s memory
- impeaching the credibility of a witness
- dealing with prior inconsistent statements
- dealing with prior consistent statements
- using the principle of judicial notice
- tendering documents or other exhibits
- complying with the rule in Browne v Dunn.

The Cycle of Evidence

The system of calling evidence used in court is intended to create a complete and orderly but fair cycle, to ensure that each party has every opportunity to bring out the relevant and admissible evidence it wishes to rely on.

The process cannot be a free-for-all where witnesses are at liberty to say whatever they want to say, whenever they want to say it. The system requires a disciplined and controlled process. The court relies on the advocates’ knowledge of what is relevant and admissible. The advocates are therefore expected to exercise control over what is adduced in evidence.

The cycle of evidence is designed to ensure that:

- during evidence in chief, all relevant and admissible evidence is given;
- during cross-examination, the witness and his or her evidence can be discredited or accredited, or additional evidence adduced under the control of the cross-examiner by leading questions.

The cross-examiner is entitled to confine the witness to answers to specific questions.

During re-examination, material raised in cross-examination can be clarified, completed or explained. Because leading questions are permitted in cross-examination, and the witness is confined to answering only the questions that are put, the process would not be fair without the opportunity to re-examine.

Evidence sought to be adduced in re-examination must be relevant and admissible.
With leave, further examination in chief of a witness can be permitted, and the cycle of evidence begins again with respect to that further evidence.

**SOME EVIDENTIARY ISSUES INVOLVING QUESTIONS OF LAW**

It is important to understand the principles behind the rules of evidence, and the application of the rules, even when appearing before tribunals which are not bound by the rules of evidence. Such understanding enables you to argue about the admissibility and weight of evidence in court, and about the weight of evidence in a tribunal.

**RELEVANCE**

The court will consider evidence only if it is relevant. Relevance is a matter of law, which is decided by the court.

Evidence is admissible if it is relevant to:

- the issues in dispute, such as the elements of the offence or claim, or
- a fact relevant to a fact in issue in dispute, or
- the credibility of a witness

and if it is not excluded in the judge’s exercise of discretion.

**ILLUSTRATION**

For instance, the following circumstances are relevant to the facts in issue:

- Watkins’ behaviour before and after he entered the bottle shop: relevant to intoxication.
- What Watkins had on him before and after he entered the bottle shop: relevant to supply.
- Watkins’ proximity to Jones in the bottle shop, and Watkins’ behaviour before and after entering the bottle shop: relevant to Jones’ knowledge that Watkins was intoxicated.

The following circumstances are relevant to credibility:

- Stojkowska’s application for a liquor licence, and the objections to it: relevant to possible bias against the hotel on the part of Stojkowska.
- Jones’ interest in the outcome of the case: relevant to Jones’ credibility, as his job may depend on it.
HEARSAY AND ITS EXCEPTIONS

At common law, an out-of-court statement is excluded as hearsay if it is tendered to prove the truth of the facts contained in it. This is because the source of the information cannot be tested.

**ILLUSTRATION**

Watkins’ statement ‘I tricked Danny again’ is an out-of-court statement and would hence be hearsay if it were used to prove the truth of its content, that is, to prove that Watkins had in fact tricked Danny again.

Is the statement relevant to prove anything else? If not, then it is inadmissible, unless it falls within an exception to the rule against hearsay.

See further the *voir dire* illustration below.

The continuing legislative trend is to abolish the strict exclusionary rule and allow the admission of hearsay if the source is sufficiently reliable.

In jurisdictions where the common law rule remains in force, there are many exceptions, such as admissions against interest. See the chapters on the exceptions to hearsay evidence in J. D. Heydon’s *Cross on Evidence*,\(^1\) or Gans and Palmer’s *Australian Principles of Evidence*.\(^2\)

Self-serving statements, such as ‘I told my neighbours that I didn’t set fire to my car’, are inadmissible, if the issue is whether the witness set fire to his car. However, statements made by a person under questioning which are part admissions and part self-serving statements or denials, in response to allegations, are admissible as part of the narrative and in the interest of fairness.

For example, a person being questioned about an assault could say that he was present on the occasion and that he struck the victim. Those are admissions. It would be unfair to exclude the next statement, that the striking was in self-defence, and so that statement, which is self-serving, would be admissible as part of the narrative.

**OPINION EVIDENCE**

Lay witnesses are permitted to give evidence of facts in their direct knowledge, based on the perception of their senses. For example: ‘I saw a blue motor car enter the intersection against the red light’; ‘I heard the screech of brakes’; ‘I smelt the burning rubber’.

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\(^1\) (7th edn), Butterworths, Sydney, 2004.

Lay people are not permitted to give opinion evidence because it is the function of the court, not the witness, to draw relevant inferences or reach conclusions based on the witness's observations. For example, it is the court’s role to decide why the accident occurred or who was at fault.

In some circumstances, lay witnesses may be allowed to give limited opinions about matters of common understanding, knowledge and experience, such as assessing speed or intoxication, or identifying people. Such statements are more impressions than they are opinions of the kind given by expert witnesses.

**ILLUSTRATION**

Stojkowska and the police form the opinion that Watkins was drunk. They would be entitled to give evidence of their impression that Watkins was drunk.

However, evidence must also be led of the observations on which Stojkowska and the police based their opinions.

**EXPERT EVIDENCE**

Unlike the lay witness, the expert witness may give evidence of an opinion, and must give evidence of the basis for it. This will include information relied on, the methodology used, tests and investigations conducted, and the reasoning process that led to the opinion.

Expert evidence is admissible only if the opinion is outside the ambit of normal human knowledge and experience. Also, the opinion must be in a field of recognised and specialised knowledge or learning.

Expert evidence is important because it provides the court with the basis for making findings of fact in areas that are beyond the knowledge and understanding of lay people.

Before the expert is permitted to give evidence of an opinion, he or she must qualify to express such an opinion by reason of training or experience. The opinion must be limited to issues within his or her area of expertise.

Such an opinion is treated as part of the evidence: the court assesses and may accept or reject it like other evidence. Once the expert evidence becomes admissible the question of its weight is for the tribunal of fact, which is not bound by the opinion. The court cannot substitute its own expert opinion because it cannot properly reach one without the assistance of expert evidence.
Thus, the expert opinion usually becomes part of the evidence that the court considers in reaching its final factual conclusion.

**EXPERT REPORTS**

Experts will usually provide reports to the party calling them, which set out their qualifications, involvement, investigation, methodology, opinion and reasons for it. Most rules of court in civil proceedings now require these matters to be disclosed by the expert in the report.

Generally, the evidence of the expert is what is said in court. However, in some civil proceedings there are rules that require written reports to be provided, exchanged and treated as evidence in chief.

Reports or any documents created by the expert which are relevant to the opinion expressed may be used by the opposing party in cross-examination.


**PRIVILEGE**

*Privilege against self-incrimination*

The common law privilege against self-incrimination allows a witness or party to a criminal or civil case to refuse to answer questions or produce documents that tend to incriminate them, that is, to expose them to criminal conviction or other penalty.

The witness or party must establish some reasonable grounds for the claim of privilege.

The privilege has been modified by statute in most jurisdictions, not in courts but in proceedings such as Royal Commissions and inquiries. In such cases, a witness can be compelled to answer questions, but usually those answers cannot be used in criminal proceedings if the witness relies on the cover of privilege.

*Legal professional privilege*

Confidential communications between a lawyer and client which have been created for the dominant purpose of legal advice, or actual

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or contemplated legal proceedings, are protected by the client’s legal professional privilege. The privilege is that of the client, not the lawyer, and may be waived by the client.

This extends to documents exchanged between either the lawyer or the client and third parties for the purpose of actual or contemplated litigation.

There are several exceptions to the privilege and many instances where it will be deemed to have been waived.

**ILLUSTRATION**

Legal professional privilege would protect Jones from having to disclose what he told his lawyers, despite having made a statement to the police.

If Jones’ lawyer writes to an expert setting out his client’s instructions, then the privilege is maintained. It would be waived if the expert was called to give his or her opinion in evidence based on the information he or she received.

**CONFESSIONS**

Admissions or confessions made out of court are admissible under an exception to the rule against hearsay, as admissions against interest.

However, in criminal proceedings, courts will exclude admissions and confessions from evidence if they are involuntarily made, for instance as a result of inducement or oppression.

Courts also have a discretion to exclude confession or admissions made in circumstances where it would be unfair to the accused or against public policy for them to be admitted. For example, where a confession is obtained during unlawful detention, or some other unlawful or unfair means, it could be excluded.

Some statutes also require certain procedural steps, such as recordings, to have been taken at or after the time of admission before any confession can be admitted.

**ILLUSTRATION**

The prosecution will allege that Jones made an admission to Stojkowska about supply. Illustrations of the issues relevant to exercising the discretion to exclude this evidence are considered below under ‘voir dire’.
IDENTIFICATION

In criminal proceedings, identification evidence can be excluded if the evidence is so inherently unreliable that its prejudicial effect outweighs its probative value. Once identification evidence is admitted, its weaknesses must be considered by a judge sitting alone, and must be highlighted to the jury.

Various principles have developed to exclude identification based, for example, on a single photograph shown to the identifying witness, or an identification in court, known as a ‘dock’ identification.

SIMILAR FACT EVIDENCE

Similar fact evidence is generally used to identify a person as the same actor on different occasions. This frequently occurs where an accused is alleged to have used the same specific technique on different occasions.

For example, if a person can be shown to have unlawfully entered a house by a specific pretext and method, the evidence of the use of the same or a similar method can be used to identify that person as the actor on other occasions.

PROPENSITY EVIDENCE

Propensity evidence involves the attempt to prove that a person acted in some way on a previous occasion, from which the court may infer that he or she acted in the same way on the occasion in question at the trial.

The potential overlap between similar fact evidence and propensity evidence, and the purposes for which they can be used, can pose difficult questions requiring careful analysis of the evidence and current law.

RES GESTAE

The doctrine of res gestae is used to characterise evidence which becomes admissible because it forms ‘part of the story’ needed to understand other parts of the evidence.

The doctrine is chiefly used as an exception to the rule against hearsay, on the basis that the evidence sought to be admitted is reliable, as it was made proximate in time to the events, and its purpose is to explain those events.
ILLUSTRATION

Watkins’ statement ‘I tricked Danny again’ could arguably be considered an exception to the hearsay rule as forming part of the *res gestae* to explain Watkins’ conduct, which is relevant to the allegation that Jones knew Watkins was intoxicated. It may explain conduct such as Watkins pausing before entering the bottle shop and appearing steady in the bottle shop.

CHARACTER EVIDENCE

Evidence of the good character of the accused may be given:

- at trial, where it is limited to good reputation and the absence of previous convictions.

  This lays the foundation for the direction to the jury that good character can be used in the accused’s favour in deciding whether he or she committed the offence and whether his or her evidence should be accepted;

- in a plea in mitigation, where additional details of the accused’s activities, contributions and attributes can be given by character witnesses.

  These can be mitigatory factors in sentencing.

DISCRETIONARY EXCLUSIONS

Courts in criminal proceedings have the discretion to exclude evidence on the basis of unfairness if:

- the evidence has been illegally or improperly obtained, or
- the prejudicial effect of the evidence on the accused would outweigh its probative value.

EVIDENCE EXCLUDED BY STATUTE

Some evidence is excluded specifically by statute.

For instance, in all jurisdictions, the prior criminal history of the accused in a criminal proceeding is inadmissible, unless character is put in issue by the accused, or an attack is made on the character of a prosecution witness which has no connection to the issues in the case. See, for example, *Crimes Act 1958* (Vic), s 399(5).
EVIDENCE THAT CAN BE ADDUCED ONLY WITH LEAVE OF THE COURT

In some situations, statutes require a party to obtain leave before leading evidence relevant to particular issues.

For instance, this applies to the prior sexual history of the complainant in sexual offences, under Evidence Act 1958 (Vic) s 37A.

WHEN TO MAKE SUBMISSIONS ABOUT ADMISSIBILITY

Good advocates will anticipate admissibility issues, and deal with them before or at the start of any trial. This will help the efficient running of the trial.

It is helpful to prepare a written summary of all objections before the hearing, identifying:

- the evidence that you will argue is inadmissible
- the legal basis for your objections.

This can be given to your opponent and to the court before the hearing, and provides an efficient structure to help the court consider the arguments.

ARGUING FOR OR AGAINST THE ADMISSIBILITY OF EVIDENCE ON A VOIR DIRE

A voir dire is a procedure for determining the admissibility of evidence.4

A voir dire is a procedure:

- before or during a trial
- to enable a ruling to be made
- as to whether evidence is admissible
- and if admissible, whether it should be excluded in the exercise of discretion.

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The party who seeks to exclude evidence has carriage of the proceeding on a *voir dire*. Generally, the onus is on the party who seeks to exclude the evidence to establish that it is not admissible.

In criminal cases where a confession is challenged, and the question of voluntariness is raised, the prosecution must establish that the confession was voluntary. In such a case, the prosecution has carriage of that issue. If the confession is shown to be voluntary, it is for the accused to show that it should nevertheless be excluded in the exercise of discretion.

Both parties can call evidence and make submissions.

**ILLUSTRATION**

The prosecutor has informed the defence that she does not intend to lead evidence of Watkins’ statement ‘I tricked Danny again’. She also said that she objects to its being brought out in cross-examination. The defence wants to rely on it.

The defence counsel has informed the prosecutor that he wishes to argue against the admissibility of the alleged admission by the accused to the witness Stojkowska.

Parties have agreed to ask for rulings on those issues on a *voir dire*.

**Prosecution position about Watkins’ comment**

- What is said is uncertain: ‘He mumbled what sounded like “I tricked Danny again”’.
- The comment was made by an intoxicated man and is unclear.
- It was made after the event in question.
- The comment is vague, as the determination of its meaning is speculative.
- At most, if a meaning is given to it, then it is being tendered to prove the truth of what is said.
- It is in the nature of hearsay, because it is an out-of-court statement at which the accused was not present.

**Defence position about Watkins’ comment**

- It is open to the jury to accept the police evidence of what was said.
- The comment is close in time to the relevant events and relates to them.
- It was made by a person who was involved in those events.
- The words are relied on as part of the conduct relating to the event and explaining its nature.
- Other evidence of the event both gives meaning to and receives meaning from that comment.
- The comment has probative value because it helps to explain the nature of the transaction, that is, Watkins’ conduct and its relationship to the element of Jones’ knowledge.
- It would be unfair to exclude it.
## Defence position about the admission

- The accused denies making the admission.
- Even if Stojkowska’s evidence is accepted, it is not an admission of knowledge that Watkins was intoxicated because it is qualified by the word ‘if’.
- It is equivocal as an admission about sale.
- The words ‘I shouldn’t have’ do not necessarily admit that the accused made the sale.
- The words are said after the police asserted in a compound question that he made a sale (Question 7 in the record of interview).
- The accused has no memory of the sale and may have simply speculated about what he should not have done, assuming that he did it.

## Prosecution position about the admission

- The prosecution accepts that it is not an admission of knowledge.
- It is open for the jury to conclude that the accused knew that he supplied liquor.
- The words are inconsistent with some of his assertions to the police that he did not sell the bottle (Question 12 in the record of interview).

### Voir Dire on the Admissibility of Expert Evidence

The admissibility of proposed expert evidence can be challenged on the grounds that:

- there is not an accepted field of expertise relevant to the opinion
- the witness does not have the necessary training, skill or experience to give expert evidence
- the evidence is within common knowledge.

In a *voir dire* where the expertise of the witness is challenged, the following background information about the proposed expert witness may be relevant:

- occupation and length of time in occupation
- place of employment and current title
- current duties
- areas of specialisation
- academic qualifications and research
- professional licence or certification
- past relevant work experience
- publications and teaching
- membership of professional societies and organisations
- awards or other recognition received.

These questions remain relevant to the weight of the evidence once it is admitted, particularly where there are conflicting expert opinions.
MAKING AND ANSWERING OBJECTIONS DURING A TRIAL

Each party may object to any piece of evidence if they have a basis for arguing that it should not be admitted.

When making an objection during the trial, you must identify the nature of the objection before you make the arguments to support it. The court may rule there and then, or hear from the other side. In civil cases, the court may hear the evidence objected to, subject to later argument about its admissibility.

To make an objection, you should:

- stand up, and your opponent should sit down
- say that you object to the question or answer and give your basis for the objection
- sit down while your opponent is responding to it.

Opposing counsel should wait until the objection is made and the reason articulated before responding.

ILLUSTRATION

Cross-examination of Constable Bier

Defence: When you identified yourself to Watkins, he said something to you, didn’t he?

Constable Bier: Yes.

Prosecutor: [Anticipating the next question, stands, and Defence sits] Your Honour, I object to my friend if she is seeking to lead hearsay evidence of Watkins’ comment. [Prosecutor resumes seat.]

WHEN NOT TO OBJECT

Objections should be based on the substance or form of the question, and should not become a personal attack on or criticism of counsel who is attempting to lead evidence.

It is unethical to object unless there is a basis for the objection (for instance, objecting merely to interrupt is inappropriate).

You do not have to object unless it suits your purpose.

In a jury trial, you should consider whether the objection is appropriately
made and argued in the presence of the jury. If you wish to argue in the absence of the jury, you should state that:

- you have an objection to the evidence
- the objection raises a question of law, and
- it may be appropriate for the judge to hear it in the absence of the jury.

OBJECTING TO THE FORM OF A QUESTION

Leading questions

You may object to the form of a question where it is leading, in evidence in chief or re-examination. The rules of evidence prohibit the asking of leading questions in evidence in chief, particularly as to contested facts.

Argumentative questions

Questions must be directed to eliciting factual information from the witness. Argumentative questions are phrased in a way that puts an argument or a conclusion to the witness.

ILLUSTRATION

Cross-examination of Jones

An argumentative question would be:

Q  Mr Jones, do you think you gave the police a consistent story?

A non-argumentative way to achieve the same result would be:

Q  When the police questioned you in the bottle shop, you told them you could not remember selling Watkins anything, didn’t you?

A  Yes.

Q  During the interview at the police station the following morning, you told the police ‘I never sold him anything’, didn’t you?

A  Yes.

That series of questions provides you with the facts to support an argument in your closing address that the witness has been inconsistent, but you have not asked the witness’s opinion or been argumentative.

Compound or multiple questions

In cross-examination, the witness should be asked questions with only single propositions, and only one question at a time.
If a witness answers a leading question by ‘Yes’ or ‘No’, where the question has two or more propositions in it, the court does not know which proposition the answer relates to.

**ILLUSTRATION**

**Cross-examination of Constable Bier**

*Impermissible form:*

Q Constable Bier, you did not see Mr Jones give anything to Watkins, or see anything below their heads and shoulders in the bottle shop, did you?

*Permitted form:*

Q From your position in the car, you could see into the bottle shop; is that correct?

A Yes.

Q You could not see below the heads and shoulders of Mr Jones and Watkins, could you?

A That’s correct.

Q You did not see Mr Jones give anything to Watkins, did you?

A No, I didn’t.

**Comments or statements that are not questions**

Your role in examination in chief and cross-examination is not to comment, but to ask questions or put propositions that elicit factual information from the witness.

**OBJECTING TO THE FAIRNESS OF QUESTIONS**

You may object to a question as unfair where the question is:

- misleading, ambiguous, confusing, or unintelligible
- harassing, intimidating or oppressive
- repeated, if it has already been asked and answered
- an inappropriate conclusion from evidence already given
- vague or lacking content about the subject matter
- a misstatement or misquotation of evidence already given
- asking for speculation or a guess.

See further the many examples given by Bernie Gross QC, ‘Making and Meeting Evidentiary Objections’, in *Introduction to Advocacy*. Note also section 41 of the *Evidence Act 1995* (NSW).

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5 NSW Young Lawyers Continuing Legal Education Seminar Papers, 16 September 2006.
THE RULES OF EVIDENCE IN SPECIFIC ADVOCACY TASKS

DEALING WITH A HOSTILE WITNESS

At common law, where a witness you have called displays an intention not to give full and truthful evidence, you may apply to cross-examine him or her as a hostile witness.

You must establish first by non-leading questions what evidence the witness is giving in court, and you may then apply to cross-examine the witness.

The court will:

- require you to establish that the witness is not being truthful, or is not prepared to give evidence consistent with a previous statement, and
- assess the demeanour of the witness to determine whether the reason for what the witness is doing is hostility to the party calling him or her.

The proposed uniform evidence legislation dispenses with the formal requirement of showing that the witness is hostile, and provides that you may cross-examine your own witness during evidence in chief where the witness:

- gives evidence that is not favourable to your client
- does not appear to be making a genuine attempt to give evidence on a matter about which he or she could reasonably be supposed to have knowledge, or
- gives evidence that is inconsistent with a prior statement.

See for example section 38 of the Evidence Act 1995 (NSW).

REFRESHING WITNESS MEMORY

At common law, when you apply to the court to allow a witness to refresh his or her memory from a written document, you must establish that:

- the witness has exhausted his or her recollection of the event or conversation
- the witness made or acknowledged a written note or statement about the event
- the statement contains the witness’s own recollection of the event
the statement was made when the event was fresh in the witness’s memory; for example it was made contemporaneously with the event; the statement would help the witness to refresh his or her memory, and the statement is available.

After this process, either under the common law or the uniform evidence legislation, you may apply to the court for leave for the witness to refresh memory from those notes.

The proposed uniform evidence legislation specifies the matters to be taken into account, among others, in granting leave to refresh memory. These are:

- whether the witness will be able to recall the fact or opinion adequately without using the statement, and
- whether the statement was written (or found by the witness to be accurate, in the case of a statement prepared by others) when the events were fresh in the witness’s memory.

See for example section 32(2) of the Evidence Act 1995 (NSW).

**ILLUSTRATION**

**Leading evidence from Constable Bier**

Prosecutor: After Watkins left the bottle shop, where did he go?
Bier: I don’t recall.
Prosecutor: What do you recall happening after Watkins left the bottle shop?
Bier: I really can’t remember offhand.
Prosecutor: Is there anything that may refresh your memory?
Bier: Yes, I made a written statement.
Prosecutor: When did you make that statement?
Bier: The next morning.
Prosecutor: When you made the statement, how was your recollection of the events?
Bier: It was clear in my mind.
Prosecutor: Would it assist your recollection to read that statement?
Bier: Yes, it would.
Prosecutor: Where is that statement?
There is no consistent authority as to whether the witness who refreshes his or her memory should simply read the notes and then give oral evidence from memory, putting the notes to one side, or alternatively whether the witness may read into evidence the relevant part of the statement. The proposed uniform evidence legislation allows a witness to read from the statement with leave of the court (see for example section 32(3) of the *Evidence Act 1995* (NSW)).

In practice, particularly where refreshing memory is about a lengthy conversation or set of events, the witness will be entitled to read it aloud or to continue referring to it.

Your opponent is entitled to look at any document used to refresh memory, and to cross-examine on it. If the document covers more than what the witness read to refresh memory, and your opponent uses the document to cross-examine about other evidence in the document (that is, material that was not used to refresh memory), then you may require your opponent to tender the document.

**IMPEACHING THE CREDIBILITY OF A WITNESS**

Counsel are not permitted to attack the credibility of one witness through another witness.

**ILLUSTRATION**

You would not be permitted to ask Constable Bier: ‘Ms Stojkowska would like to get the hotel into trouble, wouldn’t she?’ This is cross-examining Bier directly about Stojkowska’s credibility.
For further details, see Chapter 6, ‘Cross-examination’.

IMPEACHING A WITNESS WITH A PRIOR INCONSISTENT STATEMENT

Before you can cross-examine a witness about the content of a prior inconsistent statement, you must bring the occasion of the making of the statement to the witness's attention.

If the prior statement is in writing, you may produce the document or give enough particulars of it to satisfy the court that the witness was aware of the document you were referring to.

ILLUSTRATION

Assume that Stojkowska has given evidence in chief that she heard the cash register bell ring when Watkins was at the counter of the bottle shop.

**Cross-examination of Stojkowska**

Q  You made a statement to police on 24 December last year?
A  Yes.

Q  Following your visit to the bottle shop that night?
A  Yes.

Q  The events of that evening were clear in your mind when you made the statement?
A  Yes.

Q  You told the police the truth in your statement?
A  Yes.

Q  You included everything that you thought was relevant?
A  Yes.

Q  In your statement, you did not tell the police about hearing the cash register bell ring, did you?
A  No.

Where the witness denies making the prior statement or disputes the precise wording, you may produce the statement to the witness. You may call evidence about the making of the prior statement only where it is relevant to an issue in dispute or relevant to a fact relevant to the issue.
USING PRIOR CONSISTENT STATEMENTS

If your opponent seeks to impeach your witness with the suggestion that the witness’s evidence is a recent invention, you will be permitted to use a prior consistent statement to rebut such a challenge.

MAKING USE OF THE PRINCIPLE OF JUDICIAL NOTICE

Once a fact has been established under the principle of judicial notice, there is no further need to prove it in evidence.

**ILLUSTRATION**

The court would take judicial notice of the fact that Christmas Eve is on 24 December, or that Boxing Day is the day after Christmas.

In argument, you would submit that when a witness gave evidence that she made a statement on Christmas Eve, the court should take judicial notice of the fact that Christmas Eve is 24 December.

TENDERING DOCUMENTS OR OTHER EXHIBITS

Documents must be tendered if they are to be considered as evidence by the court. Before they are tendered, they must be proved.

To prove a document, generally a witness must swear to having been the author of it or having sufficient knowledge of it, and affirm its accuracy. This is to establish its provenance.

Refer to the illustrations in Chapter 5 on examination in chief.

In order to tender a document, use the following phrase after having proved it: ‘I tender that …’ (not ‘I seek to tender …’).

It is also possible to use aids or documents that have been prepared to assist the court. For instance:

- setting out the blood analysis evidence from a murder scene in a schedule which identifies different blood types found in different places
- preparing graphs, charts or diagrams, provided that the information in them is established by the evidence. For example, charts illustrating money movements must first be proved by other documents.
COMPLYING WITH THE RULE IN BROWNE V DUNN

The rule in Browne v Dunn is a rule of fairness, intended to give the witness and your opponent an opportunity to deal with contradictory evidence. The rule applies to contradictory facts, not to inferences, conclusions or opinions.

If you intend to call evidence of significant facts that contradict the witness’s story, then you must raise those facts with the witness during cross-examination.

For example, if a witness you are cross-examining gives evidence that your client was seen committing some act at a specific time and place, and your instructions are that the witness was not there and could not have seen such an act, then you must draw the witness’s attention to that contradictory evidence in cross-examination.

If you intend to argue in closing that a witness has made an honest mistake, for example where a witness describes a conversation inconsistently with your evidence, you must confront the witness with your version of the conversation. However, you need not specifically suggest to the witness that he or she has made a mistake. Whether or not the witness has made a mistake is a conclusion, and a matter for the court to determine.

Failure to comply with the rule is not a proper basis for an objection. The effect of failure to comply with the rule is that the decision-maker is entitled to place less weight on the version of the story given by your witness. One reason for this may be an assumption that the evidence was invented by the witness in the witness box, as the contradictory facts of which he or she gave evidence were not put to the opposing witness in cross-examination.

In complying with the rule, it is not effective merely to say ‘I put it to you that …’, and especially not as a series of propositions at the end of the cross-examination. A more effective way is to consider the best time during the cross-examination to confront the witness with a contradictory proposition of fact.

This is best done when you have laid a foundation by establishing a significant basis for putting the opposite position. This is when the tribunal is most likely to consider that the contradictory facts are preferable, or that they at least create a realistic possibility.
ILLUSTRATION

Cross-examination of Stojkowska

Q You have applied for a liquor licence?
A Yes.
Q It has been objected to by the police?
A Yes.
Q And it has been objected to by the Royal Oak Hotel?
A Yes.
Q You would like to get your liquor licence despite these objections?
A Of course.
Q You know that if the hotel sells liquor to an intoxicated person, it may lose its liquor licence?
A Yes.
Q That would put you in a better position in your application?
A I suppose so.
Q If you help the police, that would also help you in your application?
A I don’t know.
Q When you spoke to Daniel Jones last Christmas Eve, you had no reason to remember exactly what he said to you?
A No.
Q You did not take a note of what was said at the time?
A No.
Q That night you went to the police station?
A Yes.
Q No one asked you to go there?
A No.
Q You told the police what Mr Jones had said to you?
A Yes.
Q You did that to help yourself?
A No, I thought it was the right thing to do.
Q What you told the police is not what Jones said to you, is it?
A Yes it is.

This illustrates laying the foundation for putting the contradiction to Stojkowska at a time when the preliminary propositions provide the best basis for the court to doubt her evidence because of bias or self-interest.
The importance of dealing effectively with evidentiary issues and the diverse ways in which such issues can arise means that the law of evidence is an area with which advocates must be thoroughly familiar, regardless of the jurisdiction in which they practise.
An opening address is:

- a simple, narrative outline of your case
- consistent with your case theory
- told as a persuasive story
- directed to a specific legal result
- without argument.

An opening is a powerful forensic tool because it is the first presentation of your case to the decision-maker.

You should use an opening address whenever possible, whether appearing for the party that bears the onus of proof—that is, prosecution or plaintiff—or for the defendant.

Traditionally in criminal cases, the defence opened its own case at the close of the prosecution case. Since the 1990s, the practice has developed of allowing the defence to open its case at the end of the prosecution opening.

The law and practice vary from state to state. In Victoria, Section 13 of the *Crimes (Criminal Trials) Act 1999* requires the defence to ‘respond’ to the prosecutor’s opening in accordance with Section 7(2), that is, to identify ‘the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken’.

It is essential for defence counsel to avail themselves of the opportunity to use this powerful forensic tool, and to open before the prosecution begins its examination in chief. This will:
allow the jury’s attention to be refocused to the defence case before the prosecution evidence is led, and avoid having to regain lost ground.

Knowing the defence case also helps the judge to make evidentiary and other rulings in the trial. In civil cases, the defence position is better known from pleadings. Nevertheless, it is an advantage to open immediately after the plaintiff’s opening, for the same reasons as in a criminal case.

AN OUTLINE OF YOUR CASE

The opening must be a relatively brief and concise outline of your case.

It should identify the essential facts of the story.

<table>
<thead>
<tr>
<th>ILLUSTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>The prosecution opening would include these essential facts:</td>
</tr>
<tr>
<td>- The police were on duty in their car.</td>
</tr>
<tr>
<td>- They saw Watkins stumble across Wide Street to the door of bottle shop.</td>
</tr>
<tr>
<td>- Watkins paused, then entered the bottle shop.</td>
</tr>
<tr>
<td>- Watkins bumped into Stojkowska on his way to the counter.</td>
</tr>
<tr>
<td>- She could smell alcohol on him.</td>
</tr>
<tr>
<td>- The police saw Watkins approach the counter and have a conversation with Jones.</td>
</tr>
<tr>
<td>- Watkins then left with a bottle of sherry in a paper bag.</td>
</tr>
<tr>
<td>- Watkins was arrested by police on the street.</td>
</tr>
<tr>
<td>- When they arrested him, they saw clear signs of intoxication.</td>
</tr>
<tr>
<td>- After Watkins’ arrest, Stojkowska had a conversation with Jones.</td>
</tr>
<tr>
<td>- Jones admitted to her that he sold alcohol to Watkins.</td>
</tr>
<tr>
<td>- Jones told the police that he did not remember selling anything to Watkins.</td>
</tr>
</tbody>
</table>

An opening by the party going first is different from an opening by the defence.

A defendant’s advocate should not repeat the uncontested facts in the prosecution’s or plaintiff’s opening, which the court will have just heard. There is no need to set the scene and identify the actors already mentioned.

A defence opening is better made as a positive story, based on the defence’s realistic alternative theory focusing on the facts that support it.

In a criminal case, it is useful to bring out the good character of the accused as early as possible.
The defence opening might be as follows:

‘Daniel Jones has been a barman for many years and has never been convicted of any criminal offence. He has a good reputation in the hospitality industry.

On the busy Christmas Eve last year, he was serving many customers. He recalls seeing Watkins briefly but does not recall speaking to him or serving him. He denies making the comment that Maria Stojkowska attributes to him. If he did sell the bottle of sherry to Watkins, he did not know that Watkins was intoxicated. He would not have done so had he known.’

It may be appropriate for the defence to indicate in the opening that Watkins’ intoxication is not contested.

The opening may include a brief summary of your position in relation to the issues in the case; for example, it may be appropriate for the defence to indicate that it does not contest one of the elements of the offence.

It is not appropriate for the defence to make positive assertions that are inconsistent with the client’s instructions. So while the defence may wish to concede some facts—that is, to state that some of the facts are not contested, or that no issue is taken with one of the elements of the offence—it would not be appropriate for the defence to assert that Watkins was drunk or that there was a supply of alcohol.

CONSISTENT WITH YOUR CASE THEORY

As noted in Chapter 2, ‘Preparation and Analysis’, the opening is performed first, but is prepared last. Before you prepare the opening, you will have prepared:

- the case theory
- the arguments in support of it
- the final address
- the order, scope and emphasis of evidence in chief, and
- the direction of cross-examination.

This approach will enable you to prepare an effective opening, which will set the scene for your case at trial.
TOLD AS A PERSUASIVE STORY

An opening is an exercise in storytelling.

A good story will:

- be well-structured
- engage the interest of the listener by bringing people, places and events to life
- be told simply
- be communicated clearly
- be realistic and not overstated
- make appropriate use of visual aids.

The opening delivered to a judge alone may differ from an opening delivered to a jury. The differences may be about legal principles or issues, but as a fact-finder the judge is ‘just another juror’.

THE STORY WILL BE WELL-STRUCTURED

To be persuasive, the opening should be structured so that the story can be easily understood and remembered by the decision-maker.

A structured narrative of events is much easier to understand and remember than a list of facts, or merely a summary of each witness’s statement.

The structure of your opening address must:

- apply the principle of primacy (see Chapter 11, ‘Communication’), and
- relate to the legal framework of the case.

Start your opening with the story of what happened. That is what the judge or jury wants to hear first. Do not start by discussing legal principles or issues in a vacuum.

How the story is organised and told is ultimately a matter for you to choose in each case. There is no right way to do it, but it would be wrong not to consider how to do it in the most effective way.

In a complex case, in which many factual and legal issues must be communicated in an opening address, the advocate must be conscious of the ‘communication bottleneck’, where the quantity and density
of information make it difficult to be absorbed and processed by the decision-maker.\textsuperscript{1}

This bottleneck occurs because lawyers have had the advantage of thorough preparation, which the judge or the jury does not have. They are truly the ‘first-time listeners’. The risk for the advocate who delivers the opening address lies in attempting to provide too much complex information to the decision-maker too quickly. As a result, it can be difficult for the decision-maker to absorb and understand the opening.

The approach sometimes adopted of presenting the judge with a densely written opening accompanied by many volumes of materials is undesirable.

While the fundamental principles of good storytelling still apply, care must be taken in complex cases to ensure that the simple significant narrative of the case is told first, before providing more detail. In this way, the judge or jury will hear and absorb the story progressively, adding the more complex elements to the simple story that has already been told, understood and remembered.

Especially in complex cases, much of the detail is not necessary in the opening; it is more important first to capture the story of the case as a whole. How much detail has to be included is a matter for the advocate’s judgment.

A useful exercise is for the advocate to consider how to outline the case generally to a lay person in a few minutes. Such an exercise might start with the advocate formulating the initial simple story by beginning, ‘This case is about …’.

A different approach applies in a simpler case such as \textit{DPP v Jones}.

\textbf{ILLUSTRATION}

Here are some examples of how the prosecution might start its opening.

\textbf{Starting with Daniel Jones}

On the evening of 24 December last year, the defendant was working as a barman at the Royal Oak Hotel. While he was attending the counter of the bottle shop, Walter Watkins entered the store. Watkins bumped into another customer. The defendant saw Watkins, and when Watkins approached the counter, the two had a conversation. Jones sold Watkins a bottle of sherry, knowing that he was intoxicated. Watkins then left the store carrying a bottle of Mildara Cream.

\textsuperscript{1} Justice David Byrne, Supreme Court of Victoria.
Sherry. The police had been watching Watkins and Jones from their car, parked on the other side of Jackson Avenue. They arrested Watkins, who was obviously intoxicated.

**Starting with Watkins**

One the evening of 24 December last year, Walter Watkins was obviously drunk. He staggered across Wide Street towards the Royal Oak Hotel, and had difficulty making it to the other side. When he reached the kerb, he stumbled and almost fell. He paused and then entered the bottle shop. He bumped into another customer, then approached the counter and had a conversation with Jones. Jones sold him a bottle of sherry, knowing that Watkins was intoxicated. Watkins then left with the bottle of sherry from the bottle shop.

**Starting with police**

On the evening of 24 December last year, Constables Bier and Fisher were on duty, parked on Jackson Avenue opposite the Royal Oak Hotel. Constable Bier saw Walter Watkins crossing Wide Street, staggering and stumbling towards the Royal Oak Hotel. Watkins paused and entered the bottle shop. He spoke to Jones, the barman, who sold him a bottle of sherry, knowing that Watkins was intoxicated.

**Starting with Stojkowska**

On the evening of 24 December last year, Maria Stojkowska was selecting wine in the bottle shop of the Royal Oak Hotel. She saw Walter Watkins enter the bottle shop. He bumped into her on his way to the counter. He smelt strongly of alcohol. She noticed him approaching the counter and speaking to the defendant, whom she knew. She later saw the police arrest Watkins outside the bottle shop.

While each illustration starts with a narrative from the perspective of one party to the action, you will note that each narrative has primacy, location and action, and introduces other characters as the narrative unfolds.

To gain the impact of immediacy, avoid introductory formality and padding.

**ILLUSTRATION**

These types of introductory formalities should be avoided in opening:

- ‘Good morning, members of the jury.’
- ‘The accused is charged with …’
- ‘It is my function to open the case for the prosecution.’
- ‘I will outline the facts but it is the witnesses’ evidence that matters.’
- ‘As a matter of law, the elements of the offence are …’
- ‘What I say is subject to Her Honour’s directions on the law.’

The outline of your case will include a brief summary of your position on the issues in the case, stated at the end of the opening.
Where it is appropriate to identify the details of the charge, or the role of
the jury, these are better left until later in the opening, so that they can
be understood in the context of the story. The legal issues in the case will
make better sense once the narrative has been told.

It is unnecessary to refer to the elements of the offence before a judge,
unless the offence is an unusual one.

In a criminal trial, the judge will probably have explained the jury’s role
to them.

**ILLUSTRATION**

The prosecution might include a reference to the law at the end of the opening:

‘From these circumstances, you will be satisfied beyond reasonable doubt
that Watkins was intoxicated, that the defendant supplied him with alcohol,
and that at the time, the defendant knew that Watkins was intoxicated.’

In the defence opening, after referring to the facts of the case from the defence
perspective, the defence position about the issues in the case might be:

‘If Watkins was intoxicated, and if Mr Jones supplied him with the sherry,
which he does not remember, Mr Jones might not have realised that
Watkins was intoxicated.’

There is a significant risk that Jones did not realise that Watkins was intoxicated.

A prepared strong finish is also important. An effective approach is
to relate the story to the elements of the offence in a positive way, as
demonstrated in the illustration above.

**THE STORY WILL ENGAGE THE INTEREST OF THE LISTENER**

The listener should be able to visualise the events as the story is being
told. To bring the people, places and events to life, the advocate must
first visualise the story.

A good story will answer the questions:

- Who was involved?
- What happened?
- Where and when did it happen?
- Why did it happen?

You should always personalise your client and witnesses, referring to
them by their names. You should refer to opposing witnesses in a more
objective way.
THE STORY WILL BE TOLD SIMPLY

To make the story simple, include the important facts but do not give the whole detail of the case in the opening.

Your opening address is designed to work with evidence in chief, during which you will lead all the detail of your story from the witnesses.

By leaving out some details from your opening, and then leading them in evidence in chief, you are progressively informing the listener. This will have the effect of:

- maintaining the interest of the listener in the story during evidence in chief, and
- creating the impression of corroborating your opening address, as each witness gives evidence in chief in detail, which fits the more general story told in the opening.

Limiting the detail in your opening will also have the benefit of avoiding potential discrepancies between what is said in opening and the evidence given during examination in chief.

ILLUSTRATION

In opening for the prosecution about Stojkowska’s evidence, you might include:

‘Watkins bumped into Ms Stojkowska and she concluded that Watkins was drunk.’

Leave out detail such as:

‘Stojkowska was very close to Watkins and when he bumped into her, he smelt strongly of alcohol.’

In opening for the prosecution about what the police saw Watkins do, you might include:

‘Constable Bier saw Watkins stumble across the intersection, pause and enter the Royal Oak Hotel bottle shop. He saw Watkins speak to the defendant and leave.’

Leave out detail such as:

‘Constable Bier saw Watkins first through the rear view mirror and then through the side window of the police car.’
THE STORY WILL BE COMMUNICATED CLEARLY

For maximum effect, your opening should be a good piece of communication. That is, it should cater to the needs of the listener.

It must be presented in a manner and at a pace that enables the listener to hear, understand and absorb the story.

You should be sufficiently familiar with the story to present it without notes, or with limited use of notes, so that you can engage the listeners when you speak by talking to them instead of reading.

You should use simple language. Simple words and phrases have an immediate impact on the listener because they make it easy for the listener to understand, visualise and remember the story. Simple language is effective in creating ‘word pictures’.

ILLUSTRATION

Avoid complicated and superfluous language and sentences, such as:

‘On the evening in question, the police were performing their duties in a police vehicle parked in the vicinity of the corner of Wide Street and Jackson Avenue. They were seated in the stationary vehicle from which they had the ability to observe activities inside the bottle shop of the Royal Oak Hotel and the surrounding streets. From this location, Constable Bier made observations of Watkins’ activities both outside and inside the bottle shop.’

This can be more simply expressed as follows:

‘On the evening of 24 December last year, the police were on duty in their police car, parked on Jackson Avenue, opposite the Royal Oak Hotel. From there, Constable Bier saw Walter Watkins attempting to cross Wide Street, and entering the hotel bottle shop.’

THE STORY WILL BE REALISTIC AND NOT OVERSTATED

Another factor in the power of the opening narrative is that the listener tends to measure other versions of the story against the one first heard.

A realistic story clearly told leaves a strong impression on the listener.

Avoid overstating or exaggerating the evidence that will be given. This may damage your credibility because the detail in the evidence, once given by the witness, will not permit of overstatement or exaggeration.
AdvoCACy MAnuAL

**ILLUSTRATION**

It would be overstating or exaggerating the evidence to say in opening: ‘The police had a clear view into the bottle shop.’

The police could see only the heads and shoulders of the defendant and Watkins. Their view was partially blocked by advertising on the hotel window.

An understatement is often more effective, as it emphasises the strength of the evidence.

**ILLUSTRATION**

The defence opening about Stojkowska’s interest in the case might be properly understated as: ‘Ms Stojkowska, who had her own interests at heart, spoke to …’

THE STORY WILL BE ENHANCED BY THE USE OF VISUAL AIDS

A picture is worth a thousand words. Use plans, diagrams, exhibits and other visual aids during the opening to explain events.

Relevant documents and other physical evidence can be used in an opening address with your opponent’s consent or by leave of the court. You must be able to prove the documents or exhibits in evidence.

Take time to show and explain the visual aid to the listener before describing the action in your narrative.

**ILLUSTRATION**

*Using and/or tendering an exhibit in opening address*

**Prosecution:** Your Honour, with my learned friend’s consent, may I use (or tender) a plan of the hotel and surrounding streets?

**Judge:** Does the defence consent to that?

**Defence:** Yes, Your Honour, the defence consents to the document being used (or tendered).

[Prosecution hands up the plan to the court officer, and a copy to opponent.]

**Judge:** That will be Exhibit 1, plan of Royal Oak Hotel.

**Prosecution:** Could the jury be given copies of Exhibit 1?

**Judge:** Yes.

[Prosecution hands copies to the court officer, to distribute to the jury.]

**Prosecution:** [Holding up the plan to jury and indicating locations] You can see...
the intersection of Wide Street and Jackson Avenue with the Royal Oak Hotel and its bottle shop in the corner. There is the counter. There is the door. The police car was parked here. The police could see into the bottle shop through a plate glass window that was partly covered by advertising ...

The prosecutor would then proceed to give a narrative of the events of the evening of 24 December last year.

**DIRECTED TO A SPECIFIC LEGAL RESULT**

The story should be organised and told in a way that supports the conclusions relating to the elements of the offence.

It is not enough to state that a witness will give evidence to establish an element of an offence or claim. Let the narrative do the work.

**ILLUSTRATION**

It is not enough to state in an opening:

- ‘Evidence will be given that there was a supply’ or
- ‘Evidence will be given that Watkins was intoxicated.’

In the prosecution opening to support the conclusion that there was a ‘supply’, you might relate the circumstantial facts:

> ‘Constable Bier saw Mr Watkins enter the bottle shop, walk to the counter and speak to the barman. Watkins then left the shop with a bottle of sherry, of the kind kept behind the counter, in a brown paper bag, and said “I tricked Danny again!”’

In the prosecution opening to support the conclusion that Watkins was intoxicated, you can describe the observations of the police:

> ‘The police saw Watkins staggering and stumbling. When they approached him, they noticed that Watkins smelt strongly of alcohol, had bloodshot eyes, and was slurring his words and singing in a loud and tuneless fashion.’

**NOT ARGUMENTATIVE**

The only rule of law that applies to openings is that argument is not permitted. This is because there is no point in argument before the evidence is heard.

If told as a good story, an opening can be persuasive without being argumentative. It is permissible and desirable at the end of the opening
for the prosecutor to identify the elements of the offence intended to be proved by the facts outlined. It will be desirable for the defence to identify the inadequacy of the prosecution case. Both of these things must be done without argument.

**ILLUSTRATION**

The prosecutor may say at the end:

‘From those facts, you will be satisfied beyond reasonable doubt that Watkins was intoxicated and that Jones supplied him with the bottle of sherry, knowing that Watkins was intoxicated.’

The defence may say at the end:

‘When you have heard all the evidence, you will see that if Watkins was intoxicated, and if Jones supplied the bottle to him, there is a real possibility that Jones did not notice the signs and did not know that Watkins was intoxicated.’

You descend into argument when you give reasons as to:

- why one witness is preferable to another
- why one version of events is preferable to another
- what conclusions should be drawn from the evidence, and why

**ILLUSTRATION**

**Argument as to why one witness is preferable to another**

For instance, in a defence opening, the narrative form would be: ‘Mr Jones did not admit to Ms Stojkowska that he supplied Watkins with the bottle of sherry.’

You would descend into argument if you continued: ‘The evidence of Daniel Jones will be more reliable than that of Ms Stojkowska because Ms Stojkowska has an interest in the outcome of this case, owing to the objections that the police and the Royal Oak Hotel have made to her liquor licence application.’

**Argument as to why one version of events is preferable to another, or about what conclusions should be drawn from the evidence, and why**

For instance, the narrative form would be: ‘When Mr Watkins left the bottle shop, he had with him a bottle of Mildara Cream Sherry in a brown paper bag. As you can see from the diagram, the fortified wines were kept behind the counter, and the brown paper bags were on the counter.’

It would be argument to continue: ‘Watkins must have obtained the bottle of sherry from the defendant. The police never lost sight of Watkins in the store and did not see Watkins walk around to that side of the bar to get a bottle for himself.’
The opening is a powerful forensic tool because it provides an opportunity to anticipate and defuse the opposing case theory. That is not the same as presenting an argument.

**ILLUSTRATION**

In the opening, the prosecutor could mention the fact that Watkins paused at the door of the bottle shop. For instance:

‘Watkins approached the bottle shop. When he reached the door, he paused, and entered.’

By referring to the pause, the prosecutor recognises that the pause would be an element in the defence case theory that Watkins composed himself so as not to appear intoxicated to Jones. Here, the fact of the pause is mentioned in passing and without detail as to how long Watkins paused. This removes the element of surprise for a fact the defence is likely to bring out.

A well-prepared and skilfully delivered opening by the prosecution or the plaintiff creates a positive, powerful story and impressions at the outset. It is the first telling of a story to a ‘first-time listener’.

A good opening by the defence, delivered at the beginning of the trial, is effective in introducing parts of the story important to the defence and in refocusing the decision-maker’s attention to aspects that will help the defence case.

The requirement to open is an opportunity that should never be wasted.

**CHECKLIST**

- Avoid argument.
- Structure the story.
- Try to tell the simple story of your case without notes.
- If you need notes, they should be triggers, not narrative to be read out.
- Maintain eye contact and involve the listener.
- Deliver slowly and punctuate so the listener can understand and remember the story.
- Use simple, clear language to create imagery.
- Tell the story before referring to a legal structure.
- Set the scene before describing the action.
- Use visual aids.
- Avoid unnecessary formality.
- Avoid unnecessary repetition.
Examination in chief is:

- the detailed story of the case
- told by the witnesses
- in answer to non-leading questions
- based on relevant and admissible evidence
- organised and controlled by the advocate
- persuasively presented.

Re-examination is:

- clarification or expansion
- by the advocate who called the witness
- limited to evidence raised in cross-examination
- by non-leading questions.

The story told in examination in chief is usually the foundation for the party’s case. It is the basis of the case theory and the arguments to support it.

To be effective, it requires rigorous preparation and skilful presentation.

Examination in chief should not be underrated or thought of as a mere prompting of the witnesses. You should prepare examination in chief to ensure that you maintain control of the witness, so that the story is told as planned by you in a relevant and admissible way. The witness is the medium for conveying to the decision-maker information of your choosing in an order of your choosing.
The techniques of examination in chief may seem difficult and unnatural at first, because examination in chief is not conducted like a conversation. Once the techniques are practised, however, they become second nature.

Effective preparation for examination in chief requires:

- mastery of the evidence that the witness can give, including the documents to which the witness will make reference
- development of a structure, and
- preparation for performance.

**MASTERY OF THE EVIDENCE**

Mastery of factual materials requires you to:

- confer with the witnesses
- prepare chronologies
- know the story of your case as if it were your own story, in all its detail, colour and emotive content
- visit the scene and examine documents and exhibits
- visualise the story from the perspective of each witness you are going to lead.

**CONFERENCES**

The purpose of the conference is to learn, to teach and to build confidence in both yourself and the witness.

At a conference you should:

- clarify ambiguities or inconsistencies in instructions or accounts of events
- explain to the witness:
  - the questioning process for examination in chief
  - the prohibition on leading questions
  - the need to address answers to the decision-maker
  - the process of re-examination
  - the prohibition against discussion when the witness is under cross-examination
  - behaviour in court, and form of address for judge, jury and counsel
- understand and rehearse any demonstrations you may ask the witness to give
CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

- explain the structure that you will adopt in leading the evidence
- explain to character witnesses the nature and limitations of character evidence at trial.

See also special aspects of conferences for expert witnesses below, and Chapter 8, ‘Plea in Mitigation’.

FORM OF QUESTIONS

Leading questions about contested facts are not permitted.

Their use also constitutes ineffective advocacy, because the answers lack probative value when given as a result of suggestions by the advocate.

A leading question is one that either:

- directly or by selection of subject matter suggests the answer, or
- assumes a fact not yet established.

ILLUSTRATION

**Leading questions which directly or by selection of subject matter suggest the answer**

In examination in chief of Stojkowska:

- Were you selecting wines?
- Did a man bump into you?
- Did you smell alcohol on him?

**A leading question which assumes a fact not yet established**

In examination in chief of Constable Bier:

- Where were you seated in the car when you first saw Watkins?
  (if it has not yet been established that Constable Bier was seated in a car)
- What colour was his t-shirt?
  (if his wearing a t-shirt has not been established first)

Advocates are able to ask leading questions because they know the answers. It would be impossible to ask leading questions and get the correct answers without that knowledge. Advocates are tempted to ask leading questions to get the answers they want.

To avoid asking leading questions:

- Use inquiring words such as ‘when’, ‘where’, ‘what’, ‘why’ and ‘how’.
Avoid words that require you to state the subject matter, such as ‘did’, ‘was’ and ‘is’.

One exception may be if the question is general, for example ‘Did you go anywhere?’ or ‘Was there anyone in the room?’, provided those questions do not touch the real issue in the case.

**ILLUSTRATION**

**Non-leading questions that would elicit the answers required in the previous illustrations**

Examination in chief of Stojkowska:

- Instead of ‘Were you selecting wines?’, ask:
  ‘What were you doing in the bottle shop?’
  (after she gives evidence that she was in the bottle shop)
- Instead of ‘Did a man bump into you?’, ask:
  ‘After the man came in the door, what did he do?’
  (after she gives evidence that she saw Watkins come in the door)
- Instead of ‘Did you smell any alcohol on him?’, ask:
  ‘When he bumped into you, did you notice anything about him?’
  (after she gives evidence about Watkins bumping into her)

Examination in chief of Constable Bier:

- Instead of ‘Where were you seated in the car when you first saw Watkins?’, ask:
  ‘Where were you on duty that night?’
  (once he has said that he was on duty)
  
  A  I was in a police car.
  Q  Where were you in the car?
  A  I was sitting in the driver’s seat.
- Instead of ‘What colour was his t-shirt?’, ask:
  Q  Was Watkins wearing anything on the upper part of his body?
  A  A t-shirt.
  Q  What colour was it?

To identify the contested facts:

- First, examine the pleadings or elements and particulars of the offence.
- Next, examine and compare witness statements and other accounts (including affidavits, records of interview, depositions, etc.).
- Consider what issues will be contested and what the opposing case theories may be.
- If necessary, talk to your opponent to clarify what may or may not be in issue.

Some non-leading questions may be useful even in the non-contentious areas, in order to:
CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

- enable the story to flow more smoothly from the non-contentious into the contentious areas, so the transition is not sudden, and
- prepare the witness for the non-leading form of questions in contested areas.

Leading questions are permitted to get your witness to deny specific allegations or to contradict other evidence.

**ILLUSTRATION**

**Leading questions permitted to obtain denials of allegations**

| Q (to Jones): Did you make the statement Ms Stoikowska attributes to you? | Q (to Stoikowska): Did you falsely invent evidence to embarrass the hotel? |

This should be done early, particularly in the evidence in chief of an accused, as it allows the listener to appreciate the story in light of the denials.

**ILLUSTRATION**

**Examination in chief of Jones**

| Q Did you know that Watkins was drunk that night? | A Definitely not. |
| Q Did you supply him with any alcohol? | A I don't recall, but I wouldn't have if I'd known he was drunk. |

**STRUCTURE**

Structure is a matter for the advocate, not the witness.

Avoid merely following the structure in a written statement prepared by someone else, because this may not have been done with a view to the order in which the story should be told in court.

Examination in chief should be structured by the advocate to allow the witness to tell a persuasive story. You should ask yourself:

- How will the witness best recall the events?
- How will the decision-maker best understand the story?
- How will the decision-maker best remember the story?
- How will the decision-maker’s interest be maintained?
To achieve these purposes, you should use the following techniques:

- Evidence should follow a chronological or other logical order.
- The story should progressively inform the listener.
- Where more than one witness tells the same story or part of it, decide the order of witnesses—usually strongest and most detailed witness first.
- The story must have sufficient detail to be credible and persuasive. A detailed story is more realistic and persuasive than a vague and generalised one.

PROVING DOCUMENTS AND TENDERING EXHIBITS THROUGH THE WITNESS

It is wise to show your opponent any document you propose to tender. This will allow you to resolve any possible objection before evidence is given.

Provide enough copies for your opponent and the court, judge and jury, to be handed out when the exhibit is marked.

To prove a document through a witness, you must

- show the document to the witness
- ask the witness to identify the document, its author, and when and how it was prepared, and if possible confirm its accuracy, and
- tender the document.

Once a document is tendered, you may question the witness about it and have the witness use it during evidence.

DESCRIBING THE SCENE AND THE EVENTS

Describe the scene of an event, preferably by using visual aids, before describing the action.

Use a plan by proving it through the witness.

ILLUSTRATION

**Evidence in chief of Constable Bier**

<table>
<thead>
<tr>
<th>Q</th>
<th>A</th>
</tr>
</thead>
<tbody>
<tr>
<td>On the evening of 24 December last year, where were you?</td>
<td>I was on duty.</td>
</tr>
<tr>
<td>Where were you on duty?</td>
<td></td>
</tr>
</tbody>
</table>
A In a police car, parked on Jackson Avenue, near Wide Street.

Q Was there anyone else in the police car?

A Yes, I was with Constable Fisher.

Q Please look at this document.

[Hand plan to the Associate/Clerk to be given to the witness.]

Q Could you identify this document?

A That is a plan of the street where we were parked.

Q Who prepared that plan?

A I did.

Q When did you do that?

A On 25 December last year.

Q What do you say about its accuracy?

A It is not to scale but it shows the streets and other features in the right proportions.

Q I tender that, Your Honour.

Court: That will be Exhibit 1, plan of Jackson Avenue and Wide Street.

When describing the scene, ensure that the witness describes and shows the relevant features such as:

- the place
- the time
- the layout
- who was present and their positions
- the state of lighting, natural or artificial
- distances, if necessary
- other relevant structures and objects.

It is helpful to have enlarged copies of plans or other diagrams so that they can be seen by others when the witness is using them.

**ILLUSTRATION**

**Examination in chief of Constable Bier**

Q Do you have the plan in front of you?

A Yes.

Q I will take you through that plan and ask you to describe the features marked on it. Please hold the plan up for His Honour and the jury to see and indicate.

A Yes.
Q  Where was your police car?
A  It was parked here on Jackson Avenue. [Indicating]
Q  How far was it from Wide Street?
A  It was about 10 to 12 metres from the corner.
Q  How wide is Wide Street?
A  It is about 6 to 8 metres across.
Q  Where were you in the car?
A  Sitting in the driver’s seat.
Q  As you sat in the car, which way were you facing?
A  South, down Jackson Avenue.
Q  What was the state of the natural light?
A  There was little natural light.
Q  What was the state of any artificial light?
A  There were two street lights here and here, which gave us a clear view of the street. There were also traffic lights on each corner of Wide Street and Jackson Avenue.
Q  Using the plan, would you describe for His Honour the layout of the bottle shop?
A  Through the door of the bottle shop there were wine racks left and right, followed by the counter. On the counter was a cash register and brown paper bags. Behind the counter were the fortified wines. The bar and lounge are located here.
Q  What was your view of the bottle shop from the police car?
A  I could see into the bottle shop through the plate glass window, which made up most of the eastern wall.
Q  How much could you see through the plate glass window?
A  I could see people’s heads and shoulders inside the bottle shop above the displays and advertising on the window.
Q  From where you were sitting in the police car, how far was it to the counter of the bottle shop?
A  It was about 8 to 10 metres.

Once the plan has been tendered and the scene described, the action which takes place is easier to understand.
CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

ILLUSTRATION

Examination in chief of Constable Bier

Q  As you sat in the car, did you see anyone in relation to this case?
A  Yes.
Q  Who did you see?
A  I saw Walter Watkins.
Q  How did you first see him?
A  I first saw him through the rear view mirror.
Q  Where was he when you first saw him?
A  He was standing on the north kerb of Wide Street.
Q  Would you use the plan to show the court where he was?
A  Yes, he was here. [Indicating]
Q  What did you see him do?
A  He started walking across Wide Street.
Q  How was he walking?
A  He was staggering and had great difficulty making it to the other side.
Q  How were you looking at him at this time?
A  I had turned around and I was looking at him through the rear window of the police car.
Q  What happened after he crossed the road?
A  He stumbled and almost fell at the southern kerb of Wide Street.

DESCRIBING CONVERSATIONS

Where you want a witness to recount a conversation, set the scene by having the witness describe the place, the time, the circumstances and who was present.

Ensure that the conversation is recounted in detail by having the witness use the actual words of it, and not a summary of the meaning of the conversation. If a witness does not recall the precise words, then you should:

- seek permission to refresh the witness’s memory if an appropriate document is available (see Chapter 3, ‘Evidence in Action’), or
- have the witness give the substance of the conversation.
Examination in chief of Stojkowska

Q When the police left the bottle shop, where were you standing?
A I was standing near the door of the bottle shop.

Q Immediately after they left, did you go anywhere?
A I walked over to the bar.

Q What did you do at the bar?
A I spoke to Daniel Jones.

Q What was said?
A Well, we spoke about the police arresting the old drunk, and Daniel told me how sorry he felt for the old drunk.

Q Ms Stojkowska, I want to take you through that conversation in detail. Who spoke first?
A I did.

Q What did you say?
A I said to him, ‘Just as well the police arrested that old drunk; I wonder what they will do with the bottle they took from him—probably drink it for Christmas.’

Q What did he say?
A He said ‘The poor old bugger. I suppose I shouldn’t have sold him the grog if he was so drunk.’

Q Was anything else said?
A Yes. Then he said, ‘I feel sorry for him. I hope this doesn’t blow the boss’s licence.’

GETTING THE COMPLETE STORY FROM THE WITNESS

Ensure that the witness gives a complete account of his or her version of events. If you don’t get all of the evidence out, then:

- you will weaken your case or fail to prove an element of your case, and
- the cross-examiner may use omitted evidence effectively as a surprise or use its omission to attack the honesty or accuracy of the witness.
ILLUSTRATION

Ensure that during the examination in chief of Constable Bier you lead the fact that Constable Bier saw Watkins pause for a few moments before entering the store, even if this evidence does not help the prosecution case.

Q  What happened after he crossed the road?
A  He stumbled and almost fell at the southern kerb of Wide Street.
Q  And then?
A  He walked into the bottle shop.
Q  Did he do anything before he walked in?
A  He paused at the door.
Q  How long did he pause for?
A  For a few moments.

EXAMINATION IN CHIEF OF EXPERT WITNESSES

Generally, the same principles about leading evidence in chief will apply to the examination of an expert witness. However, the evidence in chief of an expert may also include the following:

- the witness’s qualifications, experience, and special expertise.
  Particular focus should be on qualifications and experience relevant to the issues in the case.
- information provided to the expert on which the expert’s opinion is based
- methodology used by the expert
- the process of reasoning leading to the opinion
- reasons why the opposing opinion is incorrect.

In preparing to lead evidence in chief from an expert witness, you must consider:

- whether the written report will be tendered instead of evidence in chief;
  In criminal cases, particularly jury trials, the expert will not be permitted to present a report but will instead be required to give oral evidence of his or her opinion. In civil cases before a judge alone, the report is usually tendered, and sometimes stands in place of evidence in chief, with further oral evidence permitted only to correct, explain or supplement the report;
whether you will anticipate problems to be raised in cross-examination and elicit them during evidence in chief;

whether visual aids may enhance communication.

Experts should be encouraged to use aids to communication with which they are most at ease.

To enable the decision-maker to understand and accept the expert evidence, it is necessary to inform and educate the decision-maker, and therefore the structure of the evidence should be such as to help in that process.

**ILLUSTRATION**

**Qualifying an expert witness**

When qualifying a witness as an expert, you might ask questions during evidence in chief such as:

- ‘What is your occupation?’
- ‘How long have you been an accountant?’
- ‘What educational qualifications do you have?’
- ‘What areas of accounting do you practise in?’
- ‘What have you published in that area?’
- ‘What is your experience in valuing similar businesses?’

**ILLUSTRATION**

**Tendering and supplementing an expert report in a civil case**

When tendering an expert report in a civil case, you may need to allow the witness to supplement or correct the report. For example, you may ask:

- ‘Is there anything you wish to correct in the report?’

Alternatively, if no changes are needed, you might ask ‘Is that document true and correct?’

- ‘I want to take you to some parts of your report …’
- ‘Look at paragraph 10. What do you mean by these words … ?’
- ‘In paragraph 12 you refer to a valuation method you used. What is involved in that method?’
- ‘You have seen that in Mr Smith’s report, he chose a different method. Why should the method you chose be appropriate in this case?’

The expert in the witness box must also be a good communicator, although he or she is not the persuader. It is your role to ensure that the expert communicates his or her evidence effectively to the court. Effective communication by the expert witness involves:
CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

- use of simple non-technical language
- the ability to explain technical terms, methodology and ideas to lay people
- good eye contact and delivery
- answering questions directly, simply and clearly
- not being defensive in cross-examination.

PERFORMANCE PREPARATION

When preparing for performance, you should:

- decide on the order in which you will call witnesses
- break down the story into individual, single facts
- list those facts in the order you would like them to be told.

This creates a checklist, which helps to ensure that no facts are left out by the witness during evidence in chief.

Writing out questions is not helpful because if the witness does not give you the full answer you want, your next prepared question may be irrelevant or objectionable.

Consider the questions that would elicit those specific facts as answers, and ensure that your checklist includes only facts, not opinions, arguments or other inadmissible material.

ILLUSTRATION

In the left column is a sample list of facts to be elicited from Stojkowska.

The non-leading questions to elicit the answers follow.

<table>
<thead>
<tr>
<th>Fact</th>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>In bottle shop</td>
<td>Where were you on 24 December last year at about 8.45 p.m.?</td>
<td>I was in the bottle shop.</td>
</tr>
<tr>
<td>Royal Oak Hotel</td>
<td>Where was the bottle shop?</td>
<td>In the Royal Oak Hotel.</td>
</tr>
<tr>
<td>selecting wine</td>
<td>What were you doing there?</td>
<td>I was trying to find a nice bottle of wine.</td>
</tr>
<tr>
<td>from specials stand</td>
<td>Where were you selecting wine from?</td>
<td>From the specials stand.</td>
</tr>
<tr>
<td>near the window</td>
<td>Where is the specials stand located?</td>
<td>Near the window.</td>
</tr>
<tr>
<td>saw man enter shop</td>
<td>While you were selecting wine, did you see anyone in the shop in relation to this case?</td>
<td>Yes, I saw a man come into the bottle shop.</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>bumped into me</td>
<td>What did he do when he entered the shop?</td>
<td>He bumped into me.</td>
</tr>
<tr>
<td>didn’t apologise</td>
<td>Was anything said?</td>
<td>No. He didn’t apologise, which I thought was very rude.</td>
</tr>
<tr>
<td>strong smell of alcohol</td>
<td>As he bumped into you, did you notice anything about him?</td>
<td>Yes. He had a strong smell of alcohol.</td>
</tr>
<tr>
<td>he approached the counter</td>
<td>After he bumped into you, did he go anywhere?</td>
<td>He went to the counter.</td>
</tr>
<tr>
<td>had a conversation</td>
<td>What did he do when he approached the counter?</td>
<td>He had a conversation with the barman.</td>
</tr>
<tr>
<td>with Daniel Jones</td>
<td>Who was the barman?</td>
<td>Daniel Jones.</td>
</tr>
</tbody>
</table>

**PERFORMING EXAMINATION IN CHIEF**

When you are performing examination in chief, you should:

- focus on the witness, and let him or her tell a story—without relinquishing control of the process;
- although you know the story, ask questions with the curiosity of someone who wants to know. This avoids flatness and will encourage the listener’s attention;
- use simple language;
- ask short, one-proposition questions;
- focus on facts, not on conclusions;
- be aware of the decision-maker, and of how the decision-maker is responding to the evidence.

**PIGGYBACK QUESTIONS**

It is permissible to use part of a witness’s answer to provide focus for the next question by reference to time, place or action.

The ‘piggyback question’ repeats in the new question useful facts already stated by the witness. This connects the facts between the prior answer and the current question, and further reinforces the story. An effective ‘piggyback question’ does not simply repeat facts.
### ILLUSTRATION

**Evidence in chief of Maria Stojkowska**

<table>
<thead>
<tr>
<th>Q</th>
<th>What were you doing in the bottle shop?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td><em>I was selecting wine.</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Q</th>
<th>While you were selecting wine, did you see anyone in relation to this case?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td><em>Yes, the man who bumped into me.</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Q</th>
<th>As he bumped into you, did you notice anything about him?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>This technique not only reinforces the fact of the bump, but also emphasises Stojkowska’s opportunity of noticing something about Watkins while in close proximity to him.</td>
</tr>
</tbody>
</table>

### COMMENTING ON ANSWERS

It is inappropriate to comment on a witness's answers using words such as ‘okay’, ‘right’, or ‘I see’. This is usually done from force of habit, rather than as an intentional comment, but it is nevertheless objectionable. Some advocates have even commented ‘great’ or ‘fantastic’.

Nor is it appropriate to thank witnesses for their answers.

Avoiding commentary will also help with the flow and continuity of the story in evidence.

### INVOLVE THE LISTENER

It is natural for a witness to answer the person who is asking the question. You will need to get the witness to direct his or her answers to the decision-maker. (See the diagram in Chapter 11 on communication.) This can be achieved through the form of question, and also through your body language.

### ILLUSTRATION

To involve the listener, you could turn or gesture with your hands towards the listener, to show the witness where to direct his or her answer.

When leading evidence from the police ask:

- Tell Her Honour (or the jury) what you saw in the shop?

Do not ask:

- Tell me what you saw in the shop?
FOCUSED QUESTIONS

Remain in control by using focused questions, but allow the witness to tell the story. Do not interrupt the witness’s evidence if he or she continues with the account beyond your specific question. Using the checklist, make sure that the witness does not leave out significant detail.

If the witness is reliable and impressive, and you want to display this to the judge or jury, you may ask for a general description first without asking questions about each fact.

However, use questions such as ‘What happened next?’ sparingly.

GETTING THE ENTIRE STORY OUT

Listen to the answers, and check off answers on your checklist. Ensure that each fact on your checklist has been stated by the witness. With a vague witness, it may take several questions to do so.

If the witness gets ahead of you by providing more information than asked, then allow him or her to finish, provided the evidence is relevant and helpful.

Then return to your checklist to check what points the witness has covered ahead of you, and whether necessary evidence has been left out. Where evidence has been left out by the witness, take the witness back over the evidence and elicit those further facts.

ILLUSTRATION

**Examination in chief of Constable Bier**

Q  When he entered the shop, what did you see him do?

A  I saw Watkins approach the counter and have a short conversation with the attendant, who I know now to be Daniel Jones. I didn’t lose sight of either of them while Watkins was in the bottle shop. A short time later I saw Watkins emerge from the door of the bottle shop.

Q  Let me take you back to what you saw in the bottle shop. How much of Watkins and Jones could you see when Watkins approached the counter?

A  I could see Watkins’ and Jones’ heads and shoulders above the displays and advertising in the bottle shop window.

If the witness cannot recall a fact you need, go back into a sequence which may help to prompt the witness’s recollection of detail.
CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

ILLUSTRATION

Examination in chief of Maria Stojkowska

Q  After he bumped into you, did he go anywhere?
A  Yes, I saw him leave the shop.
Q  Let me take you back to the time when he bumped into you, and the time you saw him leave the shop. Did you see him do anything else?
A  Oh yes. I saw him approach the counter and have a conversation with Daniel Jones.

Avoid unnecessarily complex and counter-productive questions.

ILLUSTRATION

Examination in chief of Constable Bier

Ask questions in the most direct way:
- Describe where the advertising was on the bottle shop window?
- Where did Watkins go after he left the bottle shop?

Do not ask:
- Can you describe whether there was anything on the bottle shop window?
- Are you able to recall where Watkins went after he left the bottle shop?

The complex questions should be avoided for two reasons:
- The correct answer to a question that begins with ‘Are you able to recall …’ is ‘Yes’ or ‘No’. A pedantic witness may do that.
- The question that begins by asking whether a witness is able to recall or describe a fact suggests to the listener that her recollection or ability to describe is an issue. That is counter-productive.

HEADLINING

The use of headlining or topic phrases is helpful, particularly in the case of a lengthy story, in order to organise the story and concentrate the attention of the witness and the listener.

ILLUSTRATION

Examination in chief of Constable Bier

Q  I want to take you back to what happened to Watkins after you spoke to him. What did you do with Watkins?
A  I arrested him for being drunk and disorderly.
Q  When you arrested him, where did you go?
A  To the police station, where I lodged him in the cells.
Q  After you lodged him in the cells, did you go anywhere.
A  Yes, I returned to the Royal Oak Hotel.

Use evidence already given by other witnesses, if your witness was present in court, to direct the witness to a specific matter.

When leading evidence to contradict another witness, be specific and accurate about what the other witness said, then ask your witness to respond to that.

**ILLUSTRATION**

**Examination in chief of Jones**

Q  You have heard Maria Stojkowska give evidence that when Watkins entered the bottle shop, he bumped into her. What do you say about that?
A  No. I saw her bump into Watkins.

Have the witness use visual aids, such as plans or other exhibits, when describing events. Ensure that the witness is familiar with the document before you begin asking questions about it.

If the witness is not familiar with the document, ensure that he or she is given an opportunity to read it in the witness box and understand all its features before you ask questions about it and its contents.

**ILLUSTRATION**

**Examination in chief of Stojkowska**

Q  Could the witness be shown Exhibit 1, the plan of the area and the bottle shop.
[Clerk/associate hands Exhibit 1 to witness.]
Q  Ms Stojkowska, are you familiar with that document?
A  I have seen it once, yes.
Q  Could you hold up the plan and show to the jury where you were standing when Mr Watkins entered the bottle shop?

Where the witness has not seen it:
Q  Ms Stojkowska, are you familiar with that document?
A  No.
Q  This is a plan of the area and the bottle shop. Do you understand it?
A  Yes.
Q  Please take a moment to familiarise yourself with it.

CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

CHARACTER EVIDENCE

Character evidence may be given and used in two different ways in the course of a trial:

- to support the evidence of the accused that he or she did not commit the offence
- to support his or her credibility.

In a criminal trial, character evidence is limited to evidence:

- that the accused has no prior convictions (usually asked of the police and/or given by the accused)
- that the accused had a good general reputation
- of the witness’s knowledge of the good reputation of the accused in the relevant community, for example as to honesty.

ILLUSTRATION

Evidence as to reputation

Should Daniel Jones call a character witness during the hearing, that witness could be examined in chief as follows:

Q  What is your occupation?
A  I am a retired barman with over 35 years’ experience working in and owning bars, and in the hospitality industry.
Q  How long have you known Daniel Jones?
A  I have known him for 15 years.
Q  What do you know of his reputation in the hospitality industry?
A  He has a good reputation in the industry, and a good reputation for complying with the licensing laws.

Character evidence is used differently in a plea in mitigation (see Chapter 3, ‘Evidence in Action’, and Chapter 8, ‘Plea in Mitigation’).

EVIDENCE BY WITNESS STATEMENTS OR AFFIDAVIT

In some courts, particularly in the civil jurisdictions, evidence in chief can be received by affidavit or witness statements.
Provide the witness with the statement or affidavit in the witness box. Have the witness confirm that it is accurate, or make any corrections.

Direct the witness's attention to parts of the document and ask him or her to explain if necessary. If you need the witness to make major changes or expand on the material in the statement or affidavit, you must seek leave of the court to adduce this further evidence.

Notice of significant further evidence should be given to your opponent, as he or she may be entitled to more time to prepare cross-examination.

APPLYING FOR LEAVE TO RECALL OR FURTHER EXAMINE A WITNESS

The method of preparing and leading evidence in chief that we have outlined should ensure that you adduce all relevant and admissible evidence.

However, if you have completed your examination in chief of a witness, and you realise that there is further evidence you need to lead from the witness, then you should apply to the judge:

- to ask further questions of the witness in evidence in chief, where the witness is still in the witness box, or
- to recall the witness, if the witness has been excused.

You should make such applications promptly, as soon as you realise that there is a need to do so.

The court will usually ask for an explanation of why the omission occurred, and require you to state what evidence is sought to be led, and satisfy the court of its significance.

The court will usually allow further cross-examination following further evidence in chief.

In a criminal case, if the evidence left out by the prosecution is significant, and the defence has not had notice of it, the court may require formal notice of the content of the evidence, to allow the defence to consider it before cross-examination.
CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

RE-EXAMINATION

Re-examination is permitted only in relation to matters which

- arise out of cross-examination, and
- require relevant clarification or explanation.

It is not permitted merely to add new evidence, which should have been led in evidence in chief. That can only be done by applying for leave to recall or further examine a witness.

ILLUSTRATION

Examination in chief of Daniel Jones
Q  What was the condition of the bottle shop that evening?
A  It was busy.

Cross-examination of Daniel Jones
Q  I suggest to you that most of the people on the premises that night were in the lounge.
A  Not really.

Re-examination of Daniel Jones
Q  Approximately how many people were in the bottle shop when you saw the customer bump into Watkins?
A  There would have been four or five people in there at that time.

This re-examination would not be allowed if there had been no cross-examination on the question of how many people were in the bottle shop or lounge area of the hotel.

ILLUSTRATION

Cross-examination of Constable Bier
Q  You were watching Watkins and Mr Jones through the window of the bottle shop?
A  Yes.
Q  That window contains displays and advertising material, doesn’t it?
A  Yes.
Q  So you could not see all of Watkins while he was at the counter?
A  No.
Q  Nor could you see all of Mr Jones while he was at the counter?
A  No.
Q  Your view of them was obstructed by the displays and advertising material?
A  Yes.
Re-examination

Q During cross-examination, you agreed that your view of Watkins and the defendant at the counter of the bottle shop was obstructed. What part of your view was obstructed?

A I could only see their heads and shoulders above the display and advertising material on the window.

Here we assume that no questions were asked of Constable Bier in examination in chief as to whether his view was obstructed. This re-examination would not be allowed if there had been no cross-examination on the question of whether the police view was obstructed.

Both of the above illustrations show how re-examination is used to clarify matters raised in cross-examination, not simply to repeat matters already dealt with in examination in chief or to add new evidence.

The rule prohibiting leading questions in evidence in chief is strictly enforced in re-examination. Answers to leading questions in re-examination have little probative value.

It is permitted in re-examination to refer to the subject matter raised in cross-examination as part of the question.

Well-prepared and presented evidence in chief directed to your case theory, and effective re-examination, are important foundations of your case.

CHECKLIST

- Know the story in all its detail.
- Organise the story in the most persuasive way.
- Decide on the order in which to call witnesses.
- Guide the witness through the story.
- Use all details to flesh out the story.
- Ask non-leading questions in an interested, interrogative manner.
- Ask short, one-proposition questions.
- Use simple language.
- Engage with the witness.
- Direct the witness’s answers to the decision-maker.
- Listen carefully to the answers.
- Do not interrupt the witness.
- Do not comment on the answers.
- Do not look down at your notes while the witness is answering.
CHAPTER 5: EXAMINATION IN CHIEF AND RE-EXAMINATION

- Avoid expressions such as ‘Can you describe …’, ‘Are you able to recall …’.
- Use piggyback questions to emphasise and reinforce the story.
- Do not affirm answers by words such as ‘Okay’, ‘Right’, ‘Thank you’. This is not permitted and interrupts the flow of questioning.
- Have the witness ‘show’ as well as ‘tell’.
- Use a checklist of the facts you need. Do not write out questions.
- Use a checklist to ensure that all significant detail is given.
- Have experts explain technical terms or concepts used in their evidence.
CROSS-EXAMINATION

The right of a party to a fair trial, whether civil or criminal, includes the right to cross-examine witnesses called by the other party.

This principle has been most forcefully stated as the right of an accused in a criminal trial:

Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.1

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible … it is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer in defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence.2

In some jurisdictions this right is enshrined in statute.

To cross-examine witnesses effectively, you must be able to:

- understand the purpose and scope of cross-examination
- know the rules of evidence
- cross-examine consistently with the case theory
- use short, leading propositional questions
- apply the ‘ten commandments of cross-examination’

PurPOSE AND SCOPE OF CROSS-EXAMINATION

Your aim in cross-examination is to lay a foundation for your final argument by demonstrating something about the evidence or the witness.

The purposes of cross-examination are to:

- elicit new favourable evidence to support your case
- accredit a helpful witness or evidence
- discredit an unfavourable witness or evidence, and/or
- emphasise or place a different complexion on existing evidence.

Counsel’s right to cross-examine includes the right to use leading, pressing and persistent questions or propositions provided they are:

- relevant to an issue or to credibility, and
- not limited or prohibited by law.

Within those limits, the subject matter of cross-examination, its extent, its form and manner are matters for counsel, not for the judge.

The judge has, however, a discretion to curtail cross-examination if it is:

- unfair, such as unnecessarily repetitive, or based on misrepresenting what the witness has said
- scandalous, insulting or offensive, or
- designed to intimidate the witness.

These common law rules are now being reinforced and enshrined in legislation.
For example, under section 41 of the Evidence Act 1995 (NSW) the judge must disallow a question put to a witness in cross-examination, or inform the witness that the question need not be answered if the court is of the opinion that the question:

(a) is misleading or confusing

(b) is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

It is likely that similar provisions will be enacted in all uniform evidence legislation. See further Chapter 3, ‘Evidence in Action’, as to fairness of questions.

ACCREDITING THE WITNESS

Cross-examination can be used to accredit a witness and the evidence given. You may wish to accredit a witness in cross-examination when the evidence in chief of the witness supports your case theory.

This can be done by expanding upon and emphasising the witness’s evidence to support the account the witness gave, to make it more clearly consistent with your case theory. This is different from merely restating the evidence in chief before asking a question in cross-examination.

ILLUSTRATION

Cross-examination of Constable Bier

The purpose of this cross-examination is to emphasise the contrast between Watkins’ behaviour inside the bottle shop and his behaviour before he entered and after he left. This will support the theory that Watkins intended to trick Jones by composing himself to appear sober, and succeeded in doing so.

The cross-examination emphasises Constable Bier’s ability as a good observer because his observations support the defence case theory.

Q    When you first saw Watkins, he was staggering?
A    Yes.
Q He had great difficulty making it across the road?
A Yes.
Q And he stumbled and almost fell at the kerb near the bottle shop?
A Yes.
Q When he reached the door of the bottle shop, he paused?
A Yes.
Q And he paused for a few moments, didn’t he?
A Yes.
Q The pause was so significant that you noted it in your statement?
A I did.
Q And then Watkins entered the bottle shop?
A Yes.
Q While he was inside the bottle shop, you saw his head and shoulders at all times, didn’t you?
A Yes.
Q That was above the advertising on the window?
A Yes.
Q You didn’t lose sight of him at all in the bottle shop?
A No.
Q You saw him approach the counter?
A Yes.
Q Where he had a short conversation with the attendant?
A Yes.
Q And then you saw him walk to the door and leave?
A Yes.
Q As soon as he left, you saw him stumbling all over the place, didn’t you?
A Yes.
Q He began singing loudly and tunelessly, didn’t he?
A Yes.
Q And he said ‘I tricked Danny again’?
A Yes.

The pause is significant. To emphasise it, the cross-examiner should pause when dealing with it.
DISCREDITING THE WITNESS

In a well-known lecture, Professor Irving Younger, an early advocacy teacher with the National Institute for Trial Advocacy in the United States, sets out what he calls the ‘Nine Pigeonholes of Impeachment’. These are the nine categories of impeachment (or attacks on credibility) of a witness, which cover the field of possible impeachment. They are adapted to the Australian context below.

Professor Younger refers to the nine pigeonholes as the technology of cross-examination, or the ‘what to do’ of cross-examination.

The first four pigeonholes relate to the principles of witness competence. To be competent, a witness must:

- take the oath or affirmation (except, for example, in the case of a child)
- have perceived the events about which he or she gives evidence (except expert opinion evidence, or where a witness’s state of mind is relevant)
- be able to recall those events, and
- rationally communicate his or her perception to the court.

If any of these four elements is missing, a lay witness is not competent to give evidence, and therefore the evidence is inadmissible.

Competence and admissibility are matters of law for the judge to determine. This is usually considered on a *voir dire* before or during a trial.

Where the witness is ruled competent and his or her evidence is admissible, you may use the four pigeonholes as a basis to impeach the witness’s credibility. You can direct your cross-examination during the trial to reducing the weight the court will give the evidence. Irving Younger calls this ‘the reverse use of the principles of competence’.

For example, you may show that the witness:

- has problems of perception, for example poor vision, poor visibility in the conditions, or other difficulties in identifying the relevant events;
- has a problem of memory, or has reconstructed the events in his or her mind in a way that does not match reality;
- cannot rationally communicate what happened, in that he or she is using another’s words without understanding them; or
- is lying.
The next four pigeonholes require a ‘good-faith basis’: in other words, some basis in either evidence or instructions to justify making the allegation during cross-examination.

You may impeach a witness by alleging that:

- The witness is biased in favour of a party, prejudiced against a party, interested in the outcome of proceedings, or corrupt. You will be permitted to lead evidence to prove these allegations if the witness denies them.

- The witness has prior criminal convictions. If the witness is the defendant in criminal proceedings, the use of this basis for impeachment is subject to the common law or statutory shield against cross-examination based on prior convictions, unless the accused opens the issue of his own character, or the defence is conducted in such a way as to open the issue of his credibility. See for instance *Crimes Act 1958* (Vic), s 399(5)(b).

Subject to that proviso, you will be permitted to lead evidence to prove the convictions if the witness denies them.

- The witness has committed prior bad acts (acts of an immoral, criminal or vicious nature), even if those acts have not been the subject of a conviction or an adverse finding.

Generally, in such an attack on credibility, you are bound by the witness’s answer and you cannot go on to prove the truth of the allegations if the witness denies them.

It is unethical to suggest prior bad acts without a proper foundation, just as it is unethical to allege fraud without proper foundation.

This pigeonhole raises the question of the admissibility of propensity evidence, considered further in Chapter 3, ‘Evidence in Action’.

- The witness has made a prior inconsistent statement. This prior statement can be proved as part of the impeachment of the witness if the material in the prior statement goes to a fact in issue, or a fact relevant to a fact in issue.

- The ninth pigeonhole, where a witness is called to give evidence about another witness’s reputation for telling the truth or otherwise, has no practical application in Australia.

**CROSS-EXAMINATION TO DISCREDIT ANOTHER WITNESS**

It is not permissible to cross-examine a witness in order to discredit another witness.
There are some exceptions, such as where the cross-examiner seeks to prove previous convictions or bias. For example, cross-examination of Constable Bier to elicit the fact that Maria Stojkowska has previous convictions or that she has an application for a liquor licence, which is opposed by the police, is permitted as an exception to the general rule.

However, cross-examination of Constable Bier directed to other information about Maria Stojkowska would not be permissible—for example that she has an association with a well-known criminal (if there was any basis for that assertion).

**CONSISTENCY WITH YOUR CASE THEORY**

Because the purpose of cross-examination is to lay a foundation for your final address, cross-examination must be directly related to your case theory and to your arguments in support of your case theory in the final address.

Before you cross-examine a witness, you must know what your arguments will be about the credibility of that witness and about the weight the court should place on the witness's evidence.

Do not cross-examine for the sake of it just because you may see a potential weakness in the evidence. If the cross-examination is not aimed at supporting your case theory, mere ‘point scoring’, which does not support your closing argument, is unnecessary and may be counter-productive.

Do not cross-examine simply to please your client.

**ILLUSTRATION**

A cross-examination of Constable Bier which attacks his credibility is possible on several grounds:

- Bier should have ensured that Watkins was not released and should have been questioned.
- Bier should have taken a blood sample from Watkins.
- Bier should have arrested Watkins, and not let him risk his safety by crossing Wide Street to enter the bottle shop.

However, it would be counter-productive to attack the police because no useful closing argument will be mounted against them as a result of such an attack.

Where the defence case theory centres on Jones’ lack of knowledge as a result
of Watkins’ ‘trick’, the evidence of the police should be accredited and re-emphasised. This is because the police evidence fully supports the defence, by demonstrating the contrast between Watkins’ behaviour inside the bottle shop and his behaviour before he entered and after he left the shop, and by reference to his pause outside the shop.

FORM OF QUESTIONS IN CROSS-EXAMINATION

In cross-examination, the rules of evidence permit leading questions.

We distinguish three forms of questions:

- non-leading questions
- leading questions
- leading propositional questions.

**ILLUSTRATION**

**Non-leading question**  
Where were you seated?

**Leading question**  
Were you seated in the front seat?

**Leading propositional question**  
You were sitting in the front seat, weren’t you?

While questions in evidence in chief and re-examination should be truly interrogative, questions in cross-examination should generally be leading and propositional.

Your propositional questions should:

- be expressed simply
- deal with only one factual proposition
- clearly be capable of being answered with ‘Yes’ or ‘No’.

It is important to be prepared for cross-examination so as to be able to maintain a flow of questions. Pausing to think about the next question is likely to enable the witness to go on beyond the answer to your propositional question.

This form of questioning is vital to the cross-examiner’s ability to control the witness. If your leading questions are expressed in such a form, you are entitled to limit the witness to the answer.
If the witness does not respond to a simple propositional question, you may repeat the question and insist on an answer.

The principles of advocacy dictate that you must put only leading propositional questions to the witness in cross-examination, unless there is a good reason not to do so.

It is rarely good advocacy to ask non-leading questions in cross-examination, such as ‘Why didn’t you contact the police?’ or ‘What were you doing on the morning of 1 June?’

It may be appropriate to ask such an open-ended question if there is a specific justifiable purpose for doing so. One such purpose might be if there is reason to believe that the witness will give an explanation that can be shown to be wrong—for example, if there is some independent evidence contrary to what the witness said. This may be a useful method of attacking the witness’s credibility. It can be used, for instance, where a witness gives as an alibi an account of having been at a function, and you can show that the function did not take place.

In order to phrase propositions as leading propositional questions, they either should be asked in an interrogative voice indicating that you want a response, or you may add a phrase such as ‘wasn’t it?’ or ‘weren’t you?’ to the end of the proposition.

Witnesses often want to go on after answering the propositional question. While the cross-examiner has a right to confine the witness to the answer to a propositional question, a tactical decision should be made whether to do so. This is because confining the witness may look as if you are withholding information, and if done in an aggressive manner, it may look as if you are bullying the witness. In any event, once the topic has been raised in cross-examination, the witness will be permitted to explain and clarify in re-examination.

HOW TO DO IT: THE ‘TEN COMMANDMENTS’ OF CROSS-EXAMINATION

These ‘Ten Commandments’ are the subject of another seminal lecture by Professor Younger, on the ‘art of cross-examination’ or ‘how to do it’. They are a mix of what to do and what not to do.3

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3 This material has been adapted for use by the Australian Advocacy Institute from material prepared by the National Institute for Trial Advocacy (NITA), USA.
1. **Be brief** is the first commandment. You need to be selective in cross-examination and to cross-examine only towards an identifiable case theory and arguments to support it. You should not be repetitive or cross-examine at large.

2. **Short questions, plain words.** Ensure that your questions deal with one subject matter only, so that they can be answered simply. Propositions can be agreed with or denied by the witness, but not explained. Plain, simple words provide clarity, both for the witness and for the decision-maker.

3. **Ask only leading questions.** Although Professor Younger calls them leading questions, we prefer to call them ‘leading propositional questions’.

4. **Don’t ask the question if you do not know the answer.** This commandment is based on the principle that cross-examination is designed to support your pre-prepared final argument. In both cross-examination to obtain further evidence, and cross-examination to discredit, it is important that the cross-examiner knows what the witness will say.

   This fourth commandment can be supplemented by the phrase ‘unless you can contradict the witness if he or she gives an unhelpful answer, or you can live with an unfavourable answer’. In other words, you can ask a question to which you don’t know the answer provided you have some material with which to contradict an answer that does not support your case.

   Cross-examination at trial is not an inquiry, an opportunity to investigate, or a ‘fishing expedition’. If you have no material to contradict a witness’s negative response, such as a prior inconsistent statement, or evidence of bias, you may wish to leave it to your closing address to argue that the witness’s answer is improbable. The aim of the cross-examiner is to gain ground or at least remain in no worse a position than that already conveyed by the witness in evidence in chief. A bad answer should not be risked on important issues.

   As a general rule, a beginner at cross-examination should take the most conservative approach.

5. **Listen to the answer.** This commandment serves to remind the cross-examiner that cross-examination must be prepared in advance, and no questions or propositions should be dreamt up during the performance. If you are not sufficiently prepared and try to construct the cross-examination on the run, you will not be concentrating on the answers given by the witness, and useful information will be missed. The commandment also emphasises the need to pay close
attention to the words, the nuance of the answers, and the witness’s
demeanour, rather than focusing on the next question.

6. **Don’t argue with the witness.** You argue with the witness when
you try to persuade the witness that he or she is mistaken, or try to
convince the witness to accept your propositions or conclusions. The
aim of cross-examination is not to persuade the witness of anything,
but to lay the foundation for your final argument and/or demonstrate
something about the witness to the decision-maker. If you take up an
argument with the witness, you risk the witness giving information
which will enable him or her to win that argument.

You will get into an argument with the witness by putting a conclusion
to the witness with which the witness disagrees, and then using
such material as you have to try to contradict the witness’s answer.
For example, you start your cross-examination by suggesting to the
witness that he could not have seen what he claims he saw, which the
witness denies, and then you put to the witness that it was a foggy
night and the witness didn’t have his glasses. The better approach is
the gate-closing technique, discussed below.

7. **Don’t allow the witness to repeat his or her evidence in chief.**
Although when accrediting a witness, some selective repetition may
be necessary, the danger of repeating the evidence in chief by asking
whether it was given may reinforce the evidence. It will also give the
witness an opportunity to change or add to what was said in chief.
There is no need to repeat evidence already given in order to come
to the propositions relevant to the point in cross-examination.

The seventh commandment is often broken by questions which start
with ‘You told the Court that …’ or ‘In your evidence in chief you
said …’. Instead, you should go directly to your propositions.

For example, if you were to put to Maria Stojkowska, ‘You said in
your evidence that you could hear their voices, but not what was
said; is that correct?’, she could answer, ‘Oh yes, but I heard a few
of the words.’ The re-examiner may enlarge upon that addition to
include: ‘I heard him say fifteen dollars’. Then you are in trouble.

8. **Never allow the witness to explain.** Leading propositional
questions give the cross-examiner control over the witness, by
forcing an answer of ‘Yes’, ‘No’, or ‘I don’t know/can’t remember’.
If the witness is asked for explanations, then that control is lost.

This commandment is frequently broken by the use of inquiring
phrases such as ‘How could you have seen that?’, ‘What do you mean
by …?’, ‘How can you explain this if ...?’.
9. **Don’t ask the one question too many.**

There is no need to go beyond the questions that are necessary to support your final argument. The ‘one question too many’ is usually an attempt to get the witness to agree with the conclusions you want, and this may develop into an argument with the witness.

10. **Save the final point for your closing address.**

These last two commandments reinforce commandment number six. The cross-examiner should go only as far as is necessary to obtain answers that support the final argument, and not put to the witness the conclusions from the evidence.

Cross-examination questions that begin with words such as ‘Therefore …’ or ‘So…’ or ‘But …’ are likely to be argumentative.

This commandment is subject to your obligation to comply with the rule in *Browne v Dunn* (see Chapter 3, ‘Evidence in Action’).

### STRUCTURING YOUR CROSS-EXAMINATION

The structure will depend on the purpose of your cross-examination. If you want to get useful material from a witness who may have to be discredited about other parts of the evidence, then the helpful answers should be sought first, before you alienate the witness.

You may have to decide whether to use a logical structure. The logical structure tends to allow the witness to see where you are going. With some witnesses it may be better to use a structure that appears more jumbled, which does not so obviously lead a witness to identify where you are headed. This can be achieved by using a mix of questions about a number of different issues. Such cross-examination will be more difficult for the decision-maker to follow and understand at the time, but you can put it all together in the final address. It is also less likely to produce an argument from the witness.

### THE GATE-CLOSING TECHNIQUE

Because the purpose of cross-examination is to lay the foundation for your final argument, when organising the structure of cross-examination, you should:

- build the facts to support your argument, and
- avoid putting the argument or conclusions to the witness.
Note that your obligation under the rule in *Browne v Dunn* does not require you to put your conclusions to the witness, only the different facts upon which you intend to base your case.

This process is known as ‘gate-closing’. It can be described also as closing off avenues for the witness to escape, argue or explain away his or her position in a way that supports the witness’s case, and not yours.

Preparation of the order of cross-examination is essential to effective cross-examination. If you start your cross-examination with the conclusion and the witness disagrees with you, then cross-examination tends to become argumentative.

Often you may have recourse during the ‘gate-closing’ process to other evidence which the witness could not deny (such as comments made in a police interview or written down by the witness), before moving to the more difficult ‘gates’ or to the conclusion.

**ILLUSTRATION**

**Cross-examination of Daniel Jones**

This cross-examination is designed to discredit Jones’ denial of his conversation with Maria Stojkowska. It lays a foundation for the argument you will present in your final address: that it would be unlikely for Stojkowska to have invented Jones’ sentiment and his precise words, and therefore that Jones is lying when he denies the conversation.

The first two matters raised are intended to establish and close the gates around Jones’ sentiment (that he felt sorry for Watkins), and Jones’ knowledge of the law (that he knew the effect of supplying liquor to a drunk).

Q  You knew Watkins as a regular customer?

A  Yes.

Q  And you saw him as a down-and-out sort of person?

A  Yes.

Q  You felt sorry for him?

A  Of course.

Q  You are an experienced barman?

A  Yes.

Q  You know the laws about supplying liquor to intoxicated people?

A  Yes.
Q And you know that if you supply liquor to an intoxicated person, it might affect the hotel’s licence?
A Yes.
Q On Christmas Day, you were interviewed by the police?
A Yes.
Q Could you look at this document please?
[Shows transcript of police interview]
A Yes.
Q You agreed with the police in question 11 that you felt sorry for Watkins?
A Yes, I did.
Q In the same answer, you said that you ‘wouldn’t break the law by selling anything to a drunk because it could blow the boss’s licence’?
A Yes.
Q Maria Stojkowska gave evidence that you said to her, ‘The poor old bugger. I suppose I shouldn’t have sold him the grog if he was so drunk. I feel sorry for him.’ That is your sentiment, isn’t it?
A Yes.
Q And that you then said ‘I hope this doesn’t blow the boss’s licence.’ They are your words, aren’t they?
A I did not say that to her.

As to the last question and its denial, you will note that the point is made by the question itself, and Jones’ denial really does not matter.

Each advocate may have a different method of preparing to perform a gate-closing cross-examination. It is not a good idea to write out questions. One method is to use a diagram which readily suggests the substance and order of gate-closing cross-examination.
In some cross-examinations, it may be useful not to proceed to close the gates in an order that may signal to the witness where you are going. It may be better to jumble them and then put the answers together for the final argument.

Another diagram sometimes used for a building up or gate-closing technique is as follows:

Number 7 is the final proposition: ‘These are your words, are they not?’ The answer does not really matter.
A similar diagram can be used to show what propositions can be put to the witness and where the cross-examination should stop, leaving the conclusion until the final address. It also shows the jumbling of the order of questions.

**SPECIFIC ASPECTS OF CROSS-EXAMINATION**

**CROSS-EXAMINATION ON PRIOR INCONSISTENT STATEMENTS OR EVIDENCE**

Prior inconsistent statements can be oral or in writing, and either can be used to discredit the witness.

Before you confront the witness with the prior inconsistent statement, you must first direct the witness's attention to the occasion or writing of the prior statement (see further Chapter 3, ‘Evidence in Action’).

If the material in the prior statement is what Professor Younger calls ‘important”—that is, sufficiently connected to the issues in the case—and is consistent with your case theory, then you can go on to prove the making of the prior inconsistent statement. If the impeaching information relates merely to credibility, you may not go beyond the answer.

**ILLUSTRATION**

*Cross-examination impeaching Bier’s credibility based on a prior inconsistent statement*

If Bier were to give evidence that ‘Watkins paused at the door of the bottle shop for a moment’, not that Watkins paused ‘for a few moments’, his credibility could be impeached.
Chapter 6: Cross-Examination

The prior inconsistent statement contained in his written statement may be necessary only to remind him of what he said in that statement. If in evidence he agrees that it was for ‘a few moments’, there is no need to take the matter further.

If, on the other hand, he persists in saying in evidence that Watkins’ pause was only ‘for a moment’, then he may be cross-examined on the basis that his evidence is inconsistent with his prior statement.

Such cross-examination may proceed as follows:

Q. You made a statement soon after these events?
A. Yes.

Q. The detail of what happened was fresh in your mind?
A. Yes.

Q. You were trying to be accurate and truthful?
A. Yes.

Q. Have a look at this statement. [Hands statement to witness] Do you see your reference to the pause, where you stated that Watkins ‘paused for a few moments’?
A. Yes.

Q. That is in fact what happened?

If Bier agrees in evidence that ‘a few moments’ is correct, you need go no further. If he disagrees, you may tender his statement.

The prior inconsistent statement is not the evidence. The evidence is what the witness says in the witness box when confronted with the prior inconsistent statement. If the witness accepts having made it, you may argue that he has changed his story and hence lacks credibility. If he denies having made it, your argument is about his dishonesty in denying it.

Cross-Examination on Documents

When cross-examining by reference to the contents of documents not already tendered in evidence, your opponent can demand that you tender them through the witness. Despite this rule, the court has a discretion in criminal trials not to enforce the tender.

Cross-Examination of Expert Witnesses

The same advocacy principles apply to the cross-examination of expert witnesses. Further considerations apply given the nature of expert evidence as opinion evidence.
Cross-examination as to the **admissibility** of expert evidence may be:

- that the claimed area of expertise is not a sufficiently recognised field of specialist knowledge;
- that the area of expertise claimed is within common knowledge and so not appropriate for the reception of expert evidence; or
- that the witness does not have the training, qualifications or experience necessary to be classified as an expert witness.

Cross-examination as to the **weight** to be given to expert evidence will usually be directed to one or more of the following areas:

- qualifications or experience
- correctness of the facts upon which the opinion is based
- correctness and accuracy of the methodology used, and its appropriateness to the circumstances
- gaps in tests or investigations conducted
- the degree to which any assumptions were reasonable at the time they were made
- ultimate correctness of the assumptions
- the reasoning process leading to the opinion
- comparison between the opinion and other expert opinions
- bias.

It is permissible to cross-examine an expert by questions that appear to be hypothetical but in fact are designed to lay the foundation for new information, about which the expert witness did not know or which contradict the assumptions made. For example, you might ask of a medical practitioner consulted by a claimant: ‘If you knew that the person you examined had made prior claims, you would have taken that into account in determining whether he was a malingerer?’

The potential to cross-examine about bias must be thoroughly considered. Bias may fall into three categories:

- the degree of independence from the issues. For example, is the expert involved in a generally connected cause?
- the objectivity of the expert’s approach. For example, does the expert start out to prove a fact in issue such as ‘This writing is a forgery’? Or does the expert have an ideological stance, perhaps reflected in his or her professional writing or opinions in prior cases?
- the expert’s professional independence. For example, does the expert’s income depend on a conclusion favourable to the income provider? If an expert’s main income is from an insurance company, you might
consider how often this witness has given similar evidence, and her prior stance on similar issues.

By conferring with your own expert witness or a consultant, you should learn about the subject matter in dispute. It is unlikely, however, that you would develop a greater knowledge than the expert to be cross-examined. For this reason, you should avoid arguing about information within the expert’s area of knowledge unless there is a sound basis for doing so. The expert will usually know more.

Similarly, lengthy cross-examination along the lines of the expert’s theory or methodology can be counter-productive and should rarely be attempted. At most, you should focus on the plausibility of other theories or methodologies consistent with your client’s case.

For illustrations of cross-examination of the expert witness, see Freckelton and Selby’s *Expert Evidence: Law, Practice, Procedure and Advocacy.*

**COMPLYING WITH THE RULE IN BROWNE V DUNN**

When complying with the rule by confronting a witness with contradictory facts upon which you wish to rely, do so in the course of cross-examination at a point at which the decision-maker is most likely to conclude that the contradictory facts are possible. This is much more effective than a set of ‘I put to you …’ questions at the end. (See Chapter 3, ‘Evidence in Action’.)

**MANNER AND DEMEANOUR OF THE CROSS-EXAMINER**

To maintain the flow of cross-examination, you must be thoroughly prepared, so that you do not allow the witness time to supplement his or her answers while you are thinking about the next question to ask.

Generally, it is best to assume a demeanour in cross-examination which is:

- conversational
- not aggressive or confrontational.

Consider the following case study in relation to the manner and approach appropriate for cross-examination of an expert witness.

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ILLUSTRATION

In a case where the issue was whether a fire was deliberately lit or started accidentally, Expert A was consulted on the morning after the fire. He examined the scene and took photographs. In his opinion, the fire was intentionally lit with the use of accelerants.

The other party called Expert B, who was consulted one year after the fire. She had available Expert A’s report and the photographs. The scene of the fire was no longer available. In her opinion the fire was probably accidental as a result of a faulty electric blanket.

Cross-examination of Expert B

The aim of this cross-examination is to lay the foundation for the argument that Expert B is disadvantaged by not having had the opportunity to inspect the scene, particularly if Expert A can give evidence of some advantage of having examined the scene.

There is no point in cross-examining Expert B in a confrontational manner about her not having gone to the scene, because she could not have done so. A question such as ‘you didn’t go the scene of the fire?’ asked in an aggressive, critical, confrontational manner will elicit the right answer. However, it will also alienate the decision-maker, because it is unfair to criticise the witness when she could not have gone to the scene.

The better approach would be to get the same answer and also useful concessions from the witness without confrontation.

For example:

Q You were consulted about 12 months after the fire?
A Yes.

Q You were provided with the photographs and report of Expert A?
A Yes.

Q You didn’t have the opportunity to attend the scene of the fire?
A No, I didn’t.

Q Sometimes going to the scene may be helpful, mightn’t it?
A Yes, it might.

Q Because there may be some things that don’t appear in photographs?
A Yes, that’s right.

Q Such as the smell of some substance or the feel of some object?
A Yes, that’s right.

Q If you’d had the opportunity to attend the scene, you would no doubt have taken it?
A That’s right.
It would be dangerous and unnecessary to go on and put the argumentative proposition, ‘So you are at a disadvantage by not going to the scene?’, because the witness may disagree and explain why not in re-examination.

The witness is most likely to agree with the last few propositions, but if she does not, then you could argue in your final address that her answers were unreasonable.

It is also counter-productive to preface your questions with often-used phrases such as ‘It’s true that …’, ‘Isn’t it the case …’, ‘Isn’t it a fact …’, ‘You would agree that …’, etc. These phrases send a negative message to witnesses being cross-examined, and as a result they may feel that they are under siege and thus are not likely to want to agree with you.

While you should not get ‘cross’ in cross-examination, you may need to appear to be firm or confronting when that is appropriate to the cross-examination. For instance, you cannot pleasantly and conversationally suggest to a police officer that he assaulted your client or fabricated evidence. Your manner must be consistent with the subject matter of the cross-examination.

You should ensure that your manner of questioning, and your questions, are fair to the witness. This is particularly important for a prosecutor. See the recent decision of the High Court in Libke v The Queen [2007] HCA 30. See also Chapter 3, ‘Evidence in Action’, on objections to unfair questions.

As a matter of evidence law, your questions are not the evidence: only the witness’s answers are. Nevertheless, your attitude, manner and body language communicate messages to the decision-maker.

**RISK MANAGEMENT**

In performance preparation, you must consider the possible reactions of the witness and be prepared to deal with them. If you ask simple, leading propositional questions, possible answers should be:

- Yes
- No, or
- I don’t know/don’t remember.

As a cross-examiner, you cannot be optimistic about what answers will be given. You must be prepared for the witness to give the least helpful response and consider how you can deal with such a response.
Cross-examination can require you to take measured risks in your questioning. See, for instance, our discussion of the fourth of the ten commandments of cross-examination, above.

To cross-examine merely for emphasis or about a minor issue can be risky, as you might allow the witness to retell the story in his own way, or explain other inconsistencies in the process, and so your case may come out worse than if you had not cross-examined the witness at all.

If you need to discredit a witness, it may be more difficult to rely on those parts of the witness’s evidence that help you. If this has to be done, get any helpful information first, before discrediting the witness or his or her other evidence.

Cross-examination opens the gates to re-examination. If you conduct an unnecessary cross-examination which introduces new evidence or issues, you may indirectly damage your case, by giving your opponent the opportunity to re-examine the witness.

It is counter-productive to cross-examine to discredit a witness when doing so is not necessary to your case theory, even if an opportunity to do so arises, and particularly if the witness’s evidence is otherwise helpful to your case.

How much you are prepared to risk must depend on:

- the value to your case of the answer sought. It is a benefit/detriment analysis asking whether the risk is worth taking in the context of the case as a whole.
- your experience. The beginner at cross-examination should be conservative. The experienced cross-examiner is able to make a better assessment of the witness during cross-examination to determine whether the witness is likely to be cooperative, and is also more likely to be able to get out of trouble by dealing with difficult situations if they arise.

**CHECKLIST**

- Obey the ‘Ten Commandments’ of cross-examination (see pp. 111–114) unless there is a good reason to depart from any of them.
- Use a conversational style for questions in cross-examination unless a different manner is appropriate.
- Avoid using an aggressive, confrontational manner.
Confront only when necessary to be consistent with the subject matter.

- Do not begin questions with words such as ‘You would agree …’, ‘Isn’t it correct that …’ ‘Isn’t it the case …’ ‘Isn’t it true that …’.

- Watch the witness to assess his or her demeanour and body language.

- Listen to the answers.

- Maintain the flow of questions.

- Get useful evidence before discrediting the witness or the evidence.

- Close the gates.

- Comply with the rule in *Browne v Dunn*, without ‘putting it’ to the witness.

- Do not take risks unless you need to.

- Be prepared to manage any risk taken.
This chapter sets out the principles of preparation and presentation of persuasive argument.

Any argument made to a court should be:

- a series of structured propositions
- supported by reasons
- to persuade the tribunal
- to conclusions of fact and/or law
- towards the desired result.

Argument must be based on evidence and legal principle, consistent with your case theory, and consistent with the onus of proof.

General principles of effective argument apply no matter what type of argument is presented, including:

- argument in interlocutory applications
- argument about evidentiary issues before or at trial
- final address to a jury or to a judge alone
- plea in mitigation of sentence
- an appellate argument.

These principles apply whatever the nature of the argument, whether it is:

- purely legal argument, for instance the interpretation of a statute or the applicability of some legal principle or authority;
- factual argument, for instance about the credibility of witnesses; or
- mixed factual and legal argument, for instance final address in a civil or criminal trial about the factual conclusions and the legal consequences that flow from them.
ADDRESSING A JUDGE OR A JURY

The question is often asked whether there is a difference between argument directed to judges and argument directed to juries. The answer is yes and no. Legal argument before a judge is different because there is a common understanding of legal principles. Therefore, the language can be that used between professional people of the same discipline.

When addressing a jury and referring to the legal principles that must underlie its decision, different language must be used to ensure lay understanding of the applicable legal principles.

However, when it comes to argument about the evidence, we think it better to approach the judge as another juror. This is because when it comes to making findings of fact, and decisions about the credibility of witnesses, there is a respectable view that a judge is no better equipped than the jury to make those decisions.

PREPARATION OF ARGUMENT

The structure and focus of argument will depend on the jurisdiction in which it is performed and the purpose it seeks to achieve. However, as noted above, there are generic principles that apply to all argument.

The key to effective argument is that is it designed to persuade. In the words of Justice Mason:

Too often counsel forget that advocacy is an exercise in persuasion rather than a defence or statement of a position. Persuasion calls not only for mastery of the materials, but also for an element of constructive imagination and boldness of approach.¹

A persuasive argument is neither a list of facts nor merely a series of assertions.

So what constitutes a persuasive argument? The answer to this question emerges from the writings of the Greek philosopher Aristotle over two thousand years ago.² There has been no significant improvement on his approach since then.

² Aristotle, Rhetoric, 1356a1–5.
What emerges from Aristotle's work is that for an argument to be persuasive, it must have the following characteristics:

- **logos** (or logic)
- **ethos** (or credibility)
- **pathos** (or empathy).

### LOGOS

A persuasive argument should be logical in its reasoning and its structure. The various parts of the argument must cohere.

**Logical reasoning**

To construct an effective argument, you must demonstrate the logical strengths of your case, and the logical weaknesses of your opponent's case.

An argument is designed to persuade the court to adopt a reasoning process that leads logically to the ultimate conclusion for which you contend. The argument must demonstrate that reasoning process, leading from the evidence to the desired legal outcome.

It will be useful in the preparation of argument to apply the ‘because’ test: that is, follow each statement or assertion you make with the reasons that support its correctness.

### ILLUSTRATION

It is reasonably possible that Jones did not notice Watkins’ slurred speech because the bar was noisy and busy, Jones was serving a number of customers, and Watkins, in an attempt to conceal his level of intoxication, may have uttered only a few words during the short conversation described by the police.

**Logical structure**

A logical argument is a conclusion supported by the evidence. In the context of advocacy, it usually consists of a number of conclusions, which are supported by the reasoning process based on the evidence and legal principle.

A structure that first informs the decision-maker of the conclusions helps the decision-maker to evaluate the reasoning process. This is because
the supporting facts and principles are understood in the context of the stated conclusions.

If, on the contrary, the argument begins with a statement of facts without the context of the conclusions, then the decision-maker may find it difficult to evaluate and appreciate the force of the reasoning process.

**ILLUSTRATION**

The argument for the defence about the element of knowledge by Jones that Watkins was intoxicated would consist of three conclusions concerning:

1. the slurred speech
2. the smell of alcohol
3. Watkins’ bloodshot eyes.

Each would be supported by the available evidence, and the reasoning process would progressively lead to the ultimate conclusion, which should be stated first: that there is a substantial chance that if he did supply liquor to Watkins, Jones may not have appreciated that Watkins was drunk.

**Conclusion:** There is a real risk that Jones did not notice that Watkins was drunk.

**Proposition 1:** Jones may have missed the slurred speech.

**Supporting evidence:** The bar was noisy and busy, Jones was serving a number of customers, and Watkins, in an attempt to conceal his level of intoxication, may have uttered only a few words during the short conversation described by the police.

**Proposition 2:** Jones may have missed the smell of alcohol on Watkins’ breath.

**Supporting evidence:** …

**Proposition 3:** Jones may not have noticed Watkins’ bloodshot eyes.

**Supporting evidence:** …
This reasoning process could be expressed diagrammatically:

![Diagram of reasoning process]

Usually, the ultimate conclusion should be stated first, followed by the other conclusions and supporting facts that lead to it. In some pleas in mitigation in which the ultimate conclusion is the identification of the sentence contended for, it may not be appropriate to state that conclusion first. (See Chapter 8, ‘Plea in Mitigation’.)

The benefits of this structure are:

- it is easy to understand
- it enables the judge (or jury) to evaluate the supporting propositions when the conclusion is first stated
- it encourages conversation with the judge, and
- this enables the advocate to develop the argument further.

**ETHOS**

*Ethos* refers to credibility. It is about correctness in the light of human experience and knowledge, not necessarily having any relation to logical validity. It has two aspects:

- the credibility of the argument
- the credibility of the person presenting the argument.

It is also about character and reputation.
**Credible argument**

For an argument to be credible, it must be realistic and balanced.

To be realistic, it must be consistent with the understanding of ordinary people about human conduct and the way the world works. It must be sensible in the light of human knowledge and experience.

In terms of the defence case theory, it is the ‘R’ in RAT: Realistic Alternative Theory. It must not be fanciful or ridiculous. To be persuasive, the defence theory and the evidence that supports it must be reasonable and realistic.

So, a convincing argument may be credible yet not strictly logical. An argument which is logical but lacks *ethos* will rarely persuade.

**ILLUSTRATION**

**Realistic argument in final address for defence**

It is logically possible to argue that someone in the bottle shop gave Watkins the bottle for Christmas, or that he picked it up off the floor or stole it. These propositions are theoretical possibilities, but they are not realistic, because they are unreasonable in the light of the evidence.

The evidence of the police that they saw Watkins walk into the bottle shop and go to the counter, that they saw the head and shoulders of both Watkins and Jones all the time, and that they then saw Watkins walk out, realistically excludes the possibility that Watkins stole the bottle. The police evidence is supported by Maria Stojkowska.

To argue that Watkins already had the bottle or got it in some other way would not only be unrealistic, it would also be inconsistent with the defence theory that Watkins set out to trick Danny and was successful.

To be balanced, an argument must deal with its weaknesses in a realistic way, and not simply ignore them. It must also grapple with the strengths of the opponent’s case.

**ILLUSTRATION**

**Balanced argument in final address for defence**

A balanced argument that Jones may not have noticed signs of Watkins’ inebriation must be put in the context of that possibility. In other words, it must acknowledge the weak points: that Jones was an experienced barman who understood his obligation not to sell to intoxicated customers and would have had reason to keep an eye on Watkins because Watkins had stolen from him before.
A balanced argument is effective because:

- it shows that you have analysed and considered all the issues from both perspectives;
- it helps the decision-maker, who has to consider the issues from both points of view, not each side's argument in isolation; and
- it anticipates the opponent's argument and thereby takes the wind out of the opponent’s sails, and removes the opponent’s advantage of the element of novelty and surprise.

**Credible arguer**

The second aspect of *ethos* is the credibility and trustworthiness of the arguer. As an arguer, you should be trusted by the decision maker and have their confidence. This entails being respectful and tactful in dealing with the court and your opponent.

A credible arguer adds value to the argument.

The following may detract from the credibility of the arguer:

- lack of preparation
- misstatement of the evidence or law
- lack of cohesive structure
- overstating the argument
- unbalanced or unrealistic argument
- pursuing unsupportable or untenable arguments instead of making appropriate concessions.

It is better to volunteer concessions than to be forced into making them by questions and comments from the judge. Conceding at the outset shows that you have analysed the case, selected realistic arguments and abandoned untenable ones. The jury will also appreciate a focus on realistic arguments, and will be impressed by your forthrightness in making concessions.

As a professional, you must also comply with ethical obligations in argument—for example, citing of relevant authorities contrary to your argument, or in an *ex parte* application disclosing relevant information adverse to your case. See further Chapter 2, ‘The Ethics and Etiquette of Advocacy’.

**PATHOS**

Another characteristic of a persuasive argument is what Aristotle called *pathos*. A persuasive argument must be empathetic.
ADVOCACY MANUAL

This is a more elusive concept, but it is very important. It involves making a realistic connection with the thinking and the feeling of the decision-maker. The Chief Justice in his Foreword refers to the need for sensitivity and tact. This is obviously about empathy.

Empathy can also be expressed as ‘making a connection’, ‘getting through’, and ‘being in touch’.

Pathos is also about commitment to the argument and passion for it.

It embraces the idea of mutual understanding, and maintaining empathy with the decision-maker, which is a relationship most conducive to persuasion. The advocate who understands the emotions and is able to put the listener into a receptive frame of mind has a decided advantage in the courtroom.

PERFORMANCE OF ARGUMENT

BURDEN OF PROOF

The argument must be framed and presented in a way that is consistent with the burden and standard of proof.

ILLUSTRATIONS

Saying in the defence argument ‘Jones did not know that Watkins was intoxicated because …’ is a positive assertion that is inconsistent with the onus of proof. The correct formulation is ‘There is a real possibility that Jones did not realise that Watkins was intoxicated because …’.

In an appellate context, if you simply assert that ‘the judge below misunderstood the effect of the decision of the High Court in X v Y’, such an assertion is formulated in a way that does not recognise the role of the appellate court. A more accurate formulation would be: ‘The judge below erred by applying a test which is inconsistent with the test formulated in the binding authority of X v Y.’

STRUCTURE

A well-structured argument will have the following characteristics:

- It will utilise the principle of primacy. It should start with something that will engage the listener’s attention and interest.

Mark Weinberg QC, now Justice of the Victorian Court of Appeal, argued an application for special leave in the High Court at a time
when there was much discussion about the real effect of the life sentence in Victoria. He opened his argument thus: ‘The point of general importance is “What is the meaning of life?”’. Humour, in this form and this context, is appropriate.

- It will be put positively. When responding to argument, it is more effective to reframe the issues or at least put the respondent’s argument positively, not defensively.

- It will avoid repetition of the opponent's argument when attacking it. This unnecessary repetition may clarify and reinforce the opponent’s argument.

- It will acknowledge and deal with weaknesses and make appropriate concessions. For example, on the evidence of the police and Stojkowska, it would be appropriate to concede that Watkins was in fact intoxicated. This is because there is nothing to contradict their evidence and an argument based on other possibilities would tend to weaken the defence argument about knowledge.

### ILLUSTRATION

**Defence closing**

One way you might start a closing address for the defence, applying the principle of primacy, is as follows:

”“I tricked Danny again.”

That is what Walter Watkins said to the police.

That is what he attempted to do.

That is what he succeeded in doing.

This is how he achieved it.”

### PRESENTATION

The following techniques will assist in effective presentation of your argument:

- Structure your argument so as to inform the decision-maker progressively.

- Treat the tribunal as a ‘first-time listener’ to your argument. Although a jury has no previous knowledge of your argument, whereas an appellate court usually does, they are both ‘first-time listeners’ to the way you develop your argument.

- Reduce difficult factual argument and legal concepts to simple propositions.
Do not restate the opponent’s argument in order to put yours, as this may explain and reinforce the opposing argument. Go to your own first.

State the proposition before the reasoning that supports it. This encourages the listener to consider the reasoning process in the light of the conclusion for which you contend.

Encourage conversation with the bench, welcoming questions and responding.

Listen carefully to questions and consider your answer. Do not rush in.

Answer questions when asked. Saying ‘I will deal with this later’ results in a break in communication because while you are developing your point, the judge may still be thinking of the question and why you have not answered it. The better approach is to say ‘The answer is ...; may I develop this later?’ If the judge says ‘No, tell me now’, you must do so.

It is therefore necessary in preparation of argument to prepare for questions likely to be asked, and either deal with them in advance as part of a balanced argument, or be ready to answer them.

Avoid a lecturing or oratorical style.

Pose rhetorical questions and answer them to help explain your reasoning process.

Adjust your pace and timing so that the decision-maker can absorb the argument as well as hear it. The aim is to persuade as you go.

When using authorities, state the principles for which they stand rather than reading slabs of judgments.

Use materials such as notes, affidavits and exhibits, transcripts or evidence, but not by simply reading the text aloud.

Avoid unnecessary formality. The overuse of formal phrases such as ‘May it please the court’, ‘In my submission’, ‘With respect’, even ‘Your Honour’ interrupts the flow of conversational argument and is a distraction.

Avoid meaningless clichés such as ‘Your Honour, the balance of convenience is clearly in my client’s favour’. Instead, refer to those matters that show that the balance of convenience favours your side.

**Outlining the argument**

When presenting oral argument without a written outline, avoid outlining the argument at the beginning. Avoid the ‘road map’ approach typical in debating.
For example, if the judge is told that there are five reasons why an expert witness should not be accepted, and the reasons are briefly identified at the beginning as a road map, there is a risk that while you are developing your first or second point, the judge may be thinking about the flagged fourth point. That detracts from the attention that you are able to command.

A different and often better approach is to say ‘There are five reasons why the expert witness should not be accepted. The first is …’, and develop that point fully before moving to the next. This is more likely to keep the judge’s attention on that part of your argument while it is being delivered.

This approach is controversial, and some advocates take the view that the fuller road map is appropriate. Judges prefer the full road map so that they can move the argument along. It is our view that it is appropriate in some cases, such as when written outlines are required. However, in pure oral argument, we think the approach that focuses the mind of the judge on one thing at a time is better advocacy.

**Speaking to written submissions**

When the court has a written outline of your submissions, whether you were required to provide them or chose to do so, you must consider the best way to present your oral submissions to the court.

Do not simply read the submissions and then develop them. In oral presentation use different language to develop and illustrate the submissions. Relate the submissions to your outline as you develop them. This provides the opportunity to explain your argument differently and provides variety for the listener. In some cases you may consider adopting a different structure from your outline if it provides a better opportunity to tell a story and better illustrates your argument.

A similar approach is often adopted by good appellate advocates when speaking to the grounds of appeal. Rather than organising and delivering the argument by direct reference to each ground, it is often better to tell a story that supports the specific grounds. This story will give a context to the formal grounds of appeal.
In an address to an appellate advocacy workshop conducted by the AAI, Justice Michael Kirby introduced his ‘Ten Rules of Appellate Advocacy’. He said these rules are not exhaustive.

1. Know the court or tribunal that you are appearing in.
2. Know the law, including both the substantive law relating to your case and the basic procedural rules that govern the body you are appearing before.
3. Use the opening of your oral submissions to make an immediate impression on the minds of the decision-makers and to define the issues.
4. Conceptualise the case, and focus the attention of the court on the matter, viewed from the perspective of the party you are representing.
5. Watch the bench and respond to them.
6. Give priority to substance over attempted elegance.
7. Cite authority with discernment.
8. Be honest with the court at all times.
9. Demonstrate courage and persistence under fire. You will generally be respected for it. In any case it is your duty.
10. Address any legal policy and legal principles involved in the case and show how they relate to the case.

An appellate argument will have all the characteristics of a good legal argument. It will also have some special characteristics.

- It should be based on the specific grounds of appeal. An appeal is limited by the grounds of appeal relied upon. The outcome you seek is to persuade the court that one or more of the grounds is made out and that the orders you seek should follow.

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4 See Suresh Senathirajah and Elizabeth Brimer, Drafting Appeal Notices and Submissions in the Supreme Court, Leo Cussen Institute, 2006.
CHAPTER 7: ARGUMENT

- Generally it is directed to a review of the existing decision, not to a rehearing. An appeal court has different powers and obligations from the trial judge or the jury.
- It should address the court's jurisdiction and role.
- It should address the court’s knowledge of the case appealed from, to ensure that the court is thoroughly familiar with the material in the case about which you are presenting argument. If in doubt, it is advisable to take the court to such material.

Grounds of appeal must:

- be appropriate to the nature of the appeal and the court's powers;
- be specific and not broad—they must identify specific errors to be relied upon;
- include the reasons why the findings are erroneous and how that should lead to the orders sought, not simply assert the errors; and
- contain a clear statement of the orders sought.

Grounds of appeal can be amended or added only by the leave of the court.

INTERLOCUTORY APPLICATIONS

In any interlocutory application, you must take care to formulate and identify the orders that you are seeking. In an injunction, for instance, you should propose the least restrictive orders necessary to maintain the status quo pending trial.

Evidence at the interlocutory stage is generally by affidavit. You must determine the extent to which the judge is familiar with the affidavit material, including whether the judge has the material and whether he or she has had the opportunity to read it.

During the course of your argument, you must refer to specific parts of the evidence that support your case, and take the judge to that evidence. You will usually do this by referring the judge to certain paragraphs and exhibits within the affidavit material, and summarising them or reading them to the court as part of your argument.

Where an application is presented in the absence of the opposing party, for example an ex parte injunction application, you have an ethical obligation to inform the court of any material that is detrimental to your case. Failing to comply with this obligation can lead to the setting aside of the injunction, in addition to subjecting you to disciplinary action.
ARGUMENT ON A VOIR DIRE

When a voir dire is conducted in order to exclude evidence, such as a confession, it is necessary to identify and formulate the legal principle for exclusion before examination of the evidence.

It is necessary to consider whether, on the basis of the best result in your favour on the evidence, you would succeed in arguing for its exclusion. The goal is to avoid the situation where, at the conclusion of the evidence in the voir dire, taken at its best, the court will still rule the evidence admissible.

Judges will often ask what is the basis on which you seek to exclude the evidence, and whether that will succeed on the most favourable view of the evidence. It is good advocacy to identify that basis for the judge, in order to avoid the voir dire becoming a fishing expedition.

As to the conduct of a voir dire, see Chapter 3, ‘Evidence in Action’.

CHECKLIST

- Apply Aristotle's principles of logos, ethos and pathos.
- Apply Justice Kirby's “10 Rules of Appellate Advocacy”
- Structure the argument.
- Do not repeat opposing argument in order to deal with it.
- Apply the principle of primacy.
- Watch the tribunal.
- Actively listen to questions.
- Welcome and respond to questions.
- Use a conversational style.
- Avoid lecturing and oratory.
- Be tactful.
- Be respectful of the opponent and/or of the court appealed from.
- State conclusions before developing them.
- Speak at a pace that will enable the listener to absorb and consider your argument.
- Involve all judges or jurors.
- Do not read the argument: minimise use of notes.
The illustrations in Chapter 8, ‘Plea in Mitigation’, are based on this case study.

 creen To Counsel For Ms Lucia Gonzales

Counsel is briefed to confer and appear to present a plea for Ms Gonzales.

Ms Gonzales is a 23-year-old unemployed single woman. She has had some training as a hairdresser and as a receptionist. She worked at one job for two years until age 18. Since then her work record has been sporadic.

Ms Gonzales will plead guilty in the Magistrates’ Court to burglary and assault occasioning bodily harm. The police summary indicates that Ms Gonzales broke into a house and stole a quantity of jewellery, valued at approximately $3000. As she was walking out, the occupant, a woman aged about 60 years, arrived home and confronted her. Ms Gonzales punched the woman in the face, breaking her nose, and escaped.

Ms Gonzales instructs that she did not intend to hurt the woman, but just to push her out of the way and escape.

Ms Gonzales has a long history of drug abuse and at the time of this offence was on Valium. She states that she was in a depressed state at the time and needed money to pay substantial medical bills.

She has two previous convictions for burglaries, committed to support her drug habit when aged 19 and 21. She received three- and six-month gaol sentences.

A report from Dr Jules Berne is attached.
At your request, I saw and tested Ms Gonzales on two occasions last week, once in the presence of her father.

Ms Gonzales is suffering from long-standing and serious depression. The symptoms of this include chronic poor self-esteem, depressed mood, repeated suicidal ideas, difficulty with sleep and appetite, and feelings of hopelessness about the future. In addition, she shows a clear disturbance in judgment, difficulty in establishing satisfying relationships with other people, and considerable immaturity.

This woman also has a four-year history of heroin abuse and is currently using marijuana and alcohol excessively. In all likelihood, she is addicted to one or both of these substances. It is noteworthy that these offences occurred while she was taking Valium.

Ms Gonzales requires consistent and ongoing psychiatric treatment. This can be arranged through her local doctor. If Ms Gonzales cannot be weaned away from the abuse of alcohol and marijuana through the treatment outlined above, on an out-patient basis, she may need a period of in-patient treatment in a drug and alcohol facility.

It is likely that her current drug abuse represents her own meagre attempts at medicating herself for depression.

The overall prognosis for Ms Gonzales is guardedly optimistic. She expresses some remorse and guilt about her recent behaviour and in looking back at the last few years, she is clearly aware of the difficulty she has caused herself and her parents. She has apparently been able to stay off heroin since her release from prison last year. If this is correct, it shows great determination.

It is noteworthy that she did not have any difficulty with the law prior to her involvement with drugs.

Her relationship with her biological father is very new, but promising. He is supportive of her and clearly has both emotional and financial resources which he is eager and willing to make available to his daughter.

Yours sincerely,

Dr Jules Berne
The illustrations in this chapter are based on the case study *DPP v Lucia Gonzales* on pages 141–142.

A plea in mitigation is an argument that is:

- well researched and prepared,
- structured,
- persuasively presented,
- for the most favourable outcome.

**INTRODUCTION**

Sentencing is one of the court’s most difficult tasks. It involves an attempt to achieve a balance between various, often irreconcilable sentencing considerations, such as:

- the effect on the community
- the need to express the community’s denunciation of serious crime
- the need to punish and attempt to deter the offender and others
- the consequences for the victims
- the consequences for the offender
- rehabilitation of the offender
- the need to give effect to the principle of parity between offenders.

There are additional pressures on the sentencer as a result of:

- the emotive nature of the subject
- the intensity of public scrutiny of sentences.
Sentences are often criticised as being contrary to ‘public opinion’ and ‘community expectations’. These concepts are complex and difficult to define and ascertain.

The public is often not fully informed, and public opinion is manipulated by the media and by assertions in political campaigns of a need to be tougher on criminals.

Such assertions are often not backed up by any evidence that harsher sentences are effective in reducing crime rates. Rarely does one hear on radio talkback sessions or read in the newspapers a contention that a sentence imposed was too harsh. This is despite the fact that courts of appeal regularly reduce sentences originally imposed.

Because sentencing is a difficult task for the decision-maker, good plea-making is an important and complex challenge for the advocate. This is due to:

- the breadth of the sentencing discretion
- the range of available sentencing options
- the difficulty of balancing the various sentencing considerations
- the vast body of decisions by appellate courts
- ever-changing social conditions and developments in the understanding of human behaviour and methods of rehabilitation, and
- the realisation that punishment by imprisonment is often counter-productive to the individual and destructive of rehabilitation prospects, although it may sometimes help to appease the victims.

A good plea can make a significant difference to the result.

The large body of sentencing decisions and the availability of numerous sentencing options reflect a recognition of the complex issues that must be balanced when sentencing an offender.

So far, ‘intuitive synthesis’ by the court of the various sentencing considerations has prevailed over a formal, structured approach by which specified portions of the sentence are allocated. A balanced approach to sentencing is needed because in a civilised society, it is necessary to look not only to punishment to protect the community and express community views, but also to the integrity and responsibility of the justice system in dealing with problems. However, some inroads are being made into this approach, for instance by identifying the sentencing discount given for a plea of guilty.
The plea can be the ultimate feat in the art of persuasion because in that role the advocate can most effectively influence the outcome for the client. These factors highlight the importance of good advocacy in plea-making.

THE DECISION TO PLEAD GUILTY

The decision to plead guilty must always be the decision of the accused. There is an ethical obligation to inform the accused, when advice is sought, of all relevant considerations and possible consequences without exerting any pressure, which may affect the accused’s free choice of plea.

The incentives and pressures on an accused person to plead guilty include:

- the availability of plea discounts
- temptation to plead guilty to a lesser charge to avoid the more serious one
- the likelihood of a lesser sentence than a sentence upon conviction
- the cost and publicity of the trial
- the emergence of damaging or embarrassing evidence at a trial
- the concern for or the fear of the victim
- a sense of guilt where the accused may consider him- or herself blameworthy although in law no crime has been committed
- taking the blame for someone else.

In the interests of justice and the interests of the accused, the advocate must take great care to ensure that the decision to plead guilty is appropriate in law and truly represents the accused’s free choice to plead guilty because he or she committed the offence charged.

To be able to advise the accused properly, the advocate must be thoroughly familiar with:

- the elements of the offence charged
- the admissibility of the evidence relied upon to prove the elements of the offence
- procedural requirements and time limits governing the laying or prosecution of charges
- prospects of conviction or acquittal
- likely penalty range
the mental state of the accused at the time of the commission of the offence
the fitness of the accused to plead
all the circumstances surrounding the commission of the offence and its investigation.

The decision to plead guilty should be made as early as possible, and once made, should be communicated to the prosecution and the court so as to:

- gain the most advantage from an early guilty plea
- allow as much time as possible for investigation and preparation
- establish a treatment or rehabilitative program
- enable the client to make arrangements in case of a likely gaol sentence
- allow time for the negotiation of appropriate charges with the prosecution
- allow time for settling the summary of facts with the prosecution.

**PREPARATION FOR A PLEA IN MITIGATION**

Once the decision to plead guilty is made, the plea must be well researched and prepared. Preparation is as important for a plea as for other advocacy performances.

Unfortunately, this is not always recognised, and comments such as ‘This is only a plea; I’ll see the client at court in the morning’ are common.

Preparation involves three stages:

- **Stage 1**: Acquiring knowledge of the relevant law, the evidence and all the circumstances of the case.
- **Stage 2**: Analysing all of the available material and developing a ‘case theory’ upon which the plea will be based.
- **Stage 3**: Preparing for the performance of the plea.

**STAGE 1: KNOWLEDGE OF THE RELEVANT LAW, EVIDENCE AND CIRCUMSTANCES**

It is important to have a conference with the client as early as possible. This will allow the client to take advantage of the time between the conference and the plea to obtain further information, organise character evidence and take steps towards rehabilitation. Also, where appropriate, the client could begin making restitution.
A plea of guilty has special significance. The court must take it into account and must evaluate its significance in the light of the time and the circumstances in which it was entered. An early plea is more valuable, especially if the prosecution case is weak.

Making use of the time in this way may in some circumstances avoid the need for pre-sentence or other reports, and thus avoid delays in sentencing. The court will usually be more impressed by such steps having already been commenced than by a promise to do so on plea day.

Investigation of the circumstances of the case and collection of material will involve determining what is relevant and significant. Not everything will be relevant to the case, as it is finally presented.

The following information will need to be considered:

- a full account of the circumstances of the offence
- a complete history of events after the offence
- a full history of events personal to the accused after the commission of the offence
- details obtained from a thorough investigation of the accused's background
- details of the accused's character.

The advocate will also need to consider:

- the selection of witnesses
- the collection of expert evidence
- whether to call the accused as a witness, and
- defence input into the statement of agreed facts and/or the police or Crown summary.

**Circumstances of the offence**

A full account of the circumstances of the offence may need to include the following information:

- the relationship between the accused and the victim
- relationships between the accused, co-offenders and potential witnesses
- presence or absence of motive
- relative parts played by the accused and co-offenders
- physical and mental state of the accused, co-offenders and witnesses
- the whole of the prosecution brief, including original exhibits and photographs
other relevant material in the possession of the police
a view of the scene.

**ILLUSTRATION**

In conference with Ms Gonzales, the following account of the circumstances of the offence has been obtained.

- The house that Ms Gonzales broke into was a house chosen at random near where she lives. It looked as if no one was home. Ms Gonzales did not know who lived in the house.
- At the time of this burglary, Ms Gonzales was on Valium and was depressed. She has suffered from depression since she was a teenager.

**History of events after the offence**

A complete history of events after the accused has been charged may need to include:

- details of the arrest and police investigation
- conversations, statements and interviews between the accused and the police
- conversations between the accused and co-accused, witnesses, fellow prisoners and others about the offence charged
- police interviews and statements of co-accused and witnesses, along with charges and results of proceedings
- bail and remand of the accused
- the exact amount of time the accused has spent in custody
- details of the accused’s behaviour in custody.

**ILLUSTRATION**

The following is a history of events given by Ms Gonzales:

- She was arrested the day after selling the jewellery to a pawnshop.
- Apparently the store manager was suspicious of Ms Gonzales and called the police to have a look at the items.
- It became apparent that the items were the stolen goods after the owner of the house reported them stolen that evening.
- Ms Gonzales left her address details with the salesperson at the pawnshop. The police went to her home the following day and took her to the police station.
- After speaking to her solicitor, Ms Gonzales made a ‘no comment’ record of interview.
- She was charged and bailed after spending the night in custody in the police cells.
- Her solicitor telephoned the prosecutor a few days before the hearing and indicated that she would plead guilty.
History of events personal to the accused after commission of the offence

Details of the behaviour and state of mind of the accused after commission of the offence may include any or all of the following:

- expressions and indications of remorse
- domestic and economic circumstances
- mental and physical state
- change of lifestyle and/or pattern of substance abuse
- restitution or compensation offered to victims
- employment, education and other indicia of rehabilitation.

ILLUSTRATION

Ms Gonzales instructed that:

- She has recently searched for her biological father. He has been in touch with her during the last five days.
- He is very supportive and eager to play a more active role in his daughter’s life.
- He will come to court.
- Ms Gonzales has been seen by Dr Jules Berne.

Details of the accused’s background

A thorough investigation of the accused’s background should be conducted. It may need to include details of the following:

- childhood problems or trauma
- relationship with parents, siblings and friends
- education, outstanding achievements or failures and reasons for them
- sporting and other interests, talents, hobbies and community activities
- employment and financial history
- medical history, both physical and mental, of the accused and his or her immediate family
- substance abuse and rehabilitation attempts
- gambling history
- marriage and relationship history
- criminal history including circumstances of prior convictions: these should be examined before the hearing, as they may reveal matters that can be used in support of the plea
- court proceedings prior to and after commission of the offence charged
- pending charges.
ILLUSTRATION

In conference, Ms Gonzales instructs that:

- She has a long history of drug abuse.
- She was adopted as a child by Mr and Mrs Gonzales.
- The marriage was a troubled one, including physical violence by her adoptive father against his wife, which Lucia witnessed.
- Mr and Mrs Gonzales separated when Lucia was six years old and subsequently divorced.
- After this she was raised by her adoptive mother and saw her adoptive father on weekend access.
- There was much difficulty on contact visits because of unresolved problems between her adoptive parents.
- Her adoptive father remarried when she was ten years old.
- She did not get on with her stepmother and she dates this as the beginning of her difficulties.
- She has been in several long-term relationships with young men. Two of the men have been physically abusive to her.
- One year ago she was in a severe car accident. She was hospitalised for three and a half weeks, continues to have pain in her nose, and is expecting to have plastic surgery.
- She has made several suicide attempts and has some past psychological treatment, which was brief.
- She has been sentenced on two prior occasions for multiple burglaries, committed to support her heroin habit.
- Over the past few years she has been in touch with her biological mother. Their relationship has been somewhat stormy and she has also been depressed about her mother's lack of response to many of her letters.
- She has had some training as a hairdresser and as a receptionist. She worked at one job for two years until aged 18. Since then her work record has been sporadic.

Details of the accused's character

You may need to interview character witnesses to support the accused's plea. Witnesses may provide evidence to support propositions such as:

- the accused is of general good character and reputation;
- the offence followed upon unusual events such as loss of employment, trauma, breakup of a relationship, etc.;
- the accused is remorseful and has undertaken efforts towards rehabilitation;
- the accused fulfils family and other responsibilities; and/or
- the accused has made contributions to the community in the form of good deeds, help to others and/or achievements. Folios or examples of the accused’s work may form part of the evidence of his or her achievements and talents.
Selection of witnesses

Witnesses should be selected who:

- are impressive, and
- can speak of specific matters in respect of the accused, as well as his or her general character.

Expert evidence

Collection of expert evidence may include:

- early assessment of the accused by experts
- obtaining psychiatric, psychological or medical reports
- obtaining progress reports, if a rehabilitation program is being undertaken
- conferences with experts.

Calling the accused as a witness

The general practice is not to call the accused as a witness, as not much can be added to the material already before the court in a plea.

It may be necessary to call the accused to establish mitigatory factors or to rebut aggravating factors relied on by the prosecution.

If an accused is obviously remorseful, articulate, and likely to make a good impression, it may be useful to call the accused as a witness, simply to personalise him or her and allow the sentencer to be influenced by his or her evidence. This is particularly important where the theme of the plea is rehabilitation.

Input into statement of agreed facts or police or Crown summary

It is common practice in pleas to have a police summary in the Magistrates’ Courts, and a Crown summary or statement of agreed facts in other courts.

A plea of guilty is an admission of all the elements of the offence. It is not an admission of all the facts upon which the prosecution relies.

It is advisable, when possible, for the defence to have some input into the contents of such documents with a view to limiting the extent of any inflammatory material. An early discussion with the prosecutor may be useful, and may even result in some mitigatory factors being made part of such a summary or statement.
Where a dispute as to the facts arises in a plea, it is important to refer to the relevant authorities, which in each jurisdiction determine the onus and standard of proof to be applied in the resolution of such disputes.

A sentencer may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. However, if there are circumstances that the sentencer proposes to take into account in favour of the accused, it is enough that they be proved on the balance of probabilities: *R v Olbrich* [1999] 199 CLR 270.

Factual disputes will usually have to be determined by the calling of evidence and not from statements from the bar table.

The sentencing process retains the adversarial characteristics of a trial. It is not the duty of the advocate for the accused to disclose to the court matters detrimental to the accused. This applies even to prior or subsequent convictions.

However, counsel cannot rely on an absence of prior or subsequent convictions, if to do so would be to mislead the court. Nor can the advocate conduct a plea that in any way implies that the accused has no prior or subsequent convictions, if this is not true. This applies particularly if rehabilitation is a factor in the plea.

**STAGE 2: ANALYSIS OF ALL AVAILABLE MATERIAL AND DEVELOPMENT OF A ‘CASE THEORY’**

A case theory is just as important in an argument such as a plea as it is in a contested trial.

Such a case theory will be the foundation of a cohesive, balanced and persuasive argument for a specific result. (See Chapter 2, ‘Preparation and Analysis’, on the development of a case theory.)

A case theory on which a plea is based will be one which takes into account:

- the established facts and circumstances of the offence
- the motive for the commission of the offence
- the aggravating factors in the commission of the offence
- the mitigating factors of the offence
- the consequences of the offence to the victim and the community
- the aggravating and mitigating factors personal to the accused
the relationship between the aggravating and mitigating factors (of the offence and the offender) and the sentencing considerations
- the effect of the sentence on the accused, including effects on his or her family, employment and health
- the community’s interests in balancing denunciation, punishment and rehabilitation
- the need or otherwise of specific and general deterrence.

When discussing the development of a case theory, we referred to it as a ‘thesis’, a ‘system of ideas’, and a ‘construct’. In a plea, it is also useful to develop a ‘theme’, which makes the connections within the case theory.

STAGE 3: PREPARATION FOR PERFORMANCE OF THE PLEA

Performance preparation will include:

- preparation of summaries of submissions where appropriate
- making copies of references and reports for the sentencer and the prosecutor
- consideration of the order in which character witnesses and other witnesses will be called
- identifying significant portions of evidence
- identifying relevant statements of principle from sentencing decisions
- identifying essential passages from sentencing decisions (with references and copies)
- preparation of clear, well-organised notes, if necessary
- finding out about the decision-maker’s approach to sentencing and attitudes.

Knowledge about the sentencer’s approach and attitudes may be obtained from colleagues and from the sentencer’s previous decisions. It may also be obtained by listening to other pleas, and to the court’s responses.

A PLEA IS A STRUCTURED ARGUMENT

To be persuasive, the plea should have a structure, which will take the sentencer through the ‘case theory’ of the plea to a specific conclusion.

The decision-maker wants to know as early as possible what you are contending for. You should therefore make this clear, either at the outset or at a later time. In some circumstances, however, if the result that you
want appears unreasonable on the face of it, asking for what you want at the outset may result in a negative reaction from the decision-maker.

**ILLUSTRATION**

Opening submission: ‘I submit that a non-conviction bond is appropriate for Ms Gonzales.’

Likely response (articulated or silent): ‘You must be joking; she’s already been in gaol twice before for similar offences, and these are serious offences.’

If it is done this way, the advocate will then have to battle against the decision-maker’s early unfavourable view through the rest of the plea.

On the other hand, if you leave the identification of the result for which you contend to the end of the plea, and the decision-maker does not agree with you, then you have no further opportunity to persuade the decision-maker to change his or her view.

In the plea for Ms Gonzales, it will be better to start by summarising the case theory and introducing a theme, to lay the foundation for a more favourable result. It provides a softer, more fertile ground, and makes the suggested result at least feasible.

**ILLUSTRATION**

A useful beginning sets the stage for the case theory and introduces the theme of change:

‘This plea is about change.

Change from: “A young adopted girl who saw violence in her family, experienced violence herself, became depressed, turned to drugs and spent time in gaol”

to: “A young woman who has given up heroin, sought medical advice, has the support of her father and is set on a path of rehabilitation”.

Allowing her to continue her rehabilitation and not sending her to gaol would be more beneficial for the community and to her.’

This structure uses a short summary of the case theory and theme. It focuses on the principle of primacy: that is, saying something meaningful and interesting instead of padding.

Padding remarks such as ‘my client has pleaded guilty’, when the court has just heard the plea, or ‘Your Honour has heard the evidence’ are useless, because they add nothing and detract from an interesting start.
Continue with the structure of the contrast between the past and the future by highlighting factors that throw light on the theme of change and good prospects of rehabilitation.

At the end of the plea, having illustrated the theme of change, it is an appropriate time to ask for the specific order contended for, such as a community-based order with drug rehabilitation conditions.

A well-structured plea has the following characteristics:

- It has a beginning, a middle, and a strong, effective end.
- It begins with a summary of the case theory.
- It takes the form of an argument that relates all plea material to the relevant sentencing considerations, rather than simply a recitation of the facts followed by a number of assertions and a request for leniency.

Every fact should be placed in one of the categories of the plea and anchored to some part of the argument; for example:

- denunciation
- protection of the community
- general and specific deterrence
- rehabilitation
- level of culpability within a sentencing range
- current sentencing practices
- parity between offenders.

- It includes, when relevant, reference to:
  - the relationship between the head sentence or sentences and the non-parole period
  - cumulation or concurrency with sentences already imposed
  - the imposition and effect of compensation, licence cancellation, loss of professional or director status, etc.
  - likely difficulties in custody with respect to health, isolation, language and/or lack of opportunity for rehabilitation and treatment.

- It identifies the specific result contended for at a stage of the plea when the sentencer may become interested and more receptive.

**A PLEA MUST BE PERSUASIVELY PRESENTED**

There is no one correct way of presenting a plea, nor is there a required structure or pattern. However, a creatively presented plea will not simply be a recitation of:
ADVOCACY MANUAL

- the background of the accused, followed by
- a series of general propositions or assertions, followed by
- a request for leniency.

The advocate must employ his or her own style. A creative, original presentation is more likely to arouse the interest of the listener.

A persuasively presented plea involves:

- good communication
- balance
- courage
- integrity.

GOOD COMMUNICATION

To persuade is to influence the decision by formulating or changing the sentencer's perception and approach. This means that the advocate must take the sentencer through his or her reasoning process in the course of the plea, and not leave it to the decision-maker to put it all together at the end.

In summary, good communication is about:

- involving the decision-maker
- getting through to the decision-maker
- catering for the decision-maker's needs
- taking into account the fact that the sentencing process involves the emotions as well as the intellect of the decision-maker: 'the head and the heart'.

Simple, strong and appropriate language is most persuasive. It helps to create imagery.

ILLUSTRATION

'When Lucia Gonzales was a little girl, she often saw her father hit her mother. She was frightened. She did not understand.'

rather than

'During the course of her childhood, Ms Gonzales witnessed physical violence perpetrated by her adoptive father towards her adoptive mother.'

It is important to personalise and humanise the person for whom you are making a plea. Avoid using the expression 'my client' instead of 'Lucia Gonzales'.
THE PRINCIPLES OF PARITY

In a case where a number of offenders have pleaded guilty and some have been sentenced, the principles of parity in sentencing may become an important issue. The plea-maker must:

- read the sentences in respect of the other offenders;
- analyse the differences and similarities between those offenders and the offender for whom the plea is being made;
- consider the legal principles relating to parity and sentencing; and
- be prepared to argue why a similar or a different sentence should be passed.

BALANCE

To be balanced, the plea should take its weaknesses into account.

These may need to be stated and dealt with in a positive way, and not left to the prosecutor or the sentencer. If ignored, these weaknesses may be used to undermine the argument.

Although the sentencer knows that the advocates are trying to get the best result, the sentencer must balance all factors, both mitigatory and aggravating.

The sentencer will be best assisted, and the advocate’s case best served, by the use of an argument that combines the two, rather than one that avoids the ‘bad’ points. The argument will be more credible as a result, because the advocate will be seen to have considered all relevant features, not just some of them.

Balance is also achieved by dealing with the competing sentencing considerations. While sentences imposed in other cases may not be of much assistance except to indicate a range of sentences, the sentencing principles that emerge from other decisions are of importance and can be used effectively as part of a balanced plea. For example:

- the greater emphasis on rehabilitation with youthful offenders
- the limited use of the principle of general deterrence in cases of offenders with mental illness
- the limited use of specific deterrence where the offender is unlikely to re-offend.

A positive, constructive and realistic suggestion as to the appropriate sentence should be advanced and reasons for the choice clearly articulated.
COURAGE

In exercising their sentencing function, the courts are generally, by their very nature, conservative. Changes in sentencing trends are often the result of creative and courageous advocacy.

It is the advocate’s proper role, in the interests of the client, to push the boundaries by a well-developed and presented argument, which may make reference to other disciplines, studies, research, and changes in social conditions and attitudes.

To be creative and courageous does not mean to be outrageous, unrealistic or controversial for its own sake. The courts welcome a novel approach provided that it is reasoned, based on evidence, and clearly, persistently presented.

In this way, the advocate can achieve results by persuading the court to move beyond the previously accepted limits.

INTEGRITY

Many matters are put to the court from the bar table, particularly in Magistrates’ Courts, where time is short.

The advocate must make sure that facts are accurate and conclusions not overstated. He or she must never mislead the court.

A good reputation in this regard may ultimately save much time and give support to the propositions that are put on behalf of the client. A good reputation helps to gain the court’s trust and confidence in the advocate. It is hard to get but easy to lose.

Prosecutorial cooperation, particularly where the case turns into a plea, is important and both sides should be in a position of being able to trust each other. Once the advocate loses trust, he or she may find it much harder to obtain the advantages that flow from getting to know the prosecution case before the hearing, and from getting assistance.

PLEA IN MITIGATION AFTER CONVICTION

Special considerations apply to a plea after conviction because the client’s instructions may be inconsistent with the facts on which the conviction is based. An accused who pleads not guilty often maintains his or her story of innocence at plea time, despite the conviction.
The structure and content of the plea will therefore have to vary with the circumstances of each case, so as to be consistent with the accused’s instructions and yet also consistent with the fact of conviction.

This means that the plea will have to be made on the basis of such facts as had to be accepted by the tribunal to found the conviction. Comments by the advocate such as ‘my client maintains his innocence’ are of little assistance to the sentencer, who must proceed on the basis of the essential facts underlying the conviction.

The treatment in the plea of sentencing factors such as prior convictions, subsequent behaviour, remorse and rehabilitation must be carefully considered, in the light of the client’s instructions as well as the facts on which the conviction is based. The case theory must accommodate these problems.

In most cases, it is possible to confer with the accused and prepare for a plea before or during the contested case. In some cases, however, it may not be desirable to involve the accused who is contesting a case in discussions relevant to the plea, because the accused may lose confidence in the advocate’s commitment to the case.

It is advisable, particularly where the conviction is in respect of some charges and not others, to have time to consider how the conviction affects the plea, whether evidence should be called and how the plea should be structured.

Time for a conference with the client and an explanation of the position in relation to sentencing is desirable.

Some advocates take the view that it is better not to embark on the plea while the pronouncement of the guilty verdict is still ringing in the sentencer’s ears.

**VICTIM IMPACT STATEMENTS**

Victim impact statements are permitted in most jurisdictions and sentencers are required to consider them as part of the sentencing process.

The effects of crime on victims have always been considered by sentencers; however, it is now done more overtly and in greater detail through the victim impact statements.
When victim impact statements refer to general, common-sense effects on victims—such as, for example, a family's deprivation and grief as a result of the killing of a husband and father—they are taken into account and no problem for the plea-maker or the sentencer arises.

Sometimes, however, victim impact statements, coming both from the victims and from others such as doctors, psychiatrists or teachers, refer to specific consequences that are alleged to flow from the crime committed. In those cases the plea-maker must carefully consider questions of causation and weight of expert evidence, as well as the reliability of such claims, and if necessary be prepared to test them or call evidence to contradict them.

Judgment and tact are required because of the risk that a challenge to such statements may reinforce them on the one hand, or be seen as evidence of further hurt to the victim or lack of remorse by the convicted person on the other.

It would be a brave advocate who launches into a cross-examination of a victim or an author of a victim impact statement without carefully considering the appropriateness of such an approach and how it may backfire.

That does not mean that the plea-maker should uncritically accept all the claims of adverse consequence to the victim without considering how they should be dealt with, and how they should be challenged, if necessary.

**THE MOST FAVOURABLE OUTCOME**

Ultimately, the aim of the advocate in plea making is to obtain for his or her client the best outcome reasonably available in all the circumstances of the case.

Excellence in plea-making can be achieved only if the advocate recognises the importance of its role, and makes his or her best effort to obtain the most favourable result for the client.

Persuasive plea-making is one of the great challenges in the art of the advocacy and must be approached thoroughly and seriously.
WRITTEN ADVOCACY

The opportunity for advocacy in writing arises when an advocate drafts or settles:

- a pleading
- a witness statement
- an affidavit, or
- a written submission.

INTRODUCTION

Oral advocacy is the most persuasive form of advocacy because of the immediacy of communication and exchange of ideas between the advocate and the decision-maker. In the ‘conversation’ with the court, the advocate can ‘read’ the court’s reactions and react by varying and reshaping the argument. There is also the force of personality and body language.

The advocate can engage the judge by understanding and ‘speaking to’ that judge’s particular characteristics. In an appellate argument, the advocate can engage each judge differently.

Questions from the bench, which should be encouraged, can provide a means of emphasising or reframing the argument.

Written advocacy also has an important role, and can be a powerful, persuasive tool.

Written submissions can stand alone, but can also be used in combination with oral argument.
It is important to check the rules of the relevant court when preparing pleadings, witness statements, affidavits or submissions, in order to comply with requirements as to form and substance. These requirements will vary between jurisdictions.

FORM OF A DOCUMENT

The way in which a document is set out is important. Set it out so that it will be easy to follow. It is useful for the reader to have space provided in the document to make notes. This is particularly helpful in submissions.

Use short, numbered paragraphs, one for each part of the evidence, topic or event. The numbering system in a complex document should also be simple. It is best to number paragraphs consecutively in a simple form, and to avoid complex and confusing numbering such as ‘3.4.1(a)(iii)’. Each paragraph should deal with only one subject matter.

In more complex documents, headings are useful to identify the subject matter with which the paragraphs that follow deal.

PLEADINGS

A detailed discussion of the finer points of pleadings is beyond the scope of this chapter. However, when considering how to make a pleading the most persuasive tool that it can be, it is important to keep in mind the purpose of pleadings. Pleadings are documents designed to ensure that all material facts and questions of law in dispute between the parties are stated clearly for the court’s determination.¹

The pleadings are the first documents to which a decision-maker will refer. First impressions will be formed on a reading of the pleadings. Therefore, where there is scope in a pleading to organise and present the facts in such a way as to lead to the conclusion for which you contend, that opportunity should not be lost.

An advocate should consider:

- what facts should be pleaded;
- what level of detail should be pleaded; and
- in what order the facts should be pleaded

with a view to maximising the document’s persuasive qualities.

¹ See M. G. Britts, Pleading Precedents (5th edn), Law Book Company, Sydney, 1994.
WITNESS STATEMENTS

In many civil jurisdictions, witness statements or affidavits contain factual material which, when tendered, becomes the evidence upon which the court relies. Once tendered, the factual material takes the place of the evidence in chief of each witness.

A good witness statement is:

- the detailed story of part of the case
- told by the witness
- based on relevant and admissible evidence, and
- persuasively written.

THE DETAILED STORY OF PART OF THE CASE

In many civil cases, the story told by the witness in his or her statement is treated as the evidence in chief of the witness. No oral evidence is adduced, although leave may be granted to give additional oral evidence in certain circumstances.

The witness whose statement is tendered can be cross-examined and re-examined.

A witness statement is usually prepared by a lawyer taking instructions from the witness in conference. In order for the lawyer to arrive at a final narrative text of the story as told by the witness, he or she requires an understanding of the principles of preparation of evidence in chief. (See Chapter 5, ‘Examination in Chief and Re-examination’.)

Although the witness statement is arrived at as a result of questioning in conference, it is ultimately presented in the form of a narrative.

Before taking instructions from a witness for the purpose of preparing a witness statement, the advocate must identify the purpose of that witness’s evidence, its relevance and admissibility. Where does it fit into the advocate’s case theory?

The advocate should revisit the pleadings in the case to ensure that the issues in dispute are at the forefront of his or her mind. What is it that this particular witness’s evidence will prove?

*Thinking must precede expressing.* (Julian Burnside QC)

*Good writing is clear thinking made visible.* (Ambrose Bierce)
TOLD BY THE WITNESS

When taking instructions for a witness statement, the lawyer should:

- let the witness tell the story, using his or her own words and expressions
- avoid ambiguity and generalities in questions
- explore details by probing questions
- get facts not conclusions
- ask for explanations of inconsistencies
- explore the peripheries of the story
- get the specific language of conversations, not a summary, the effect of or a conclusion about what the conversation meant.

It is important to follow up if information is incomplete, and to persist in getting answers to difficult questions. If information that is unhelpful to the case is going to emerge, it is best that it emerges in conference, rather than in the witness box.

Although it is accepted that it is the lawyers who prepare the witness statements in the form in which they are used in court, the witness statement should use the language and expression of the witness, as closely as possible. This will help to prevent the other side, in cross-examination, from suggesting that:

- the story is in the language of the lawyer, not the witness
- the lawyer has influenced the witness by suggesting answers or asking leading questions.

BASED ON RELEVANT AND ADMISSIBLE EVIDENCE

The evidence must:

- be relevant
- be admissible
- contain statements of facts, not opinion (other than the opinions of expert witnesses), argument, belief or speculation
- comply with rules of the relevant court.

The statement should be the witness’s recollection of personal experiences and what he or she perceived: what he or she saw, did, heard, said, etc.

During the conference with the witness, the lawyer should focus the witness’s attention on the relevant issues. The client’s perception of what
is relevant and important may not relate to the real issues in the case. It is for the lawyer to retain control of the conference, and therefore the way in which the story is told in the witness statement.

Include all of the detail to tell the full story:

- if describing an event, include the time, the place, and then the action;
- if describing a conversation, include the time, place, who was present, and the actual words spoken by each party to the conversation.

**ILLUSTRATION**

'I said to the builder, “I am not happy about this three-month delay”’, not ‘I related my concern about the delay to the builder’.

Such detail helps to make the story, the characters and the action come alive. Words that conjure up images in the mind of the reader make the story more memorable and credible.

Use visual aids and exhibits:

- refer to plans, diagrams, charts, or graphs to set the scene or explain different concepts;
- refer to relevant exhibits; and
- attach the visual material to the witness statement.

**PERSUASIVELY WRITTEN**

The witness statement should be structured as a narrative told by the witness.

A good written story, like good evidence in chief:

- will be logical
- will be structured in a way that is easy to understand and recall
- will interest the listener by bringing people, places and events to life
- will be told simply
- will not be repetitive.

Consider how the story will best be received by the court. Ask yourself how it will be most persuasively told, by reference to the following considerations:

- How will the decision-maker best understand the story?
- How will the decision-maker’s interest be maintained?
The following techniques are useful:

- Evidence should follow a chronological or other logical order.
- The story must have sufficient detail to be credible and persuasive. A detailed story is more realistic and persuasive than a vague and generalised one.

**Language**

Simple, expressive language is persuasive. Witnesses should be encouraged to express themselves clearly and simply. (See Chapter 11, ‘Communication’.)

Short sentences and plain, familiar words should be used:

<table>
<thead>
<tr>
<th>ILLUSTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instead of ‘utilise’: ‘use’</td>
</tr>
<tr>
<td>Instead of ‘commence’: ‘start’</td>
</tr>
<tr>
<td>Instead of ‘prior to’: ‘before’</td>
</tr>
</tbody>
</table>

The active voice should be used:

<table>
<thead>
<tr>
<th>ILLUSTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘I drove my car north along Smith Street’, not ‘The car was being driven by me in a northerly direction along Smith Street’.</td>
</tr>
<tr>
<td>‘John approached me and said ‘Please sign this document’”, not: ‘I was approached by John and asked to sign the document.’</td>
</tr>
<tr>
<td>‘I saw the man run from the side of the house’, not ‘The side of the house is where the man came from.’</td>
</tr>
</tbody>
</table>

Be specific; avoid generalities:

<table>
<thead>
<tr>
<th>ILLUSTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘On 1 June 2006 …’ or ‘three months later’, not ‘After a period of time John purchased a car’.</td>
</tr>
<tr>
<td>‘I telephoned her and said “I will be away””, not ‘She was informed by me that I will be away’.</td>
</tr>
<tr>
<td>‘I posted (or faxed or e-mailed) the document to the solicitors’, not ‘The document was forwarded to the solicitors’.</td>
</tr>
</tbody>
</table>

When describing conversations, use the words that were actually spoken, not a summary or interpretation:
Use names, not descriptions:

‘Mr Jones’, not ‘the defendant’ or ‘my client’.

Avoid collective expressions:

‘I’ instead of ‘we’
‘the company’ or ‘the managing director’ instead of ‘they’.

Avoid expressions containing or connoting subjective opinion:

‘I would have done …’
‘I would have been …’
‘I imagine …’
‘I believe …’

Avoid interpretations or explanations of intention:

‘When I wrote this letter I meant that …’ or
‘When I said to her, “I will be there soon”, I meant about one hour’

Avoid statements of a state of mind (unless clearly relevant):

‘I understood …’
‘I thought …’
‘I intended …’
‘I felt …’
The reader of a good witness statement should be able to visualise the events described as if they were played out in a film. Imagery, created by word pictures, can be very powerful.

Simple direct language and precise detail help to achieve this.

**AFFIDAVITS**

An affidavit is another way in which evidence may be adduced in writing. The same principles that apply to the drafting of a good witness statement apply to the drafting of a good affidavit.

An affidavit should:

- be a persuasive account of the facts relevant to that particular witness
- contain only relevant and admissible evidence
- be expressed in simple, clear and concise language
- be set out in numbered paragraphs
- comply with the relevant rules of court

and should not:

- be argumentative
- contain legal submissions or evidence of opinion (unless the witness is an expert)
- use phrases such as ‘I verily believe …’
- begin each paragraph with the word ‘That’.

Where affidavits are used in interlocutory proceedings, a deponent may state a proposition of fact on the basis of information and belief, but the source of the information and the reasons for the belief must be identified.

**WRITTEN SUBMISSIONS**

The fundamental characteristics of persuasive oral argument apply equally to persuasive written argument (see Chapter 7, ‘Argument’).

In Australian courts, oral submissions are still the primary form of communication. However, close attention should be given to the preparation of written advocacy, because well-written, persuasive
CHAPTER 9: WRITTEN ADVOCACY

submissions enhance oral argument and allow it to be conducted more efficiently.

If the written argument has to be submitted in advance of the hearing, it can be a golden opportunity to make a favourable impression on the decision-maker before the oral presentation. It can also save time, by helping the decision-maker to focus on the real issues.

Depending on the circumstances and jurisdiction, the advocate may need to prepare full written submissions, or alternatively an outline of submissions. The relevant rules of court often set out what is required.

Whether an outline of argument or full written submissions are called for, ‘the oral argument and written submissions are twin weapons in the task of persuading by communication’.2

CRITERIA FOR PERSUASIVE WRITTEN SUBMISSIONS

In order to enhance oral argument, persuasive written submissions should be informed by the question, ‘What is the author trying to do?’3

To achieve their purpose, written submissions must be useful to the decision-maker, both in substance and in form. In other words, they must help the decision-maker to understand what has to be decided. They should mould the decision-maker’s thinking so that he or she arrives at the conclusion for which the advocate contends.

Written submissions can serve this function only if they are:

- **Clear**
  
  To be clear, the advocate should:
  - identify the party for whom he or she is acting;
  - explain at the earliest stage what decision that party wants the court to make and why;
  - formulate each proposition of fact and law followed by the supporting material;
  - organise the issues in a logical sequence;
  - use clear, simple language (see also Chapter 11, ‘Communication’);
  - use short sentences;
  - use numbered paragraphs;
  - use appropriate headings;

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2 Justice James Douglas, Supreme Court of Queensland.
3 Justice Kenneth Hayne, High Court of Australia.
use appropriate definitions;

ensure that the submissions are well set out, providing space for the decision-maker to make notes; and

include cross-references to key documents where appropriate.

Cogent

The written submissions should have a natural flow and a coherent structure. They should be easy to read and easy to understand. A document that is both well-structured and pleasing to the eye is likely to be more persuasive. It should:

begin with a short introduction, setting out what the advocate is seeking, and why;

set out the issues for decision (and, where appropriate, what is not in issue);

then set out enough of the facts to enable the decision-maker to put the arguments on the law into context;

continue by developing the arguments in favour of the advocate’s case and dealing with the arguments against it;

conclude with a brief summary of why the court should find in the advocate’s favour.

Concise

If the written submission is not concise, it is more difficult for the reader to maintain focus. Too much detail that is not central to the argument can distract the reader from the main thesis of the submissions.

Do not overload the document with unnecessary case references or lengthy quotations. Pick the best authority and cite the key passage, or if it is too long, append a photocopy and highlight it.

Try to pick the three strongest arguments in your favour on each issue. Avoid long lists.

Use as few adverbs as possible.

Use short sentences and paragraphs.

Think of the document as a springboard for oral submission. The advocate should leave himself or herself something to say when developing the case orally.

If time allows, put the first draft away for at least a few hours and then read through it afresh as if you were the decision-maker. Excise or shorten any passage or sentence that appears overlong or unnecessary.
CHAPTER 9: WRITTEN ADVOCACY

■ Accurate

If the written submissions are not accurate, or present an argument unfairly, the decision-maker is more likely to put them aside in favour of the opponent’s submissions. Furthermore, an oral presentation based on inaccurate written submissions lacks credibility.

■ Comprehensive

Submissions that miss important detail or are inappropriately selective undermine the credibility of the advocate and of the argument. Address all of the issues as briefly as seems appropriate.

OUTLINE OF SUBMISSIONS

The outline of submissions provides the foundation from which the oral argument proceeds. It should identify and encapsulate the very essence of the issues and of the submissions to be made.

Provision of a well-structured and concisely articulated outline of submissions presents an opportunity to develop a clear and principled approach to the questions in dispute and to make a strong initial impression on the members of the court. It allows the advocate to set the stage for oral persuasion.

As a concise summary of the argument, the outline of submissions may be used as a road map. As such, an outline should:

■ give an immediate overview of the entire presentation; and

■ provide a structure for the decision-maker to follow so that at any given point, he or she knows what point is being argued in the overall context of the matter.

The aim of the advocate when drafting an outline should be the same as when drafting more detailed written submissions. The same objectives apply, but the outline is in summary form.

At the end of oral argument, the outline of submissions will continue to provide an important reference point for the judge evaluating the competing arguments. In some cases it can also be used as the basis for more detailed written submissions, which contain cross-references to the evidence or which deal with new arguments that may have arisen in the course of the hearing.

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When citing authorities in full written submissions or summaries, reference should be made to the principle for which it is contended the case stands.

Although reference should be made to the place where relevant passages can be found, transcribing passages from judgments should be avoided.

A simple, brief and concise statement of the argument can be a powerful and persuasive starting point for the reader and for the advocate. It takes considerable discipline to reduce an argument to its essence.

When you are finished with the writing of submissions, it is useful to put them away, then reread them one more time, placing yourself in the position of the person to whom they are addressed.

Then ask:

- Is it realistic?
- Does it have a chance of succeeding?
- Do I need to do more or less?
- Is it easy to follow?
- Does it read well?

Whether written or oral, as Justice Kirby has said, ‘In the end, the object of advocacy is, by communication, to persuade.’
ADVOCACY IN MEDIATION

Mediation is one form of Alternative Dispute Resolution (ADR).

ADR has been defined as ‘[the process], other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’.¹

The other common forms of ADR are conciliation and arbitration. We will not discuss advocacy in those contexts, because advocacy in conciliation and in mediation are similar and advocacy in arbitration is similar to court and tribunal advocacy.

ADR has gained increasing acceptance among prospective litigants and the legal profession for those disputes that can be resolved outside the court process. This trend can be attributed to:

- the unpredictable outcome, time frame and the escalating costs associated with litigation;
- the parties’ desire that both the dispute and outcome remain confidential; and
- the courts’ increasing caseload and consequent requirement that parties engage in ADR before the case is fixed for final hearing.

The Victorian Law Reform Commission has recommended that additional ADR options should be available to courts and parties.² They are:

- conferencing
- case appraisal
- early neutral evaluation

THE NATURE OF MEDIATION

Mediation is a process in which an independent person, trained in mediation, facilitates the parties' negotiation towards their own solution of their dispute, by helping them to isolate the issues and reach agreement.

At the heart of the mediation process is the opportunity for each party to make a dispassionate and fundamental objective reappraisal of the whole situation in the free and totally protected discussions that take place within the mediation. Such discussions enable each party to make a more fully informed and reliable assessment of its own position and interests, of the other party's position and interests and of likely future developments and options.3

Mediation can be compelled by the courts or can be agreed to between the parties. In each case, any agreement reached must be voluntary.

There are different methods and practices used in conducting mediations in various jurisdictions and by different mediators. However, they share the common aim of facilitating a genuine agreement between the parties that will resolve the issues and avoid litigation.

THE ROLE OF THE MEDIATOR

It is important for lawyers involved in mediation to understand that the mediator:

- must be impartial
- must not impose a solution to the dispute
- does not make decisions of fact or law
- must not coerce the parties into settlement, and
- helps the parties to explore the issues and to reach an agreement.

3 Sir Laurence Street AC KCMG QC, ‘Representation at Commercial Mediations’ (1992) 3 ADJR 255.
Chapter 10: Advocacy in Mediation

It is for the mediator, with the consent of the parties, to decide what model of mediation will be adopted. The process can be modified to accommodate the needs of the parties in particular circumstances.

The mediator’s role is:

- to describe and explain the process to the parties;
- to explain the confidential, ‘without prejudice’ nature of the process;
- to inform the parties of the mediator’s costs and obtain their agreement to pay those costs;
- to explain to the parties their right to suspend or terminate the mediation;
- to explain the importance of each party’s opportunity to present its point of view;
- to obtain agreement to the mediation;
- to generate options for resolving the issues;
- to obtain sufficient information to enable issues to be identified; and
- to help the parties to draft the agreement, if it is reached.

The process of mediation is not formal. It takes the form of discussions managed by the mediator in which various issues are considered and terms of agreement proposed.

While the process of mediation is flexible, it usually contains the following steps:

- The mediator outlines the mediation process to the parties in a joint session.
- Each party explains its grievances or concerns, either personally or by a representative.
- The mediator summarises the issues or topics of concern.
- The parties discuss the issues under the control of the mediator.
- The mediator separately and confidentially confers with each party to discuss options for settlement.
- The mediator may make suggestions on how a settlement may be reached.
- Legal representatives discuss the issues and possible terms of settlement with the mediator.
- The legal representatives discuss the terms with the parties and advise them.
- Parties may be invited to reconvene and discuss settlement options.
- Negotiations are usually conducted directly between the parties’ representatives, with the mediator’s assistance.
The mediator may act as a conduit, passing offers and counter-offers between the parties’ representatives. If an agreement is reached, precise terms are put into writing and signed by the parties.

**THE ROLE OF LAWYERS IN MEDIATION**

A lawyer present at a mediation is there as an advisor to a party, not as an advocate for his or her party’s cause, because the process is not adversarial. In mediation, there is no contest between the parties, or between their legal advisors. ‘A legal advisor who does not understand and observe this is a direct impediment to the mediation process.’

In the other ADR processes recommended by the Victorian Law Reform Commission, the lawyer’s role would be primarily non-adversarial, except in arbitration and mini-trial case presentation, the aim of which is to put the client’s best case forward.

The lawyer’s role in mediation is:

- to identify the strengths and weaknesses in his or her client’s case and in the opposing party’s case;
- to help the client to understand the risks inherent in litigation;
- to explain to the client the cost consequences of a successful outcome at trial, including the costs that will not be recovered even if they win, and the cost consequences of failing at trial;
- to compare those outcomes with the best offer that the client receives at the mediation and discuss whether the best alternative is to go to trial rather than to accept that offer; and
- to emphasise the need for the client to listen to the other party’s concerns and to make a genuine effort to resolve their differences.

This approach is sometimes referred to as the ‘BATNA’ (Best Alternative To a Negotiated Agreement).

**LAWYERS’ ETHICAL OBLIGATIONS**

Although lawyers in mediation are not advocates in the same sense as in the adversary process, they nevertheless have similar ethical obligations:

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4 Street, ‘Representation at Commercial Mediations’.
CHAPTER 10: ADVOCACY IN MEDIATION

- to act on instructions
- to maintain professional competence
- to maintain professional etiquette
- to maintain confidentiality
- to act in good faith
- not to mislead the mediator or the parties
- to advise their clients to act in good faith
- to avoid conflict of interest
- to cooperate with the mediator.

PERSUASION IN MEDIATION

In this manual, we have discussed the importance of advocacy as the art of persuasion in court.

In mediation, many characteristics of advocacy apply, but the concept of persuasion must be qualified: the lawyer’s role as an advocate is not to persuade the mediator, although it helps if the mediator is persuaded. It is to persuade the decision-makers—that is, the parties to the mediation—to adopt a solution that will best meet their needs and concerns.

In this sense, advocacy has its place in mediation, but it is non-adversarial.

The lawyer’s role is to help the client to achieve the desired outcome by advising him or her about the effects and consequences of any proposed agreement.

THE LAWYER’S INVOLVEMENT IN THE PROCESS

The lawyer’s participation in the mediation process will involve:

- conferring with the mediator
- making suggestions as to how mediation should be conducted in the circumstances of the particular case
- opening his or her client’s case
- discussing the case with the other party and his or her lawyer.

PREPARATION

In fulfilling their role as advisors and advocates in mediation, lawyers must be well prepared. This involves:

- a thorough knowledge of all the available materials;
- an understanding of the real issues in dispute between the parties;
an assessment of the strengths and weaknesses of each party’s case, in order to form a view of what the likely result may be in litigation;

an assessment of what the client’s needs are and where the client is likely to make concessions;

in commercial mediation, an assessment of the financial implications for the parties of litigation and of mediation, and the consequences of a resolution of the dispute.

Thorough preparation will enable the lawyer to advise the client and help the client to weigh up the various options, and to achieve the client’s desired objectives in the mediation.

OPENING THE CASE

The general principles described in Chapter 4, ‘Opening Address’, apply to opening the case. The story of the case is told simply and clearly. However, because of the different nature of the process, it is important that the lawyer:

- builds a relationship with the other party at the outset
- does not open on the basis that the other party is wrong or unreasonable
- presents a balanced, realistic and empathetic overview
- is tactful and understanding
- communicates in clear, simple language
- emphasises that his or her client is genuinely willing to cooperate and to resolve the issues.

A lawyer who is second to open should also:

- actively listen to the first presentation
- not present the second opening in a confrontational manner
- not enter into argument
- show respect for the other party’s position
- make concessions where appropriate.

COMMUNICATION

The general principles of good communication apply in mediation.

In the adversary courtroom, communication involves building a relationship with the decision-maker, which helps in persuading the decision-maker to the result sought by the advocate.
This is different in mediation. As the aim is to persuade the parties to reach a mutually satisfactory resolution, the advocate needs to build a relationship of trust, confidence and credibility with the parties, as well as between them. To do this effectively, the advocate’s manner and attitude should be consistent with cooperation and agreement. Language and body language should convey the idea that mediation is an attempt to ‘resolve’ rather than to ‘win’ the case.

It has been noted by some mediators that advocates steeped in the adversarial process find it difficult to achieve this different approach and manner.

**ILLUSTRATION**

John has recently been dismissed from his employment with XYZ Pty Ltd, after a recent promotion. The reason given for termination is that he was unable to meet production demands.

Rather than launching into an argument that the employer has been unreasonable or unfair, and that the termination was wrong, it will be more effective to set out the reasons why John is aggrieved with the company’s decision. The advocate for John would include these essential facts:

- John has been a dedicated employee for 19 years.
- He was honoured to accept the promotion to production manager.
- He was not given training in the new position and thought he was doing well.
- Production demands were not quite met, but he thought he would be given time as he was new to this position.
- Colleagues in the industry may now question his capacity and his work ethic.
- He is 59 and will find it almost impossible to gain employment in the industry. He has no other qualifications.
- He would still like to continue his employment with the company, but in all the circumstances this is not feasible.
- John is keen to resolve this dispute in the best way possible.

**RELATIONSHIP WITH THE MEDIATOR**

The impression the lawyer must convey to the mediator is also important. The mediator must feel that the lawyer is:

- genuine in attempting to have the dispute resolved
- not there to take a position or gain some advantage
- willing to cooperate with the mediator and all parties.

This relationship with the mediator will assist the lawyer, in that the mediator will be in a better position to advance suggestions to the other party as proposed by the lawyer.
Successful mediations often do not depend on the declaration of legal rights. They succeed because of empathetic and practical considerations explained to and understood by the parties.

In mediations in which the parties have a continuing relationship, such as those concerning employment or family disputes, an empathetically conducted, successful mediation may help to preserve the relationship in a way that litigation does not.
COMMUNICATION

THE IMPORTANCE OF COMMUNICATION IN ADVOCACY

Advocacy is the art of persuasion.

The word ‘persuasion’ is from the Latin *persuadere*. In the forensic context it means to prevail by reasoned argument and communication of information and feeling, by both verbal and non-verbal means.

Effective communication is essential to persuasion. The origin of the word ‘communication’ is from the Latin *communicare*, meaning ‘to share’. It involves the conveying and sharing of information, ideas and emotion, by both verbal and non-verbal means.

For an advocate, communication is:

- the building of a relationship
- between the advocate and the decision-maker
- which will assist the advocate
- to be most persuasive.

Persuasion involves affecting the decision-maker’s intellectual and emotional responses towards a desired end by:

- engaging the interest of the decision-maker, and
- making the desired impression during argument and the evidence of witnesses in order to:
  - build a relationship conducive to persuasion;
  - create new perceptions in the mind of the decision-maker; and/or
  - change perceptions already held.
The first stage in the building of a relationship with the decision-maker is active listening. This applies to:

- what the advocate’s opponent is saying
- what the judge is saying
- what the witnesses are saying.

Active listening involves:

- being in a position to look at the speaker and maintain appropriate eye contact
- taking in what is being said
- taking in how it is being said
- not interrupting.

As an advocate, you will be better able to listen actively if you are:

- not tied to notes
- sufficiently prepared, so that you can focus on what the speaker is saying rather than thinking about what you want to say next.

Active listening is essential to:

- understanding and absorbing
- being able to respond appropriately
- giving the speaker the confidence that you are listening and interested
- avoiding being at cross-purposes.

It is important to ‘listen before you speak’.

The test of effective communication is the message that the decision-maker receives. Building a relationship allows the advocate’s message to be understood, accepted and acted upon.

The content of the message must be good, but that in itself may not be sufficient. To be effective it must be communicated persuasively.

Therefore, effective communication is the most significant quality of good advocacy.
ADVOCACY SKILLS FOR EFFECTIVE COMMUNICATION

To communicate effectively, the advocate must first:

- be thoroughly prepared.
  That involves:
  - complete familiarity with factual material
  - knowledge of relevant law, rules of evidence and procedure
  - analysis of the materials and development of a case theory
  - preparation for performance
- have developed specific advocacy disciplines and techniques
- have knowledge of the characteristics of the decision-maker.

It is then necessary to:

- understand the characteristics of effective communication
- understand the obstacles to effective communication
- find a means of overcoming the obstacles to effective communication
- identify personal strengths and weaknesses, and
- consciously develop communication techniques through critical self-appraisal and practice.

As an advocate you bring to your task your own personality and experience of life. It is important to remember to be yourself. You will communicate more effectively if you use what comes naturally.

You may admire other advocates and their particular styles but you should not try to emulate their style in precisely the same way. Attempts to do so will invariably appear contrived and artificial. Nevertheless, we can learn from other advocates by adapting their techniques to suit our own.

Communication skills, like those of advocacy, are best taught and developed by the workshop method.

ASPECTS OF EFFECTIVE COMMUNICATION

Effective communication is manifested in an advocate’s performance when that performance employs:

- appropriate language
- appropriate body language
ADVOCACY MANUAL

- clarity
- brevity
- simplicity
- timing
- pace
- voice control
- appropriate eye contact.

Other skills that will be evident include:

- command of materials—the ability to use relevant materials and control their presentation
- precision or accuracy in the content of what is presented, either orally or in written form
- organisation
- active listening
- reason and logic—the conclusions argued for are validly drawn from the supporting information provided
- empathy—the ability to identify with a person
- sensitivity and responsiveness
- balance
- control—the power to hold people’s attention and influence their behaviour.

These characteristics, in combination, exemplify good communication in advocacy. An observer can discern a good advocate by what he or she is doing. However, seeing what is done does not necessarily disclose the skills and techniques used to perform what is manifestly good advocacy.

For example, seeing a good cross-examiner control a witness or a good advocate exhibiting ‘presence’ in court does not teach how those qualities are achieved.

Before considering the specific skills and techniques involved in effective communication, it is useful to identify the obstacles to effective communication.

OBSTACLES TO EFFECTIVE COMMUNICATION

There are two categories of obstacles to effective communication: functional and psychological. A lack of specific advocacy skills in handling witnesses or presenting argument is a functional obstacle. The psychological obstacles are generally produced by performance anxiety.
By the time people become advocates they are generally good communi-
cators in ordinary day-to-day situations. In everyday communication
there are no barriers of the kind that affect communication in the
courtroom, such as:

- hierarchical relationships
- formality of proceedings
- the layout of the courtroom
- the requirement to comply with the rules of ethics, evidence and
  etiquette
- the pressure of skilled performance
- competitive pressure in the adversary system
- pressure of responsibility for the client.

To gain understanding of what interferes with effective communication
in the courtroom, it is useful to ask:

- What is the psychological impediment to effective communication?
- What can be done to minimise it?

The psychological impediment to effective communication is perfor-
mance anxiety, caused by any of a number of factors.

A degree of nervousness or anxiety is to be expected before and during
any performance. For an advocate, performance anxiety is increased by
worries about:

- insufficient familiarity with the materials
- insufficient familiarity with the court process and environment
- insufficient familiarity with the characteristics of the decision-maker
- inadequate legal knowledge and skills level
- making mistakes
- looking foolish
- failure to do the best for the client
- professional failure.

It is natural for advocates to have critical, destructive thoughts as a result
of those fears. Such thoughts (‘I am not really up to it’; ‘I am going to
look stupid’, ‘I am going to fail’) are sometimes referred to as ‘the second
voice’. If not dealt with, it undermines one’s ability to perform.

This ‘second voice’ is something that develops and intensifies as we grow
up. A toddler learning to walk does not, when falling over for the first,
second or even third time, say to him- or herself, ‘That’s it, I give up, I’m
never going to learn to walk. What will people think of me!’ A toddler will keep
standing up, and falling down, until he or she has learned to walk. Skills
are best learned when people are young, before they develop inhibitions and defences and their thoughts become critical and unhelpful.

Human thinking follows a pattern of asking and answering questions or dealing with propositions. For example, the questions ‘What sort of day is it? What will I wear?’ may be answered by, ‘It’s cool; wear a jumper.’

Positive questions or propositions can help to encourage constructive, positive thinking and actions. For example: ‘I have to be at court by 9.00 a.m.; how do I get there on time? What time do I have to leave to make sure I’m on time?’ In this example, the positive question will lead to looking in the street directory to find the best way to that court, and checking train schedules for relevant departure and arrival times.

If the ‘second voice’ asks a negative question or puts a negative proposition—for example, ‘I don’t know how to get to Broadmeadows Magistrates’ Court; I’m going to be late’—the answer will be an unhelpful response that will increase anxiety.

**ILLUSTRATION**

The ‘second voice’ undermines confidence:

Q    Why didn’t I put that argument?
A    You’re incompetent.

Q    Why didn’t I ask the right questions?
A    You’re lazy so you did not do enough preparation.

**OVERCOMING OBSTACLES TO EFFECTIVE COMMUNICATION**

In the above illustration, the obstacle can be minimised by understanding that positive thinking and asking positive questions will produce more useful responses leading to positive action. For example, ask ‘How can I improve my questioning?’; ‘How can I better analyse and prepare my case?’

Performance anxiety can also be minimised by:

- consciously developing performance skills;
- improving knowledge and preparation;
- becoming more familiar with the court and the decision-maker. By knowing the decision-maker and his or her approach, the advocate can better anticipate issues that may arise;
- analysing one’s own performance and assessing it critically but positively;
organising the materials for easy identification and access;
- using relaxation techniques such as deep breathing and slowing down;
- focusing on and visualising the performance;
- being realistic about what can be achieved in the available time and circumstances.

It is important that expectations are commensurate with the advocate’s level of experience, skill and ability. For example, it is unrealistic for a junior barrister to expect to achieve what a senior barrister could achieve in a short space of time. What is realistic is a positive commitment to preparation, and performance to the highest standard possible within the available time and level of ability.

**COMMUNICATION SKILLS AND TECHNIQUES FOR PERSUASIVE ADVOCACY**

**ORGANISATION**

An advocate must structure the evidence, cross-examination or argument to support the case theory in a way that is most likely to persuade the decision-maker.

To be most persuasive, the advocate should aim to capture the decision-maker’s attention and interest in the first 20 seconds of the presentation. The advocate should use this opportunity to:

- focus the attention of the bench on the most significant issue;
- encapsulate the case in a concise but interesting way; and
- eliminate unnecessary introductory padding.

**ILLUSTRATION**

A final address for the defence in *DPP v Jones* may begin:

‘I tricked Danny again.’

That is what Watkins said and that is what he did.

How did he go about doing it, and why was it successful?

Watkins, knowing that he would not be able to purchase a bottle from Jones if Jones thought he was drunk, composed himself to appear sober, and successfully bought the bottle of sherry.

---

1 This is a view expressed by David Bennett QC, Solicitor-General of Australia, when teaching appellate advocacy for the Australian Advocacy Institute. It is known as the principle of primacy.
That immediately encapsulates the theme of the argument for the defence, which abandons argument in relation to the first two elements of the offence and focuses on the third element: that if the sale was made, Jones did not know that Watkins was intoxicated.

It also uses a rhetorical question, which is a good way of involving the listener and highlighting the points supporting the conclusion that the advocate wishes the decision-maker to reach.

The advocate should also provide the decision-maker with sufficient information, in progressive sequence, so that each point will be understood in the light of the previous information. This overcomes the problem of the advocate assuming that the decision-maker has the same knowledge of the facts as the advocate does, which may not be a justified assumption.

Finally, the advocate should ensure that the decision-maker is ready to absorb and respond favourably to each stage of the evidence or argument. The advocate must work out the most advantageous time to make the request, state the desired conclusion or make the best point. It must not be:

- too soon, when the listener is not ready and therefore may misunderstand or have a negative reaction; or
- too late, when the decision-maker may have formed a different or adverse state of mind.

The most persuasive style of argument in court is conversational, not oratorical. This helps to build the relationship between the arguer and the decision-maker (see Chapter 7, ‘Argument’).

A good structure should:

- reflect the principle of primacy
- provide a clear introduction, development and conclusion
- capture and maintain interest
- control the listener’s reasoning process so as to persuade ‘as you go’.

TELLING A STORY

People are conditioned from childhood to hear and respond to stories. We see and experience life as a set of stories and associated feelings. Most cases are based on events, which constitute a story. In most cases there are competing or different stories based on people’s differing perceptions, recollections and honesty.
Storytelling is important in the courtroom in:

- the presentation of an interesting opening address
- the leading of evidence
- describing the factual foundation for an argument
- setting the scene in an application, a plea in mitigation, or an appeal.

A good, persuasive story will:

- have a structure that is easy to follow
- maintain interest
- be simple
- use words to create images in the mind of the listener
- engage other senses as well as hearing, by the use of visual aids and exhibits
- be directed towards an objective
- have appropriate, emotive content.

It is much easier to communicate a scene or event to a listener if the advocate has first visualised the scene for him- or herself.

In order to tell a persuasive story, advocates should, from the material available to them, be able to visualise the scene. Going to the actual scene to view it, if possible, can be of enormous assistance.

Effective use of visual aids such as diagrams, photographs, charts, etc. is a powerful communication tool.

The importance of communicating a scene effectively was highlighted during a mock trial at a workshop. During the trial, none of the advocates used a plan of the scene, which was available in their materials.

After the jury delivered its verdict, the jurors were asked to draw a plan of the scene. The jurors’ perceptions of the scene were all very different. Many of the jurors placed important landmarks in completely different locations. The location of the landmarks relative to other important landmarks, and to sites where action took place, were different. The jurors’ maps were all significantly different from the ‘real’ scene.

Even where visual aids are not available, the advocate should help the listener to visualise the scene. This can be done only if the advocate has visualised the scene first.

Storytelling and imagery are important, useful and admired—even in the High Court. Upon his retirement from the High Court Bench, Justice...
Michael McHugh spoke to the NSW Bar. He described how he and Justice Kirby lamented the absence of eloquence and colourful advocacy in the courts. They attributed the decline to the increased use of written submissions and to the attitude of some judges who discouraged rhetoric. Sometimes this takes the form of a comment from the judge: ‘Please get on with it. I am not a jury.’

This attitude is not shared by all judges. Justice McHugh referred to the ‘powerful and electric moment’ when senior counsel in the 1996 Wik case managed in a few moments to paint an image of the Wik people going about their everyday life in 1879.

Beginning the case with the story of the Wik people is an example of primacy in argument. The importance of primacy was also illustrated by Justice McHugh, who gave an example of what is not primacy:

Nothing used to annoy Justice Kirby and myself more than counsel getting up, when we were eagerly waiting to hear what the answer was to the appellant’s case, and saying, ‘Now I want to take Your Honours to page 17 of my submission, footnote 4—it should be 77, rather than 74 ...’

The events and action that take place in a particular setting are much better understood when the listener understands the scene. Once the advocate has visualised the scene, it is easier to introduce action by reference to the scene.

The action should be visualised in the course of preparation. Where witnesses differ in their accounts of the action, it is useful in preparation to visualise the action from the perspective of each witness. This will help you to deal with each witness’s account.

**LINES OF COMMUNICATION IN THE COURTROOM**

Communication lines in the courtroom are unnatural and can be difficult. Normally, when a person is asked a question, the communication is between the questioner and the person answering.

It is natural for the answer to be directed back to the questioner, particularly if the questioner shows interest and actively listens.

However, in the courtroom, the information, and therefore the impact of the story, should be directed to the decision-maker and not to the questioner. Witnesses find this difficult.
It is important that the advocate ‘directs’ the communication in the courtroom. In evidence in chief, the advocate asks questions of a witness. The witness’s answers should be directed to the judge and/or to the jury, depending on the case. An advocate can help the witness to direct his or her answers to the judge or jury by using a number of techniques:

- saying to the witness ‘Tell the jury what Mr Watkins did after leaving the bottle shop’;
- using hand gestures to indicate that the witness should direct his or her answers to the jury; or
- moving eye contact from the witness to the jury towards the end of the question.

Overuse of any of these is distracting; however, a combination of these techniques will keep the lines of communication between the witness and the judge or jury.

In cross-examination, directing communication in the courtroom is more complex. In order to control the witness it is useful to maintain eye contact and occupy the attention of the witness, so that his or her answers are directed to you.

The following diagram illustrates the appropriate lines of communication:
INCLUDING ALL DECISION-MAKERS

Whether it be an appellate bench of three or five judges, or a jury of twelve, it is critical that the advocate involve all decision-makers.

This will mean considering not only how to address the bench or jury as a group, but also how to attend to the needs of each member of the bench or jury as an individual.

For example, in the case of an appeal, it may be apparent that one of the judges is having trouble accepting the advocate’s proposition, as revealed by the judge’s facial expression. The advocate should take the time to address that judge and reframe the proposition, beginning with ‘Perhaps, Your Honour, I can put this another way.’

Making every decision-maker feel involved and valued is an important part of effective communication.

USING POWERFUL, SIMPLE LANGUAGE

Simple language is powerful. It is expressive and easy to understand. Simple words and sentences help to communicate and persuade. It also helps to create images (word pictures) and provide emotive content.

This applies to both speech and writing. For advocates it applies to questioning and arguing.

*I notice that you use plain, simple language, short words, and brief sentences. It is the modern way and the best way. Stick to it.*

(Mark Twain in a letter to a friend)

Obstacles to simple expression include:

- unclear thinking
- fear of commitment to a clear idea
- fear of making mistakes
- fear of appearing unprofessional.

Listening, noticing and practising will help to develop the art of simple expression.
CHAPTER 11: COMMUNICATION

ILLUSTRATION

Simple, powerful language which creates images and has a strong emotive content is contained in this excerpt from a speech on an anniversary of September 11:

‘The memories of September 11 will never leave us. We will not forget the burning towers and the last phone calls. We will not forget the rescuers who ran toward danger and the passengers who rushed the hijackers. We will not forget the men and women who went to work on a typical day and never came home.’

THE PRINCIPLES OF CLEAR EXPRESSION

Write to express, not impress. (Jack Trout, The Power of Simplicity)

I like short words. (Winston Churchill)

Empty your knapsack of all adjectives, adverbs and clauses that slow your stride and weaken your pace. Travel light. Remember the most memorable sentences in the English language are also the shortest: ‘The King is dead’ and ‘Jesus wept’. (Bill Moyers, journalist)

When speaking or writing:

- use short and simple words
- use familiar, expressive words
  ‘After watching Walter Watkins leave the Royal Oak Hotel, Constable Bier got out of his car and walked towards him’ \textit{not}
  ‘After observing Walter Watkins exit the Royal Oak Hotel, Constable Bier alighted from his vehicle and proceeded in the direction of the subject of his observations.’

- don’t be pretentious by using Latin terms unnecessarily, such as \textit{per coram, contra}, etc.

- avoid clichés (trite stereotypical expressions)

- avoid jargon (language particular to a profession or group).
  This particularly applies when leading evidence from an expert witness. It is essential to ensure that the witness explains any technical terms.

- use direct expression
  ‘If the prosecution withdraws count 1, my client will plead guilty’ \textit{not}
'If the prosecution considers an appropriate step in relation to the first count my client will take a certain course.'

- use identifying names and humanising expressions, not depersonalising terms
  - 'Daniel Jones' not 'my client'

- use correct grammar and syntax
- use descriptive language to create word pictures
- avoid standard expressions or ‘fillers’
- use short sentences
- use the active voice
- use rhetorical questions to ‘involve’ the audience
- use metaphors
- use appropriately emotive language.

**ILLUSTRATION**

*From a transcript of a trial.*

Barrister: What was the substance of that alleged conversation?
Witness: What?
Barrister: What was the substance of that alleged conversation?
Witness: What was that?
Judge: What did he say?
Witness: Oh!

**ILLUSTRATION**

*Examples of simpler words and expressions*

- in the event that if
- at the present point in time now
- for the reason that because
- reside live
- utilise use
- commence start
- endeavour try
- be desirous of want
- make reference to refer
- proceed go
Examples of more effective sentences

Instead of:
‘Walter Watkins was arrested by Constable James Bier’ or ‘Constable James Bier was responsible for Watkins’ arrest’ (passive voice)
use:
‘Constable Bier arrested Walter Watkins’ (active voice)

Instead of:
‘Section 5 of the Public Order Act was breached by the defendant when the bottle of sherry was provided by the defendant to Walter Watkins’ (complex passive voice)
use:
‘Daniel Jones breached section 5 of the Public Order Act by supplying the bottle of sherry to Walter Watkins’ (simple active voice)

Instead of:
‘By reason of the fact that Walter Watkins was released from the police station and can no longer be located he is unavailable to appear as a witness’ (padding)
use:
‘Walter Watkins cannot be called to give evidence because he cannot be found’ (simple positive)

Instead of:
‘A barrister must do his best for his client’ (sexist language)
use:
‘Barristers must do their best for their clients’

Inaccurate phrases such as ‘I seek to tender this document as an exhibit’ should be avoided. When a document is proved, the advocate should simply say ‘I tender the document’.

In examination in chief, you should avoid questions in the following form:

- Are you able to remember who was in the room when you walked in?
- Do you recall what she was wearing?
- Can you describe what she did?
There are two problems with such questions. The first is that the strictly accurate answer to each is ‘yes’ or ‘no’ and the advocate must then ask the real question.

The second and more significant difficulty is that by introducing the idea of possible difficulties in recalling or describing, you are calling into question the witness’s capacity to recall or describe.

Better and simpler questions are:

- Who was in the room when you walked in?
- What was she wearing?
- What did she do?

NON-VERBAL COMMUNICATION

Appropriate body language helps the advocate to create the desired effect and atmosphere, and to convey appropriate emotional messages and seriousness of purpose.

Where there is a conflict between what is said and the advocate’s body language, it is the advocate’s body language that will leave the greater impression.

Body language that enhances communication includes:

- stance or posture that conveys confidence and can be either receptive or commanding
- movement designed to have an impact or create a change of mood
- gesticulation used for emphasis
- mannerisms that are natural but not distracting
- facial expressions that are appropriate to the subject matter and atmosphere
- eye contact that creates a rapport.

Eye contact can be sympathetic and inquiring, or hard and glaring. Eye contact, together with facial expression, should be appropriate to the occasion and to the witness or decision-maker.

It is difficult for advocates to change their natural mannerisms. A person who tends to move and use his or her hands would find it difficult to remain very still. It is important that an advocate remain natural, but aim to ensure that his or her mannerisms do not detract from effective communication.
Some mannerisms that detract from effective communication include:

- unconscious, continuous hand movements
- playing with a pen
- flicking or twisting hair
- constantly shifting weight from one foot to another
- shuffling of papers.

**DELIVERY**

Effective delivery involves:

- timing and use of pauses
  
  For example, when bringing out in cross-examination that Watkins paused, or when addressing the jury, describing Watkins’ approach to the hotel and stating that he ‘paused for a few moments’, actually pausing before going on will highlight the pause.

- pace, to enable the decision-maker to absorb the information
- intonation for emphasis, change of meaning, or emotive quality
- volume, to make listening easier
- enunciation, for clarity

- minimal use of notes, to enhance the relationship with the listener.

**USE OF NOTES**

In performing all advocacy tasks, an advocate who is tied to his or her notes creates a number of communication problems, including:

- lack of appropriate eye contact
  
  If the advocate is reading notes, he or she is not looking at the decision-maker. The advocate cannot monitor the decision-maker’s responses, nor build a relationship with the decision-maker. The advocate may miss an opportunity to reframe a proposition so that it is accepted by the decision-maker.

- inappropriate pace
  
  Most people read more quickly than they would speak. It is very difficult for a decision-maker to hear what is being said, consider it and evaluate it if the advocate is going at ‘reading pace’.

- wasted opportunities for emphasis
  
  An advocate who is reading is less likely to pause for emphasis, or to use tone and volume for particular effect.
inappropriate stance
If notes are on a table or lectern, then the temptation will be to lean forward and look down, rather than standing upright with shoulders back. An advocate who is standing upright and looking at the decision-maker not only appears more confident, but compels the decision-maker to pay attention.

It is unrealistic, however, to expect an advocate to run an entire trial or lengthy matter without a note. The key to using notes so that they do not interfere with effective communication is to ensure that they:

- prompt the advocate's thoughts, and
- do not constitute the substance of what the advocate will say.

When the advocate has finished a particular topic, he or she may look down at the notes to be prompted about the next topic. There is nothing wrong with the advocate pausing to look down to read the prompt, then looking up again and continuing on with the next topic. The decision-maker will most likely be grateful for the pause, which is an opportunity to consider what has just been said.

The key to effective communication in this context is to avoid talking and looking down at notes at the same time.

Useful notes will often be dot points: simple propositions written as a list. They should not be in narrative form. It is also helpful to break the subject matter down into topics, highlighting topic headings.

These useful notes can be produced only after all of the preparation and analysis of the case has been finished. They are part of the performance preparation phase. It is only at this stage of the preparation that the advocate will know what is the substance behind the prompt.

Remember that you prepare to perform. You do not perform your preparation.

THEATRE OF THE COURTROOM

There are useful analogies to be drawn between a theatre performance and the advocate’s performance in court. In both places, the audience responds to the performance.
There is a kind of invisible threat between the actor and the audience. When it’s there, it’s stunning. There’s nothing to match that.
(Maggie Smith)

The famous jazz singer Al Jolson insisted on having all the lights on in the theatre. ‘When I sing, I want to see their faces,’ he said.

Both of these performers were, of course, talking about reading their audiences, making contact with them, responding to them and getting a reciprocal response.

The advocate’s performance in court is organised and intended to affect the decision-maker. Like a good script in a play, substance is important, but also of critical importance is the performance itself.

In a contested case, there is no ‘objective reality’. The real events that led to the dispute are not known to the court nor to the advocates, and sometimes not even to the participants. Truth, accuracy, understanding and perceptions vary.

Each party contends for a different reality or a different interpretation of reality. To succeed, a party must persuade the court to accept and act on its interpretation of the objective reality. The interpretation that is better communicated has a greater chance of being accepted and relied on.

In applying the analogy of the theatre to the courtroom, the advocate can be said to have a number of roles:

- producer
- director, and
- one of the actors.

The advocate is not the scriptwriter. In cases where there are disputed facts, each side has instructions in the form of accounts of events from the parties and witnesses. Often there are also documents and objects which form part of the case story. These are all for the advocate what the script of a play is for the actor.

The manner of presentation and performance of this material is up to the advocate.

The advocate’s role should not be performed mechanically. It should be measured but creative. A skilled barrister will:
avoid being overly theatrical
inject enough theatre into the performance to make the story and the argument come alive in the mind of the listener
hold the listener’s attention and ultimately persuade the listener towards the desired conclusion.

Any actor with any talent can convince us in the right part: for the great actor, every part is the right part.²

In court, the theatre analogy has its limitations because, unlike an actor, the advocate does not assume the character of another person. The advocate relies on performance skills, the use of appropriate language and body language in order to persuade.

Consider, for example, a case involving a car accident, where the advocate wishes to convey the idea of spatial proximity. Here, the word ‘close’ would be a better choice than the word ‘far’. In addition, the advocate’s choice of words will be enhanced by the use of body language. A good question would be, ‘How close was the car to the crossing when the pedestrian stepped on?’ The effect is heightened by moving or leaning forward, placing emphasis on the word ‘close’, pausing after the word ‘close’, moving the hands together to indicate closeness, and making direct but not confronting eye contact with the witness. All of this will reinforce the idea of closeness, together with the use of the word ‘close’ instead of ‘far’.

In such a situation, the advocate is clearly performing: he or she is adding to the communication through manner and gestures. However, as an advocate you must also be yourself. The audience knows that you are advocating, and not pretending to be someone else in the same way an actor assumes a role. Your performance needs to stay within the range of your personality in order to be both persuasive and credible. The less the audience notices that you are acting, the better.

DEVELOPING COMMUNICATION SKILLS

Developing communication skills in advocacy as the art of persuasion must be the aim of every professional advocate.

The skills of effective communication are best developed by critically observing and evaluating one’s own performance and performances of others, and practising the specific skills.

Other qualities of the great advocate include:

- commitment
- seriousness of purpose
- the will to persuade
- focus
- energy
- passion.

These are largely the result of a commitment to the role of the advocate in the adversary system, along with well-developed communication skills.

The two lectures on cross-examination by Professor Irving Younger, referred to in Chapter 6, provide an excellent demonstration of communication skills. The lectures themselves are not courtroom performances, but the skills he demonstrates can be appropriately adapted to the courtroom.

Some room, however, must be left for the most elusive: talent and force of personality.
ADVOCACY WORKSHOPS
AND INSTRUCTOR TRAINING

AAI WORKSHOPS

The Institute designs and delivers basic and advanced advocacy training workshops in Australia and overseas. Workshops can be:

- open to all members of the profession;
- specific to law firms; or
- specific to legal bodies and organisations.

The workshops are designed to suit the needs of the pupils at their level of advocacy. The Institute also supports undergraduate and postgraduate university courses in advocacy and Bar readers’ courses in Australia and overseas.

Advanced workshops are also offered in:

- appellate advocacy
- advanced cross-examination techniques
- dealing with expert evidence
- jury advocacy.

A typical AAI workshop is delivered over a weekend. Other workshops are designed to suit the needs of the group or organisation.
WORKSHOP ADMINISTRATION

The role of the administrator

The work of the Institute is administered by its General Manager, in consultation with the Chairman, the Board and occasionally senior members of the faculty.

The General Manager has the responsibility of promoting, planning, arranging and monitoring the Institute workshops. The General Manager either attends each workshop as the administrator, or nominates a person to fulfil that role.

For each workshop the General Manager appoints a moderator, who is usually the most senior and experienced member of the faculty.

Once the nature, time and place of the workshop have been established, the preliminary planning by the administrator includes:

- identifying the moderator and the instructors
- identifying suitable workshop materials
- preparing a timetable and role allocations
- organising the venue and catering
- arranging for a whiteboard, video and playback equipment
- arranging video operators
- arranging travel and accommodation for instructors
- dealing with inquiries and processing registrations
- sending materials and instructions to pupils at least ten days in advance
- sending the case studies and materials to the instructors, including instructor training materials, at least seven days in advance
- arranging pupils into groups of not more than eight
- preparing name tags which identify the pupil’s name, group and number in the group
- allocating instructors to groups on a rotation basis for workshops and video reviews

At the workshop the administrator and/or his or her nominee oversee the efficient running of the workshop. They:

- welcome the pupils
- distribute name tags
- allocate rooms to the groups and for video reviews
- set up the video equipment
- instruct the camera operators in their roles
give instructors a list of their allocations  
ensure that the times allocated for various sessions are adhered to  
arrange for the showing of advocacy videos  
supervise the catering  
ensure that evaluation sheets are completed.

Quality control is necessary in any skills training workshop or program. The AAI uses the following evaluation form, which helps to assess and improve the programs and the instructors’ performances.

**SAMPLE EVALUATION SHEET**

1. How many years’ experience do you have?
   - (a) in legal practice
     - Under 5  □
     - Over 5  □
     - Over 10  □
   - (b) in making court appearances
     - Under 5  □
     - Over 5  □
     - Over 10  □

2. What were your expectations of what you would learn before this workshop?

3. Were these expectations met by the workshop? Yes □ No □

4. What were the three most important skills you have learned from this workshop?

5. Did you find these sessions helpful?
   - (a) Introductory session
     - Excellent  □
     - Good  □
     - Fair  □
     - Poor  □
   - (b) Performance/review sessions
     - □
   - (c) Overview/discussion sessions
     - □
   - (d) Video review sessions
     - □

   If not, how could they have been of more help?

6. Any suggestions towards improving the workshop?

7. Any further comments generally?

**The role of the moderator**

The moderator assists the administrator in managing the workshop and is responsible for the academic content of the workshop.

Before the workshop the moderator:

- helps to select the teaching faculty
- helps to select the case studies and materials
- presents and/or oversees the general sessions
- checks the timetable
- checks the instructor allocations for breakout groups and video reviews
- allocates instructors to some roles in general sessions.
At the workshop the moderator:

- presents the introductory session
- deals with any necessary timetable changes
- oversees and presents the general sessions
- presents the closing session or allocates it to an instructor
- monitors the instructors’ performances.

The Institute now provides training for senior experienced instructors who are selected to be moderators.

**DESIGNING CASE STUDIES**

Effective teaching of advocacy by the workshop method depends largely on the quality of the case study materials used. The approach to the construction of a case study is critical to its effectiveness.

It is tempting, but not effective, merely to take an actual case and use it as a case study. An actual case can be used as a basis for the development of a case study provided it complies with the following essential qualities:

- A case study must have built into it the opportunity for the pupil to use the skill that is being taught; and
- it must not be dependent on external factors such as a witness’s unscripted response.

A case study can be drafted using the procedure detailed below.

**Step 1: Identify the advocacy skills that are to be taught:**

- witness skills
- examination in chief
- cross-examination
- first instance legal argument, and/or
- appellate argument.

Consider which specific skills are to be taught, and how many. For example:

- Examination in chief:
  - leading eyewitness evidence
  - leading evidence in an order best designed to tell a story
  - leading evidence of a conversation
  - proving and using a plan to describe places or events
CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

- proving and using documents and other physical evidence
- qualifying an expert, leading opinion evidence

Cross-examination:
- adducing favourable evidence
- challenging reliability
- challenging veracity
- using prior inconsistent statements
- dealing with witnesses whose evidence was given by a written statement
- contradicting by use of other evidence
- complying with the rule in Browne v Dunn
- attacking credibility

Addresses, applications, pleas:
- identifying legal principles
- the opening—telling the story
- presenting argument in closing address
- dealing with conflicts in evidence

Legal argument—first instance and appellate:
- identifying and articulating legal principle
- identifying outcome/relief sought
- distinguishing between first instance and appellate argument.

**ILLUSTRATION**

Skill to be taught: Accrediting cross-examination

Step 2: Identify the best vehicle for teaching that skill.

**ILLUSTRATION**

Best vehicle: Observations made by Constable Bier

Step 3: Consider the desirable skill outcome.

What is it that you want the pupils to achieve at their particular level?

**ILLUSTRATION**

The pupil cross-examines to give Constable Bier the opportunity to make observations, and to build up those observations to emphasise their accuracy and reliability.

Why? Because what he sees supports the defence case theory.
Step 4: Build into the case study the opportunity for the pupil to use the skill.

**ILLUSTRATION**

Add in facts which tempt the pupil to cross-examine to undermine Constable Bier’s opportunity to see:

- It’s 8.45 p.m.
- Constable Bier’s car is facing south, away from the direction in which Walter Watkins emerges.
- Displays and advertising on the windows cover the lower portion of the bottle shop.

**Analysis to a consistent case theory**

Build into a case study the potential for more than one case theory. This provides the opportunity for teaching analysis of a case with the aim of developing a consistent case theory.

**Step 1: Consider all possible case theories.**

**ILLUSTRATION**

Possible case theories:

- Walter Watkins brought the bottle with him.
- Walter Watkins was not intoxicated.
- Walter Watkins stole the bottle of Mildara Cream Sherry.
- Walter Watkins was intoxicated, but composed himself before he went into the bottle shop and deceived Daniel Jones.

**Step 2: Choose one of these case theories.**

The choice should be based on the theory that is:

- the most realistic alternative explanation of what may have happened, and that is
- consistent with as much of the evidence as possible, and that is
- based on some evidence, not mere speculation.

**ILLUSTRATION**

Case theory: Walter Watkins was intoxicated, but composed himself before he went into the bottle shop and deceived Daniel Jones.

The circumstances in the bottle shop on that day made it realistically possible for Jones to miss some of the symptoms of intoxication.
Step 3: Build in material that favours the case theory chosen.

This information will:

- make the other possible case theories less realistic, or
- make it clear that the other case theories are in conflict with too much of the evidence to be readily accepted by a judge or jury.

### ILLUSTRATION

**Considering each case theory**

**Walter Watkins brought the bottle with him.**

Make it unrealistic by focusing on:

- the clothing Walter Watkins was wearing, that is, trousers and a t-shirt
- the extent and detail of the police observations
- Watkins’ behaviour: going to the counter, speaking to Jones, and emerging with a bottle in a brown paper bag in his hand.

**Walter Watkins was not drunk.**

Make it unlikely to be accepted by:

- requiring the pupil to challenge the police evidence:
  - Walter Watkins’ staggering
  - that he smelt of intoxicating liquor
  - his eyes were bloodshot
  - his speech was slurred

without any basis on which to do so, or by

- pointing out that Walter Watkins is a known drunk.

**Walter Watkins stole the bottle of Mildara Cream Sherry.**

Make it unlikely to be accepted by showing that:

- the layout of the bottle shop makes it impossible
- neither the police nor Stojkowska saw anything that could support a theft by Walter Watkins.

**Walter Watkins was intoxicated, but composed himself before he went into the bottle shop and deceived Daniel Jones.**

Make it:

- consistent with police evidence:
  - Watkins paused at the entrance to the bottle shop
  - police did not observe him stumbling inside the bottle shop
  - Watkins stumbled again outside the bottle shop
  - ‘I tricked Danny again’
  - Daniel Jones’ statement that it was a busy night

- consistent with evidence that Jones was busy serving people in three areas of the hotel.
Volume of materials

Materials do not need to be voluminous or complex to produce specific learning results. A simpler case study that is designed to teach specific analytical and performance skills is better, because:

- performance time is limited
- it allows the pupil to focus on performance preparation
- it avoids overloading the pupil
- it retains focus.

Concise materials can still give rise to great conceptual challenges. A good example of such a case study is *DPP v Jones*.

If the teaching purpose is to teach the skill of assimilating and analysing complex and voluminous materials, then the materials must be voluminous in order to teach pupils to organise the materials and distil the case theory. This is a different purpose from that of teaching specific advocacy skills, and teaching both at the same time would be very difficult using the one case study.

Teaching notes

Teaching notes are important to encourage a consistent approach by instructors. They should identify:

- the case theory and why it was chosen
- the skills to be taught
- the ‘traps’ built into the example
- the relevant law, or where to find it.

Other considerations

When teaching witness skills, all case studies should have:

- a map or a plan, and
- a prior inconsistent statement.

All case studies should be:

- *balanced*—there must be argument for both sides supported by material for cross-examination to support such arguments;
- *self-contained*—the materials for argument and cross-examination must be contained in the case study;
- *of manageable size*—usually it is appropriate to have two prosecution witnesses and two defence witnesses. Other witness statements can be
included to make the case study more realistic and to provide evidence that can be used in analysis, argument and cross-examination, but which need not be called during a workshop;

- **authentic**—factual circumstances must be realistic, and names should be serious;
- **non-prejudicial**—avoid gender and ethnic stereotypes;
- **adaptable**—make up a location so that the case study can be used in all states;
- **of national application**—if possible, use substantive law and procedure which are the same across the country, and include relevant statutory provisions; and
- **accurate about dates**—assume that the hearing of the case is in the current year. All events relating to it should be described as last year, two years ago, etc. Ensure that witness statements clearly relate to the time when they are made.

Case studies from different areas of law reinforce the message that advocacy skills cross jurisdictional boundaries.

It is expected that experienced, senior instructors will prepare case studies which can be used for a range of skills teaching at different levels.

**TEACHING ADVANCED ADVOCACY**

Most teaching of advocacy in Australia and overseas is still at a basic level, for beginner advocates.

There are two main purposes of advanced advocacy courses. One is the continuing development of skills and techniques beyond the basics. For example, once the advocate has learned how to ask non-leading questions in examination in chief, and how to structure and control the flow of information from the witness, other techniques can be developed, such as limiting or eliminating the use of notes and other communication skills. Similarly, in cross-examination, once the use of leading propositional questions has been learned, more sophisticated techniques and exceptions to the basic rules can be developed.

The other aim of advanced advocacy workshops is the acquisition of skills in areas in which beginner advocates are unlikely to practise, for example appellate advocacy and examination of experts.

The AAI started teaching at more advanced levels in the 1990s and continues to do so. A substantial number of senior counsel and many middle-range barristers have attended workshops in appellate advocacy,
advocacy.

One problem with the teaching of advanced advocacy has been in the selection of pupils. When an advanced workshop is planned, self-selection by those who attend has shown that there is confusion between experience and ability. The best method of selection would be by viewing the performance of advocates and assessing whether they are ready for advanced training.

It is also important to ensure that the instructors are sufficiently skilled in their own advocacy, and have had training at an advanced level. Instructors in advanced advocacy workshops must be experienced advocates who can analyse and demonstrate highly developed skills. Only such instructors will have sufficient credibility for advanced advocacy pupils.

ADvOCaCy worKSHoP STRuCtURe

The introductory session

Each advocacy workshop commences with an introductory session presented by the moderator. Other instructors should be present and may also participate. The purpose of the session is to introduce the pupils to the approach to advocacy and how it is taught, according to the AAI philosophy and method, and to set the pattern for the rest of the workshop.

Pupils need time after the introductory session to prepare for the analysis and performance sessions. Experience shows that many pupils have not prepared before they attend the workshop, and those who have prepared nevertheless need time after the introduction to consider what changes they would make. Therefore, it is better to have the introductory session a few days before the workshop, if possible.

The session must be based on the principles referred to in the AAI teaching philosophy, with such further explanations as are appropriate to the workshop. While the individual style of the moderator will dictate the nature of the session, it must include an explanation of the fundamental principles upon which advocacy and its teaching are based.

At advanced workshops, or those dealing with specific areas of advocacy, a summary of the teaching philosophy should be included before a discussion of the subject matter of the specific workshop.
Although the session is in the form of a lecture, it should be as interactive as possible.

Because demonstration and modelling are important in skills training, the introductory session should be prepared and presented by the moderator with all the characteristics of good advocacy, as an interesting and persuasive performance.

The structure of the session is a matter for the moderator, but it must focus on:

- the pupils’ understanding of the nature of advocacy as the art of persuasion
- the significance of communication in persuasion
- the teaching of advocacy as the teaching of generic skills and techniques
- approach to preparation
- approach to the trial process
- general identification of specific advocacy tasks.

The following exercises and illustrations are useful in explaining these matters:

- Hold a discussion of the pupils’ expectations of the workshop.
- Hold a discussion of the nature and importance of advocacy in the adversary system.
- Ask the pupils to describe what they have seen in a performance by a good advocate.

The characteristics they usually mention include:

- confidence
- presence
- organisation
- control
- command of materials
- brevity and precision
- good interaction with the bench
- voice
- good manner
- eye contact.

When these characteristics are noted, it will become apparent that most of them relate to preparation and good communication.

It should then be pointed out that these characteristics are manifestations of what a good advocate does, but seeing them does not
teach how to do it. For example, to observe that a good advocate exercises control in cross-examination does not teach the skills required to do it.

In discussing the teaching of advocacy, as a set of skills and techniques, a useful analogy is with coaching (sport or musical instrument), in contrast to learning by acquisition of knowledge (history or philosophy).

An interactive discussion about the methods used in coaching will validate the workshop teaching method.

A coach will not merely give information, but will:
- watch each pupil’s performance
- assess their level, strengths and weaknesses
- decide what should be worked on
- proceed incrementally
- explain each specific skill
- demonstrate at the level of the pupil
- monitor the pupils’ progress.

A coach will often have to undo the bad habits of an experienced but untutored pupil, to enable the pupil to progress.

In discussing the first fundamental of advocacy—that is, preparation—it is useful to refer to three stages:
- complete knowledge of case materials, relevant law, evidence and procedure
- analysis to develop a case theory—what to do
- performance preparation—how to do it.

In explaining the approach to the trial process, it is necessary to identify the four main steps in a contested trial:
- the opening
- examination in chief
- cross-examination
- address.

Pupils should then be asked to consider and discuss the order in which these steps should be prepared. After the discussion, the order of preparation that must be identified and explained is:
- first, the final address, based on the case theory and arguments to support it;
- second, examination in chief, structured and prepared to support the final argument;
- third, cross-examination, to elicit further support and/or to overcome evidentiary hurdles;
- finally, the opening, which will set the scene and be based on the understanding of how the trial as a whole will develop.
CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

The point that must be made is that a trial is a purposive process, with each advocate trying to achieve a preconceived end. A trial is not an investigation or an inquiry.

The specific advocacy tasks can then be briefly described as follows:

An opening is:
- a short outline of the case
- told as a simple persuasive story
- in narrative form (see Chapter 4, ‘Opening Address’)
- painting a picture of events and people
- directed to a specific legal result
- without argument.

An examination in chief is:
- the development of the story as opened in all its relevant detail
- organised and controlled by the advocate
- told by the witness
- in answer to non-leading questions in contentious areas
- directed towards the tribunal (see Chapter 5, ‘Evidence in Chief and Re-examination’).

A cross-examination must be:
- organised and controlled by the advocate
- conducted by a series of short, leading propositional questions
- directed to:
  - eliciting further supportive information
  - challenging material evidence that conflicts with yours
  - demonstrating something to the tribunal about the credibility of the witness (accredit or discredit the evidence and/or the witness)
  - laying a foundation for the final argument (see Chapter 6, ‘Cross-examination’).

A final submission is:
- a series of structured arguments
- in support of your case theory
- to persuade the tribunal
- to conclusions of fact and/or law
- towards the desired result (see Chapter 7, ‘Argument’).

The moderator should give the following information about the workshop:
- Pupils will work in groups of not more than eight.
- Equal times are allocated for performances, but it is not expected that pupils will necessarily complete the tasks in the allotted time.
- Pupils will receive a short individual review in the group, directed to one or two matters of substance arising from their performance.
All performances will be video recorded.
Each pupil will receive a review of the video of one or more of their performances, directed to style.
All reviews are intended to be constructive, not critical.
There will be general interactive sessions with discussion and demonstrations about specific skills.

Content of the workshop
Following the moderator's introductory session, the workshop consists of a combination of interactive general sessions, performance sessions in breakout groups, and video reviews.

- **General sessions** include:
  - analysis and the development of a case theory;
  - instruction in specific techniques in advocacy and drills;
  - demonstrations
  - communication skills in the courtroom;
  - advocacy videos.

- **Performance sessions** involve:
  - short performances by pupils
  - individual reviews of performances by instructors, in the group context
  - individual video reviews of some performances
  - repeat performance sessions.

- **The closing session** is an overview of the workshop, with an opportunity for:
  - questions and further discussion
  - a comparison of pupils' original expectations with what they learned
  - encouraging the pupils to continue their learning on the basis of what they were taught.

The general sessions and the closing session should be conducted by the moderator with the involvement of other instructors. The moderator may delegate the whole or part of that role to other senior instructors, who should be informed of what is expected of them. These sessions should be as interactive as possible.

**General session on analysis and case theory**

- This general session should be delivered after the pupils have performed some of the tasks in examining and cross-examining witnesses. Their reviewers will not have had a discussion of case theory during the performance sessions.
CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

The reason why the analysis session is conducted after some performances is that it is helpful for pupils to attempt the tasks and experience the difficulties in relating the cross-examination to a thoroughly thought-through case theory, before the case theory is revealed.

- The session should take the form of a discussion, designed to bring the pupils to the realisation of what the most effective available case theory is.
- The session should conclude with a demonstration of one or two cross-examinations, to show the relationship between the case theory, the arguments to support it, and the cross-examination.

See Chapter 2, ‘Preparation and Analysis’.

General session on communication skills

This session should:

- emphasise the importance of communication in advocacy;
- deal with the impediments to communication;
- refer to the principles of good communication;
- deal with issues of language and body language; and
- include a drill exercise designed to show the use of emphasis, pause and slower pace (see Drill Exercise 1 following).

See Chapter 11, ‘Communication’.

General session on examination in chief

This session should:

- include the methodology in asking non-leading questions and ‘piggyback’ questions; and
- include a drill exercise designed to show how to convert individual facts or answers to non-leading questions (see Drill Exercise 2 following).

See Chapter 5, ‘Examination in Chief and Re-examination’.

General session on cross-examination

This session should:

- emphasise the need to ask leading propositional questions;
- explain and demonstrate the ‘gate-closing’ technique;
include references to the theory behind the ‘Ten Commandments of Cross-Examination’ (see Chapter 6, ‘Cross-examination’); and
include a drill exercise designed to show how to convert questions into single leading propositions (see Drill Exercise 3 following).

**General session on argument**

This session should:

- use the principles drawn from Aristotle's analysis of persuasive argument;
- include a discussion on structuring an argument;
- refer to the need to state conclusions before the argument to support them (see Drill Exercise 4 following); and
- include a discussion on answering questions from the bench.

See Chapter 7, ‘Argument’.

**Drill exercises**

Drill exercises have the benefits of:

- including all or most pupils in the group
- using repetition as a good skills teaching method
- increasing the energy and level of participation in the group
- enabling pupils to say things without notes
- making the learning immediate and enjoyable.

**Drill Exercise 1: Emphasis**

This exercise is to be used in the session on communication. The aims are for participants:

- to discover the different meanings conveyed by emphasising different words in a sentence
- to learn to use their voices more expressively
- to learn to pause and slow down
- to avoid flatness and inappropriate inflection.

Give the pupils a sentence such as ‘He did not give John any money’.

Have each pupil in turn repeat the sentence, with each placing emphasis on a different word.

Ask the pupils to identify the different meanings that are given by the different emphases.
Point out how using such emphasis enables the pupil to pause and slow down the delivery of the whole sentence.

**ILLUSTRATION**

- He did not give John any money.
- He *did not* give John any money.
- He did not *give* John any money.
- He did not give *John* any money.
- He did not give John *any* money.
- He did not give John any *money.*

Continue in the same fashion with sentences from examples the pupils have used or are familiar with.

**ILLUSTRATION**

- ‘The school has a responsibility to all students.’ (from the AAI case study *Davies v Riverside Grammar*)
- ‘If you don’t stop play on the fifth hole, there is a real risk of harm to Mr Porcine and his property.’ (from the AAI case study *Porcine v Royal Bridgewater Golf Club*)

Explain that the choice of emphasis depends on the meaning you wish to convey, which in turn depends on your case theory.

Explain how the word emphasised can be the basis for the next proposition in argument.

For example: ‘He did not give John any *money.* He gave him a *gift* of a bottle of wine.’

**Drill Exercise 2: ‘The answer is …; what is the question?’**

This exercise is to be used in sessions on examination in chief.

The illustrations here use the case study of *DPP v Jones.*

The aim is to learn how to elicit a number of single facts by sequential, non-leading questions.

State each proposition and ask the pupils in turn to break up the information into single propositions and ask a non-leading question to elicit those facts.
Watkins emerged from the bottle shop.
We approached Watkins and identified ourselves.
We approached him a short distance down Jackson Avenue.
He was carrying a brown paper bag.
In the bag there was a bottle of Mildara Cream Sherry.
He was stumbling.
He smelt of intoxicating liquor.
His eyes were bloodshot.
His speech was slurred.
He began singing.
He sang in a loud and tuneless fashion.
He mumbled, ‘I tricked Danny again.’

Explain to the pupils:

- the need for the use of inquiring words, such as ‘where’, ‘what’, ‘when’, ‘who’ and ‘why’, and if appropriate, describe and demonstrate;
- that they should not begin questions with words such as ‘did’ or ‘was’;
- that questions beginning with words such as ‘did’ or ‘was’ are appropriate when combined with the general inquiry words such as ‘anywhere’, ‘anyone’ or ‘anything’. They are usually not leading when the issue is what was seen or what was discussed. For example: ‘Did you see anyone?’ or ‘Was anything discussed?’

Point out that some of these should be broken down into questions to elicit single facts.

Another way this exercise can be used is to ask pupils, in turn, to turn the inquiring questions into leading questions that are not in propositional form. For example, ‘His speech was slurred’, first turned into the question, ‘What was his speech like?’, can now be turned into a leading but non-propositional question, ‘Was his speech slurred?’

Later, in Drill Exercise 3, these questions will be turned into leading propositions: ‘His speech was slurred?’.

Another exercise is to use a narrative description of an event, have the pupils identify the facts which have to be established, and in turn have the pupils ask non-leading questions to elicit those facts.

I walked into the room and saw a tall blonde woman holding a carving knife in her uplifted right hand. She moved toward me, saying, ‘I knew it was you.’
Point out that it is not helpful to write out the questions. It is better to write out a list of the facts to be elicited. Such a list will provide the sequence and serve as a checklist for ensuring that all relevant facts have been elicited.

**Drill Exercise 3: Converting questions into single leading propositions**

This exercise is to be used in sessions on cross-examination.

The illustrations here use the case study of *DPP v Jones*.

The aim is to emphasise that, generally, cross-examination is best conducted by leading propositional questions, each of which is designed to elicit a single fact.

Read out the question and have the pupil reformulate it into assertive, propositional form.

**ILLUSTRATION**

- Did you first see Walter Watkins on the opposite side of Wide Street?
- Was he staggering as he crossed the road?
- Did the staggering attract your attention?
- Did that make you keep watching him?
- Did he stumble and almost fall when he got to the kerb?
- When he got to the door of the bottle shop did he pause?
- How long did he pause for?
- Did he pause for a few moments?
- Did you see him approach the counter?
- Did you keep sight of him the whole time?
- Were you able to see his head and shoulders?
- Were the lower parts of the windows covered in advertisements?
- Did they prevent you seeing below shoulder height?
- Did you keep sight of his head and shoulders from the time he entered the bottle shop until he reached the counter?
- And all the time you saw him, was he at the counter?
- Did he speak to the barman?
- Was the barman there at all times that you saw Watkins?
- Did Watkins then leave the bottle shop?

Reinforce the learning from Drill Exercise 1, by stressing the need to emphasise the key word in the reformulated propositions.

Point out the problem with the use of argumentative words such as ‘but’ or ‘however’.
Point out that it is not necessary to overuse phrases such as ‘Didn’t you?’ or ‘Wasn’t it?’. Those words can be replaced by an inquiring manner and tone of voice.

**Drill Exercise 4: The argument drill**

The illustrations here use the case study of *DPP v Jones*.

The aim of this exercise is to demonstrate the need to structure argument by:

- stating the desired conclusion first;
- following it by supporting evidence or inferences, so as to avoid argument by assertion;
- applying the ‘because’ test; and
- responding to the argument.

Have one pupil state the conclusion and ask him or her to follow it with the facts that support it.

Have the next pupil state the conclusion in response and support it.

Continue this process with different conclusions and responses.

<table>
<thead>
<tr>
<th><strong>ILLUSTRATION</strong></th>
</tr>
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</table>
| **Conclusion:** Watkins tricked Danny by concealing his intoxication. How? ...  
**Response:** Watkins could not have concealed the level of his intoxication, because ...  
**Conclusion:** Stojkowska’s evidence of what Jones said to her should not be believed, because ...  
**Response:** Her evidence of his comments is correct, because ...  
**Conclusion:** The clear inference is that Jones supplied Watkins with the sherry, because ...  
**Response:** That is not an inference which should be drawn to the exclusion of other inferences, because ... |

Point out that in preparation for argument all facts and inferences that support a conclusion, as well as those that counter it, should be considered and organised.

Discuss the need to order the supporting material for each conclusion or response in the most persuasive way and discuss how that may be done.
CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

Instructors are encouraged to devise further drills, using the material in the case studies used in a particular workshop.

INSTRUCTOR TRAINING

The AAI trains its instructors and continues to develop their skills so as to maintain quality and consistency in advocacy training.

Members of the profession are identified as potential instructors and are invited to attend an initial instructor training workshop. Such training is necessary for even the best and most experienced advocates and judges, because:

- advocacy skills and teaching skills are different—proficiency in advocacy does not automatically translate to the ability to teach it;
- the AAI method is well developed and has proved successful;
- trained instructors will use the method correctly and consistently;
- trained instructors will understand how adults learn skills.

HOW ADULTS LEARN

Adult learning of skills that are transportable from the workshop to the work environment involves an active and interactive process.

The traditional ‘teacher-focused’ method of instruction, such as lectures, is inadequate. Studies have shown that over a period of three days, people retain only:

- 10% of what they read
- 20% of what they hear
- 30% of what they see
- 50% of what they see and hear
- 70% of what they say
- 90% of what they say and do.¹

Accordingly, the AAI adopts the technique of teaching by coaching, using the workshop method. A coach:

- is performance-oriented and provides context, direction, and motivation to the pupil, evaluating progress (rather than testing) during the session, and directing the pupil to achieve an end result;

controls the performance regime;
- evaluates the performance to identify the skills that most need improvement and gives the pupil immediate feedback;
- repeats the exercise by demonstrating techniques and strategies to improve performance; and
- encourages the pupil to practise the performance, incorporating the skills demonstrated.

**Principles of adult learning**

Adult learning is based on a number of principles relevant to advocacy training:

- Adults are autonomous and self-directed.
  
  The role of the instructor is not merely to transmit knowledge. Teachers must actively involve adult participants in the learning process, by a process of inquiry, analysis and decision-making.

- Adults have accumulated a lifetime of knowledge.
  
  They come to learning with a wide range of personal and professional experience, interests and competencies. Not only should those differences be accommodated and respected, but those experiences can serve as a catalyst for discussions or problem-solving analysis. It must be remembered that adults learn and retain information more easily if it can be related to a past experience.

- Adults are competency-based learners.
  
  They may not be interested in knowledge for its own sake. They want to learn a skill or acquire knowledge that they can pragmatically apply in their immediate circumstances.

- Adults are goal-oriented.
  
  At the outset, instructors must show participants how the class will help them attain their goals.

- Adults are relevance-oriented.
  
  They must see a reason for learning something. Learning has to be applicable to their needs in order to be of value.²

**Motivation to learn**

Adults are primarily motivated to learn because the skill being taught will benefit them either personally or in their career. Accordingly, adults want to know:

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CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

- Why do I need this skill?
- How can I use it?
- When will I be able to use it?
- What’s in it for me?

So tell them. An instructor will get more commitment when the pupil understands that the objective of the lesson is relevant to his or her professional purpose, namely, to be a better advocate. An instructor needs to show the adult learner how the skill can be used immediately in the real world.

**Feedback**

Learning a skill requires both guidance from the instructor and practice by the pupil. The adult pupil needs an opportunity to apply and practise the skills taught through performance. It is also necessary to inform them of their progress as their skills develop. In a workshop environment, one strategy that enhances motivation is to recognise improvement by providing immediate and specific feedback.

Feedback must be constructive. When teaching adults, respect should be shown for the learners’ experience and individuality.

Language and manner are important. If the pupil feels patronised, or denigrated, this will be an impediment to learning. Feedback should take the form of constructive analysis, not criticism.

By performing a task in a simulated framework, a pupil can immediately learn the purpose and application of that skill for transfer to the workplace. The transfer of learning is not automatic. It must be facilitated. Retention of a learned skill is directly affected by the amount of practice.

The role of a coach is to create an environment in which the students are encouraged to practise until they can transfer that skill to their work.

> I hear and I forget … I see and I remember … I do and I understand  
> (Confucius)

**BECOMING AN ADVOCACY INSTRUCTOR**

Criteria for invitation to train as an instructor include:

- competence in advocacy
- potential teaching ability
- willingness to contribute to professional development without financial reward.
Training of advocacy instructors

An instructor training workshop consists of:

- An introductory session, which includes:
  - an elaboration of the AAI teaching philosophy
  - instruction in the teaching methodology
  - a description of what is taught
  - a description of how it is taught

- A demonstration of the review process, which involves:
  - performances by pupils
  - demonstration reviews by senior faculty
  - critical analysis of the demonstrations by the moderator

- Performance and review sessions, which involve:
  - pupils’ performances of various advocacy tasks
  - reviews by the trainee instructors working in teams of two (see below, ‘Teaching as a team’)
  - reviews of trainee instructors by senior faculty

- A video review session, which involves:
  - introduction by senior faculty to the video reviewing method
  - a demonstration of a video review of a pupil’s performance
  - a review of videos by trainee instructors
  - a review by senior faculty of the trainee instructors’ reviews

- A demonstration of an analysis session, which involves:
  - a demonstration by senior faculty with pupils
  - discussion of the development of the case theory.

Instructors who have successfully completed the initial workshop training become eligible to be selected to teach with senior faculty. They are then able to continue their development and gain experience as instructors.

Criteria for selection are:

- understanding and acceptance of the AAI advocacy teaching philosophy
- ability to apply the teaching method
- knowledge and application of the advocacy principles described in the AAI Advocacy Manual
- good communication skills as instructors
- good personal skills as instructors
- commitment to teaching others.
In addition to making an important contribution to the profession, instructors find that their own advocacy skills are honed and developed by teaching, first at basic and later at more advanced levels.

The AAI now has over 500 trained instructors in Australia and overseas. They range from good, young advocates of a few years’ experience to experienced advocates and judges.

Our training methods are constantly reviewed and improved. Instructors are informed of these changes as they continue to teach.

THE PERFORMANCE AND REVIEW PROCESS

Advocacy involves preparation and analysis, and most importantly, performance of the various tasks in court.

Performance skills are best learned by the workshop method of performance and review.

Advocacy instructors act as coaches, helping individual pupils to improve their performance.

Advance preparation

To be effective and credible, as an advocacy instructor, you must be well prepared.

In your advance preparation for the performance and review process, you must:

- know the case study materials thoroughly
- know the relevant legal and evidentiary issues
- develop the case theory or theories
- anticipate the likely problems the pupils will have and prepare possible solutions
- prepare to perform and demonstrate each advocacy task.

You will be assisted by teaching notes, which accompany many of the case studies.

Preparation during the pupil’s performance

The aim is to be prepared to review each pupil’s short performance when it is finished.
During the pupil’s performance, your preparation to review requires you to:

- assess the pupil’s general level of advocacy skill
- analyse what the pupil is actually doing
- note accurately what the pupil did
- identify problems or areas for improvement, and
- select a topic to review.

In selecting the topic to review, choose:

- one topic only
- a matter of substance not of style
- from what the pupil actually did, not failed to do (unless reviewing structure)
- something that the pupil should be able to understand and apply in the available time
- something that will be of most help to the pupil
- something that is recurrent
- something that has not yet been reviewed with other pupils in the group.

If the topic is chosen in this way, your review of the individual pupil will also teach others in the group.

**Steps in the performance review**

If you are well prepared in advance, have considered and noted what the pupil did, and selected an appropriate topic for review, you are now ready to assist the pupil and the others in the group. The following outline of the performance review sets out and illustrates each step.

(1) **Identify the review topic to the pupil.**

- This gains the pupil’s attention.
- It helps you to be more focused and brief in your review.
- It also helps the pupil to focus on the topic you selected.

**ILLUSTRATION**

‘Sophia, let us look at the form of some of your questions in evidence in chief.’
(2) Repeat precisely what the pupil did on the topic you have identified.

Precise repetition will:

- show that you have been attentive and specific
- help to refresh the pupil’s memory of what was done
- make it easier to explain why it should be done differently, and
- make it easier to demonstrate how it may be done differently.

**ILLUSTRATION**

You asked Maria Stojkowska:

- ‘Were the brown paper bags beside the cash register?’
- ‘When he bumped into you, was he on his way to the counter?’
- ‘After he bounced off the door, did he recover immediately?’

(3) Explain why what the pupil did needs to be changed.

Explanations:

- give the pupil a reason to want to do it differently, and
- keep the pupil’s focus and your own on the selected issue.

**ILLUSTRATION**

These are all leading questions on matters which may be contentious. They suggest the answer to the witness. That is not permitted. It also detracts from the probative value of the evidence of the witness, because the answers have been suggested.

(4) Describe how the pupil could do it better.

The description will:

- give the pupil specific steps for change, and
- prepare the pupil to appreciate your demonstration.

**ILLUSTRATION**

The way to change that is to ask questions as if you didn’t know the answers, by using words such as ‘where’, ‘when’, ‘what’—not ‘were’, ‘was’, ‘did’.
(5) **Show how the pupil can do it better.**

**Demonstrations:**

- show the pupil how to put what you have explained into effect, and
- show the pupil how that can be applied to other parts of the performance.

**ILLUSTRATION**

Look at the form and manner of my questions.

(Demonstrate non-leading form with an inquiring attitude.)

- ‘Where were you seated in the car?’ (once Constable Bier said he was seated in the car)
- ‘What part of the window was obscured?’ (after Constable Bier said the window was partly obscured)
- ‘What did Watkins do after he walked out of the bottle shop?’ (once Constable Bier has said that Watkins walked out of the bottle shop)

Continue the demonstration by asking a few more questions of the witness in non-leading form, for example:

- ‘When you had a conversation with Jones, who spoke first?’ (after Constable Bier said he had a conversation with Jones)
- ‘What did you say?’
- ‘What was his reply?’

(6) **Explain what was demonstrated.**

The explanation will help to:

- ensure that the pupil has understood the steps for change, and
- ensure that the pupil saw what you did differently.

**ILLUSTRATION**

What did you notice about the form of my questions?

(See if the pupil identifies the difference.)

They all began with words like ‘where’, ‘when’, ‘what’—not ‘were’, ‘was’, ‘did’.

They did not assume a fact not yet established.

While the review was limited to the form of questions in examination in chief, the demonstration also modelled:

- asking questions in an inquiring manner
- using ‘piggyback’ questions
- asking specific questions to elicit evidence of a conversation.
CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

In the last illustration, drawing the pupil’s attention to the manner of asking inquiring questions is an additional part of the demonstration that can be usefully added to benefit the pupil who is comfortable with the form of the question, and who can now concentrate on a better manner of asking questions in examination in chief.

Feedback for pupils

When reviewing a pupil’s performance, the following guidelines should be kept in mind.

■ Be sensitive to the pupil’s feelings.
  Pupils may be:
  □ disappointed with their performance in the group
  □ embarrassed
  □ overly self-critical or negative
  □ over-confident, or
  □ defensive.

■ Be positive and constructive.
  Bear in mind that:
  □ the pupil expects criticism, but
  □ needs encouragement and help in improving specific skills.

■ Praise judiciously for what the pupil did well.
  Be sure to:
  □ select something specific
  □ explain to the pupil what he or she did and why it was done well.
  This gives the pupil positive feedback, which builds confidence and at the same time teaches other pupils in the group.

■ Pitch the review at the pupil’s level.
  Remember that:
  □ teaching a skill is about what the pupil can do, and
  □ not what the instructor can do.

■ Demonstrate at the pupil's level.
  The pupil will learn from seeing it done as he or she should be able to do it.

■ Demonstrate as an advocate.
  Rather than using the position and manner of an instructor, stand at the bar table and adopt the manner of an advocate.

■ You may ask the pupil what the case theory is and review his or her performance on the basis of that theory.
But avoid:
- discussing the case theory
- disclosing the case theory.

All that is left to the moderator in a later general session.

- If reviewing structure, you may need to adapt the methodology by dealing with what the pupil did not do—for example begin and develop the evidence or the argument in a different way.

If you select structure for your review, you will:
- have noted the pupil’s structure
- have a different structure to suggest
- explain why it is better
- demonstrate the part that you suggest should come earlier in the performance (there is no time to do a full structure demonstration), and
- explain why it is more effective.

- Model during the whole review.

Remember that:
- the pupils see you as an advocate role model, and
- your focus, clarity, brevity, language and manner will be watched by pupils.

Be aware that when demonstrating you will model other aspects of the performance in addition to the one you have identified for the pupil.

**ILLUSTRATION**

While the review described earlier was limited to the form of questions in examination in chief, the demonstration also modelled:

- asking questions in an inquiring manner
- using ‘piggyback’ questions
- asking specific questions to elicit evidence of a conversation.

- Keep to time.

Watch the time progress of the session and avoid:
- general discussion with the group
- general discussion or argument with a pupil
- complex or excessive explanation
- repetition.

- Encourage the pursuit of excellence by demonstrating your own interest, commitment and enthusiasm.
CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

**Difficulties experienced by instructors**

Instructors may have difficulty with one or more of the following:

- selecting an appropriate topic to review, according to the selection criteria
- noting precisely what the pupil did, so as to be able to reproduce it accurately
- maintaining consistency throughout the review by ensuring that the identified topic is the one explained and demonstrated
- giving the pupil clear, specific steps for change
- limiting the demonstration to the topic identified
- limiting the time and extent of the demonstration
- changing from the instructor mode to the advocate role during demonstration
- modelling
- keeping to time.

A good test of the quality of the instructor’s performance is to ask the pupils what they would do differently following the reviews they received from the instructors. Each pupil should be able to articulate what they would do differently and make an attempt at doing it (see below, ‘Reviewing repeat performances’).

**The video review process**

The pupils’ performances in the group are video recorded. Some of them are then reviewed by another instructor.

The focus is on style, not substance. Before the video is played, the pupil should be informed that the review will be of style, and not another general review of the performance.

While the video is playing:

- Allow the pupil time to settle:
  - the pupil’s mind may still be on the previous review;
  - the pupil may be tempted to discuss the performance generally; and
  - seeing oneself on video, as others see you, can be distracting and unsettling.

- Watch the pupil’s performance in silence for one or two minutes.

- Identify stylistic problems or areas for improvement:
  - select one point as a topic for review (the selection criteria are similar to those for the performance review);
  - identify for the pupil the topic with which you will deal;
advocacy manual

- pause the video to comment—do not speak over the pupil’s performance;
- point to what the pupil is doing; and
- ask the pupil to watch for that behaviour while the video continues—for example looking down, clicking a pen or leaning on the bar table.

**illustration**

(After pausing the video when you notice the recurring behaviour)

‘Max, do you notice how you are leaning on the bar table and looking down at your notes?’

(Let the video run on)

- Explain why it is a problem.

**illustration**

(After pausing the video when the pupil repeats that behaviour)

‘Max, this is a problem because you are losing eye contact with the bench. You are also leaning down, your voice does not project to the listener, and you are tempted to read your notes.’

- Explain how the problem can be overcome, by:
  - suggesting different methods for change
  - not prescribing one particular way to change, and
  - encouraging experimentation.

**illustration**

There are ways you can try to change that, for example by:

- having your notes in dot point form and large print so that they can be seen from a distance
- standing away from the bar table
- using a lectern or some books to bring your notes up so you don’t bend over
- looking at and engaging with the person you are addressing.

- Demonstrate and model for the pupil how doing it differently is more effective.

**illustration**

Look at how much more impact you can get by looking up, engaging, standing up straight and being able to glance at your notes, which are prepared so they are easy to follow.
Ask the pupil to attempt to do it differently.

**ILLUSTRATION**

‘Max, let us see if you can try some of these ways of freeing yourself from your notes and engage with the listener.’

*Reviewing repeat performances*

Repetition is an important part of the process of learning skills.

At most workshops pupils are given an opportunity to repeat a part of their performance. This enables them to practise what they were taught and gain confidence.

It is important that the same instructor or instructors who saw the original performance review the repeat performances.

Pupils should be told in advance that they will have an opportunity to repeat a part of their performance. They should then be given time to reflect and prepare to repeat, but the benefits of repeated performances are dissipated by allowing too much time to elapse.

They should be instructed that:

- they may choose to repeat any part of their performance, to show that they understood the reviews and are able to attempt to implement what they were told and shown;
- they may choose to deal with a matter of substance or of style;
- they must be able to identify what it is that they are going to attempt to do differently as a result of the review or video review that they received;
- they will have a limited time—up to three minutes—for the repeat performance.

In reviewing the repeat performances you should:

- review only that which the pupil identified and tried to repeat;
- be positive and constructive—in most cases the pupil has been able to show some understanding and improvement, and that should be acknowledged.

Otherwise, the same general principles for review apply, but the review is shorter: about half the time of the pupil’s first performance. The repeat performances are not video reviewed.
TEACHING AS A TEAM

At some workshops there will be two instructors in one group working together. Usually one will be a more senior, experienced instructor, and teaching together will help the less experienced instructors to develop.

Each instructor should contribute to the review process in the group.

There are two methods of working with two instructors.

One is by alternating reviews, where each of the two instructors takes a turn at doing the whole review.

The other method involves the two instructors alternating in giving a first and second review to each pupil:

- The first reviewer selects one topic and does a review.
- The second reviewer must be ready to pick a different, but usually less time-consuming, topic to review.
  
  During the pupil’s performance, the first reviewer may tell the second reviewer what topic has been chosen. The second reviewer then has more time to choose another topic, and also more time to prepare for the review while the first reviewer is reviewing.
- Both reviews must be of substance, not style.
- The two reviewers should not go over each other’s ground, or—save in the most extreme cases—contradict each other.
- The total review time must not be exceeded: for example, after a seven-minute performance by the pupil, the total review time should not be more than five minutes—three for the first review and two for the second.
- The second reviewer need not demonstrate if there is insufficient time.

TYPICAL PROBLEMS ENCOUNTERED IN SUBSTANCE REVIEW

Some of the typical problems, particularly for beginner advocates, are:

- In opening addresses:
  - unnecessary introductions and formalities at the start
  - not a cohesive, structured story
  - merely summarising each witness statement
  - too much detail
  - argumentative instead of narrative in form
CHAPTER 12: ADVOCACY WORKSHOPS AND INSTRUCTOR TRAINING

- In examination in chief:
  - not brought out as a cohesive, organised story
  - insufficient control by the advocate
  - leading questions in contentious areas
  - leaving out detail
  - asking two or more questions rolled into one
  - not listening to the answers

- In cross-examination:
  - not asking leading propositional questions
  - inquiring and exploring
  - asking complex questions
  - not closing the gates
  - asking for opinions and conclusions
  - being argumentative
  - cutting the witness off

- In argument:
  - not having a logical, organised structure
  - starting with facts rather than conclusions
  - arguing by assertion, not reasoning
  - arguing by mere repetition of evidence
  - not answering questions from the bench.

TYPICAL PROBLEMS ENCOUNTERED IN VIDEO REVIEW

Some of the typical recurring stylistic problems are:

- speaking too quickly
- not punctuating by pauses, emphasis and intonation
- leaning down and not projecting the voice
- ‘umming’ and ‘aahing’
- not engaging the tribunal
- not getting a witness to engage the tribunal
- having a distracting stance or mannerisms, for example fiddling with pen or notes
- reading from notes
- not watching the witnesses
- presenting argument in an oratorical, not conversational manner
- being unnecessarily formal.
CONTINUING TO LEARN TO TEACH

Teaching skills, like advocacy skills, must be developed and practised.

Like advocacy, teaching is an art, not a science. It is based on the developed and tested approach set out in this chapter. Trainee instructors must learn the described method as a foundation for their teaching approach. Experienced and capable instructors may be more flexible in some circumstances.

Continuing to teach, watching other instructors, listening to general sessions, and critically assessing your own performances are necessary for developing expertise as a good instructor.

Teaching, like advocacy, requires commitment to continuous improvement in keeping with the Institute’s motto: ‘In the pursuit of excellence’.
In ordinary life, advocacy skills are assessed in a variety of ways. Whenever a person advocates for a particular outcome, the effectiveness or otherwise of the advocate is one form of assessment.

The true measure of an advocate's performance in a court or a tribunal is whether it is effective in persuading the decision-makers.

The qualities of the advocate that combine to produce a persuasive performance can vary. Usually the listener knows whether the advocate has been persuasive, but may not be able to point to the characteristics of the advocate's performance or the particular skills employed by the advocate that contributed to the effectiveness of the presentation.

In order to teach any skill, it is necessary to isolate those characteristics which contribute to effective performance and those which should be avoided. Once identified, these characteristics can be used as a basis for a more tangible, skills-based training and assessment. There is now a body of combined knowledge about effective advocacy upon which this manual is based.

Whether advocacy skills can and should be assessed has been a controversial issue. Much of the controversy that surrounds the question is based on a concern that it is not possible to grade advocacy performances, numerically or otherwise, in any definitive way because of the inherent subjectivity and bias that must affect the assessor's own appreciation of the performance.

These strongly held concerns exist despite the fact that there are many areas of human endeavour—indeed everything from ballroom dancing
to Olympic diving—in which assessment on a numerical scale is an accepted means of distinguishing between levels of achievement and where the judgment exercised by the assessors is in part inherently subjective or impressionistic.

The controversy is further diluted by the fact that grading of advocacy has occurred at university level for many years in at least two contexts. Many universities have included advocacy in the curriculum, either as individual assessment components of substantive subjects, or as elective or compulsory subjects with a focus on legal skills training. In all cases some element of assessment is required, ranging from a simple pass/fail to a grade on a numerical scale.

Competition-based grading of advocacy skills has also existed for a long time. International and domestic advocacy competitions depend upon a grading system that makes it possible to distinguish between the skill and level of competitors.

Assessment can be used for a number of purposes. In each case, its objective is critical in determining the method of assessment.

**ASSESSMENT AT PROFESSIONAL LEVEL**

There is no doubt that training and assessments should take place before any member of the profession with a right of audience in the courts is entitled to represent others.

As the profession moves toward this new approach, much can be learned from the university models and experience.

If the objective of the assessment is to determine whether a pupil advocate has sufficiently understood the basic concepts underlying the advocacy task, the pupil’s performance can be judged against the identified criteria or characteristics of good performance to determine whether the performance demonstrated, to an adequate standard, the core elements of the skill.

If so, the pupil passes. If not, it is still possible, using the identified criteria, to ascertain what remedial action is required.

This kind of ‘minimum standards’ assessment does not involve the assessors in a comparison between pupils to determine which is better. The object of the assessment is to determine whether the pupil has a sufficient grasp of the requirements of the skill and its execution.
CHAPTER 13: ASSESSMENT OF ADVOCACY SKILLS

It is a form of assessment that is useful in circumstances where it is desirable to ensure that the pupil has attained a minimum level of competence following the completion of a course of study focused on advocacy training, for example a bar readers’ course.

ASSESSMENT AT UNIVERSITY LEVEL

In university-level assessment and in competitions, it is necessary to grade performances.

In all forms of assessment, it is important that the participants clearly understand the criteria upon which they are to be assessed. The method adopted to administer assessment is also critical.

In any assessment-based advocacy training course, the three critical questions are:

- What are the criteria for the performance of advocacy tasks?
- How are the criteria conveyed to the participants?
- How can assessment of performance be administered?

With the advent of legislation in many jurisdictions requiring the successful completion of practical skills training as a prerequisite to admission to practice, these questions have become even more important.

A true appreciation of the practice of advocacy cannot be gained from the written word. A combination of instruction and the opportunity to practise advocacy skills under the guidance of experienced teachers is a more effective way to gain that appreciation, and to understand the criteria that will form the basis of subsequent assessment.

One model for achieving such a combination is:

- a series of lectures which expand upon the following topics:
  - the nature of advocacy generally and the role of language and communication skills in advocacy;
  - the technical requirements of the particular tasks that advocates must perform (for example leading evidence in chief—the non-leading question) including demonstration and illustrative examples;
  - ethical considerations; and
  - the importance of case theory development
an opportunity for the pupils to put these concepts into practice in short performances that are reviewed in small workshops (eight people), led by an experienced instructor.

Just as the written word is incapable of imparting an adequate understanding of performance criteria, lectures are never able to give a pupil a full appreciation of what is required. Actual performance by the pupil, guided by demonstrations by the instructor and informed by constructive criticism in the context of a particular set of facts, gives tangible substance to otherwise abstract concepts.

Providing pupils with the opportunity to perform an address, to lead evidence and to cross-examine is fundamental to the successful teaching of the skills. Practice instils confidence in the pupil, and allows the instructor to pinpoint where remedial action is needed. Assessing these workshops in any way is undesirable. They should be viewed as a practical forum in which mistakes can be made and learned from, and a springboard for improvement.

Only after this combined tuition (lectures and workshops) can the pupil be expected to have a clear understanding of what is expected at the assessment phase. This process could be augmented by instructive videos, and by practice trials.

The object at university level is to teach pupils that advocacy is not just about standing up in court and sounding eloquent, but that it involves the development of a case theory based on analysis of the available material, and the execution of that theory through the opening, evidence in chief, and cross-examination.

Thus, assessment at university level has three fundamental aspects:

- development of the technical skills of an advocate, for example leading evidence and cross-examination;
- development and application of analytical skills to produce a case theory and the execution of that case theory by employing the technical and communication skills of an advocate; and
- development of communication skills in a courtroom environment.

All of these elements can be tested in mock trials, in the course of which a pupil is required to examine a factual problem, develop a case theory, and execute that case theory in the course of performing the role of counsel. The trials are conducted from start to finish, following the ordinary course of addresses and evidence. Each performance is limited
in time. The pupil comes to this assessment armed with the knowledge of the criteria, gained from the lectures and the workshops.

The most effective way of administering assessment at this level is to break down the component parts of a pupil’s performance in the trial, weighting each part according to the objectives of the particular course. The following sample score sheet is illustrative:

<table>
<thead>
<tr>
<th>Task/Criteria</th>
<th>Mark</th>
</tr>
</thead>
<tbody>
<tr>
<td>Examination in chief</td>
<td>12</td>
</tr>
<tr>
<td>P 6 C 7.2 D 8.4 HD 9.6</td>
<td></td>
</tr>
<tr>
<td>Cross-examination</td>
<td>12</td>
</tr>
<tr>
<td>P 6 C 7.2 D 8.4 HD 9.6</td>
<td></td>
</tr>
<tr>
<td>Address</td>
<td>16</td>
</tr>
<tr>
<td>P 8 C 9.6 D 11.2 HD 12.8</td>
<td></td>
</tr>
<tr>
<td>Analysis</td>
<td>25</td>
</tr>
<tr>
<td>P 12.5 C 15 D 17.5 HD 20</td>
<td></td>
</tr>
<tr>
<td>Communication</td>
<td>15</td>
</tr>
<tr>
<td>P 7.5 C 9 D 10.5 HD 12</td>
<td></td>
</tr>
<tr>
<td>Preparation</td>
<td>20</td>
</tr>
<tr>
<td>P 10 C 12 D 14 HD 16</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>100</td>
</tr>
</tbody>
</table>

Of the available marks:

- 40% is concerned with the skills component of what is taught: address, examination and cross-examination;
- 25% is directed toward the substantive case theory development and execution;
- 15% is focused upon communication skills;
- 20% is concerned with performance preparation.
SKILLS

The execution of basic technical skills can be easily isolated and assessed without recourse to subjective interpretation. Once the fundamental characteristics of the technical skill are articulated as criteria, their presence or absence is obvious to any experienced assessor.

For example, the leading of evidence in chief has the following performance criteria:

Evidence in chief is:

- the development of the story as opened,
- organised and controlled by the advocate,
- told by the witness,
- in answer to non-leading questions.

Different pupils will perform this task at different levels. Some will be obviously better than others in one aspect of the task or another. Some may lapse into a leading form of question occasionally, while others may be more adept at maintaining a non-leading form. Others may be more skilful at developing the story, while others may have a stilted delivery. Some will be better at maintaining control of the witness than others.

All of these differences will involve variations in degree. At one end of the spectrum will be a pupil who is incapable of performing competently against any of the criteria, for example by continually asking leading questions. At the other end will be a pupil who proceeds flawlessly.

These same principles are applicable to both addresses and cross-examination insofar as they involve the performance of a task against identifiable criteria, for example not arguing in an opening.

A pupil who can substantially perform against the criteria clearly passes. Pupils will distinguish themselves from others by their level of proficiency relative to others. The best performing pupils will therefore achieve the higher scores.
CASE THEORY

The assessment of case theory development is also amenable to relatively objective assessment. The assessment of this component of the performance does not differ greatly from marking an exam paper.

Each problem forming the basis of an assessment has a ‘model answer’, which might be described as the most plausible case theory available to an advocate. Pupils will rarely achieve the ‘model answer’ and then execute it well. The very best marks are reserved for those who do both, or for those who develop an alternative case theory which is plausible, consistent and well executed.

At the other end of the spectrum are the pupils who do not demonstrate any consistent overall case theory.

In the range between a bare pass and the highest mark will be variations on case theory and differing levels of execution. Distinguishing between performances of this type undoubtedly involves the assessor’s judgment. However, the examination problems that form the basis of assessment are not overly complex, and experienced assessors and instructors are capable of drawing distinctions of such degree in that context.

The guiding principle is that the more plausible the case theory and the better the execution of that theory, the better the result.

COMMUNICATION

This aspect of assessment is the one most prone to the subjective disposition of individual assessors. That is not to say that basic skills are not clearly identifiable when present in a performance.

While matters of individual style, manner, and power of communication are appreciated more subjectively, they are no less capable of articulation as criteria. Components such as the use of language, the pace of a speech, eye contact, and body language can be isolated. All of these are good indicators of communication skills and are capable of assessment.

ADMINISTERING ASSESSMENT

Instructors who have been trained in the approach to assessment and have gained experience are usually consistent in their decisions and mark allocations.
In final assessment it is important that:

- there be at least two assessors;
- each assessor is experienced and familiar with the criteria for assessment;
- each assessor marks each performance independently; and
- each assessor makes notes, both on the substantive content of the performance and on the aspects of the performance that stand out against the criteria.

Assessors should confer and compare results for each pupil. The following process helps assessors to resolve difference and provides a mechanism by which results can be reached in a fair way:

- Where assessors agree, the mark is recorded.
- If there is a difference between assessors of two marks or less, the marks should be averaged and recorded.
- If the difference is more than two marks for any task, the difference should be discussed between the assessors, resolved and the mark recorded.
- Marks for specific tasks can be in fractions of half a mark.

It can be assumed that experienced assessors may differ about the mark to be awarded for a particular task. A difference of two marks or less represents a relatively minor discrepancy, which may reflect one assessor giving more weight to one aspect of the criteria than another. The average of the two marks is an equitable way of resolving the difference.

Where the difference between assessors is greater than two marks, ventilation of issues is useful, to ensure that the criteria are being properly applied and as a check to ensure that subjective likes or dislikes do not creep into the assessment process.

The analysis in this manual of the fundamentals of advocacy as the art of persuasion should help assessors to set specific criteria at both the professional and university levels, and also help pupils to understand those criteria.

Most importantly, we hope that this manual will encourage those responsible for the provision of courses for professional advocates to conduct assessment, to ensure that advocates reach a level of minimal competence before they are entitled to represent clients.