



The Australian Advocacy Institute

Handbook for Advocacy Instructors

**A ready reference to the
AAI method of advocacy instruction.**

**Compiled by Prof. the Hon. George Hampel AM QC
and
The Hon. Justice Ann Ainslie-Wallace**

**To be used in conjunction with the
AAI Advocacy Manual
(Second Edition).**

© COPYRIGHT 2019 - Australian Advocacy Institute

These materials are copyright. Subject to the Copyright Act 1968, they and any part of them may not be reproduced in any material form, performed in public, broadcast, transmitted by subscription, cable service, or adapted without the prior written permission of the Australian Advocacy Institute.

These restrictions do not apply to the use of these materials by instructors trained by the Australian Advocacy Institute in the course of conducting advocacy training by or in conjunction with the Australian Advocacy Institute.

FEBRUARY 2019

An easy reference to the Review Process

Before the workshop:

- 1. Know the materials thoroughly.**
- 2. Understand the issues raised by the case study.**
- 3. Analyse and develop a Case Theory.**
- 4. Anticipate the likely problems and consider solutions.**

During the Advocate's Performance:

- 1. Assess the advocate's level of advocacy.**
- 2. Analyse the advocate's performance.**
- 3. Note precisely what the advocate is doing.**
- 4. Identify areas for improvement.**
- 5. Select a topic to review.**

Topic Selection Criteria:

- 1. One topic only from what the advocate did.**
- 2. Substance not style.**
- 3. That which will most help the advocate to improve.**

Six Steps to an Effective Review:

- 1. Identify the topic.**
- 2. Repeat what the advocate did.**
- 3. Explain why it should be done differently.**
- 4. Describe how it can be done differently.**
- 5. Demonstrate how it can be done differently.**
- 6. Deconstruct the demonstration.**

TABLE OF CONTENTS:

1. Introduction	Page 1
1.1 The Aims of the AAI	
1.2 The AAI Teaching Philosophy	
1.3 The AAI Teaching Method	
1.4 The AAI Advocacy Manual	
1.5 Dispelling Myths about Advocacy and its Teaching	
1.6 Teaching Advanced Advocacy	
1.7 Modern Approach to Excellence in Skills	
2. The Instruction and Review Method	Page 7
2.1 An AAI Advocacy Instructor must....	
2.2 The Performance and Review Process	
2.3 The Video Review Process	
3. Summaries of Advocacy Fundamentals	Page 13
3.1 Preparation	
3.2 Approach to the Trial Process	
3.3 Communication	
4. Summaries of Specific Advocacy Tasks	Page 15
4.1 Opening	
4.2 Examination in Chief/Re-Examination	
4.3 Cross Examination	
4.4 Argument	
5. Designing Case Studies	Page 17

1. INTRODUCTION

The Australian Advocacy Institute (AAI):

The AAI was established under the auspices of the Law Council of Australia in 1991. It is a not-for-profit, non-commercial and self-funded organisation. The current Chair is The Hon. Justice Ann Ainslie-Wallace.

The Institute was chaired by Prof. the Hon. George Hampel AM QC from its inception in 1991 until 2015.

It provides advocacy training in Australia and internationally.

Contact Details:

Scott Wallace, General Manager
mobile: 0418 473 303
email: aai@advocacy.com.au
web: www.advocacy.com.au

1.1 The Aims of the Institute [Advocacy Manual page XXVIII]

The aims of the Institute are to:

- improve the standards of advocacy skills throughout Australia and in cooperation with similar international associations, organizations and councils
- provide a 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
- train lawyers to teach advocacy skills.

1.2 The AAI Teaching Philosophy [Advocacy Manual Page XXIX]

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. A person who holds him or herself out as a specialist advocate must have the basic understanding of the concepts of good advocacy and the ability to perform the essential skills of an advocate.
3. The practice of advocacy must be in accordance with professional ethics and etiquette.
4. Advocacy consists of developed disciplines, skills and techniques applied with such talent as each advocate has.
5. Effective court room communication skills are essential to advocacy as the art of persuasion.
6. Advocacy skills, techniques and disciplines 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.

enabling advocates to develop individual style and approach free of fundamental error. The aim is to help advocates to improve, rather than find faults in their performance.

9. The disciplines, skills and techniques taught are generic and cross jurisdictional.

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

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:
 - i. legal argument
 - ii. opening and closing addresses
 - iii. evidence in chief and re-examination
 - iv. cross-examination
 - v. written advocacy
 - vi. 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 advocates.

13. The AAI is committed to the pursuit of excellence in advocacy 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 and training members of the profession as potential instructors
- continuing to develop the instructors' skills in order to maintain quality and consistency in advocacy training.

1.3 The AAI Teaching Method

The teaching method is based on the combination of concepts and practical skills. Its application is comparable to ‘coaching’ rather than lecturing and is the accepted teaching method in common law based jurisdictions.

This method of performance and review follows the approach taken by the National Institute for Trial Advocacy (NITA) in the USA and further developed by Professor George Hampel QC. The AAI adapted it to jurisdictions such as Australia, UK, New Zealand and other common law derivative systems. It is now referred to by the UK Bar and internationally as “*The Hampel Method*”.

The method provides a well-developed and accepted foundation for the teaching of advocacy and should be adhered to by advocacy instructors generally. However it is not inflexible and can be varied to meet changing levels of competency shown by advocates and the nature and duration of the course being taught.

The method is applicable to both general and advanced advocacy skills training.

1.4 The AAI Advocacy Manual

As a result of the knowledge and experience gained from over 25 years of teaching of advocacy nationally and internationally, and developing teaching materials and methodology, the AAI has produced an Advocacy Manual, (now in its second edition, published in 2017).

This Manual is a practical work using illustrations from a case study. The principles contained within it are based on the input of many advocates and judges trained as advocacy instructors by the AAI.

It has been widely and positively reviewed as a manual which will assist advocates at all levels. It also sets accepted standards by which the levels of advocacy can be assessed.

References contained within the notes that follow are to the AAI Advocacy Manual second edition.

A hard copy of the AAI Advocacy Manual second edition can be obtained by contacting the General Manager, AAI [aai@advocacy.com.au] or through the AAI website [www.advocacy.com.au].

The Hon. Justice Ann Ainslie-Wallace
Chair, Australian Advocacy Institute
aai@advocacy.com.au

1.5 Dispelling some myths about advocacy and its teaching

The myths include:

- Advocacy is a gift, a talent which cannot be taught.
- There are no assessable criteria of competence as an advocate.
- Clever lawyers will be good advocates.
- Experience in practice is sufficient for learning and developing as an advocate.
- Good advocates (and judges) will be good teachers.

The truths are:

- There is no one correct way of performing as an advocate however there are fundamental principles which underpin good advocacy.
- The instruction must take into account the personality of the particular advocate.
- Good standing and reputation with colleagues and the court helps the advocate's credibility with the court.
- Sound ethics are essential and good manners are an advantage.
- Teachers must be trained, show commitment and demonstrate good modelling of the essential advocacy skills.

1.6 Teaching Advanced Advocacy

There are two identifiable levels of advocacy skills (both analysis and performance based): Basic and Advanced.

Both can be learned and developed.

Experienced advocates can sometimes have an idiosyncratic style which may be very effective if based on sound basic principles of advocacy. Otherwise it can be disastrous.

The development of skills from basic to advanced levels is a progression, the rest is art.

Advanced training involves honing of basic skills and teaching of skills in areas in which beginners are unlikely to practice, such as appellate advocacy and expert evidence.

The AAI's teaching, is essentially the same for both standards, however in Advanced training, the emphasis is on development of skills rather than elimination of basic error.

In teaching of advanced advocacy there is an assumption of basic competence in the participant.

Advanced teaching includes:

- Improved preparation methods.
- Refining the case theory as a "pathway".
- Refinement of argument skills.
- Refinement of verbal and non-verbal communication skills.
- Identification of the purpose of examination and cross-examination of witnesses.
- Improving witness handling skills.

Teachers at the advanced level must:

- be good, experienced advocates
- be able to apply the teaching method with flexibility
- understand the progression from basic competence to advanced skills
- be able to review advanced performances
- be able to demonstrate at an advanced level.

Case studies must be designed which raise issues to test advanced conceptual and performance skills

In advanced training in evidence in chief and cross-examination, the relationship between the analysis and performance is best taught by having the advocates present argument about the witness first (or at least a detailed identification by the participant of what they are trying to achieve).

Problems in advanced advocacy training include:

- self-selection, misconception by participants of their standard
- seniority and experience not matching competence
- defensive behaviour and ego
- undoing bad habits
- quality and standing of the teaching faculty
- those with an idiosyncratic style not underpinned by a good understanding of basic advocacy skills.

1.7 Modern approach to the achievement of excellence in skills

When the famous pianist Arthur Rubinstein, while walking in New York was asked by a lost tourist, "How do I get to Carnegie Hall?" He replied "Practice, practice, practice".

While it has long been thought that "practice makes perfect", modern research has elaborated on that general concept and has corrected some misconceptions about effectiveness of practice and experience.

In activities which involve a combination of conceptual and performance skills, amongst them advocacy, one misconception has been that by mere repetition of the activity the various skills involved in it are improved.

Modern research supports the opposite. Once a level of skill is reached and performance of it is continued the level of skills plateaus and then declines. For example, merely continuing to play tennis, the violin or chess does not develop the performer's skills towards excellence.

This is because the player does not practice during a concert or the match.

Effective practice, better described as "deliberate" or "deep" practice, focuses on practising those skills that need improvement.

So the advocate does not practise skills during a trial. The advocate practises and hones his or her skill by having coaching at workshops, by self-reflection and through critical analysis of each performance in court to identify how their skills and performance can be improved. Merely relying on experience does not assist an advocate to understand what he or she is doing wrong (or could do better) and how those skills can be improved against a measurable criteria, namely the basic advocacy competencies and skills.

Studies of performers who achieve excellence have shown that deliberate practice is most effective when done under continuing quality coaching. That is because objective assessment and methodical input into development of skills is the best way to progress towards excellence. The best performers in all fields have coaches.

That is not to say that continuing practice of skills does not add the benefit of experience and what can be learned from it. However, there is the demonstrated risk that learning merely by experience without objective input, entrenches bad practice.

“Slippage” in skills can occur through complacency and imitation of bad practice.

Current research diminishes the emphasis on the need for special talent to achieve and maintain excellence and focuses on three factors in combination:

- The desire and enthusiasm for continuing commitment to excellence
- Deliberate (deep and purposeful) practice of what needs improvement
- Objective input by good coaching

These developments in understanding the nature of effective practice and the pursuit of excellence are consistent with the philosophy and method of advocacy training adopted by the Australian Advocacy Institute.

2. THE INSTRUCTION AND REVIEW METHOD

2.1 An AAI advocacy instructor must ...

1. be a competent advocate
2. understand and accept the AAI advocacy teaching philosophy
3. be able to apply the teaching method as described in the AAI Advocacy Manual
4. have good communication skills as an instructor
5. be committed to teaching others according to the AAI method.

A. C. Grayling on the importance of good teachers....

“There is not much middle ground when it comes to teachers. They are either good, in which case they are among the most important people in the world, or they are not good, in which case at best they represent a missed opportunity, at worst they are positively harmful.”

“... worst kind of harmful teacher are those who undermine their students’ confidence, making them lose self-belief, humiliating and ridiculing them ...”

“Good teachers do exactly the opposite ... and as a result inspire and guide.”

“... what goes into being an inspiring teacher includes enthusiasm, charisma, capacity to clarify, humour, kindness and a genuine interest in the students’ progress.”

“Teachers know that the best way to learn is to teach. Students’ questions compel one to think and rethink often prompting one to see things that have not been noticed before. For this reason, it is never boring to teach the same subject repeatedly. Like reading the classics or revisiting familiar places, new insights always offer themselves, and better ways of doing things with them.”

“Good teachers are those who remember being a student.”

Chronicle of Higher Education, 2015

2.2 The performance and review process

A. Advance preparation by the instructor before the workshop

To be effective and credible the instructor must be well prepared by ...

1. knowing the case study materials thoroughly
2. knowing the relevant legal and evidentiary issues
3. developing the case theory or theories
4. anticipating the likely problems the advocates will have and considering possible solutions
5. being prepared to perform a demonstration of each advocacy task as an advocate.

B. Preparation during the advocate's performance

Because the review follows immediately after the advocate's performance, the instructor must be prepared to review that performance as soon as it is finished. During the performance the instructor must ...

1. assess the advocate's general level of advocacy skill
2. identify what the advocate is actually doing
3. note accurately what the advocate is doing
4. identify areas for improvement
5. select a topic to review.

In selecting the topic to review choose ...

1. one topic only
2. a matter of substance not of style
3. from what the advocate actually did, not failed to do (unless reviewing structure)
4. something which the advocate should be able to understand and apply in the available time
5. that which will help the advocate most
6. something which is recurrent.

C. Steps in the Review

Based on the advanced preparation and preparation during the advocate's performance, the instructor should ...

- 1 **Identify** to the advocate the review topic selected (Described as "Headnote" by NITA)
This will ...
 - provide a focus for the advocate
 - gain the advocate's attention
 - identify the direction of the review.
- 2 **Repeat** precisely what the advocate did on that topic ("Playback")
This will ...
 - show that the instructor has been attentive and specific
 - remove any doubt about what the advocate actually did
 - keep the next steps in the review to the topic.
- 3 **Explain** why the advocate's performance on that topic needs to be improved ("Rationale")
This will ...
 - give the advocate a reason to want to do it differently
 - keep the advocate and the instructor focused on the selected topic.
- 4 **Describe** how the advocate could do it better ("Prescription")
This will ...
 - give the advocate specific steps for improvement on that topic
 - prepare the advocate to understand and learn from the instructor demonstration that will follow.

5 **Demonstrate** how to do it better (“Demonstration”)

This will ...

- show the advocate how to put into effect what was explained
- show the advocate how that can be applied generally.

6 **Deconstruct** the demonstration for the advocate (“Deconstruction”)

This will ...

- ensure that the advocate identified what was done differently
- ensure that the advocate understood the steps for change.

D. When reviewing the advocate’s performance

The instructor must ...

1. be sensitive to the advocate’s feelings
2. be positive and constructive
3. praise judiciously for what the advocate did well and point out why
4. pitch the review at the advocate’s level
5. demonstrate at the advocate’s level
6. demonstrate and model as an advocate
7. keep to time allocations.

The instructor **MUST NOT** review or reveal Case Theory at this stage.

E. Some common difficulties experienced by instructors

1. Selecting the topic to review according to the selection criteria.
2. Noting precisely what the advocate did or said in order to reproduce it accurately.
3. Maintaining consistency throughout the review by ensuring that the identified topic is the one explained and demonstrated.
4. Giving the advocate clear, specific steps for change.
5. Limiting the demonstration to the topic identified.
6. Limiting the time and extent of the demonstration.
7. Changing from the instructor mode to the advocate role for the demonstration.
8. Modeling the qualities of good advocacy.
9. Keeping to the allocated time.

A good test of the quality of the instructor’s review is to ask the advocate later ...

“Having had your performance review, what would you do differently next time and how would you do it?”

F. Repeat performances

Repetition is an important part of learning skills.

Where a repeat performance has been built into the workshop timetable, Advocates should be told that they will have an opportunity to do a repeat performance. They should then be given time to reflect and prepare.

The advocate should be instructed that ...

- they may choose to repeat any part of their performance
- they may choose to deal with a matter of substance or style
- before performing they must be able to identify what it is that they will do differently as a result of the review or video review which they received
- they will have a limited time – up to three minutes.

In reviewing the repeat performances, the instructor should ...

- review only that which the advocate identified and tried to improve
- be positive and constructive. Any improvement should be acknowledged.

G. Teaching as a team

There are two methods of working with two instructors in a group.

1. By alternating reviews where each of the two instructors takes a turn at doing the whole review.
2. Two instructors alternating in giving a first and second review to each advocate:
 - 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.
 - In the group both points must be of substance not style.
 - The two reviewers should not go over each other's ground or contradict each other.
 - The total review time must not exceed the time allocated in the timetable.
 - The second reviewer need not demonstrate if there is insufficient time.

2.3 The video review process

In the past this aspect of the training was focused solely on the personal style exhibited by the advocate rather than the substance of the performance. Present thinking is that the Video Review can be very helpful in reinforcing the substance review and in assisting the advocate, through watching the performance just performed, to understand the point made in the substance review or to ask questions about the substance review. This is especially helpful as the video review takes place almost immediately after the performance.

At the outset, the advocate is asked by the instructor what was the point made in the substance review and then they watch the performance together and the instructor offers the advocate an opportunity to discuss the substance review and, most importantly, to see for him or herself what had been done in the performance.

A further benefit of using the Video Review in this way is that it provides an opportunity for the instructor in the video review to support the substantive point made in the group by reference to what the advocate actually did.

It is useful to allow the advocate a few minutes of watching the video before discussing the subject of the substance review. First to allow the advocate to see the performance and secondly because it is often distracting to see how they appear in film.

Nevertheless, matters of personal style, where they operate as barriers to good communication either by through distraction or otherwise, should be reviewed.

Where the instructor believes that a matter of style should be discussed and reviewed with the advocate, then the instructor must: The steps in the style review are similar to those in the performance review with the following variations.

1. Select the stylistic problem or area for improvement to be reviewed.
2. Pause the video.
3. Identify for the advocate the topic for review.
4. Point to what the advocate is doing.
5. Ask the advocate to watch for that while video continues.
6. Explain why it is a problem.
7. Explain how the problem can be overcome by ...
 - suggesting different methods for change
 - not prescribing one way
 - encouraging experimentation and practice.
8. Demonstrate and model for the advocate how doing it differently is more effective.
9. Ask the advocate to attempt to do it differently.

Common stylistic problems:

Typical recurring stylistic problems are listed below but it is important to select a style point **only where** for it to continue will interfere with the advocate's communication with the court:

1. Speaking too quickly.
2. Not punctuating by pauses, emphasis and intonation.
3. Leaning down and not projecting the voice.
4. 'umming' and 'aahing'.
5. Not engaging the tribunal.
6. Not having a witness engage the tribunal.
7. Having distracting stance or mannerisms e.g. fiddling with pen or notes.
8. Reading from notes.
9. Not watching the witnesses.
10. Presenting argument in an oratorical not conversational manner.
11. Being unnecessarily formal.
12. Distracting gestures.
13. Insufficient or excessive movement.
14. Inappropriate use of the lectern.
15. Inappropriate verbal habits.

3. SUMMARIES OF ADVOCACY FUNDAMENTALS

Competent advocacy consists of a number of developed skills and techniques.

Underlying these skills and techniques are three fundamentals:

1. The approach to preparation.
2. The approach to the trial process.
3. The ability to communicate effectively.

The specific skills are what the advocate performs in court [see pages 15-16 below]:

1. Opening.
2. Examination in Chief.
3. Cross Examination.
4. Re-Examination.
5. Argument.

Emphasis on these fundamentals ensures that advocacy is taught in keeping with the now accepted principles and in a consistent manner.

3.1 Preparation

[Advocacy Manual Chapter 2]

Preparation is in 3 parts ...

1. **Knowledge of**
 - all factual materials (on both sides) in detail
 - current relevant law
 - relevant evidence law and procedure.
2. **Analysis of**
 - the factual material (on both sides)
 - the legal result to be achieved.

To develop a consistent **case theory** which is

- the central construct which provides the pathway, through the facts and law leading to the desired result

and is

- realistic and credible
- consistent with as much evidence as possible
- consistent with the instructions.

Case theory for the Prosecution/Plaintiff is:

- a positive factual construct
- supporting the factual and legal basis for the case
- anticipating the defence case.

Case theory for the Defence is:

- a **Rival Alternative Theory (RAT)**
- rational and credible
- sufficiently undermining of the opposing theory.

3. Performance Preparation

Knowledge and Analysis (above) – tells us **what** to do.

Preparation for Performance – tells us **how** to do it.

It involves:

- organising all materials
- structuring all tasks
- preparing summaries of submissions
- preparing speaking notes
- preparing to perform each task.

3.2 Approach to the Trial Process

A trial is not an inquiry or an investigation. It is a purposive exercise by each side to achieve its desired result, based on its case theory.

In **performance preparation** of each task:

- The **final address** (Argument) must be prepared **first** based on the case theory and the arguments to support it.
- **Evidence in chief** must be prepared **next** because it is usually the foundation for the case theory.
- **Cross examination** is prepared **next** to discredit, accredit or emphasise.
- **Re-examination** is **next** to the extent to which it is possible to anticipate cross examination.
- The **opening** is prepared **last** when all above steps have been prepared and the course of the trial is set.

3.3 Communication as an essential part of persuasion

[Advocacy Manual Chapter 13]

This involves building a relationship with the decision maker by ...

1. involving the decision maker
2. speaking with apparent conviction and commitment
3. using a conversational style
4. using simple, expressive language – avoiding jargon and legalese
5. speaking in an audible, varied voice
6. keeping a slow/punctuated pace
7. maintaining good eye contact
8. minimizing or avoiding the use of notes,
9. using appropriate body language
10. avoiding distracting mannerisms and verbal habits
11. applying the principle of Primacy
12. being tactful, respectful and empathetic with witnesses, the decision maker and the opponent.

4. SUMMARIES OF SPECIFIC ADVOCACY TASKS

The following summaries provide instructors with the basis for the review of the advocate's advocacy skills. They are usually the basis for the "headlines" in performance reviews.

The typical advocacy skills problems encountered by advocates during workshop performances and areas for improvement are usually the reverse of, or non-compliant with, the characteristics summarised above.

The remedies, explanations and illustrations are described in each of the relevant identified chapters in the Advocacy Manual.

Where advocacy skills are formally assessed, as in University or Readers' courses, such assessment must be in accordance with a consistent, accepted standard. It cannot be based on individual idiosyncratic views of advocacy.

These summaries provide a basis for consistency in teaching and assessment.

4.1 Opening

[Advocacy Manual Chapter 4]

An Opening is ...

1. a short outline of the case
2. told as a simple persuasive story
3. in narrative not argumentative form
4. painting pictures of places, people and events
5. well structured
6. not over detailed
7. presented with the use of visual aids
8. related to the charges.

A Defence Opening should ...

1. identify the issues
2. outline the defence story in relation to the contested issues
3. be in narrative not argumentative form
4. be positive, not defensive
5. avoid repetition of the prosecution/plaintiff story.

4.2 Examination in Chief and Re-Examination

[Advocacy Manual Chapter 5]

Examination in Chief ...

1. develops in detail the story as opened
2. is organized and structured
3. sets the scene before the action
4. is controlled by the advocate
5. is told by the witness in answer to **non-leading questions** on contested issues
6. establishes facts not conclusions
7. is assisted by visual aids (and tendering **exhibits**)
8. involves the tribunal
9. **with expert witnesses** - qualifies the witness and leads the opinion.

Re-Examination is ...

1. limited to that which arises in cross examination
2. elicited by non-leading questions
3. used sparingly and only when necessary.

4.3 Cross Examination

[Advocacy Manual Chapter 6]

Cross Examination is ...

1. a foundation for the final argument
2. organised, structured and controlled by the advocate
3. designed to discredit or accredit the evidence and/or the witness
4. consistent with the case theory
5. conducted by a series of leading propositions (with specific exceptions)
6. not argumentative
7. conducted without repetition of evidence in chief
8. organised with appropriate 'gate closing' not unnecessarily aggressive or confrontational
9. compliant with Prof. Younger's "*10 Commandments of Cross Examination*"
10. compliant with the rule in *Browne v Dunn*.

4.4 Argument

[Advocacy Manual Chapter 7]

Argument is ...

1. logical, credible, empathetic (Aristotle)
2. a series of structured arguments
3. presented as a series of conclusions supported by facts or inferences
4. designed to persuade the tribunal
5. directed towards the desired result
6. consistent with the case theory
7. consistent with the onus of proof
8. balanced – dealing with weaknesses
9. presented in a conversational style
10. prepared to be ready with answers to anticipated questions from the tribunal
11. **as appellate argument** – based on the grounds of appeal and in compliance with appellate principles.

5. Designing Case Studies

Effective teaching of advocacy by the workshop method at both the basic and advanced levels, 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 and adapted for use as a teaching tool.

A case study must have built into it the opportunity for the participant to use the skill that is being taught; and it must not be dependent on external factors such as a witness's unscripted responses.

A case study is designed using the following approach.

Step 1: Identify the advocacy skills to be taught:

- Conceptual and analytical skills.
- Preparation skills.
- 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.
 - Proving and using documents and other physical evidence.
 - Qualifying an expert, leading opinion evidence.
- Cross-examination:
 - Structure.
 - Gate-closing.
 - 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* persuasively.
 - 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.

Step 2: Identify the best vehicle for teaching the above skills.

Step 3: Consider the desirable skill outcome.

What is it that you want the participants to achieve at their particular level?

Step 4: Build into the case study the opportunity for the participant to use the various skills.

Step 5: Provide for different possible case theories.

Step 6: Choose one of these case theories which is the one which students should choose.

The choice should be based on the case theory that is:

- the most realistic alternative explanation of what may have happened
- consistent with as much of the evidence as possible
- based on some evidence, not mere speculation.

Then:

- 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 accepted by a judge or jury.

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 participant to focus on performance preparation
- it avoids overloading the participant
- 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* (see Advocacy Manual).

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 and 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.

