



The Australian Advocacy Institute

Handbook for Advocacy Instructors

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

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

An easy reference to the Review Process

[Advocacy Manual Chapter 12, pp 227-232]

Before the workshop:

- 1. Know the materials.**
- 2. Understand the issues.**
- 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.**

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The Australian Advocacy Institute:

General Manager:
Scott Wallace
mobile: 0418 473 303

email: aai@advocacy.com.au
web: www.advocacy.com.au

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1. INTRODUCTION

1.1 The Aims of the Institute

The aims of the Institute are to:

- improve the standards of advocacy skills throughout Australia and in cooperation with similar associations, organizations and councils, internationally
- 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

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 must be in accordance with professional ethics and etiquette.
[Advocacy Manual Chapter 1]
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 20 years of teaching of advocacy nationally and internationally, and developing teaching materials and methodology, the AAI has produced an Advocacy Manual.

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 first edition. A second edition of the AAI Advocacy Manual was released in 2017 with updated references to the Uniform Evidence Acts, Appellate Advocacy, Case Theory and Expert Evidence.

A 'pdf' copy of the manual (first edition) is available to all AAI trained instructors. A hard copy of the 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

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.

2.2 The performance and review process

A. Advance preparation by the instructor before the workshop [Advocacy Manual p. 227]

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 [Advocacy Manual pp. 227-228]

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 ...

[Advocacy Manual p. 228]

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

[Advocacy Manual pp. 228-230]

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

[Advocacy Manual pp. 231-332]

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

[Advocacy Manual p. 233]

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

[Advocacy Manual p. 235]

Repetition is an important part of learning skills.

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

[Advocacy Manual p. 236]

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

[Advocacy Manual pp. 233-234]

The focus is on **style** not **substance**. The steps in the review are similar to those in the performance review with the following variations.

While the video is playing:

1. Allow the advocate time to settle.
 - The advocate's mind may still be on the previous review.
 - They are tempted to discuss the performance generally.
 - Seeing oneself on video, as others see you, can be distracting and unsettling.
2. Watch the advocate's performance in silence for one or two minutes.
3. Identify stylistic problems or areas for improvement.
4. Select one topic for review.
5. Pause the video, do not speak over the advocate's performance.
6. Identify for the advocate the topic for review.
7. Point to what the advocate is doing.
8. Ask the advocate to watch for that while video continues.
9. Explain why it is a problem.
10. Explain how the problem can be overcome by ...
 - suggesting different methods for change
 - not prescribing one way
 - encouraging experimentation and practice.
11. Demonstrate and model for the advocate how doing it differently is more effective.
12. Ask the advocate to attempt to do it differently.

Common problems encountered during a video review:

Typical recurring stylistic problems are:

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 11-12 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 “A theory from various conceptual elements” (Oxford)
- the central pathway, through the facts and law leading to the desired result.

and is

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

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 11]

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’ [Advocacy Manual pp. 114-118]
9. not unnecessarily aggressive or confrontational
10. compliant with Prof. Younger’s “10 Commandments of Cross Examination” [Advocacy Manual pp. 111-114]
11. compliant with the rule in *Browne v Dunn*.

4.4 Argument

[Advocacy Manual Chapter 7]

Argument is ...

1. logical, credible, empathetic (Aristotle) [Advocacy Manual pp. 128-134]
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 [Advocacy Manual pp. 138-139].

5. GENERAL DOs AND DON'Ts IN ADVOCACY

Hints for lawyers to avoid giving the impression that they have learned advocacy from American TV shows rather than from the Australian Advocacy Institute ...

DO NOT

- Greet the judge, opposing counsel or witness.
- Call opposing counsel “counsellor”.
- Approach the bench or the witness box without permission.
- Move from behind the bar table during the hearing without leave.
- Leave the bar table unattended while the judge is in court.
- Address adult witnesses by first name.
- Stand when the opponent is objecting or arguing.
- Stay seated when addressed by the judge.

DO SAY ...

DO NOT SAY ...

In evidence in chief

On direct

At the end of evidence in chief ...
“I have no further questions.”

“Your witness.”

In cross examination

On cross

At the end of cross examination ...
“I have no further questions.”

(Not just sit down)

Evidence

Testimony

In the witness box

On the stand

“What is your name and address?”

“State your name and address for the record.”

“That is the case for the Prosecution.”
(or Defence)

“The State (or Defence) rests.”

“I tender.” (plan or document)

“I seek to tender.”

“I submit.”

“I believe.” or *“I think.”*

I (if you are appearing alone)

We (unless you are one of two counsel)

