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## THE ADVOCACY SKILLS WORKSHOP

The following Workshop Materials have been designed primarily to assist those who regularly practice in Australian courts or tribunals.

The basic principles apply to any advocate who appears on behalf of a client before a decision maker, be they an Assessor, Magistrate, Judge or Jury.

Good advocacy, in any jurisdiction, is a skill that can be learnt, and these principles are as relevant to solicitor advocates as they are to counsel in the highest courts.

The Australian Advocacy Institute's materials and workshops are designed to enable advocates to achieve a basic level of competence and to develop their skills in the pursuit of professional excellence.

These materials include:

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# **1. ADVOCACY AND THE AUSTRALIAN ADVOCACY INSTITUTE**

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## **THE CRUCIAL ROLE OF THE ADVOCATE**

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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 which flow from such facts. Ultimately, after evaluating the evidence and argument, the court makes its decision by asking the question, whether or not the party making the allegation or claim has proved their 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".

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 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 true facts upon which the decision should be based.

The advocates' responsibility is to deal with the facts and submissions skillfully and ethically to persuade the court to accept the version of events and legal consequences which best suit their clients' cases.

## **ADVOCACY TRAINING**

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For centuries there was a wide-spread belief that advocacy could not be taught. Lawyers who wanted to practice as advocates relied on observation, trial and error, and experience 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 developed disciplines and skills. A competent advocate must be more than someone performing "to the best of their skill and ability". A minimum standard of competence should be required.

The Australian Advocacy Institute (AAI) was established by the Law Council of Australia in 1991 in response to the ever-growing demand by the Australian legal profession for advocacy training. The AAI is now an independent, not-for-profit body that conducts Advocacy Training Workshops across Australia and in the UK, The Hague, Hong Kong, Singapore and Malaysia.

The AAI 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 worldwide.

## AAI TEACHING PHILOSOPHY

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The aims of the Institute are to:

- improve the standards of advocacy skills
- 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.

The AAI teaching philosophy is based on the following principles:

1. Competent advocacy 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. All advocates must have the basic understanding of good advocacy and the ability to perform the essential advocacy skills.
3. The practice must be in accordance with professional ethics and etiquette.
4. Advocacy consists of identifiable disciplines, skills and techniques which can be taught, learned and developed.
5. Effective court room communication skills are essential to advocacy.
6. Advocacy skills are best taught and learned by the workshop method of instruction, demonstration, performance and review.
8. The focus of teaching is on methods of preparation, analysis and performance, enabling advocates to develop individual style and approach, free of fundamental error. The aim is to help pupils to improve, rather than find faults in their performance.
9. The disciplines, skills and techniques taught are generic and cross jurisdictional.
10. Experience alone does not ensure competence. The AAI approach 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.
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 to analyse their work and critically assess their performance
  - identifying and training members of the profession as potential trainers.

## **EDUCATION, TRAINING AND RESEARCH BY THE AAI**

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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 Offices of the Director of Public Prosecutions, Government Solicitor and Legal Aid Services.
- Conducting advanced and specialised workshops in appellate advocacy, expert evidence, advanced cross-examination techniques, questioning of vulnerable witnesses and jury advocacy.
- Providing teacher training workshops for Australian, English, Scottish, Hong Kong, Singaporean and South African advocacy teachers according to the AAI method.
- Collaboration and instruction in advocacy training with the English Inns of Court College of Advocacy (ICCA), 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, ANU, The College of Law, University of Hong Kong and the Leo Cussen Institute.
- Training of war crimes prosecutors in The Hague and Tanzania.
- Supporting undergraduate and post graduate courses at universities.
- Supporting and teaching at the bar readers courses in Australia.
- Presenting seminars and demonstration sessions at national and international conferences.
- Conducting international conferences on advocacy and advocacy training.

The AAI's work would not be possible but for the contributions of the AAI board members and trainers whose ideas and teaching have enabled the philosophy of the Institute and the teaching of advocacy to develop.

## **2. ADVOCACY READING GUIDE**

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- **AAI Advocacy Manual** – 2<sup>nd</sup> Edition *The Complete Guide to Persuasive Advocacy*  
Australian Advocacy Institute  
George Hampel AM QC, The Hon Justice Ann Ainslie-Wallace, Elizabeth Brimer, Randall Kune
- **Hampel on Advocacy** *A practical guide to basics.*  
Max Perry - Leo Cussen Institute
- **Hampel on Ethics & Etiquette for Advocates**  
George Hampel QC, Elizabeth Brimer - Leo Cussen Institute
- **An Introduction to Advocacy**  
Lee Stuesser - Law Book Company
- **Fundamentals of Trial Techniques**  
Mauet & McCrimmon

### 3. SUMMARIES OF ADVOCACY FUNDAMENTALS

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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 that the advocate performs in court:

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

#### 3.1 Preparation

**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) – tell us **what** to do.  
**Preparation for performance** – tells us **how** to do it.

It involves

- organizing 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;
- **reexamination** 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

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 and empathetic with witnesses and the decision maker.

## 4. SUMMARIES OF SPECIFIC ADVOCACY TASKS

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The following are summaries only. For an in-depth analysis of the skills involved in each task, please refer to the AAI publication “The AAI Advocacy Manual”.

### 4.1 Opening

**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

**Examination in Chief:**

1. develops in detail of the story as opened
2. is organized and structured
3. sets the scenes 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

**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**
6. not argumentative
7. conducted without repetition of evidence in chief
8. organised with appropriate ‘gate closing’
9. not unnecessarily aggressive or confrontational
10. compliant with Prof. Younger’s “*10 Commandments of Cross Examination*”
11. compliant with the rule in *Browne v Dunn*.

### 4.4 Argument

**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 – deals 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** – is based on the grounds of appeal and in compliance with appellate principles.



## 5. GENERAL DO'S AND DON'TS IN ADVOCACY

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

### DO NOT

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- Greet the judge, opposing counsel or witness;
- Call the 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

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(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.”*

“your witness”

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 (a 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)

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