

Legal Practice Handbook

Advocacy

AVROM SHERR



LEGAL PRACTICE HANDBOOK

ADVOCACY

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Preface

I have been teaching advocacy for so many years now that it is difficult to remember how many of the ideas mentioned in this book are original and how many derive clearly or solely from other sources. I know that I am entirely indebted to two other people for many of the ideas, or the confirmation of them. Roger Burrridge at Warwick University and Paul Bergman at UCLA (two outstanding advocates and teachers) sat together for two hours one wintry afternoon whilst Paul was visiting Warwick in the early 1980s. Those two hilarious hours have already spawned two articles on the subject and were certainly among the generative beginnings of this book (and perhaps also elements of Paul Bergman's latest editions of *Trial Advocacy*). Many of the ideas were common to the three of us and some definitely emanated from the other two. My indebtedness to them for those ideas is set out clearly here and also to the thousands of law students, lawyers, health and safety inspectors, social workers and others who have been involved in my advocacy courses over the years. Thank are also due to Tony King, Glenn Brasse and Rod Morgan for careful comments on an earlier draft and especially to Sheila Wood for painstaking typing. All of them have enriched the text somewhat, though any faults are entirely those of Bergman and Burrridge.

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Dedication

This book is dedicated to Liora Tamar Sara Sherr during whose gestation it was conceived and written. The first draft of the book was concluded on the day of her birth, 22 January 1993.

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Introduction: New Advocacy Roles and Skills Standards

This book is intended as an introduction to the skills of advocacy. It is written both for new and less experienced advocates as well as for those involved in training them. Unlike the traditional texts on advocacy it is not replete with witty war stories having the appearance of being so much better in the repetition than in their likely occurrence. Neither will it provide a neatly alliterative set of clever catechisms covering credibiity in court.

Rather, its aim is to set out simply and clearly the basics of the art and science of advocacy and the means of practising the basic skills both inside and outside of the court, tribunal or other forum.

As a pervasive concept in the background to this text advocacy is seen as a wider occurrence than the specifically formal ritual of the courtroom, tribunal or arbitration forum. Advocacy of an idea, an opinion or an argument is something known to all social beings and is an integral part of general social interaction. It occurs certainly within the lawyer's office both over the telephone and in meetings with 'the other side' as a part of the process normally known as negotiation. It occurs in lawyers' offices as lawyers take clients through alternative proposals for dealing with their case. Advocacy occurs between lawyers during internal meetings inside firms to decide how the firm is to be run, whether there should be computers on lawyers' desks, whether more trainee solicitors should be taken on and whether a new photocopier should be purchased.

Advocacy also occurs between individuals deciding on which film to see, which restaurant to go to, what holiday to take this year and whether to buy a new compact disc player. Although this book is confined strictly to the work of advocacy within law, it builds on the existing social skills possessed by new advocates but perhaps not naturally visualised as appropriate for the cut and thrust of trial.

Breaking one of its own rules for the new advocate, the book takes for granted a basic understanding of the legal process and the nature of the practice of law. It addresses young lawyers who possess some background and now wish to venture into advocacy.

This book also accentuates the 'tip of the iceberg' nature of forensic advocacy, in its marginal significance in relation to the work of preparation for the forensic event. The bulk of the competent advocate's work is not carried out on the advocate's feet on the day of the hearing, but in the long days and nights beforehand ensuring that all of the law and procedure is understood, all arguments are covered, all evidence is ready and techniques of persuasion are well-practised and at hand. Good advocacy is not *creatio ex nihilo*, or the deity creating a world out of chaos, but merely the icing and cherry on the well-baked ingredients of a carefully prepared cake.

The skills of advocacy will now be an essential part of each qualified solicitor's repertoire as well as that of the barrister. The Council for Legal Education's vocational course now involves full advocacy training for barristers. It is the Law Society's confirmed intention that rights of advocacy for solicitors will be extended within the early 1990s. Together with such extension of rights comes the responsibility to ensure that all aspiring advocates are properly trained and grounded in the basic skills.

In order to ensure that new generations of solicitors will be adequately prepared for their new role, the Law Society has devised three sets of skills standards in advocacy training to be achieved through:

- (a) the Legal Practice Course (the new Law Society final examination) starting in September 1993;

- (b) the Professional Skills Course to be taken during articles, starting in September 1994;
- (c) the training contract, or period of articles itself, and the informal or formal, on-the-job training during articles.

Although some of these standards are not yet in final, approved form, they are presented here for guidance as to what is likely to be necessary at each stage. These standards will be published by the Law Society in due course. In their three constituent parts, some necessary repetition exists. They are presented here as drafted so that an advocate or trainer may be aware of what is expected separately at each stage. They are also useful, in general as a guide to what might be expected of a new advocate.

The foundation training will take place in the Legal Practice Course.

Draft skills standards on advocacy in the Legal Practice Course

The student should be able to formulate a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner. The student should understand the crucial importance of preparation and the best way to undertake it. The student should be able to demonstrate an understanding of the basic skills in the presentation of cases before various courts and tribunals and should be able to:

- (a) identify the client's goals;
- (b) identify and analyse factual material;
- (c) identify the legal context in which factual issues arise;
- (d) relate the central legal and factual issues to each other;
- (e) state in summary form the strengths and weaknesses of the case from each party's perspective;
- (f) develop a case presentation strategy;

- (g) outline the facts in simple narrative form;
- (h) prepare in simple form the legal framework for the case;
- (i) prepare the submission as a series of propositions based on the evidence;
- (j) identify, analyse and assess the specific communication skills and techniques employed by the presenting advocate;
- (k) demonstrate an understanding of the purpose, techniques and tactics of examination, cross-examination and re-examination to adduce, rebut and clarify evidence;
- (l) demonstrate an understanding of the ethics, etiquette and conventions of advocacy.

It is assumed that the student should already have developed oral and written communication skills, interpersonal skills, and the skills of legal analysis and research. It is assumed, in particular, that a student should be able to:

- (a) listen effectively;
- (b) engage in oral discussion in a clear and concise fashion;
- (c) record or summarise a discussion in clear and concise notes;
- (d) write clearly and precisely with attention to grammar, style organisation, bibliographies and citations;
- (e) work cooperatively with others in small groups;
- (f) extract, analyse and apply up-to-date law from primary sources, including case reports, primary and delegated legislation.

In addition to the skills learned in the legal practice course, trainee solicitors will be taught further skills during their articles in a five-day course, as part of the professional skills course.

Draft skills standards on advocacy and oral communication to be addressed in the Professional Skills Course taken during the training contract (articles)

On completion of the advocacy unit trainees should be competent to exercise the rights of audience available on admission.

It is assumed that as a consequence of the Legal Practice Course trainees will already be able to:

- (a) interview a client;
- (b) identify the client's goals;
- (c) identify and analyse factual material;
- (d) identify the legal context in which factual issues arise;
- (e) relate the central legal and factual issues to each other;
- (f) state in summary form the strengths and weaknesses of the case from each party's perspective;
- (g) develop a case presentation strategy;
- (h) outline the facts in simple narrative forms;
- (i) prepare in simple form the legal framework for the case;
- (j) formulate a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner;
- (k) identify, analyse and assess the specific communication skills and techniques employed by the presenting advocate;
- (l) demonstrate an understanding of the purpose, techniques and tactics of examination, cross-examination and re-examination to adduce, rebut and clarify evidence;

(m) demonstrate an understanding of the ethics, etiquette and conventions of advocacy.

Trainees should, in addition, be able to advise a client on the appropriate pre-trial procedures and proceedings, understand the crucial importance of preparation and the best way to undertake it, and assist in the preparation and conduct of pre-trial procedures and proceedings.

Trainees should be able to make an interlocutory application before a district judge.

On completion of the Professional Skills Course advocacy module trainees should be able to:

- (a) exercise rights of audience available on admission;
- (b) create the conditions for effective communication with the client, witness(es), other advocates and triers of fact and law;
- (c) use language appropriate to the clients, witness(es) and triers of fact and law;
- (d) speak and question effectively;
- (e) use a variety of presentation skills to open and close a case;
- (f) use a variety of questioning skills to conduct examination-in-chief, cross-examination, and re-examination;
- (g) listen, observe and interpret the behaviour of triers of fact and law, client, witness(es) and other advocates and be able to respond to this behaviour as appropriate;
- (h) prepare a witness for examination and cross-examination;
- (i) present a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner;

- (j) present a submission as a series of propositions based on the evidence;
- (k) organise and present evidence in a coherent and organised form;
- (l) identify and act upon the ethical problems that arise in the course of a trial.

Trainees should be able to demonstrate these skills in cases or transactions in the criminal courts and the civil courts and in one of the following: family cases, industrial tribunals, planning enquiries, other statutory tribunals, alternative forms of dispute resolution.

Trainees should be able to question a variety of witnesses in the appropriate manner (e.g., expert witnesses, hostile witnesses, biased, untruthful or mistaken witnesses, sympathetic witnesses, and identification witnesses, a witness with previous convictions, a witness who has made a prior admission, child witnesses).

Trainees should consider the interest which the client may have to resolve a dispute by settlement or through forms of alternative dispute resolution rather than by litigation, be able to state the central issues of the case simply to the client and explain the benefits and disadvantages of settlement, and be able to agree suitable action with the client and where appropriate adopt the proper techniques to settle a case.

Apart from these two sets of direct formal teaching, trainees are expected to reinforce skills learned in these courses and develop other skills by learning on the job itself under supervision.

Draft skills standards on advocacy and oral communication to be addressed during the training contract

On completion of the training contract trainees should be competent to exercise the rights of audience available to solicitors on admission. They should have had experience which will enable them to understand the need to use the specific

communication skills of the advocate and the techniques and tactics of examination, cross-examination and re-examination. They should understand the need to act in accordance with the ethics, etiquette and conventions of the professional advocate.

During the legal practice course trainees will have been instructed in the general principles involved in advocacy through role plays and simulation. They will, also, have been given instruction on the appropriate pre-trial procedures and proceedings, and through simulation, on how to make interlocutory applications before a district judge.

During the Professional Skills Course trainees will be given experience, through simulation and role play, that will enable them to:

- (a) use the specific communication skills and techniques employed by the presenting advocate;
- (b) demonstrate the techniques and tactics of examination, cross-examination and re-examination to adduce, rebut and clarify evidence;
- (c) act in accordance with the ethics, etiquette and conventions of the professional advocate.

During the training contract trainees should be given practical opportunities that will enable them to understand the principles involved in preparing, conducting and presenting a case, including the need to:

- (a) identify the client's goals;
- (b) identify and analyse relevant factual and legal issues and relate them to one another;
- (c) summarise the strengths and weaknesses of each party's case;
- (d) plan how to present the case;

(e) outline the facts in simple narrative form;

(f) formulate a coherent submission based upon facts, general principles and legal authority in a structured, concise and persuasive manner.

To help trainees develop these skills they could:

(a) help advise on pre-trial procedures;

(b) help prepare cases before trial;

(c) in the company of one or more lawyers, attend a magistrates' court to observe trials, bail applications, pleas of mitigation or committal;

(d) observe the conduct of a submission in chambers or examination, cross-examination and re-examination in open court;

(e) observe proceedings in family cases, industrial tribunals, planning tribunals or other statutory tribunals or the use of alternative forums of dispute resolution; or

(f) as training progresses, and under appropriate supervision, take a more active role in the conduct of a case. This could include interlocutory applications before a master or district judge.

Supervisors should discuss the progress of a case with trainees and review with them the performance of advocates. Supervisors should review the trainee's own performance, drawing attention to those aspects which could be improved.

Through this threefold approach future generations of trainee solicitors will be far better prepared than their predecessors for their new advocacy role. These standards have been published here verbatim. It should be noted that they are *not* yet final, although it is unlikely that they will be subject to major changes.

It will be seen that there is a concentration on the formally taught elements of the Legal Practice Course and Professional Skills Course and the standards to be achieved as a result of the work experience of articles is rather more vague. This is intended to deal with the wide variations in work to be found in different firms.

Although it is clear that many solicitors, and especially those in particular types of law firms, are unlikely to wish to practise their skills often within the forensic setting, there are still enormous advantages in learning the practice of the advocate. All those who prepare litigation cases as solicitors, and all those who advise others in all fields of law where litigation may arise at a later date are given an enormous benefit when they understand how a case proceeds in court. Advising clients on a daily basis is strengthened and enhanced by the ultimate knowledge of how a case, if needs be, might be presented and how it might be accepted at trial. Rather than leading lawyers to be more risk averse as a result of this knowledge it can provide a strength of action in appropriate circumstances, impetus to negotiate in others and simple understanding of the necessities of the courtroom for those preparing cases.

Though this book will emphasise the importance of proper representation, it clearly cannot deal with the entire range of all legal skills involving client interviewing and counselling, legal and factual investigation, drafting and negotiation, etc. The book therefore opens with an introduction to these issues and their importance, the details of which need to be derived from elsewhere. Other books in the Legal Practice Handbook series should be helpful in providing both background and detail for these areas. The overall structure of most hearings is then presented and the book is then divided up in accordance with the structure of a hearing. It concentrates on each aspect of the hearing in turn and the differential skills involved in each.

In relation to each of these subdivisions the specific skills are portrayed together with some suggestions for examples of exercises which might be used in an advocacy training course. These exercises are intended as illustrations of the skills described and are intended to be as useful to the reader as to someone involved in a course.