

# THE ART OF ADVOCACY<sup>1</sup>

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## Table of contents

A.	Introduction.....	2
B.	Jury Address – Defence of the art.....	2
C.	Court advocacy .....	9
D.	Practical guidelines .....	15
E.	Approach of the skilled advocate.....	18
F.	What are the tools of advocacy? .....	19
G.	What is the key object of effective advocacy?.....	20
H.	What is the key to effective advocacy?.....	20
I.	How does the effective advocate shape the keys of advocacy?.....	20
J.	What is the fabric of the key to effective advocacy? .....	21
K.	How does an effective advocate select the right key?.....	21
L.	Practical hints and trouble shooting for the effective advocate .....	21
	L.1. Professional Duties .....	21
	L.2. Getting Started.....	21
	L.3. Planning .....	22
	L.4. Content.....	22
	L.5. In Action .....	23
	L.6. Focus.....	23
	L.7. Shifting Adverse Comment .....	23
	L.8. What Style .....	24
	L.9. What Polish.....	24
	L.10. Reminders .....	25
	L.11. Efficiency.....	25
	L.12. Interest Factor and Attention Span .....	25
	L.13. Argue Glue .....	25
	L.14. Brevity .....	26
	L.15. Lifelines .....	26
	L.16. Control Yourself .....	26
	L.17. Final Questioning of the Inner Advocate.....	27
M.	Bibliography .....	27

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**A. Introduction**

1. The art of advocacy is effective communication to the canvas of the mind through the artwork of four brushes, effective speaking, effective writing, effective reading and effective listening. I intend opening a jury address in defence of the art of advocacy and then to delve into such of her secrets as I have gleaned, address court advocacy and expand on some practical hints. If from the spring of knowledge of the art of advocacy you emerge drenched with enthusiasm and inspired, so much the better, but if you emerge from the spring bone dry – then one of us has failed in our artwork.

**B. Jury Address – Defence of the art**

2. Ladies and gentlemen of the jury I come before you to defend the art of advocacy who stands charged with being a charlatan, no more than chicanery, sophistry, a pharisaical ruse and empty rhetoric. It is our case that the art of advocacy is but the quest for virtue and truth in the presentation of argument. It is the evil people do by their deeds, not the workings of the tongue that should be charged.
3. Some say the tongue should never be mightier than the mind, but I ask each of you, is it not you that opens the ear of the mind, is it not right to be receptive to the ideas and thoughts of others, is that not how we first learnt, is it not the only way in which our fragile human spirit can touch each other's heart.
4. Advocacy is a noble art, advocacy is an honourable art, advocacy is an endless quest in the honing of persuasive reasoning skills and the art of advocacy is as potent and diverse as the imagination. The art of advocacy cannot unravel the knot of human fate, but it can inspire, uplift, and empower with the wings of thought, and harness the heat of the mind – coloured brightly with the blended energies of human passion and emotion enriched and informed by our social mores. The art of advocacy is innocent of vice, is empty of wrong, is but a path of enlightenment, yet only to the pure of heart.
5. If I can briefly play with the words "*The art of advocacy*", remove the "*T*" to which I will return – we discover the words "*heart of advocacy*". Therein lies the cause, the

object, the means and the end – the heart of the art glistens with meaning, the heart of an advocate, beats a path by art to the heart of the judge. As Tom Hughes AO QC once said inside the chest of every judge beats the heart of a juror. It is the subtle syncopation with that beat of the heart that the skilled advocate advances the cause.

6. The heart of advocacy also speaks to us of the most vital organ, the crux of our carbon life forms. The skilled advocate seeks to reveal the heart of the dispute, not the lesser organs, not the surface complexion, but, in a single simple sentence, the heart of the discord. Once you are to the heart of the matter – you can focus your art, confine the controversy, and constructively assist the decision maker. You must have heart to pursue the case, you must keep a healthy heart, and most importantly a heart of integrity. So the art of advocacy defends herself, first and foremost with the heart of advocacy. The *T* that precedes the heart of advocacy is the cornerstone of principle – the *T* stand for truth. The art of advocacy appeals to the mind by advancing the quest for truth and virtue in the presentation of argument.
7. I say truth and virtue because the process in which the skills of advocacy are deployed must be just and fair. There is no virtue in a process that results in the risk of stoning to death or capital punishment. Such want of virtue in process means there is involved no art of advocacy and the twisted process exposing persons to inhumane punishment does not reflect the rule of law. It is the truths of advocacy which we all must endlessly seek in honing the skills of argument in support of a virtuous process. So we defend the art of advocacy by both the principles of heart and the foundation stone of truth and virtue in the technique of persuasion.
8. The art of advocacy is accused of subduing the mind of malleable – but the art of advocacy merely touches the fire that burns within each of us.
9. If we leap to political advocacy and cause, Cicero had a dream. Niccolo Machiavelli had a dream, Martin Luther King had a dream, a dream of freedom and democracy, a dream of liberty and enfranchisement, a dream of a republic!
10. Was that not a good dream? Is it not a strong dream? Do you too not share that dream of Cicero, Machiavelli and Martin Luther King? Do we not all share the glorious dream of a republic – a dream that all patriotic and bright minds share – a

dream of nationhood, a dream of national spirit and pride, a dream of independent sovereignty, should we not be a republic, do you not want to call for a republic now.

11. Should we fear those that would oppress, should we let fear destroy our dreams, should we not join hands with each other and make the heavens tremble with one unified voice. Friends with our combined call should we not together awaken the Gods, chill our fear that crushes noble dreams and freeze the spirit of oppression – I call for a – republic, republic, republic.
12. Now at this point, either I have swept you along in a frenzy of agreement or I have been unmasked, by reason of my lean and hungry look, and it's you, not me, that's thinking too much – so I won't be crowned Caesar today. In the partisan political art of advocacy, the advocate seeks to empower and manipulate our inner hungers, prejudice, pity and interest by illusive and empty rhetoric.
13. Needless to say the image we each have of any noble cause is discordant in detail – but at a higher level – we have common cause, in every case there is a higher level where common cause or merit can be found and there are more detailed layers that may shift the sands of merit. A president elected by the people or a President selected by the people so elected, detail can divide, or detail can be harnessed to a higher cause, a greater good, a stronger sphere of merit and a worthy end.
14. We can shift from means to end or end to means and by so doing shift the important perception of merit. We can to adopt more current political art of advocacy – appeal to noble ideals focus on moving forward together, building a brighter future, the future of a true believer – slogans, jingoism, clichés and platitudes decorate the tinsel of political advocacy.
15. By self indulgent flattery the political advocate may appeal to the wise, the mature, the sound, the safe. Alternatively the political advocate wields the empathy of identification by engaging the audience through being kind to children, the kissing ritual of babies, and the delighting of the elderly. Or the political advocate connects the audience by seeking to invoke pity and compassion in tragic causes, like redressing the plight of the homeless, the disadvantaged, the sick or the impaired.

16. We can light the passion within us, if we understand each other, read the people, grasp the sparks of empathy or motive and fan the fire of understanding and the effect of humour, fear, ridicule, illusions of glory or sweet caress of a good and noble higher cause. The opposing argument or opposing advocate is in gladiatorial splendour diminished by polarised extremes, ridicule and the antithesis of worthy or noble cause, and is dismissed under labels of harm to our self-interest. Whilst political advocacy is not the art of the court advocate it is artwork of advocacy at a raw and illusive form. But all artwork of advocacy can enrich the intellect.
17. The court advocate must play the issue not the opponent, with concrete ideas and not illusion. But the human element is always at work in this art of persuasion. The art of advocacy involves the awakening of one's own knowledge, one's understanding of each other, it is the dawn of reason, it's the sunrise of logic, it is the day break of beauty and structure.
18. The seamless flow of great advocates is bewitching, entrancing, captivating – it is readily comprehensible, it is innately appealing, forceful in its coherence, clear in its quest and obvious in structure, glistening with simplicity and delivered with apparent effortless ease of virtue and truth.
19. The trapdoor logic of the skilled cross examiner works not by genius but by mastery of the detail and a clear comprehension of the minds of others, their limits and the shutting of gates, until there is but one cattle race in which the witness is caught by the steel crush of truth or to be branded a liar.
20. Every question to a witness by the skilled advocate is calculated to be either constructive or destructive, as are the underlying arguments or rhetorical questions. The art of advocacy marshals for the purpose of argument dimensions and detail, commands attention, brightens our senses and by the power of focus deploys a gilded vessel of the mind which we can board.
21. But like all art it is individual, it is unique, and it is informed and informing. Now we would all skin a cat or dress a mouse differently – the art in advocacy – is informed by your own heart and by your own art. It is your heart of advocacy that you must apply, strengthen, protect and maintain. But as each cat and mouse are different, so

too is each case and you must adapt, change or shift your art as flexibility, versatility and variability of paradigms are part of the advocate's skillset. It is useful to quote a passage from *Nudd v R* (2006) 80 ALJR 614 which quoted *R v White*, where the Ontario Court of Appeal examined the need to draw a clear line between incompetence and tactical decisions later judged unwise or imprudent:

*“The art of advocacy yields few, if any, absolute rules. It is a highly individualized art. What proves effective for one counsel may be ineffective for another. Most cases, therefore, offer defence counsel a wide scope for the exercise of reasonable skill and judgment. Appellate judges, many of them advocates in their own practices, should not be too quick to conclude that a trial lawyer's performance was deficient because they would have conducted the defence differently.”*

22. Now Oscar Wilde once said all art is quite useless, and that if perchance you make a useful thing you may be forgiven, so long as you admire it intently. Rare indeed is the advocate who admires their own art, war stories of conquest, or the recreation of prowess once crossing the Rubicon to the bench, should all be forgiven – as we each admire intently our own art.
23. But no great advocate is conceited, arrogant or elite – it is the common touch, the understanding of human nature, the sensitivities of others, the prejudice of some, the motives of the mind, the grasp of our weaknesses and causes that must be mastered and absorbed – so that the jury on the bench or the jury in the box – likes your character, identifies with the strengths of your case, sees the valour of your vigour, listens to your argument and follows your path of reason.
24. This is not to propound sycophancy as advocacy at times must be fierce in reason and bold in logic and fearless in presentation. Advancing the unsavoury cause is the hallmark of skilled advocacy – it serves to emphasise the cold objective nature of our adversarial system. The skilled advocate maintains the rock of objectivity and foundation of cold reason for every step in presentation of the cause, with courtesy and ever mindful of preserving the dignity and independence of the court, remaining a servant to the rule of law and assisting the exercise of the judicial power.
25. The reason in the art is for you to find – but be conscious that the premise of every proposition is exposed to weakness of its expression and the shallowness of the

thought. All conclusions of fact are inherently assailable. All universal truths of legal principle are vulnerable to refinement and exceptions.

26. When we hear prayed in aid of argument – the call of necessity, remember necessity is the orphan of logic, necessity is the fertile mother of invention, but barren of reason, necessity is the last bastion of tyranny, the siren of danger – necessity is Machiavelli’s deceit that the end justifies the means. Certain it is that there are some legal principles that are said to be moulded on necessity but that is an unsure footing and where asserted calls for careful analysis being very much open to the challenge of logic.
27. As with every proposition advanced, develop the underlying reason, why is such course necessary – why is that conclusion tenable – why is the credit to be rejected – why is the principle of law subject to exception – the question why is always on the advocate’s lips, and no skilled advocate let’s leave any expression or idea without knowing why. Why must be the chorus of your presentation in the art of advocacy?
28. Has not the art of advocacy inspired the deities of the heavens, is not every religious work or sermon honed with the craft of persuasion. It is the compelling coherence of any work of art that stirs our spirit and our soul. The art of advocacy is the method of the Gods. As Shakespeare said are we not the paragon of animals, the beauty of the world – therefor the art we create should also be beautiful, is not the art of advocacy beautiful to behold.
29. But if deployed to evil end – the terror of wrongful persuasion is destructive of the human spirit – that has been the plight and tragedy for many a society, inspired by fear and loathing – harnessing the chaos of hatred, vacuum of anarchy and boiling the caldron of difference and distrust. That is not the art of advocacy any more than those who would mislead the court – they are not advocates and the dark arts they practice are not the art of advocacy. The art of advocacy is the rightful seduction of the mind by force of reason and logic in quest for persuasion of truth and virtue.
30. The great gods and goddesses of advocacy inspire motive and drive us. The Hon. Mary Gaudron AC QC – had to be better than the rest – to my mind she applied four important principles – pithy, punchy, principled and penetrating.

31. The Hon. Justice Beazley AO was like the Hon Michael McHugh AC QC, Sir Maurice Byers or Bret Walker SC– so enchanting you became intoxicated by the magic of the speaker and just didn't want it to stop. The Hon. Justice Ruth McColl moulded in part by the styles of the Hon. Sir Anthony Mason AC KBE and the Hon. Murray Gleeson AC QC – she applied another four important principles – preparation, presentation, power and precision.
32. We have the advocate's advocate like the Hon. Sir Garfield Barwick AK GCMC KC, and now Justin Gleeson SC whose steeled products are forged in the furnace of his mind and tempered with the heavy hammers of logic.
33. We have the percussion advocates who produce florid flourishes, platitudes, slogans and hyperbole – are like a brass drum – empty of meaning.
34. We have the busy advocates – like clattering chimes whose message is lost in a sea of noise.
35. We have the rising master chef advocates – whose sentences are pregnant in meaning but the progeny uncertain and the pie is undercooked or tasteless.
36. We have the Delphic oracles (like the late the Hon. Peter Hely QC) whose every syllable is crystal clear and whose rare sentences are jewellery to the ears.
37. Your heavyweight advocates like Stephen Gaegler SC and David Jackson AM QC whose gravitas is derived from well-earned confidence and respect flowing from their deep ravine like learning which commands attention.
38. You have advocates like the Gods of the underworld whose head rotates around the room – absorbing all that is going on in the court room to maintain control and command. Why, to instil an air of confidence, to breed a message of reliance, dependability and mastery.
39. The old stories, before our technological Silicon Valley era, of Jack Smyth QC, Jack Cassidy QC and Jack Shand QC inspired earlier generations of advocates. These outstanding advocates included the Hon. Tony Larkins QC, the Hon. Andrew Rogers QC, the Hon. Simon Sheller AO QC, Frank McAlary QC, Chester Porter QC and Christopher Gee QC. We now have sources on line for some of our heroines and

heroes of today in the High Court of Australia transcripts where we can see the advocacy artwork of others – whether or not great advocates – one learns from observing poor and skilful advocacy, and you can and should from those transcripts try to extract wisdoms, techniques and truths of advocacy.

### **C. Court advocacy**

40. We are all advocates and we are all artists – whether we advocate for rights of whales, for political fortune, for personal conquest, for attention in the throng of humanity – but today it is the court advocate that is of prime focus. And the art which we will examine is the art of judicial assistance and legitimate persuasion. The art is not that of unbridled persuasion. The art is focused upon legitimate argument as the true task of the court advocate and never under-estimates the judicial artistic critic or the opponent.
41. The aim of all great artists is to reveal the art and not the artist – according to Oscar Wilde and he is right – the aim of the great advocates is to reveal the force of the art of their argument not themselves. So what is the art that great advocates reveal?
42. It is the crystal-like perfection of objective logic in a well-structured argument designed to assist the judicial critic achieve the efficient exercise of judicial power.
43. Without comprehension of the purpose of the advocacy no clear guidance can be given in honing of the skills of the adversarial advocate. One must understand the court advocate's role before one can develop the art. A court advocate is exactly that – an advocate of the court. Not a free agent entitled to engage in any Machiavellian ploy that is deceptively justified by the end achieved. No court advocate can start the task of advocacy without being tethered by both function and principle.
44. The function of a court advocate is to advance the administration of justice by assisting the exercise of judicial power wielded by the impartial and independent judicial officer. That function carries principles designed to ensure the advancement of justice and the rule of law. The first principle of successful court advocacy is

integrity of the advocate. The greatest court advocates were all those of impeccable integrity. Integrity is central to the role of success.

45. A dishonest advocate has no role in the administration of justice. Perfidy, deception, chicanery, mendacity, dishonesty, and corruption have no part in the administration of justice but are rather brought to account before the law. The court advocates armour of integrity is at the very heart of the art. Truth in advocacy is essential. Frankness and candour are inherent in the coin of truth in advocacy.
46. The advocate must adhere to this tenant of integrity and any straying from the path of integrity carries the full might of the wrath of the law. Those who deliberately mislead will be struck off the role of practitioners – they are not fit to be officers of the court. The armoury of court powers to protect the proper administration of justice is more than ample to prevent those who seek to impede the administration of justice. An attempt to defeat or pervert the administration of justice is a criminal offence, a contempt of court and is the antithesis of task of a court advocate.
47. The clarity of comprehension of this function of the court advocate is the key to successful court advocacy. The renowned acknowledgement that one must not mislead the court is only the surface of the duty. The court advocate must assist the court in maintaining the rule of law through the independent and impartial exercise of judicial power. No dealing with witness, client, opponent or judge can depart from this duty. All ethical obligations are moulded to advance this core duty.
48. Whilst this is not a seminar of ethics – the cornerstone of the court advocate is steadfast integrity in the performance of the duty to assist the administration of justice.
49. Why harp about the given – because that is the greatest and most important principle of successful court advocacy – integrity in performance of duty. The court advocate's art is the honing of legitimate argument by the honest performance of an essential role for the efficient administration of justice.
50. So our court advocate is steeped in understanding of that duty- is guided in all that is done by that duty and is rigorous in maintaining that duty. All that is in this lecture

must be understood as anchored in the duty of integrity and there is nothing more persuasive and forceful than the truth and honest distilled argument.

51. All court process in the adversarial system is designed to advance the ends of justice by fair and just means. Not a naked search of Socratic truth, but by a procedurally fair opportunity to frame the issues of the dispute and to advance relevant evidence on those issues. Rules of pleadings and evidence are common sense procedures designed to ensure a fair and just process. Those common sense rules aid the court advocate in the proper representation of the client's case. An analogy to the rules of the game or the boundaries of the playing field diminish the gravity and stature of the exercise of judicial power to determine disputes as that is what maintains the rule of law in our society. The order of our society is dependent on the rule of law and in our adversarial court based determination of disputes the court advocate is an essential officer and servant.
52. Court advocates are not just officers of the courts but are in fact servants of the law. The rule of law is the constitutionally entrenched supremacy upon which our democracy and freedoms is dependant. High concepts, high ideals and high standards are demanded for the court advocate as a servant of the law and as an officer of the court.
53. Both concepts are in harmony and are enshrined around the duty of integrity. As a servant of the law there is no other master, no other mistress, no other dominant call of interest or scope for self indulgence. Court advocates serve the rule of law and our advocacy is designed in all aspects to advance that end.
54. I have resisted the temptation to reduce either concept to a single theme as being a servant of the law and an officer of the court are embed with complementary and coherent obligations. The court advocate's integrity is not temporally connected to the court process and as an officer of the court perhaps a concept of function which if misunderstood outside the court might be perceived as attenuating the court nexus and correspondent duty. Hence the emphasis of the dual role of an advocate, by reason of being both a court officer and also a servant of the law. The court advocate's duty of integrity is properly comprehended as derived from both being an

officer of the court and being a servant of the law. These dual sources ensure integrity of duty is tied to every aspect and function in the profession of court advocates. The professional duties match the sources identified and the art of persuasion is so confined.

55. Where are the pearls in the art of advocacy? The pearls are found in the judicial reasons supporting the exercise of judicial power to quell the controversy. The court advocate proffers assistance by diving into the detail of the dispute, distilling the morass of data into discrete focused topics developing the location of the relevant pearls by compelling rational argument that permit the judge to extract the right pearls of truth supported by sound reason and to then apply the scales of justice by application of legal principle in orders quelling the controversy.
56. How does a court advocate best assist in the administration of justice? By providing skilled assistance through refined careful argument, clarity, reason and structure in grounds for the exercise of judicial power.
57. So the second great secret to successful advocacy after integrity of duty is clarity, reason and structure in the argument to support grounds for exercise of judicial power. Central to that task are four concepts, first soundness of the source of judicial power being invoked- often catch-phrased as jurisdiction; second certainty in formulation of the available end remedies within judicial power desired by the relevant party being the object of the justiciable dispute, thirdly presentation of a structured argument that aids the judicial method of reasoned judgment upon contested facts and law, and fourthly sourced foundation within the procedural process, within the admitted material and within the sources of applicable statutory and unwritten legal doctrine.
58. The skilful court advocate sweeps these four concepts into the simplest form of ultimate persuasive conclusions upon the matters of contest – built upon explicable logic, lucidly revealed if challenged and properly sourced. The skilful court advocate utilizes the procedural process to assist the court by accurate and succinct identification of the critical issues, clarification of ambiguities arising from pleading or evidentiary fact, crisp presentation of evidence and argument, economical ordered

adducing of evidence, refined structured efficient cross examination, certainty in the formulation of proposed relief/orders and constructive thoughtful refined submissions. To fully grasp the role of helping the court in the discharge of its critical analysis of the dispute and resolution by exercise of judicial power is the key to creating receptive judicial minds.

59. A most material object in the art of persuasion is to engage the listener. If the court knows, you know what your role is and you adhere to that role, you will be listened to with enthusiasm and courtesy, but more importantly you are likely to entice the listener to reveal the areas that require the advocate's attention.
60. Every judicial intervention is a wind that can be harnessed in trying to sail your client's case to the home-port of success. Every sailor knows that one wants winds to fill the sails, it is not the advocates wind that is needed it is the judicial breeze, and the skilful advocate will tack and go-about to work with the wind to the best of her or his seamanship skills, but within the rules of the sea. No art or craft that is of a professional nature in the delivery of services is without rules of constraint. The collision rules in sailing. In court advocacy it is ethics. So within the ethical constraints the court advocate springs to attention as the wind sets and alters the sails of the case within the limits of the fabric of evidence and applies a shifting rudder through the currents of legal principle.
61. The assistance touchstone means that the irrelevant is discarded and the relevant material topics of contest clearly identified. The material topics should if possible be reduced to the singular as the more issues, the more distraction, the more scope for confusion, the less comprehensible, the less simple and the greater the risks of losing. No topic of contest is unable to be articulated in more than a three word heading. No underlying argument is unable to be identified in a single sentence. No flaw in underlying argument is unable to be distilled into a single sentence.
62. Every concept in contest must be honed in the fire of rational foundation. The irrational is irrelevant. All rational argument is ordered, compelling and readily digestible. The perceived complexities must be simplified and are nothing more than the matrix of circumstances that must be succinctly identified. No source of

justiciable dispute is beyond the ken of the ordinary person and part of the advocate's task is to provide that plain English comprehension. Prolivity of expression or unstructured argument is of no real assistance. The simpler the language, the clearer the meaning.

63. Repetition is not rational foundation. The court advocate must assist by the presentation of material and argument in a structure designed to assist the judicial officer efficiently quell the controversy by exercise of judicial power. This requires preparation, forethought, foresight, and contraction to the essential features, limited real issues of fact or law properly sourced by reference to evidentiary foundation or refined legal concept and relevant authorities' citation.
64. Nor is argument compelling if there is no fulcrum in each proposition. The critical propositions should be sourced in identifiable evidence or legal principle and should be properly founded upon a justifiable and supportable premise and sequentially developed in a simple linear form of flowing why, because, why because. If the argument for why a critical fact should be found or a material proposition accepted is not compelling, think more deeply and refine the argument/proposition or discard. The abstract, the rhetorical, the lateral or theoretical are more likely to distract and protract, unless used sparingly and only when necessary.
65. Brilliance on the feet must be matched by brilliance with the pen as often the written submissions will be decisive. That the written work of the court advocate is of utmost importance as reflected by the fact that the exercise of judicial power is reduced to writing. The written submissions should aid that task by lucid reason. The chronology should be equally well drawn.
66. The greater the ease with which the judicial role can be fulfilled by the assistance of the court advocate the greater the weight of receptive reliance. The correlative of that task of the court advocate is to reject the unarguable, to discard the flawed, to concede the doomed and to limit the controversy to the real sphere of battle. Reliance upon the court advocate is crucial to the efficient administration of justice and those correlative tasks are not hand-maidens to be selected on grounds of attraction. The

court advocates duty to assist is a heavy burden and real responsibility that rises above the dust of pragmatics and transcends the seduction of eristics.

67. Here in the sphere of preparation, forethought, foresight, logic, contraction and reflection are the most arduous and comprise the most important presentational refinement by the court advocate. You cannot reduce a morass of material without effort and meaningful application. What is the ultimate aim? What is the final order desired? By what legitimate method is this aim achievable? By what steps can this be achieved? With what finding is each step built? Upon what basis is each finding advanced? How can the argument be most efficiently presented?
68. Still wanting greater insight as to the tools of the great court advocates? Excellent; as that is the endless Sisyphean task that drives every successful advocate to improve their techniques of persuasion. Those tools are development of the mind, expansion of the rules of logic, continued schooling in epagogics, developing lateral thinking, drinking more deeply the motives and influences of mankind, studying the history and growth of legal theory, refine your understanding of and the tools of linguistics, philosophy, science, cosmology and epistemology, and monitor the recent judgments of the highest courts, and be insatiable in the thirst for knowledge.
69. Entreaties to hone skills and mastery of logic are the insight to success as there is no perfect court advocate, no sublime state of knowledge of the art of advocacy and in our brief time spans there is no time to waste in digesting the truths that you can extract from other advocates.

#### **D. Practical guidelines**

##### **Advocacy Charts and Navigation**

70. An advocate is an oral cartographer – and a navigator. You are creating a chart upon which you will work and then plotting a course. The chart can be seen as the objective context – the topography, the boardroom, the intersection, the surgery theatre, it is the landscape identified by the pleadings within which the issues or problems are to be resolved.

71. The oral presentation, written and object evidence and the submissions are the navigator's plotting of the course of the ship hopefully named *Success*.
72. Why a navigator? Navigators are renowned for requiring clean, clear and neat chart work. Why – so you know where you are. Why – so the judge knows where you are. Why – so that another Court of review or another advocate can follow your course – through your chart work.
73. Why a navigator? Because that is what you are doing as an advocate – you are travelling through a timeline of critical events, occurrences or communications.
74. Why a navigator? Because preparation for a navigator is the key to safe navigation – a competent navigator corrects and studies the chart, just as a competent advocate checks, studies and corrects the pleadings. A competent navigator researches the meteorological and navigation information – a competent advocate researches and studies the whole of the available factual material.
75. A competent navigator is trying to ensure a seaworthy vessel for the intended voyage. A competent advocate is trying to ensure a seaworthy case that will last the voyage without being sunk, stranded or lost in collision.
76. Why a navigator? Because a navigator keeps a good look out as the course progresses and uses all appropriate navigational aids. A competent advocate has a constant weather eye on the course of the case and uses effective aids. The signs of changing weather will also impact on the Navigator's advice to the ship's Captain both on commencement and continuation of the voyage. The advocate will generally have advised the solicitor and client on the merits, percentage prospects, best case/worst case outcomes and avenues for compromise including mediation before the litigious voyage commences, highlighting the inevitable uncertainty of every litigious route, the shifting perceptions of strength in any scope for resolution, difficulty in arresting the momentum of the case in court and where appropriate updated settlement advice.
77. Why a navigator? Because you have to know where you are and where you are going at every moment in Court.

78. If you don't know your destination you can't properly plan the course, so like navigation, it is the end port or end objective that dictates the course.
79. Why a navigator? Because a properly chartered course by a competent navigator is reproducible and permits transparency for review, supervision and monitoring of the voyage undertaken. Similarly, a competent advocate charts a course on the transcript which is the advocate's chart, so that another court or advocate can follow the chart work and what you both say or fail to say sets the course of your ship.
80. Every material point an effective cross examiner makes is transparent on the transcript.
81. Every material credit criticism was clearly put to the witness and is in the transcript.
82. Every material flaw in the expert's opinion, expertise or independence is identified in the transcript.
83. The problem or issues raised in the case need to be as clear as the argument advanced in answer, recorded in transcript or written submission.
84. Why a navigator? Because a navigator translates and transposes a reality of a series of events into a written record before the sea conceals the wake of the ship. The advocate is also transposing into the transcript a reality of a series of events in the courtroom and a reality of a series of events comprising the dispute.
85. Why a navigator? The navigator is a professional, accountable as such for the reasonableness of action taken gauged against the standard of good practice. So to, an advocate is a professional accountable by reference to the standard of good practice. The navigator must also comply with the *Collision Rules* and ensure that the vessel is safely manned and safely navigated in accordance with the *Rules of the Road*, so to, the advocate must ensure compliance with ethical constraints and with the rules of procedural fairness.
86. Why a navigator? Because a navigator uses the logic of maths to identify speed, course, stability of the ship and use of fuel. A skilled advocate uses the similar logic of common sense in the course, speed and stability of the case, watching carefully the fuel of evidence adduced and replenishing evidentiary supplies as needed.

87. Why a navigator? Because a navigator applies his or her art within the bounds of physical realities, likewise an advocate's task is to reproduce the contended physical realities – not a flight of fancy.
88. Further, navigators identify dangers, they mark up limiting danger lines and radar ranges to keep the ship off reefs and out of shallow water.
89. Likewise the skilled advocate identifies the reefs and shallow water detectible from the chart and steers a course to safe water. How:
- (a) by the power of reason;
  - (b) by past practice;
  - (c) by observation of witness;
  - (d) by contemporaneous record;
  - (e) by probable inference from other established facts;
  - (f) by effective listening.
90. When an unexpected danger emerges a skilful navigator follows the dictates of good seamanship – where is the safe water, can I change course, do I reduce speed, do I jettison some cargo, do I change my destination. This is precisely what the competent advocate does as unexpected dangers emerge. Ultimately the critical necessity is for the advocate in danger to have considered the alternative courses open and have reason to support the course taken (or where instructions are required the course advised).

#### **E. Approach of the skilled advocate**

91. In further enlightenment of the art of advocacy are the following:
- (a) a skilled advocate knows that there is a vast unknown;
  - (b) a skilled advocate asks what he or she doesn't know;
  - (c) a skilled advocate tests what is alleged to be known both by examining the process or method through which the alleged particular knowledge is derived

and then tests that method or process and tests the soundness of the conclusions derived;

- (d) a skilled advocate is a deep thinker – and rotates the perceived problem, rotates the adversarial roles and having gleaned the weaknesses – identifies the strengths;
- (e) a skilled advocate works to make concrete blocks – for the foundation and construction of compelling argument.

- 92. It is those incontrovertible facts to which the advocate will return to rebuild and reconstruct what is intended to be the more compelling argument.
- 93. A skilled advocate knows that all events and occurrences suffer the imperfect translation into language, are dulled by time's rusting of memory, and are blinkered by the constraints of individual senses and position.
- 94. A skilled advocate knows that observation, perception and belief can influence or deflect the narrative in just the same way as suggestion, assumption or speculation, quite apart from mendacity.
- 95. A skilled advocate understands the weeds, swamps and shadows of the mind and sifts for the ring of truth by reference to reliability, corroboration, accuracy and foundation and applies forensic judgment.

#### **F. What are the tools of advocacy?**

- 96. The tools of advocacy are:
  - (a) voice – language, tone, volume, pace, eloquence and content;
  - (b) listening – reflective, information gathering, to respond, correct or advance;
  - (c) memory – retention of issues, planned course, anticipated dangers and intended track to destination;
  - (d) thought – concentration, information processing, testing, dissecting, restructuring, retesting;

- (e) imagination – testing by analogy, lateral thinking and labelling to advance or to destroy;
- (f) eyes – performance, connection, focus, pictorial representation and aids;
- (g) style – body language, appearance, hand movements, order and avoidance of distractions;
- (h) emotions – empathy, enthusiasm, humour, fear, joy, sadness, pity, interest, passion, sincerity, sensitivities;
- (i) instincts – involuntary gut response, reactions on merits, warning bells;
- (j) habit- conditioning, training, routine and practice;
- (k) health- body, mind, integrity and repute

**G. What is the key object of effective advocacy?**

- 97. Capturing the mind of the listener and persuading with compelling logic.
- 98. Winning the argument by power of reason.

**H. What is the key to effective advocacy?**

- 99. There is not one key, as every mind is different.
- 100. The effective advocate shapes the key to every different occasion.

**I. How does the effective advocate shape the keys of advocacy?**

- 101. On the lathe of reason.
- 102. In the mould of simplicity.
- 103. With the steel of interesting logic.
- 104. Shaped and grooved by refined clarity.

**J. What is the fabric of the key to effective advocacy?**

105. It is critical thinking to create a persuasive argument that is coherent and not fragmented or reduced to porridge.

**K. How does an effective advocate select the right key?**

106. From the absorbing the detail.
107. By discerning the impact and importance of the context.
108. By engaging in the additional phase, after preparation, of refinement.

**L. Practical hints and trouble shooting for the effective advocate****L.1. Professional Duties**

109. Ethical duties -avenues of resolution, prospects of success, timing/duration/costs exposure, litigation risks/collateral damage/reputation/stress, disclosure/estimate of costs, fee agreement – reviewing and revising, proper practice, limits of retainer, limits of instructions, overarching duty to the court
110. Identify time limits and bars
111. Amend / correct – early as possible
112. Preservation of records
113. Preserving integrity of witnesses
114. Privilege – preserve and steps giving rise to waiver
115. Prevent improper use of material – *Hearne v Street*
116. Use open door of colleagues – seek ethical guidance

**L.2. Getting Started**

117. Start at the end (formulate in full final orders) to get to the beginning

- 118. Case Analysis (some call case theory) – spreadsheet issues, evidence, argument, flaws, revision
- 119. Key issues (facts and law)
- 120. Read the documents – Hedley Berne (read the exclusion clauses)
- 121. Read the Practice Notes, follow the rules of Court

### **L.3. Planning**

- 122. Diary – plan, diarise and monitor necessary steps / critical dates
- 123. Litigation strategy – have one and keep up to date
- 124. Select documents for tender, proof witnesses, critical XX bundles, marked up material documents
- 125. Reflection – on whole case, issues, and remedies/result
- 126. Sequence of steps
- 127. How does context – help or hinder
- 128. Sources of proof and probability
- 129. Dangers and risks
- 130. Housekeeping lists

### **L.4. Content**

- 131. Overarching Structure – begin, develop, finish
- 132. Say what you are going to say, say it and then say what you said
- 133. Written submissions – headings, topics numbered paragraphs, read and revise, chronologies, timelines
- 134. Pruning Prose – the baggage of the theatre and histrionics should be left behind – eschew unnecessary words – less is more in meaning

- 135. Understand the holistic nature of your case
- 136. Distil to the highest authority

#### **L.5. In Action**

- 137. Best point – No cannon
- 138. Listen to the witness – best source of xx
- 139. Listen to the judge
- 140. Watch what is happening in the court
- 141. Adapt the pace to the forum
- 142. Be seen to be fair
- 143. Keep order – in papers – around you
- 144. Control the witness in xx
- 145. Know the source of powers, rules or applicable provisions

#### **L.6. Focus**

- 146. Pre-formulated purpose and reason for anything said
- 147. Don't be distracted, freeze or listen to crickets
- 148. Always a higher number and a lower fraction – a higher plane of analysis – or a more detailed level of analysis
- 149. Silence can be effective advocacy – trivialising opponent's contentions
- 150. Attack the argument not the advocate
- 151. Avoid repeating opponent's argument
- 152. Finishing points (address, X in chief, XX)

#### **L.7. Shifting Adverse Comment**

- 153. Change the framing of the issues – changes the values

154. Understanding based on conceptual frames
155. Simplistically we reason metaphorically
156. Consider the impact of re-framing – episodic issues (facts, occurrences, personal suffering/causation/solution) and/or thematic issues (higher level issues, trends, public consequences, global causation/impact/substance)
157. Change the frames to access the mind – then change the frame of content

### **L.8. What Style**

158. Eye contact, body and hand gestures
159. Sincerity and conviction
160. Wise words
161. Maintain courtesy
162. Maintain the dignity of the court
163. Connecting sound bytes

### **L.9. What Polish**

164. Minimise risk of interruption
165. Maintain order, organisation and decorum
166. Identified plan of presentation
167. Effective use of aids
168. Relevant eloquence
169. Control you team
170. Think about timing

**L.10. Reminders**

- 171. KISS – keep it simple stupid
- 172. Preferably one target- too many targets, too much distraction and the real target is lost in the mass
- 173. Apply intellectual rigour to reduce and distil

**L.11. Efficiency**

- 174. Discard the weak points
- 175. Exercise judgment in the selection and contraction of issues
- 176. Conversational style – not lecturing, not oratorical
- 177. Avoid repetition

**L.12. Interest Factor and Attention Span**

- 178. Storytelling – that is what we are used to hearing
- 179. Create pictures for the mind
- 180. Keep the content digestible

**L.13. Argue Glue**

- 181. Linear reasoning – why because why because
- 182. What links are missing
- 183. Refute by reason and identified errors of logic / unstable distinctions / empty legal rhetoric
- 184. Structure of factual argument – should reflect structure for judgment – resolving the ultimate facts
- 185. Structure of legal argument – should also reflect the structure for judgment – resolving the correct principles – supported by policy, principle, precedent and/or text

186. Check any applicable statutory material, applicable date, transitional provisions, secondary material

187. Think about constitutional foundation and sources of validity/invalidity

#### **L.14. Brevity**

188. Express – to dress with less

189. Think how to use less ink

190. Don't fawn

191. Avoid fillers

192. Pace not race

#### **L.15. Lifelines**

193. Honesty and integrity

194. Use notes – as prompt points – not to be read

195. Courage and conviction – under fire

196. Candour and concessions – response to weakness

197. Balance and common sense

198. Find the merit

#### **L.16. Control Yourself**

199. Keep calm

200. Use nerves as the energy for focus

201. Never scared if you're prepared

202. Don't rise or speak in anger or distress

203. Ignore sledging and don't be baited (and do neither)

### **L.17. Final Questioning of the Inner Advocate**

204. What is likely to be asked, what is the answer, what is the weakness with the answer, what are the most persuasive matters, what is the tipping point, what is the smoking gun, what are the material incontrovertible facts, what are the material contemporaneous observations/records, what is just/unjust and why, what is missing.

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<sup>2</sup> Revised