

CRIMINAL ADVOCACY

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*Most people can display a reasonable degree of judgement if given plenty of time. The advocate has to use his when he has no time at all.**

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1 Many factors are employed whenever an advocate addresses the court. Advocacy is an art and, at the same time, a means towards an end, which is to persuade the judge to subscribe to the cause pleaded by the advocate. All the skills in the various stages of litigation – opening address, the examination of witnesses, and the closing speeches are exhibited for the sole function of persuading the judge. Most of you will be familiar with the axioms of advocacy and there are numerous books available for this purpose. A lawyer will know that he must not ask leading questions in the examination-in-chief, and that he should not ask a question of a witness if he does not know beforehand what answer that witness will give. These are the techniques of court craft, but just sticking by these rules alone will only make the lawyer a technician instead of the craftsman that the advocate should be.

2 In the next hour, I will talk about the macro aspects of advocacy – I am mindful that the subject on which I should be dwelling on is “criminal” advocacy – but the basic essentials are so critical that we should explore them first. Sometimes a lawyer is perplexed and bewildered by the responses of the witness and the judge because they are not what the lawyer had expected. He thinks that he had followed the rules of cross-examination but

* Richard Du Cann, *The Art of the Advocate* (Penguin Books, 1980) at p 53.

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that does not seem to yield the desired or expected results; the witness, far from collapsing, remains stoic and seemingly more formidable than ever. And the judge appears unimpressed. What has gone wrong? What does it take to get it right?

I. Ingredients of advocacy as a performance art

3 Advocacy is a complex form and many factors come into play in different ways, on different people, and in different contexts. That is why even the best of counsel may still get flummoxed from time to time – but good advocates react quickly and well in difficult moments. That is part of good advocacy. A good advocate is one who knows all the factors at play and is able to manage them as a complex whole; he sees the big picture only to determine which spots he needs to dig – and how deep to go. The moment he arrives in court, he knows exactly what he wants to do, and how to do it. This is what I am going to talk about. Although it has been more than 24 years since I last addressed a court, I am speaking to you today as an advocate, not as a judge. It is important that you keep in mind that although I can only examine one topic at a time, you must reflect on each of them in its connections with all the rest. That is the secret of good advocacy – the ability to blend the multitude of complex requirements into a performance art. In this respect, no single part is greater than another. The ingredients necessary for blending and managing are more than the technical skills lawyers strive so fervently, sometimes, to learn. This complexity of factors involves the mingling of personal qualities and skills. A lawyer’s talents determine how far and how fast he acquires the necessary skills of advocacy; his personal qualities are what determine the enduring nature of his art. These personal qualities are a mix of character, personality, and learning.

A. Humility

4 It helps when one places himself as the first subject of his learning. When a case collapses, it may not be the witness’s fault nor should one be quick to blame the judge. The advocate must

have a very thorough understanding of himself so that he knows what his strengths and weaknesses are, and, of course, take steps to maintain or improve himself in all those areas. A conceited and arrogant person can be a good advocate, but humility will serve the advocate better. Ego tends to stand in the way of sound judgment. There is a reason why counsel says “In my humble opinion” when he expresses a particularly important point. It serves as a reminder to himself that he might be wrong, that he is not ramming his views down on the opposing counsel or the court. It is a reminder to himself that he must choose his words carefully and not overstate his case. Implicit in the importance of humility is that it usually travels with its sister, sincerity. Judges are, by training – if not by talent – able to quickly spot fakes; so, humility is probably one of those things a lawyer should not try to fake.

B. Confidence

5 One of the paradoxes that one will encounter in his quest to acquire good advocacy skills is that although he must always be humble, he must appear confident. He must walk into court with an air of confidence. He must speak with confidence, and he must, in every moment in court, project confidence. He must remind himself that he is not likely to persuade the judge if he appears not to be fully convinced of his own case. In capital cases for example, the man standing accused deserves to have counsel advance his defence with not just competence but also confidence. He already has enough to worry about the charge without having to worry about counsel. How does this translate into action?

6 Confidence begets confidence. The more confident you look, the more confident you will feel. Naturally, we assume that you are prepared for trial because confidence without preparation is plain bravado. That will not get you far. The usual problem is that lawyers who are prepared for trial nonetheless do not pay attention to the importance of appearance. Sometimes that has to do with inexperience and getting a little overawed by the occasion, but it is important to realise that looking serene

and confident is very much a part of advocacy because it strengthens a lawyer's composure, puts the judge at ease, and perhaps causes a bit of unease in the opposing lawyers.

7 Let not your mien betray your mood. Do not walk into court baring a grin, a scowl, or a sulk. Looking serious is fine but sometimes tension shows through that serious mien. The best face for the lawyer is the poker face. The only things an observer should read from that face is that the wearer is calm, confident, serious, and professional. He should not walk into a courtroom as if he had walked into a party, greeting everyone more exuberantly than the accused might feel comfortable with; neither should he walk to the Bar table without looking at anyone. Look first for the accused as a matter of courtesy and reassurance. Then look for the Prosecution and greet them genially.

C. *Respect*

8 Throughout the trial, the advocate must continue to carry himself in that ostensibly professional way because it is important that everyone – client, opponent, and judge – has reason to respect you. It is also important that you show respect to everyone else. The change from addressing one's opponent as "my learned friend" to the blunt "my friend" by some barristers is unfortunate. The former forces the lawyer to express salutations that sound respectful (regardless of how that lawyer really feels), whereas the two words "my friend" not only fall a little short on politeness scale, they are also amenable to sarcasm or anger. Therefore, force yourself to say "my learned friend".¹

1 Keith Evans, *The Language of Advocacy* (Oxford University Press, 1998) at p 29. The author accepts "my friend" as a recognised short form of "my learned friend".

D. Objectivity

9 There is a reason why the judge is referred to in the third person as “the Court”, or “Your Honour”, and the reason is more than just the natural respect for the position of the judge, it also reinforces the notion and ideal of the judge as a neutral and disinterested third party. It is not enough that he behaves fairly to both sides – he must truly be fair; inside and out. Thus, both judge and counsel must avoid any interaction that brings them down to a personal level. The court ought to remain detached and impartial in all proceedings before it. It is simply, decorum. Counsel has to help remind him that he has to remain impartial and hear the evidence and submissions from the detached position as “the Court” and “Your Honour”. It is, of course, the business of the advocate to try his best to move the judge to be sympathetic to his client (and often, also to counsel himself), but the judge must retain the unmoved appearance because that is the only outward appearance of detachment – the mantle of objectivity.

E. Etiquette

10 At this point, we remind ourselves that the purpose of advocacy is not just to persuade the judge; it is also important when we try to persuade opposing counsel as well as our own client. Proceedings in court is not a fight in order to stand triumphant over the carcass of a vanquished foe. You do not really need to win. You just need to get what you need. One might ask if the advocate has to be nice and friendly even though he is not so by nature. Would that not make a hypocrite of him? After all, there are lots of nasty people, and some of them may be practising as lawyers. The point is that etiquette must be maintained, not just because the rules of professional conduct require it to be so, but also as a psychological tool – one of the most important ones to keep the judge in a good mood.

11 Remember, this is not about the law or the facts of your case, or any case. If the case is meritorious, it should generally succeed in spite of poor counsel; likewise, if your case is utterly

devoid of merits, the most gifted voice will not charm the court. Advocacy is about the cases that truly merit the consideration of both sides of the claim or charge.

II. What you say and how you say it

12 We have been talking about some of the qualities that are important but often overlooked when we commence our quest to persuade the court. We should now focus on another aspect of the delivery system, and this has to do with words. There are two aspects of this that need attention.

A. Fluency and clarity

13 First, we must pay attention to what we say. The words you choose must convey your thoughts clearly and precisely and beyond this, everything else is a matter of personal style. Although some of us prefer to use short, unadorned sentences in our legal writing, there is no strict rule that one cannot use long sentences. The test is always fluency and clarity. When we speak, we do not vocalise commas and full stops. In speech, there are only pauses, inflections, and pitch.

B. Speaking well – Tone, pace, pitch and enunciation

14 The second aspect of the delivery system concerns how we speak. Lawyers here tend to speak in a monotone, very much like the way they read a text aloud. Neither speaking nor reading aloud should be bland and boring. In speaking, it is crucial that you watch the audience, and in court, that would generally be the judge. Sometimes he might be writing or typing on his computer keyboard, so watch him, and pace yourself accordingly. When he stops, continue speaking to him but this time, try to catch his eye. Watching the judge as you speak will tell you a great deal about your submissions, and if it seems like the judge is not with you, you will have to quickly fall back on a backup plan. That may entail changing your words, or your tone, or both, for the rest of your speech; or even moving to a new point altogether. Another

example of poor elocution is that of a fast-speaking advocate. Whenever we hear a lawyer speaking at a quick pace, we get the unmistakable impression that he cannot wait to finish and get out of the courtroom. That may not be very comforting for his client if he too mistakes the fast-talking (no pun intended) for nervousness.

15 Many a lover's quarrel carries the famous line, "It's not what you said, but how you said it." An advocate is a speaker, not a reader, and yet, many lawyers come to court reading from prepared texts as if they were rehearsing a script. It is important to prepare your script; write it down if you must, but as soon as you rise to speak, you must put away your script. That will take preparation, which includes rehearsal, and much practice. Going back to what I have said about confidence – speaking without a text requires and exudes confidence. Of course, there will be moments when you will have to read to the court; it may simply be quoting a passage from a judgment or a portion of a statement. On this note, let me read to you a passage from *The Articulate Advocate*:²

Your brain is not experienced at talking and reading simultaneously. In everyday life, when you talk, you talk, and when you read, you read. Do not create notes with prose paragraphs that must be read. Such notes are a trap. The more words you write, the less helpful the notes become. When you are speaking to an audience, there just isn't time to recall all those words. If you stand up with a lengthy, detailed script, the temptation to read it will be irresistible. As your brain doesn't naturally talk and read at the same time, it must do one or the other. But reading is inevitably boring.

16 What seems to inhibit lawyers from speaking well? The main fault lies in trying to speak too fast. Remember, although commas and full stops are not vocalised, speeches have pauses. Here is an example. Compare "We the people of Singapore" with "We the people of Singapore". The second with an emphasis on

2 Brian Johnson & Marsha Hunter, Crown King Publishers, 2nd Ed, 2016 at p 77.

“We” and a slight pause before continuing with “the people of Singapore” is much more emphatic than saying it with no emphasis, no break, and at great speed.

17 Another reason we do not speak well is the very basic problem of not breathing well. The problem I mention above often arises from counsel trying to squeeze as many words as he can in a single breath. We must learn to say just enough words that we can with each breath and learn to draw in the next breath between pauses in our lines. Finally, we tend to be lazy speakers, not articulating and enunciating each word clearly. Sometimes (though sober) we slur, making it difficult for the audience to make out what it is that we have just said. Pronunciation is important, but there can be no good pronunciation if enunciation is poor. It is certainly possible to speak softly and still be a good speaker, but it helps if the voice is clear and audible.

C. *Duties of honour and justice*

18 Before I move on to the next aspect of advocacy, I think that this is the right moment to recall the importance of humility and confidence. When you appear in a criminal trial, you will either be for the Prosecution or the Defence. In either case, remember your role and functions, and that both of you are obliged to fulfil the highest duties of honour and justice. The most important point to bear in mind in this regard is that you must both be neutral. The prosecutor is not a public avenger any more than the defence counsel has to spring the accused in any event. Counsel must gather and evaluate his own evidence in support of his case, keeping in mind at all times, that no matter how strong his case is, or how weak his opposing counsel’s case is, mistakes might have been made, crucial evidence might have eluded him, or perhaps, misinterpreted; and all of which could have been missed by everyone concerned – including the court. Counsel must never allow arrogance to overcome the much needed and highly valued quality of self-examination to maintain fairness and objectivity in his decision-making.

III. Trial essentials

19 On that note, we can move on to actual court work. By the time counsel rises to his feet to deliver the opening address, he would have studied every document with utmost care and attention to detail, and engaged his witnesses as often and as long as it requires counsel to understand what case he has to meet and how he is going to meet it. For the Prosecution, the evidence of the complainant has to be studied as carefully as defence counsel studies the evidence of the accused. All too often it appears to be the other way around – the prosecutor knowing more about the accused than the complainant, and likewise, defence counsel knowing more about the complainant than his client, the accused.

20 Take the simple case of a mitigation plea, for instance. Some lawyers make the plea on behalf of their clients with just a few minutes of cursory discussion, and nary a note in their files. You might have heard the story of the lawyer who told the court to be lenient to his client because “the accused is a married man with two young children” only to be promptly corrected by the client, “I am not married”.

A. *Trust and respect – A two-way street*

21 Taking detailed instructions from the client and witnesses is the most basic and important work of the lawyer. There once was a young lawyer who was assigned to represent an appellant who had been sentenced by the High Court to death for a drug offence. During one of the prison interviews, the appellant complimented the lawyer, and when the puzzled lawyer enquired as to the reason for the compliment, the appellant told him that the lawyer who represented him at trial had only been to see him once, whereas he had already met him seven times for the appeal. The lawyer eventually persuaded the appellant that there was no merit in the appeal, and because of the trust and respect of the appellant, counsel was able to say to the Court of Criminal Appeal that having studied the record of appeal and

advised the appellant, the appellant accepted that no argument could be made in respect of the appeal.

22 The notion of trust and respect applies both ways. Counsel must be able to trust that he has been given the full truth of the story as far as the client knows. This is the most important arsenal in the Prosecution or Defence as the case may be, for, if your client is telling the truth, the opposing witness cannot be.

23 When counsel is satisfied that he has the full story and understands his client's case, he may proceed to prepare for trial. In the old days, this was known as the "getting up" stage. What is the first thing that counsel should do in preparing for trial? It is not the opening address, or the examination-in-chief, or the cross-examination. The first exercise is to plan and prepare the closing submission.

B. Closing submissions – The first step in trial preparation

24 If the trial is a performance art, the closing speech is the final scene. It is the most important part of counsel's performance. Whatever counsel will not be saying to the court in closing, it will not be relevant or important for any other stage of the trial. The closing submission encapsulates the entire litigation, not just the trial itself. It is the point where counsel asks for the court's indulgence or relief, reminding the court of the evidence that has passed through the trial, and citing, if necessary, the law that applies to justify the orders prayed for.

25 When counsel knows what he wants to say in his closing speech, he will also know what evidence he needs from his witnesses, and what cross-examination is required. The closing submission defines and determines the trial. That is why it is the first step in trial preparation. The most important law, it seems, is trite law, for it is cited in many closing submissions, sometimes several times in the same submission. In most first-instance cases, facts are of paramount importance. The law, as lawyers say, is often trite. First-instance judges rarely make new law, they all prefer to leave the invidious task (and blame) to

the appellate court. It is therefore very poor advocacy to spend long minutes or pages on the law especially at the start of the closing submission. You must know the law, of course, and use authorities skilfully so that they enhance your submission and not detract from it. You can refer to the law at any point in your submission but use it well. You can start with the law in your submission, for instance, in this way:

The law says that if you are found in possession of more than 2g of heroin, you are presumed to have them for the purposes of trafficking – but Mr John Doe [accused] says that the 3kg of heroin sitting in a jar on his dining table was neither in his possession nor for trafficking by him.

26 When you prepare your closing submission, focus on the killer points. Typically, there would only be a handful. These are points that if you succeed in persuading the court you win your case no matter how many pinprick points your opponent might have won. If you persuade the court that the DNA on the bag of drugs was that of someone other than your client, it would not matter if the Prosecution has successfully proved that your client had a similar shirt worn by the man seen by other witnesses as the one who received the bag of drugs.

27 It is, of course, possible that in some cases you can achieve the “death by a thousand cuts” approach at trial. In some cases, counsel throws in every bit of evidence – the “kitchen sink” approach to trial. Bear in mind that the indiscriminate use of evidence and arguments can distract the court from important points or leave the judge with a wrong impression of the case. It also opens the trail to too many fronts for counsel to manage. Most importantly, it enfeebles the final argument which should be clear, concise, and compelling. Remember that your job is to persuade the judge to your client’s cause – not to put him to sleep.

28 The closing submission is also the part in the trial where counsel may take liberties with adverbs and adjectives. Here, when all the testimonies have been heard and the documents examined by the court, counsel may be permitted to enhance his

arguments and garnish them with choice descriptions, but always taking care not to overdo it; remembering that one need not gild the lily. Did not some famous bard once write, “To seek the beauteous eye of heaven to garnish, is wasteful and ridiculous excess”?

C. *Lead evidence without leading the witness*

29 Knowing what he wants to say in the closing submission requires counsel to know what evidence he has and what else he needs, and that, in turn, determines for him how to prepare his examination-in-chief and the cross-examination of opposing witnesses. These days, there is more orally-led examination-in-chief in criminal trials than in civil ones. That means that counsel must be able to lead evidence without leading the witness. It is such a simple feat that it is perplexing why some lawyers are unable to do it. There is a very simple exercise you can do for practice. It works wonders. Take a book, preferably a novel, and read a chapter each night aloud. This will help you improve your oral submissions. Then go back to the first line, and beginning from there, ask a non-leading question to elicit that line as an answer. Then ask by way of a leading question that very same line. Do that with every line in the chapter, and very soon, you will be able to toggle between asking an open-ended question and a leading question easily. Far too often, the inexperienced counsel, when asked to rephrase his question, responds by saying, “I withdraw my question.”

30 The skilful advocate will not lead every piece of evidence in the examination-in-chief of his witnesses. He might leave out some bits to snare his opposing counsel. For example, he may ask a woman who had complained of sexual assault by the accused, “When did you first meet the accused person?” She replies, “On that night of the assault.” Some prosecutors will press on to ask why she followed the accused, having just met him. A better approach is to leave that question for the unsuspecting defence counsel to ask, and her to answer, “Because at that time he looked sincere and I did not yet realise that he had lied about all the things he said to me.” This comes out better under cross-

examination than in the examination-in-chief. At this point, the defence counsel should smell a trap and stop; but if he does not and blindly asks, “What lies did he tell you?”, well, that is about the end of the accused because that opens the way for the complainant to provide all the details. Going back to the original question, if the prosecutor stops there and the defence lawyer does not take the bait, no serious harm is done to the prosecution case, and the prosecutor can just treat that as an unsprung trap, move on and wait for another opportunity to raise the evidence.

D. Cross-examination as a commando raid

31 The cross-examination is a commando raid. It is not trench warfare in a battle of attrition. Understand what evidence you require for your submission that you do not already have in the form of undisputed documents or other incontrovertible evidence, and that that evidence can only be gleaned from the witness under cross-examination. When you have identified the evidence you need, decide how you will get it out of the witness – charm it out of him or frighten him into revealing it. If it requires a series of questions, plan the order in which you would ask those questions and choose the words you think best suited to elicit the answer you want. Finally, plan your backup in case you are ambushed as you launch your raid. And as soon as you get what you came for, get out — as fast as you can.

32 This backup is closely connected to the rule in cross-examination that you do not ask a question unless you know the answer. This is sometimes not well understood by young lawyers. They cannot be blamed for wondering why they are asked to ask questions if they already know the answer? The reason is simply that he will need that answer recorded so that he can refer to it in his closing submission. The difficult trick is getting the witness to say what you want him to say. This is important. Lawyers often ask questions of hostile witnesses for no reason other than curiosity, or that they do not know what the witness’s view or evidence on that point will be. Often, it is obvious that whatever that witness’s evidence will be, it cannot be good for the cross-examiner. If you find yourself in that situation, it is

best to seal your lips than to seal your client's fate. When you do proceed, keep your questions short and simple, and as soon as you have gotten the witness to say what you want him to say, stop. Far too many lawyers, as soon as that happens, begin to bask in the glory of their achievement and decide to have an audio replay by asking the witness to confirm what he had just said. And, of course, the witness, now clued in, begins to explain his previous answer.

33 It is not difficult to learn how to ask questions the answers to which are already known to counsel. It will be more accurate to describe the tip as "Not asking questions the answers to which cannot be anticipated". The way to do this is by crafting your question so that it only admits of four possible answers – "Yes", "No", "I don't know", and "I cannot remember". When you pose the question in this way, the answer is anticipated, namely, that it can be any of these four. With that, you can prepare the backup questions. If the answer is "Yes", then the questions can end; if the answer is "No", then counsel must be prepared to follow up. For example, if you ask the witness whether he visited the defendant on 1 April 2016, expecting him to say, "yes", but he replies "no", this denial, nonetheless, is one of the answers he might have given, and so, you follow up his answer by telling him, "Your car licence plate is SXX 111?" He agrees and you then say, "You obviously did not know that the security guard at the defendant's apartment recorded this number as the car that arrived at the apartment's car park on 1 April 2016 at 11.00am?" Thus, always remind yourself that the witness may be difficult; and if so, how will he be so; and what do you need to prepare for his denial?

(1) *Controlling the witness*

34 The most important aspect of the cross-examination is the aim to control, if not dominate, the witness. The advocate will not be able to achieve this if he is lacking in confidence, whether real or perceived. The perceived weakness and lack of confidence arises whenever counsel is asking questions from a prepared text. A cross-examination must be conducted without

reading from a script. It must be carried out by counsel staring his witness down and asking his questions in full control of the witness. A related weakness is to read a passage – whether from an affidavit or a statement – and then asking the witness to confirm that that was what he said. This is a poor way of cross-examining the witness. Instead of saying, “In paragraph 4 of your statement you said, ‘I have been to the complainant’s house three times last year ...’ do you confirm that?”, put away the statement. Look at the witness and ask, “You have been to the complainant’s house last year, haven’t you?” If he agrees, you can move on; if not, then ask, “In fact you went to her house three times, didn’t you?” Again, if he agrees, you have achieved what you wanted. If he denies, then you can flash that paragraph 4 of his statement and ask him, “Well here we are, a statement by you in writing, contradicting your last two answers to my questions ... you are such a forgetful liar, aren’t you?”

35 One important rule, with very few exceptions, is never ask a witness under cross-examination to explain his answer. This is part of the rule that you should never ask an open-ended question, but more importantly, asking a witness “Why?” is an invitation to have him bolster his case and damage your client’s. Many lawyers ask it in the hope that the answer will be favourable, and find that more often than not, it is not. Some ask this question in the hope that the witness may give them more fodder for further and more fruitful cross-examination. Sometimes they do but more often than not, it only results in a prolonged cross-examination. The commando is thus mired in a long fire-fight. A polished, well-trained lawyer will not ask a witness “Why?” unless he is certain he will extract the answer he knows the witness will give, but that expectation is based on a proper build-up and not on hope alone.

(2) *The rule in Browne v Dunn*

36 Ladies and gentlemen, I put to you – *Browne v Dunn*³ Fairness requires that any fact critical and damaging to the

3 (1893) 6 R 67.

witness that counsel will rely on in his closing submissions to the court requires an opportunity for that witness to be told and given an opportunity to refute or explain it. Sometimes when asked why counsel is plodding along with seemingly mundane or repetitive questions, the response from him was simply, “*Browne v Dunn*.” This principle of fairness must be properly understood, and skilfully employed, or, as Ross QC says, “True artistry calls for the questions to be precisely designed to achieve their purpose. Formula is the absence of mastery and thought.”⁴ The learned QC was referring to the use of formulaic phrases, “I put it to you” and “I suggest to you” to comply with *Browne v Dunn*. So, instead of saying “I put it to you that the complainant never said, ‘Yes, let’s go to my house’”, say, “The complainant had never said, ‘Yes, let’s go to my house’.” So far as the main or crucial facts are concerned, you can state each of them by just asking if the witness agrees or accepts them, but doing so in a way that you are reminding the court what your case is.

E. Know, understand and respect your witnesses and accused

37 There is no need to call every witness that you have, even in a criminal case. If the evidence a witness is giving is not in dispute, it can be admitted as an agreed fact. Where the evidence is lengthy or where many witnesses are saying the same thing, the Prosecution can let the Defence have the list of witnesses and ask if they are required, whether to be identified by the accused person, or for cross-examination. If the Defence has no need for them, those witnesses can be completely dispensed with. In all cases, witnesses of a material disputed fact must be called by the party relying on that fact.

38 Remember that not every witness in a criminal case is a criminal – even the accused. Experienced counsel merely pose their questions in a calm and detached manner. They do not attack or treat the witness as dishonest or in league with the accused; or conversely, that all investigating officers are out to

4 David Ross QC, *Advocacy* (Cambridge University Press, 2007) at p 52.

frame arrested persons. Even in cases where it may be necessary to go hard on the witness, it is best to get all the less contentious or controversial evidence out of the witness before attacking him because once he is attacked, he will become obstinate and defensive, unwilling to co-operate with any further suggestions put to him.

39 Ross QC explains why the Bar in England does not refer to the accused as “the accused” and never to their client as “my client” or “the plaintiff”. He thinks that it is impolite in the first case, and “distasteful commercialism” in the second. “Always use the correct title of the person for whom you act: Professor, Dr, Mr, Mrs, Miss or Ms.”⁵

40 There is a category of witnesses called “the experts”. No counsel should attempt to cross-examine an expert unless counsel has sound advice from good experts in the same field. You ought to run the Defence based on a view adopted by your client’s experts. If the experts are unable to agree with your client’s case, or if counsel cannot justify the defence, it may be best, then, to abandon that point.

F. Opening address and re-examination

41 Only when you have a very clear idea of what you wish to say to the judge in your closing submission can you then plan what to say to him in your opening address. The value of the opening address is either underestimated or overestimated. This is because the purpose of the opening address is not understood. Those who think that it is a perfunctory act merely used to signal the commencement of trial tend to underestimate it. Those who are overly anxious and think that they might be penalised for bringing up issues not mentioned in the opening address tend to overestimate it.

42 We all know that after the cross-examination comes the re-examination, but few understand or even know what dangers

5 David Ross QC, *Advocacy* (Cambridge University Press, 2007) at p 28

lurk in it. As Ross QC wrote, “Re-examination is one of the hardest of the advocate’s tasks. Unlike examination-in-chief and cross-examination it cannot be planned.”⁶ The simple but important rules are that, first, if there has been no damage to your case during the cross-examination, do not re-examine. Secondly, if there is damage, but you are unable to repair it, do not re-examine. These are negative exhortations, but I state them first because all too often, the damage is increased when counsel do not observe them. Hence, re-examine only damage that you can repair.

IV. Conclusion

43 In the psychology of persuasion, subtlety is invaluable. You must not sell everything at the first pitch. It is therefore a mistake to indiscriminately inform the court of every aspect of your case at once. Every case has a handful of big points – you will want the court to know what they are as early as possible, and you will want to remind the court of them whenever appropriate, and finally, you will want to reinforce them whenever possible, without overdoing it.

44 The opening address allows you to do the first. You then remind the court what your case is when your witnesses relate their story, fulfilling the claims and statements you make in the opening address. Then those points are reinforced when you cross-examine the opposing witnesses to plug gaps that remain after the evidence-in-chief of your witnesses. Finally, you wrap it up in the grand manner of the closing speech, the moment when you speak your eloquent best why, having reached this point, the evidence and the law point indubitably to the court deciding in your client’s favour.

45 Remember what I said at the beginning, advocacy is an art. Sometimes you feel sure that you had done what you had been taught about court craft and yet you did not achieve the

6 David Ross QC, *Advocacy* (Cambridge University Press, 2007) at p 100.

desired result. The answer, very probably, is that some other aspect of the delivery might have let you down. To achieve the desired result, everything about good advocacy must fall into place. One of the very early lessons that my pupil-master Howard Cashin taught me was that I must remember that litigation is not about a single battle; it is a long campaign to establish your credibility with the court. The corollary to that, he told me, was that you cannot be a litigation lawyer unless you go to court. None of what I have said above will help you unless you put them to long and constant practice.