
# The Solicitor as Advocate

**By**

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The increase in jurisdiction of the District and Circuit Courts and the proliferation of tribunals present, more so than ever before, opportunities for the Solicitor Advocate. This article covers some of the ground rules and problems associated with advocacy. Arguably, such an article should have been written by one of the great advocates of our time. Such advocates have, perhaps, been too busy exercising their talents in a milieu of tradition and precedent that has changed little over the decades.

## Disposition

First, there is the disposition of the advocate. Many shy away from advocacy, leaving it to barristers and feeling that one must be a born advocate before one enters the fray. There are no magical formulae for success. Practice and, even more so, experience, are primary ingredients. Many advocates experience difficulty in addressing a court or tribunal. A well-known judge[1] summed up the feeling of many an advocate:

> "I was no good at first. I was too shy; also too nervous. Others are different … At (University), I joined the (debating) Union but never spoke there … One thing that you will never be able to avoid - the nervousness before the

> case starts. Every advocate knows it. In a way it helps, so long as it is not too much. That is where I used to sometimes fail …I was anxious to win - and so tense - that my voice became too high pitched …. I never quite got over it … No longer, now that I am a judge. The tension is gone. The anxiety - to do right - remains."

Professor Heuston of Trinity College, Dublin, in his book 'Lives of the Lord Chancellors 1885-1940' tells the story of Lord Halsbury's first case in the High Court. It was before Lord Campbell, then Chief Justice. The future Lord Halsbury became the victim of an attack of extreme nervousness, hesitation and stammering. The Chief Justice - not known for his patience - leaned from the Bench and stated: "For God's sake, get on young man". The future Lord Halsbury had been cured. Others have been less fortunate. But time and experience help.

**Speaking For Others**

One thing the advocate must appreciate is that it is not easy for a person to speak for himself in forums which are foreign to him. Edward Majoribanks, in his biography of Sir Edward Marshall Hall, puts it well:

> "Now it is difficult for any man, however wise or eloquent to speak for himself, when fortune, reputation, happiness, life itself are in jeopardy and rest on the decision of strangers sworn before God to find an impartial verdict from the evidence brought before them. Hence has arisen the honourable and necessary profession of the advocate; it is indeed a high and responsible calling; for into his keeping are entrusted the dearest interests of other men."

**Self-Advocates**

In passing, I refer to two persons who have advocated for themselves - rarely with final success. Maurice Healy in 'The Old Munster Circuit' tells an anecdote about a Miss Anthony who advocated her own causes. She was a litigant in his father's time and 'plagued' the courts. At first she used to be represented, in the ordinary way, by solicitors and counsel but 'soon grew impressed by her own abilities' and decided to argue her cases herself:

> "One day she was being very troublesome to a court presided over by the Lord Chief Baron, who at length said to her; 'Miss Anthony, I see your counsel sitting behind you; would you not be wise to leave the argument of your case in his hands?' 'Ah my Lord', replied the lady, 'that's not my counsel at all; he's only the young man I hire to bring down the books from the Law Library for me'."

Maurice Healy stated that it was the business of junior counsel engaged in cases to carry books for their senior counsel to court. Such is still the way today.

Another self-advocate was Paul Singer, who conducted his own criminal defence at his first trial in Green Street Courthouse, Dublin, before Mr Justice Haugh and a jury.

Seamus Brady, in this book 'Doctor of Millions', describes Singer's oration in Court as the 'most extraordinary exhibition of egotism, picturesque erudition and the forensic arts ever delivered in Green Street Courthouse'. In his closing speech, which lasted for four days, Singer explained why he was not calling evidence or going into the witness box himself:

> "There is very little evidence to give, as most of the facts in this case are not in dispute. My case is based solely on reason, logic and justice."

Memorable words for an advocate. Singer was, however, found guilty. He successfully appealed - but a new trial was ordered.

At Singer's second trial before Mr Justice Walsh, Mr Sean MacBride, S.C., with Mr Paul Callan, then Junior Counsel, instructed by Mr Gerard Charlton, Solicitor, put Singer's case.

After Mr Justice Walsh had directed the jury to record a verdict of 'not guilty', Singer held a news conference. He said that he had read law while in prison. Singer told how he had two cells, one for sleeping in and the other for use as an office and library. He stated that he had nearly five hundred law books and had about half a ton of correspondence in the cell. He also stated that he had educated quite a few of the prisoners on their legal rights - some of whom successfully won their freedom as a result.

There will always be such persons with us. Few succeed at the end of the day. Most people in difficulty need someone else to advocate their causes.

**Adversary System**

One thing the advocate will have to get used to is our adversary system. There is, more often than not, an opposing party and a conflict on the facts. Generally, only one side can win. Richard Du Cann, in his book 'The Art of the Advocate', sets the scene for the advocate in this way:

> "In every quarrel there are at least two sides but in every adjudication there can only be one successful party. Few men have the breadth of vision of Lynch who, after being condemned to death for treason, wrote of Carson, who had prosecuted him to conviction: 'He had done his part in condemning me to death, but these are not things that induce bad blood among men of understanding'. Fully half of those who resort to the courts come away dissatisfied …"

The adversary system thus puts stress on both advocate and client. The advocate must never underestimate the stress his client is under. Whether it be a civil or criminal matter, the client approaches the court or tribunal under stress. Samuel Johnson summed it up:

> "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."

Few advocates will be called upon to defend clients who could be hanged, but it is true that those who seek the help of the advocate generally come with their minds 'concentrated wonderfully'. Advocates owe it to their clients to have their own minds concentrated on the case.

**Qualities and Duties**

It would be difficult, if not possible, to list definitively the qualities of the advocate. This is particularly so as there are so many different forms of advocacy practised before diverse Courts and tribunals. Majoribanks, in 'The Life of Sir Edward Marshall Hall', lists some of his qualities:

> "The advocate must have a quick mind, an understanding heart and charm of personality. For he has often to understand another man's life story at a moment's notice, and catch up overnight a client's or a witness's lifelong experience in another profession; moreover, he must have the power of expressing himself clearly and attractively to people so that they will listen to him and understand him. He, must then be histrionic, crafty, courageous, eloquent, quick-minded, charming and great hearted."

Hugh O'Flaherty, B.L., as he then was, writing in Justice (1965) refers to one essential attribute of the advocate which does, indeed, tower over all the other qualities;

> "In every case there is one essential attribute which he must possess; he must be a man of honour. His word must always be his bond. After this, most else can be added."

Indeed, in this context, one is mindful of the answer of Mrs Moya Quinlan, former President of the Law Society when asked [2] what were the major requirements for someone entering the profession:

> "Patience and absolute tact. These, I think, are the basic and most important requirements."

**The Duty**

What is the duty of the advocate? One writer [3] has declared that the duty of the advocate is fivefold - a duty to his client, a duty to one's opponent, a duty to the court, a duty to oneself and a duty to the State. It is not easy to fulfill all five duties at the one time.

Without a client, there would be no advocate. Therefore, in the context of the advocate's other duties, the advocate must primarily have attention to, and consideration for, the many needs of his client. I referred earlier to the difficulties experienced by persons in speaking for themselves and the stress placed on clients in our adversary system.

The advocate is taking part in the process of the administration of justice. In criminal cases, the prosecuting advocate has a duty to see that there is a fair trial. He must prosecute not persecute. The case against the defendant should be 'pursued relentlessly - but with scrupulous fairness'. The defending advocate has a duty to see that his client 'has the advantages of all the rights which the law gives him and that his case is put in the best possible way' [4]

John Clitheroe, in 'A Guide to Conducting a Criminal Defence', sums up the defending solicitor's task:

> "The defending solicitor's task is to take every proper point in a defendant's favour. Therefore, the precise wording of the charge must be checked and the section of the Act under which it is brought considered, to see if the allegation is properly framed. This may seem pedantic but it is the defence lawyer's duty to represent his client 'properly'; 'properly' includes taking any point for the defence which the lawyer's additional knowledge provides and which the defendant will not know himself."

**Know The Forum**

Never go 'cold' into the 'arena'. Some knowledge of the personalities in the forum always helps. If the advocate is not familiar with a particular court or tribunal, speak to someone who practises before such a court or tribunal. It is a fact of life that judges differ in their attitude to the same matter. Find out from officials or others who know the forum what attitude is taken to long cases and particular offences. There may also be other questions, such as the order of the day's business.

**Instructions**

It is vital that the solicitor advocate takes proper instructions. A check list for civil and criminal cases is useful and helps to identify the immediate problem. A check list should ensure that vital matters are not forgotten. Dates are then entered into the office diary.

***Locus In Quo***

Should the advocate visit the '*locus in quo'* in civil or criminal cases? One Senior Counsel I know always inspects the physical location. He was thus able to tell a mapping draughtsman that his map did not accord with reality. Other counsel will never visit the site location - feeling that they might be compromising themselves. There is much to be said for visiting the *'locus in quo'* in particular cases. Many items do not appear on a plan but may be critical to the case. In road traffic accidents, the line of the buildings, trees and hedges, street furniture and the flow of traffic could be vital to the case. Thus, in court, such details as the name of the street and width of the road are cemented in your mind when you are examining or cross-examining witnesses.

**Law of Evidence**

It is almost trite to say that the advocate should be aware of the rules of evidence. At the examination-in-chief stage, it has been argued that it is helpful for both sides to allow the witness to be asked leading questions on formal uncontested matters - until contested matters are reached. Mr Justice Finlay in his lecture on Advocacy to the Society of Young Solicitors submits that it is a fundamental and cardinal rule in the direct examination of a witness, particularly of your client, that you give him time to 'play himself in'. Thus at the start, questions should be asked, the replies to which he knows he can confidently answer.

Clitheroe, again, in 'A Guide to Conducting a Criminal Defence', states a truism by submitting that ignorance of the rules of evidence can lead to embarrassment for advocate and client. He continues:

> 'The most common breach (of rules) of evidence in (criminal) courts is the witness who, without realising the significance, blurts out what someone else has said concerning the incident. In ordinary life, the description of an event often includes reported speech, but it has no place in evidence, though once given, its effect upon (the court) is incalculable.'

Then there is the cross-examination. Edward Cox, Sergeant-at-Law, in 'The Advocate', defines three objects of cross-examination as being:

> "to destroy or weaken the force of the evidence the witness has given against you; to elicit some fact in your favour which has not already been stated, or to discredit the witness … to show that he is unworthy of belief."

There is an art in cross-examination and experience is probably the best teacher. There are no set rules to cover all situations, but one cannot but heed the words of Josh Billings (see "The Art of Cross-examination" by F.L. Wellman 4th edition, Collier Macmillan, p.15) on cross-examination:

> "When you strike oil, stop boring; many a man has bored clean through and let the oil run out of the bottom."

Thus, if an admission is obtained in cross-examination, never repeat the question; you are unlikely to get the same answer.

Never cross-examine for the sake of having something to say. In some cases, you may be relying on a submission seeking a direction and cross-examination may be inadvisable. There is also an appropriate time to stop cross-examination. This, too, will only come with experience. An example illustrating when it is right to stop cross examination may be gleaned from the narrative of a case in R. Barry O'Brien's book 'Lord Russell of Killowen.' Charles Russell, then a Junior Counsel, appeared in a cause *célebre, Saurin v Starr.* The plaintiff, a Mercy nun who had refused to obey the rules, was reported to her ecclesiastical authorities and then expelled. She took an action against the Mother Superior. Coleridge led for the plaintiff before Lord Justice Cockburn. Coleridge's case was that the breaches of discipline were trivial. He

pressed the Mistress of Novices on the point, asking what the plaintiff had done. The Mistress of Novices stated, as an example, that the plaintiff 'had eaten strawberries'. 'Eaten strawberries', explained Coleridge; 'What harm was there in that?' 'It was forbidden, Sir', replied the Mistress of Novices. 'But', retorted Coleridge 'What trouble was likely to come from eating strawberries?' 'Well Sir' replied the Mistress of Novices, 'You might ask what trouble was likely to come from eating an apple, yet we know what trouble did come from it'. The answer floored Coleridge. There was no point in further cross-examination. He threw himself back in his seat and laughed. The judge laughed. The whole court laughed.

Care should be taken not to ask a witness questions which will enable him to correct a failure to prove a vital element in his evidence-in-chief. If, for example, a prosecution witness does not come up to his proof in respect of an essential ingredient necessary in the case, leave him alone and rely upon a submission that the case has not been properly proved.

Clitheroe, again, gives advice on cross-examination relating to disputed facts;

> "Where facts are disputed, cross-examine on them; do not merely put the defendant's version. 'I put it to you, Mr X that my client will say so and so. What do you say to that?' is not cross-examination, but merely giving the witness the chance to repeat his original evidence, thus reinforcing its effect upon the mind of the tribunal. Approach the witness on the basis of the client's account, first testing the witness on the areas peripheral to the essential facts. If doubt can be sown, either in his mind or the mind of the court, as to the accuracy of his recollection on peripheral facts, it will make more effective the suggestion that his account of the central issue may also be mistaken."

Mr Justice Finlay, in the same lecture on Advocacy, suggests that the advocate should not follow any sequence in cross examination. He argues that the more logical, consequential or chronological the cross-examination is, the more likely an untruthful witness will be able to anticipate the reasons for the questions and thus be in a position to fabricate the answers.

In submissions on law, unnecessary quotation from authority should be avoided. But be prepared to elaborate if necessary. In final submissions, a claim for good character should never be made if it is patently untrue.

There is a golden rule for the advocate - he is never allowed to mislead the court. In this context, one judge[5] gave advice to counsel, and, indeed, the same advice applies to all advocates. The advocate 'should stick up to the judge. It is one of his duties to be courageous on behalf of his client using all proper weapons, but no improper weapons.'

After the final submission, the matter is in the hands of the court or tribunal. Johnson has advice for the advocate at this stage:

> "A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge."

In this context, Mr Justice Finlay, in the first issue of the (Irish) Criminal Law Review, stresses that the function of the lawyer is not to decide the guilt or innocence of his client. 'He is one cog only in a machine provided for that purpose'. Thus, Mr Justice Finlay argues that it is 'perfectly possible and correct for the advocate to take part in a trial, notwithstanding a very strong belief, almost amounting to a certainty that his client is guilty.'

**Succinctness**

There is much to be said for the advocate being short and to the point, both on paper and on his feet. This is particularly so in addressing the court or tribunal when advancing submissions. Clitheroe, again, in his book 'A Guide to Conducting a Criminal Defence' gives good advice on addressing the court or tribunal, particularly when making the final submission (speech);

> "To be most effective the speech should be succinct; a wearisome meander through the evidence would only bore and irritate the court. The human mind accepts and retains a limited number of suggestions in a brief period … watch the Bench for signs of wandering attention and, if it occurs, move quickly to some fresh idea which may reawaken interest."

Mr Justice Finlay, in his lecture on Advocacy to the Society of Young Solicitors, makes the same point:

> "Indeed, across the whole gambit of the craft of advocacy, I think a cardinal principle must be 'Keep your eye on the judge'."

Mr Justice Finlay argued that, wherever possible, the advocate should always have at least two alternative arguments, either on law or on the facts to submit to a court - in case you find yourself on 'the single branch which is lopped off'.

On the question of succinctness, Lord Hailsham, the Lord Chancellor, in the case of *R v. Lawrence* [1981], 1 All ER 974, referred to the fact that part of the delay in bringing cases to trial was due to:

> "the increasing prolixity in the conduct of cases when they actually come to be heard. It cannot be too often stressed that verbose justice is not necessarily good justice. There is virtue both from the point of view of the prosecution and from the point of view of the defence in incisiveness, decisiveness and conciseness; not only in addressing examination and cross-examination of witnesses, the submission of legal argument, and in summing up. A long trial is not necessarily a better one, if a shorter trial would have sufficed."

In this context, a contributor[6] to The Solicitors' Journal, commenting on Lord Hailsham's remarks in the above case, summed up the practitioner's dilemma;

> "The practitioner, however, knows full well that the argument that prevails with Judge 1 may be rejected by Judge 2, whose mind hovers between

> arguments 3 and 4. He knows that one judge will complain if he refers to more than one case, and another Judge will complain if he fails to draw the court's attention to a particular authority… No one intends to be prolix. No one seeks to refer to more authorities than he considers necessary, bearing in mind the not infrequent need to draw attention to adverse decisions. Every barrister is modest enough to know that he is explicit and always to the point, and is astute enough to perceive that it is his opponent who is long-winded and addicted to irrelevance. Such features (or blemishes) are endemic in the legal profession and will probably never change. There will always be those who have the instinct of knowing what are the right arguments that will attract a particular judge and the ability to make the right noises and there will always be others who…"

Richard Du Cann, in 'The Art of the Advocate', argues that prolixity is practically the handmaid of the lawyer. He tells the story of a judge in past times who had the ledges in front of counsels' seats at the Old Bailey cut away so that they had nowhere to rest their papers:

> "By this simple expedient, the length of speeches was always 'exceedingly small'."

Lord Denning in 'The Family Story' poses the question how do you stop the advocate who goes on too long?

> "The best method is to sit quiet and say nothing. Let him run down. Show no interest in what he is saying. Once you show any interest, he will start off again. Other methods have their uses. Take a few hints from Touchstone. There is the Retort Courteous: 'I think we have that point Mr Smith'… There is the Reply Churlish: 'You must give us credit for a little intelligence, Mr Smith'. To which you may get the answer 'That was the mistake I made in the court below'. Next is the Reproof Valiant: When the advocate said 'I am sorry to be taking up so much of your Lordship's time' - 'Time, Mr Smith? said the Master of the Rolls, 'You've exhausted time and trespassed upon eternity'. Next there is the Countercheck Quarrelsome: 'You've said that three times already'. Finally, the Lie Circumstantial and the Lie Direct; 'We cannot listen to you any longer. We will give judgment now' against him."

**Delay**

Advocates should be conscious of not delaying in bringing matters to a hearing. Judges in the Supreme Court have stressed this recently. Lord Hailsham put it forcibly in the case of *R v. Lawrence* [1981], 1 All ER, 974

> "It is a truism to say that justice delayed is justice denied. But it is not merely the anxiety and uncertainty in the life of the accused, whether on bail or remand, which are affected. Where there is delay, the whole quality of justice deteriorates. Our system depends on the recollection of witnesses, conveyed to a jury by oral testimony. As the months pass, this recollection necessarily dims and juries, who are correctly directed not to convict unless they are

> assured of the reliability of the evidence for the prosecution , necessarily tend to acquit as this becomes less precise and sometimes less reliable. This may also affect defence witnesses on the opposite side."

The causes of delay in bringing cases before courts and tribunals are complex and the remedies are not always simple. However, the advocate should always try to ensure an early hearing.

**Style**

Lawyers talk of the 'style' of an advocate or 'styles of advocacy'. Style is a nebulous quality. Much has been written about style, particularly in the past. Arguably, you recognise style when you hear it - or see it - but sometimes cannot define what the style is, or perhaps ought to be. The writer[7] put it succinctly:

> "Style is the dress of thought; a modest dress.
> Neat but not gaudy, will true critics please."

Sir Walter Scott, himself a lawyer, gave advice to lawyers. Referring to books of history and literature:

> "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

There is no distinct style in vogue today. Indeed, a particular style may be a distinct handicap for the advocate. Again, Richard Du Cann, in 'The Art of the Advocate', argues that style is not adaptable - and adaptability is everything for the advocate called upon to cross-examine people in every walk of life.

**Law School**

Advocacy plays an important part in the Law Society's Professional and Advanced Courses for solicitors' apprentices. Some of the remarks made in this article have already been made to such students. Role playing and mock court situations in both civil and criminal law cases do help in the training of the advocate.

**Important Role**

The lot of the legal advocate is becoming increasingly complex. His subject matter was aptly described in the Laureate's lines[8] - when he spoke of:

> "The lawless science of our law -
> That codeless myriad of precedent,
> That wilderness of single instances"

The advocate's role and functions are as important and vital today as they ever were.

**End notes:**

1. Lord Denning in *The Discipline of Law* (Butterworths, 1979).
2. Interview in Evening Press - March 25, 1981.
3. Lord Macmillan, a Lord Advocate-General in Scotland and a member of the Judicial Committee of the House of Lords. See Du Cann. *The Art of the Advocate* p.32.
4. Lord Justice Lawton in foreword to John Clitheroe's *A Guide to Conducting a Criminal Defence.*
5. Lord Denning in *The Family Story* (Butterworths, 1981)
6. Jack Hames Q.C. The Solicitors' Journal, Vol. 125, page 818. (Dec 4, 1981).
7. Samuel Wesley in "An Epistle to a friend concerning Poetry" referred to by Lord Denning in *The Family Story* (Butterworths, 1981) p.216.
8. Referred to by V.T.H. Delaney in his biography, *Christopher Pallas,* (Dublin: Allen & Figgis, 1960) at p.163.

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