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Inspiring Advocacy

30 tips in 30 days

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Foreword

Through the lockdowns of recent times I tried to provide some remote career based materials for aspiring barristers or newcomers to the profession. In late March I had a thought to publish an advocacy tip per day for the month of April. Whilst it may seem obvious, I did not really make the leap of realisation that I had just committed myself to coming up with 30 pieces of advice about advocacy!

As the month of April went along, I soon realised that there was more than enough to talk about. Advocacy is a process of continuing learning. There is a way in which we learn something every day of our careers. As I have been doing this for 28 years now, I have learned a lot of advocacy lessons.

My chambers have kindly collated the 30 tips into this digital document. I hope that you find at least one of the tips contained within it of some assistance. Advocacy is a deeply personalised skill. There is not one way of “doing” advocacy. There are certain hard and fast rules, certain pieces of advice that will be universal, but always remember you are not trying to emulate a good advocate that you have seen, you are trying to be the good advocate that is you.

Jaime Hamilton QC

13th May 2021



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1 Remember advocacy is about communicating, informing and persuading. With that in mind, don't think you have to sound like you imagine lawyers write letters. There is no need for "hereinbefore". Clear and understandable advocacy, accessible to all who are listening, can be as eloquent as someone who has swallowed a thesaurus. Remember the formal setting, but don't set out to just sound like a lawyer.

5:59 PM · Apr 1, 2021



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2

This tip may seem to contradict No 1 but it doesn't. Remember to use language well. Make your submissions sound attractive. Think about how you express yourself. That does not require references to classical literature and those long words. You don't want 60s brutalist tower blocks nor a gothic cathedral with flying buttresses but do construct your language with clean lines aided by the occasional architectural flourish.

12:57 PM · Apr 2, 2021



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3

This one might seem like a strange one but it is vital. Stand still. Don't wander around, shuffle your feet, bend over the lectern or hop from foot to foot. Stand with your feet just wider than hip distance apart and with your feet firmly planted. You will feel more confident just from that stable stance and you won't distract/annoy your tribunal.

4:17 PM · Apr 3, 2021



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4

Flying hours. You are always learning as an advocate. All the time. Flying hours is about always thinking about the basics and getting them right each and every time. Every piece of advocacy you do should be thought about. It's when the basics are absolutely second nature that you are better prepared for the difficult moments and give you the foundation to advance your advocacy. Hence flying hours. When you have landed the plane 100 times in perfect conditions you have a better foundation for landing in a howling gale. Part of this isn't just doing. In your early years be an avid consumer of advocacy. Take the opportunity to watch others. Talk about advocacy. Ask others how they did it and why they did it. Learn what's good, what's not so good and, importantly, what works for you.

10:35 AM · Apr 4, 2021



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5

Listen. We like the sound of our own voice. But always listen. No matter how prepared you are, listen to the evidence given. Listen to the answer given in cross examination, no matter what your next question is planned to be, the answer just given determines what it is. And listen to your judge. Answer the question asked. Directly. Listen to what points are landing, what points need more to land and which points are totally missing the mark.

12:05 PM · Apr 5, 2021



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6

Keep calm. The calmest person in the room never lost a case for that reason. People can be inspired and motivated by righteous indignation, fire in the belly may fuel a cross examination, but always keep a clear head and a sharp focus. Never let the heat of the battle cloud your judgement. Never lose sight of what you want to achieve because you get distracted by something else. And always remain polite with it.

2:22 PM · Apr 6, 2021



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7

We are moving on to submissions now and I am going to start with a bit of a “don’t”. In fact two “don’ts”. “Don’t No 1” When making submissions on the law, don’t treat it like a law essay. Take as your starting point what it is that you are seeking to persuade the to do. What ruling are you seeking? Your submissions should be crafted with that aim in mind. You are not seeking to give the tribunal a lecture in the law, you are seeking to persuade them. You have to know all the background but that may not necessarily require repeating. Use what you know to show why you are right and why your opponent’s submissions are incorrect. Your submissions should be directed to what your aim is, and with that will come being concise. “Don’t No 2” is tip no 8 tomorrow!

1:07 PM · Apr 7, 2021



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8

“Don’t No 2”. Forest Gump’s momma may have thought life was like a box of chocolates but submission advocacy isn’t. This applies particularly to mitigations but I am sure is equally true of other submissions. Don’t lay out every point and bit of information like a buffet and say to the Judge “you choose”. You may know that your client played Tiny Tim in the school play but does the Judge need to know? A plea in mitigation is not a complete biography, it is an attempt to persuade the Judge to pass a type or length of sentence. That means this is your goal. Your submissions should set out to achieve that goal. Does what you are saying work towards the goal? A plea in mitigation, or any submission, is not a list of facts and options. Your job is to persuade.

10:58 AM · Apr 8, 2021



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9

On paper there are many things that help the reader navigate the document and assist understanding. Punctuation, paragraphs, headings etc. Replicate that in your oral submissions for the listener. Pause between points. Give vocal clues that you are moving on. For example “Your honour, those are my submissions on the guidelines, turning now to the defendant’s personal circumstances”. This approach has the additional benefit of making sure that your submissions have a structure and are not just a list of points. It helps the listener know you are moving on to a different point. Do not fear the pause, it does not have to be a breathless rush through all the words. The pause can be your paragraph and gives the listener the time to process what you are saying.

4:23 PM · Apr 9, 2021



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10

Advocacy isn't just the stuff that comes out of your mouth. Do not neglect your written advocacy. First rule for your written documents – know what is expected. Is it a skeleton argument? There are not many points that you will deal with day to day where a skeleton argument would need to be tens and tens of pages. The clue is skeleton. It isn't an anatomy text book. Keep it skeletal. Inform your tribunal and opponent as to the direction you are going in but flesh it out with oral advocacy. Don't overload your tribunal. If you produce a fully formed set of written submissions don't just read it out. Summarise your points and speak to those that require amplification. (I appreciate that this has implications in relation to open justice and there is a balance to be struck).

1:40 PM · Apr 10, 2021



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11

When making legal submissions, give the Judge the whole answer. This is particularly true of written submissions. Give the judge the very basis of their judgment in the document. Write your conclusions as if you were writing the judgment. It is great when you hear your own words used when the judge delivers their ruling. This is also possible in oral submissions. Before you embark on your oral submissions have a very clear idea how it is that you wish to conclude.

12:09 PM · Apr 11, 2021



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12

Everyone makes errors. You will submit documents with typos. But do try to limit them. Proofread the document. Print it out. Then proofread it again. Walk away from it. Then read again. Possibly out loud. This is particularly true for the new barrister and all written work. Don't give solicitors a reason NOT to want to use you again. Back to your documents for the court. Make them attractive within the formal setting that is the courtroom. Eyes may roll when you see discussions about fonts but a neat and tidy document will assist you in getting your point across... I am now proofreading this tweet like crazy...

1:18 PM · Apr 12, 2021



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13

Say what it is that you want. And from the outset. I can't recall any submission that I have ever seen that was improved by an air of mystery and a long introduction before the big reveal as to what was being asked for. Introduce what you seek to achieve early on. "Your Honour, the object of this mitigation is to persuade the court to impose a community order" or "My Lord, this is an application to exclude the evidence of identification given by the witness Vera Snargs". I know this sounds very basic stuff but I have seen judges ask of counsel "What is that you want?" a number of times. And of course if you begin with asking for what you want, don't forget to remind the Judge at the end as well.

5:34 PM · Apr 13, 2021



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14

Before we move on to witness handling, a final tip for oral submissions. Don't neglect advocacy. You will sometimes hear a Judge admonish counsel for "treating them like a jury" when counsel have strayed into the realms of flowery language. That does not mean that you should not seek to speak in a way which is both persuasive and an aid to understanding. You will sometimes need to find a way of expressing something in a way which helps to unlock the complexity of an issue, even to a Judge. Strike the right balance but do not forget that you are undertaking the task of oral persuasion.

1:43 PM · Apr 14, 2021



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15

Examination in chief. The most brutally difficult simple discipline. I promise you that once it clicks, it clicks. The tip for non-leading questions. Imagine you are in conversation with someone and you have absolutely no idea where their remarkable story is going. Your side of the conversation would be full of “no way, what did you do then” and “they didn’t did they? What did you say?” and “that’s amazing, what did you think when that happened?” That’s kind of how examination in chief should be. You don’t give the answers, even though you know what the answer should be.

7:15 PM · Apr 15, 2021



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With no scientific or statistical basis whatsoever for this assertion, I reckon 75% of examination in chief of witnesses of fact could be elicited with the question “what happened next?” Of course you cannot conduct the examination using only that question because it doesn’t allow you the necessary control and becomes intolerable for the tribunal to hear you repeat the same question time and time again. But that knowledge allows you to have that card up your sleeve. You can quite often fall back on the question “what happened next”. So develop that. Think of ways you can ask that question. The first stage of that is to have a store of questions that ask this in a different way. “What’s the next thing that happened?” or “After you saw that, what can you remember next?” You can have a bank of such questions and they can often help you avoid leading. This can then develop to have those store of slightly more specific questions but basically designed to move the story along. “What did you see?” or “After that happened, what did you say?” or “Did you reply?” These are the foundations upon which you can build skillful and controlled examination in chief. I have talked before about flying hours. This is the muscle memory side of advocacy. Like sports people have the basic moves they do time and time again, this is your muscle memory. Think in advance about a range of non-leading questions. They are then there when your mind reaches for them.

3:16 PM Apr 16, 2021



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17

Know the difference between a leading question and a closed question. It is sometimes said that a leading question is one to which the answer is going to be yes or no. That's not quite right. You can and should ask questions that only have yes or no as the answer as a means of controlling the narrative. This is particularly important with a witness who may give potentially prejudicial and/or inadmissible evidence. An example. Let's say the witness had previously met the defendant but you didn't want the circumstances being revealed. If you asked "You had previously met X on the 6th July" that is a leading question. So you ask two fairly closed questions. "Had you met X before?" to which the answer is yes or no. You then ask a precise closed question. Not "when was that?" because can lead to the answer "oh, when I arrested him" but "what was the date of that previous meeting?"

11:32 AM · Apr 17, 2021



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18

The examination of expert witnesses is a different discipline. The best tip I can give about it in the context of this is – go watch. When you hear one of your colleagues is calling an expert, go and sit in the public gallery. If you hear in the robing room that an expert is being called in a case that day, go along and watch when you have finished your court business. When calling your own experts know the report inside out then get them to explain it to you as if you had not read it. That's the tale you want to tell the tribunal.

12:22 PM · Apr 18, 2021



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19

This is a general matter for both chief and cross examination. You must plan them but, and this is a big but, you cannot write out question after question and expect to read it out. It is the answer which you are given which dictates what the next question will be NOT what you wanted the answer to be or whatever you have planned next. Listen to the evidence given. This means that you need to be able to be flexible with your questioning from the very beginning of your career. Planning and preparation should not be at the expense of flexibility.

3:56 PM · Apr 19, 2021



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20

This is going to be one tip spread over a couple of days. I have said don't write out every question in cross examination but to plan cross examination. How do you do that? The first consideration is the order you are going to do things. Think about this carefully. Do you want to have the impact of a really good point undermining the witness from the off? Or do you want to save some point to be the final impression? Is there material that you want to get from the witness that assists you before moving on to areas that may turn the witness from wanting to assist you? Are there points that you have to deal with properly sequentially? This is the start to your plan. You may change the sequence as you continue to plan. It is only a start, there is plenty left to do.

1:58 PM · Apr 20, 2021



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21

The planning of your cross examination. Make a list of each and every area of challenge. Each part of the witness's evidence with which your client disagrees. Then work out how you are going to fairly "put your case" consistent with your duty. Work out when you are going to do it and how. A big clue – it isn't by saying "I put it to you". You may be able to round up certain challenges as one challenge. You may do it as you go along or you may do some or all of it at the end. (Sub tip – it generally isn't a good idea to leave 6 challenges to the end of your cross examination).

1:02 PM · Apr 21, 2021



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22

I have already said that you cannot expect to read out your cross-examination as prepared question after prepared question. But there may be times when the wording of the question is absolutely vital. Write out this question. Or, at times, a short series of questions. This is to get the wording exactly right. To make sure there is no room for the answer you do not want.

9:29 AM · Apr 22, 2021



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23

Still on planning your cross examination. Think very carefully about what you can achieve. We all love the court scene from A Few Good Men with the “you want the truth, you can’t handle the truth”. Well, the real line would be “you want half a dozen seemingly unconnected and apparently inconsequential additional facts which you will weave into your speech as a means of unlocking the case against your client, you can’t handle the etc etc”. The reality is that you are seldom going to lay waste to the account of the witness. You are going to try to get material together that you can use in your speech. Sometimes you will do a little of both. But have a clear idea of what you want to achieve when in the planning stage.

1:26 PM · Apr 23, 2021



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24

People talk about winning cases in cross examination. Starting out to win the case in cross examination is not the place to start. The place to start is not losing the case in cross examination. We go from Colonel Jessop to Harry Potter. Think of the Defence Against the Dark Arts class. There is no good being a fabulous wizard in every other way, if you are going to get slain because you don't know the first thing about defence. Cross examination is a defensive as well as an offensive discipline.

4:09 PM · Apr 24, 2021



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25

Never ask a question to which you don't know the answer. This is the most oft repeated advocacy tip. And the most wrong. It is impossible, unless you have psychic powers. The correct advice is in two parts. Firstly make sure you frame the question in a way which gives you the most control over the possible answers. Secondly, think through the possible answers. Work out what damage those range of answers could do to your case. It is the reckless question which most often wrecks your case. This is an aspect of defence before attack. It may be that one answer, the answer you want, would win you the case. But you may not get that answer. So think what other answers you may get. If you only ever ask questions to which you absolutely know the answer, you will probably never ask a question. But that doesn't mean you shoot for the stars with every question.

10:49 AM · Apr 25, 2021



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26

Cross examination of experts. Approach it this way - your job is to make the jury understand. If you are the advocate that helps the jury understand then you are on to a winner. Think about the language you are using. Keep it simple. Think about the ways that you are going to make your standpoint come to life for the jury through cross examination. Don't get bogged down in technical details. Simple explanation is key.

3:50 PM · Apr 26, 2021



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27

We turn now to jury speeches. One for the opening speech. Don't start with the indictment, the burden/standard and loads of mundane stuff. The jury have wandered in and want to hear what the case is about. Give it to them. A one or two sentence summary. "Members of the jury, this case is about a fight in a pub. The prosecution say that the defendant took a glass and pushed it into the face of one of the other customers, causing a six inch cut that required 38 stitches."

1:02 PM · Apr 27, 2021



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28

I have encountered a number of advocates that have a series of speeches that they have for their closing speech. They will say “oh this is a case for the gates of heaven speech” or even “this is a number 4”, as if they are selecting a golf club. I am not saying their approach is wrong. I am not saying they don’t deliver high quality advocacy. But I am saying “don’t be that advocate”. The reason why I say that is that each and every piece of advocacy you conduct should be bespoke to the case. It should be crafted around the facts of that case. It should be thought about in relation to the needs of that case. Yes, you will develop the occasional little set piece that you may deploy a few times in the right circumstances. But only because it fits that case, not because the case has been shoehorned into one of your standard speeches. Nothing is ever off the peg, ever client deserves the care and attention of a speech written for their case, not the jaded speech you first deployed ten years ago.

1:18 PM · Apr 28, 2021



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29

This applies to a lot of advocacy but never more so than in closing speeches: Remember that you are a storyteller. Have that mindset, whether prosecuting or defending. How am I conveying this story to the jury? How am I going to make it come alive for them? How am I going to assist their understanding? How can I have them relate to the narrative? Thinking of yourself as a storyteller helps with so many of the devices that you will deploy. It will help with the manner in which you address the jury. It will help with the way you utilise analogies, metaphor etc.

1:39 PM · Apr 29, 2021



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30

The last day of April. The last tip. It's a simple one. Always have the confidence to know you are right, blended with the humility to recognise when you are not. That will carry you a long way as an advocate in which others place their trust, in every sense of the word.

1:20 PM · Apr 30, 2021



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