

# Does advocacy training work?

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It is to be hoped that the myth that advocacy skills are something with which the fortunate few are born has been dispelled by the enthusiasm with which advocacy skills training programmes around the world have been accepted. It has become clear from the various advocacy training programmes around the world – Australia, America, Scotland, England and Wales – that these skills can be taught and that the various methods developed by the Bars in these countries actually work.

## Opposition

In the United States, although there was initial opposition to the concept of teaching advocacy skills, programmes have been instituted. To date more than 60 000 American lawyers have been trained by NITA.

In Australia there is still resistance to advocacy training. In the words of Justice George Hampel (Justice of the Supreme Court of Victoria, Australia and Chairman of the Australian Advocacy Institute), “This is reflected in the number of very experienced, very bad advocates in our country. Indeed it could be said that these advocates have perfected the art of bad advocacy.”

A number of excuses have been advanced not to implement advocacy training programmes: it is too hard to teach adults new skills; it is too hard to teach advocacy as a skill; advocacy is not a skill, it is a talent – the list goes on. Most people who have not undergone advocacy training believe that advocacy cannot be taught and is best learnt by a process of combining observation and osmosis.

The premise upon which the developers of the advocacy skills training programmes worked was that the basic skills of advocacy – preparation, ethics,

management of witness testimony and argument (whether of fact or law or both) – remain constant and can therefore be taught.

There are a number of good reasons for implementing advocacy training programmes, not least of these being that the social stigma that is already often attached to the legal profession is exacerbated by incompetence within the profession. Lawyers are already perceived to be a money-grubbing, manipulative, amoral bunch. Incompetence and lack of advocacy skills only serves to further this perception.

It is incumbent upon our profession to dispel these views by, inter alia, improving standards of advocacy in our courts. This would also lead to other benefits. To quote Chief Justice Warren Burger: “The tradition of independence of the British Bar and the corollary of accountability for the exercise of that independence are reinforced by their system of training and the standards of the profession. At the core of their training is the inculcation of strict standards of ethics, civility and decorum as components of professionalism.”

## Developing programmes

The Bar of England and Wales has developed successful advocacy training programmes, run by practising barristers, for the pupils and new practitioners at the four Inns of Court. The Scottish, Australian and American Bars have also developed similar programmes. All these programmes have been incorporated into our training programmes in South Africa. We owe a debt of gratitude to the past and present chairmen of the IATC and Grays’ Inn departments of Continuing Legal Education for their unflagging interest and participation in the development and progress of our



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programmes in South Africa. The thoughts and views expressed in this article draw upon the many hours of discussion held with these people as well as the papers presented by many leading Advocacy trainers who took place in the First International Advocacy Training Symposium at Gray’s Inn in January 1997.

We in South Africa were extremely fortunate to have been offered assistance from the Inns of Court Advocacy Training Committee (IATC). In January 1996 a group of 13 South African advocates from various bars across the country were privileged enough to attend a training course in London to become advocacy trainers in South Africa. These pioneers initiated the drive to improve the standards of advocacy in our country.

As it stands in 2002 we have over 230 advocacy skills trainers throughout the country – consisting of judges, senior counsel and junior counsel. The different Bars across the country all run training programmes for pupils and junior counsel who are already practising.

Although advocacy training should not be limited to pupils, it is particularly important at this stage of an advocate’s career. This is because the first time an aspirant advocate comes across any of the practical aspects of advocacy is during their pupillage. Prior to the implementation of the advocacy training

programme of the GCB, other than legal drafting, there was no practical training offered for pupils. Pupils merely watched their masters and others in court or during consultations and picked up what they could. The lectures given during pupillage, while invaluable, also contained no practical aspect whatsoever. Thus during pupillage pupils were given no opportunity to practise their skills (or lack thereof), to identify any flaws they may have or to correct them. After intense investigation into this problem, the GCB instituted the compulsory practical workshops which take place either after the completion of the Bar exam or during pupillage itself.

## Workshops

The approach at these workshops is to avoid the typical lecture scenario, instead focussing on a practical training in trial techniques, motion court, appeals in the high court, case analysis as well as the other basic advocacy skills including consultation, preparation for trial and presentation of argument. Instead of teaching the skills in a classroom, the pupils take part in the motion court and appeal exercises in the high court presided over by real judges. Instead of academics lecturing, the teachers are practicing advocates, including many senior counsel, and judges – all of whom have been trained as advocacy trainers. This added authenticity often means that not only is the lesson learned but that it is worth learning.

There are certain basic advocacy truths wherever advocacy is practised. Advocacy training necessarily reflects the following three features, amongst others: first, the important role that oral advocacy still has in our court system; second, the fact that our practising legal profession is split into two branches, advocates and attorneys, and that litigation preparation and advocacy are seen as distinct, albeit related, operations; third, the important role that established judges and advocates play in the education of junior counsel through advocacy training programmes as well as through pupillage.

In respect of conveying these aspects of the profession to the junior counsel and pupils at the Bar, it is all-important

that the method used to teach them is effective. The movement away from didactic teaching methods where students do not participate in the learning process is reflected in the approach adopted at the workshops. Advocacy training provides an opportunity to learn as opposed to merely teaching. The essence of all advocacy training is “learning by doing”. The focus is on the pupils and their skills and not on the teachers and their expertise. This approach is necessary especially in the light of the fact that most of the students have more than one university degree, and are now professionals – as a rule such people resist being taught anything, let alone criticised!

The programme therefore tries to involve all role-players in the learning process. For instance, the video performance and review is done by pupils, peers and trainers in a joint effort, with the proof there for all to see and hear. After the initial shock of seeing oneself on a TV screen, it is a profoundly interesting and extremely instructive tool. The review is intended to illustrate the strengths and weaknesses in presentational style, and we emphasise strengths as well as weaknesses, as it is not meant as a purely negative and embarrassing exercise but is intended to encourage the use of a particular stance, or manner, or type of articulation. Having seen him or herself on video, the pupil has time to reflect, assimilate and aim to improve. Watching others on video allows for further reflection, comparison and an opportunity to learn from the performance of others. It is thus made possible to learn the art of advocacy by doing, and more particularly by seeing. The process also makes it possible for a junior advocate to iron out flaws in a workshop in front of a sympathetic and supportive audience, rather than in court.

The approach adopted in training is therefore not to dehumanise or formulaise the student, but rather, through the use of small groups and personal attention, to encourage and develop the person’s advocacy skills. An insightful comment emanates from John Mummery, Lord Justice of the Court of Appeal, on the need to preserve a person’s uniqueness in advocacy training: “You cannot teach people to have

personality. The fact is that if a pupil does not show personality during a training programme it does not mean that he/she does not have one. The personality of an advocate comes from experience and training. Many people go into court and think you have to talk funny English; you cannot speak straightforward English, you have to use all these fancy words and you cannot actually relax and be yourself; you have to adopt stilted manners; you have to speak to a judge as though he is not a human being. Nothing annoys me more as a judge than being spoken to as if I am a Martian. You do not want that. You just want to be spoken to respectfully and intelligently as another human being. We are in danger of losing that something special that we all loved about advocacy, and that is the human dimension of it.”

## Visible improvement

All of these aspects of advocacy can be taught, and by the end of a workshop the improvement in the pupils or junior counsel is greatly visible. This is clearly a case of the results demonstrating the effectiveness of the method.

The method adopted from the IATC Advocacy Training is that the student’s performance is broken down into six categories for review purposes: *Headline*, *Playback*, *Rationale* (the problem), *Prescription* (the solution), *Demonstration* and *Review*. By identifying a particular problem that the student has, a trainer will then be able to put the student back on the right track. The method sounds too simple to work. But perhaps it is the very simplicity that makes it work as well as it undoubtedly does.

The simple structure of the training allows the experience of the trainers to shine through, and because of the fact that the trainers are drawn from the ranks of judges and advocates, their advice has credibility and value to pupils and junior advocates alike.

The involvement of judges is particularly important. The judiciary have in the past put forward their fair share of complaints about the quality of the advocacy that was being presented to them, coupled with a decided reluctance to do anything about it. However, we have a substantial number of judges who

very enthusiastically take part in our advocacy training workshops. They give up of their time to be trained as teacher-trainers and they participate in both pupil and junior counsel advocacy training workshops. This demonstrates a commitment to improve the standards of advocacy in our courts. The judges' belief in the system is proof of the fact that advocacy skills can be taught.

Even counsel who have been at the Bar for many years will admit that they are always learning. They should have the humility and self-confidence to admit that they can learn from their mistakes. Teachers can also learn from the process of teaching, and so it is too with advocacy teachers.

The idea of advocacy training is to combine the young lawyer with the experienced lawyer as a teacher. However, not every experienced lawyer is able to teach others. Personalities differ – one finds advocates who are much more hands-on, excellent trial lawyers, and lawyers with a more academic approach. One has to recognise these differences and find ways of utilising all types. The trainers also inevitably learn from other trainers as they teach side-by-side at workshops.

Thus, part of advocacy training is training the trainers themselves, getting them to think about what they are doing, getting them to develop their own skills. It is very much the profession itself accepting the responsibility of not only improving their own oral advocacy skills, but of assisting juniors and pupils to hone their advocacy skills, thereby raising the standard of the profession as a whole. This responsibility we are pleased to say has been taken on by many members of all the national Bars who give generously of their time and knowledge without any remuneration. Our objective is the delivery of good quality advocacy teaching to pupils and young practitioners where pupils are given objective and professional feedback on which aspects of their performance they can improve. Both pupils and juniors who have attended workshops have expressed gratitude for the enormous benefit they received.

### Not only altruistic...

Improving the standards of advocacy at the Bar is not only altruistic. There is a

very selfish motivation for any advocate to encourage high levels of advocacy skills at the Bar. It is the very advocacy skills that develop with appearing in court almost every day over a long period of time, and the resultant level of expertise developed, that attorneys obviously do not have. The very justification for having an independent Bar is in its advocacy skills, and especially its oral advocacy skills. This is what sets us apart from the attorneys' profession, and justifies our specialised position.

Oral dialogue is at the very heart of our profession. It is the best way of identifying the key issues and getting the right answers. Advocacy is the art of persuasion. It is an art of performance, using oral communication, which, unlike written communication, is unforgiving if there is not a clear structure and a clear leading through of arguments and their development. This why it is perhaps the wrong focus to bring pupils through years of training at university, through a lightning four-month pupillage and some pretty tough exams before letting them loose on an unsuspecting public. Perhaps an intense, specialised course in practical advocacy training is what is really needed. This is especially true in respect of the increase in the number of people coming to the Bar straight from university and then undergoing a mere four month period of pupillage – a large part of which is spent studying if not stressing about the Bar exam at the end. As the universities do very little, if anything at all, in the way of practical training, these pupils have no concept whatsoever of court room procedure or practice. These aspects may have their solution in the one year training that is proposed in the Legal Practice Bill, and the current rethinking of the pupillage curriculum as a consequence.

### Ethics in the advocacy training scenario

Ethics are another aspect of our profession that is taught in a practical way in advocacy training. The art of persuasion is about winning, and it is at that point that we often come into direct conflict with, or at least raise for our consideration, some ethical issues. The

advocacy teacher has in this respect two fundamental tasks. The first task is to ensure that from whatever background, the student or junior counsel fundamentally understands and accepts the demands made by our codes of conduct. We hope we all became members of our profession due to our belief in advocacy and our faith that quality advocacy is the means by which justice is achieved. However, if the practice of advocacy is distorted by the advocate's self-interest, or an overriding interest in pleasing his attorney or client by somehow bending the standards of ethics by being less than totally honest with the court, then no amount of belief in advocacy is going to see justice being done. The second task is to provide opportunities for effective practical training in those ethical issues that they may encounter. The most effective manner to provide training on ethical issues is to allow people to see the consequences of a wrong ethical decision in the safety of a training programme. There is great merit in combining advocacy training and the awareness of the consequences of unprofessional behaviour.

"The culture of the Bar, the size of the Bar, the changes in chambers' life have all affected the absolute standards that the code of ethics requires. Standards in society are also no longer absolute, and we live in a society where all too often the end justifies the means. There is a widening gap opening up between the absolute standards set out in the code of conduct and the standard that young pupils are brought up to believe in and see as examples, whether on the television, in the newspapers or in the lives of public figures. The basic premise which we espouse when teaching ethics is that integrity and honesty are not on a sliding scale when it comes to professional conduct, and one needs to understand that the privilege of representing others and being in a position where our word is accepted in court, as a matter of course, carries with it a duty of carrying out our work with the utmost respect, dignity and honesty. As advocacy trainers we have the opportunity of coming into contact with the young advocate and are thus provided the opportunity for effective training in those standards which we all believe in and accept fundamentally, so that the next genera-

tion who takes over from us has the same uncompromising acceptance of an absolute standard of behaviour in the conduct of our cases.”\*

The involvement of the judiciary at all levels of advocacy training has a huge advantage, but specifically with regard to ethics as they are the victims of unethical behaviour, and are exposed to unethical behaviour more often. They are thus extremely useful in this teaching process.

Despite the resistance encountered when advocacy training was introduced in South Africa, where judges and senior and junior members of the Bar had to be persuaded that advocacy skills could be taught, we think we can confidently state that the method works and that the basic skills of advocacy can and have been taught and learnt. This is seen in the improvement in the advocacy skills of the people that have attended the work-

shops, and in the increasing number of judges and senior counsel that are participating in the programmes.

Through advocacy training we are providing something that was never given to most of us when we started. We are providing something to the young that will illuminate everything that they do and that our profession does in the future. We are afforded an opportunity to raise the status of our profession in the eyes of the public because we are seen to be serious about what advocacy training is really all about, that is to provide a service to our clients, to the administration of justice and to our society, which is after all the only justification for our existence.

The aim of advocacy training is not to teach master lawyers. The people that we teach might become master lawyers if they have their skills, but we need to give

everyone who comes to us to study, the skills to be a mediocre but an efficient, competent and ethical lawyer. We cannot ever really hope to teach great advocacy or to produce great advocacy. That comes with time, dedication and ability as well as training. But we can aspire to eliminate the incompetence and wrong-headed approaches that result from lack of basic technique and foundation. A lawyer in the United States was fond of saying, “he learned right from wrong, but he started from wrong.”

Advocacy training can help to provide the techniques to learn right from wrong, but by starting from right.



\* Extracts from the paper presented by Michael Lawson QC to the First International Advocacy Training Symposium, Gray's Inn, January 1997.

### Compromising fundamental values

‘There were government officials and legislators who, in the name of expediency or for the sake of purported effective governance, have been too ready in compromising fundamental values of the Rule of Law that we lawyers treat as inviolable and have held dearly to our hearts. Rule of Law and Independence of the Judiciary were what we had taken for granted. But, can no longer. Fairness, due process and respect for fundamental human rights

and freedom were values we assumed to have been shared by all. But, can no longer. It has become increasingly clear that, if not being closely watched and scrutinized, these institutions on which Hong Kong has depended for her success would be undermined and threatened more than ever.’

From *The challenge of independence*. Paper delivered by Alan Leong, chairman of the Hong Kong Bar Association at the World Conference of Barristers and Advocates, at Edinburgh, June 2002.

### Justice College

Continued from page 46

- An international conference to compare South African and French criminal procedure.

### Regional co-operation and international profile

Justice College has presented training courses in Swaziland, Botswana, Namibia and Uganda and officials from these countries attend our courses on an ongoing basis. In terms of an agreement with the Judicial College of Zimbabwe and the United Nations Office for Drug Control and Crime Prevention, the College presented courses for magistrates and judges from fifteen African countries on international and regional issues associated with drug control and trans-national prosecutions.

The United Nations Development Programme requested the head of the college to visit both Mozambique and Bosnia Herzegovina to assist with the setting up of training institutions similar to Justice College. The

head of the college also serves on the Advisory Board of the Commonwealth Judicial Education Institute.

### The way forward

Apart from continuing and expanding the existing training programmes, the college aims at:

- Finalising the restructuring of the college into an autonomous statutory body governed by a college council representative of all the relevant role players and the creation of faculties responsible for the training of the various components within the justice family;
- Maintaining and extending the existing links with the donors and other institutions mentioned above but then with the clear understanding that the relationship should culminate in the building of the capacity of the college to maintain the particular programmes; and
- Forging links with other institutions, countries and donor organisations to enhance our current capacity.

The mission and goals of the college in respect of judicial training:

- Fostering a culture of continuous development and learning;
- Keeping abreast of and providing training in the latest developments in the law;
- Developing and implementing effective entry level training programmes for judicial officers in the lower courts;
- Redesigning existing training programmes through continuous consultation to ensure that the training needs of the lower court judiciary are addressed;
- Developing a human rights culture by integrating constitutional values and human rights into all training interventions;
- Sensitizing judicial officers to issues of social context, age, race and gender by facilitating specific training programmes in this regard and by including these issues in all training interventions presented by the college; and
- Dealing with compelling issues such as domestic violence, maintenance, and issues concerning children.

The college will continue to endeavour to become a centre of excellence and specialisation where the whole is greater than the sum of the individual parts. In order to attain this, the assistance of the total legal fraternity will be essential.

