

## Assessing competency in advocacy skills\*

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If the purpose of advocacy training is to produce advocates who are able to serve the administration of justice by representing clients competently and ethically, then it seems axiomatic that someone has to train them and that someone has to test them. Who is to do the training? And who is to do the testing? The answers to these questions can only be given within individual jurisdictions and are subject to political influences.<sup>1</sup> It seems to me that the real question is not *whether* advocates should be required to receive training and then demonstrate an acceptable level of competency before they are admitted to practice but *how* they are to be trained and *how* their competency is to be assessed. My premise is that the two – training and assessment – cannot be separated.

There are three important principles involved. The first is that a complete advocacy training programme has equally important elements of *design*, *course delivery* and *assessment*. The second is that these elements need to be co-ordinated into a cohesive system of training and assessment. The third is that it is generally undesirable that the same persons or body providing the training should also conduct the assessment of the competency of the trainees.

So how does one design a course of training and an assessment guide for advocates? Other professions have struggled with the same problem and have come up with answers that may be used as guidelines. For example, the practical training of critical care nurses in some American hospitals is based on the recognition that competency-based education:

- involves a competency-based curriculum;
- is based on the real world;

- is directed at a specific role and setting;
- is derived through expert practitioners;
- is centred on practice or performance outcomes;
- is founded on clearly articulated competency statements;
- involves publicised expectations of learners;
- incorporates flexibility in the means of instruction;
- involves criterion-referenced methods of evaluation;
- provides for remedial training;
- is learner centred.

No doubt the practical training of nurses is grafted on top of a certain amount of academic or theoretical learning. That is the standard in all professions. The profession of the advocate is no different and these principles seem to me to be equally applicable to advocacy training. We are, after all, also engaged in a profession where the adequacy of an individual performance depends on the competencies or skills of the performer. As Jeroen van Merriënboer has pointed out, '*Competencies are always bound to a particular domain or profession. They are, in fact, a mix of complex cognitive skills, interpersonal skills, and attitudes that allow someone to show competent behaviour in a particular domain or profession.*'<sup>3</sup> Competency-based learning is aimed at those skills and techniques that will allow an advocate to perform competently in the courtroom.

So what are the competencies around which an advocacy training course and assessment guide could be designed? There have to be limits to this paper so I provide an example of only one, namely an assessment guide for defence counsel in a criminal trial. Different assessment guides will obviously have to be prepared for other roles and settings, for example, for prosecuting counsel, counsel on either side in a civil trial, non-adversarial advocacy (Motion Court),

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non-trial advocacy (interlocutory applications, bail applications etc.) and appellate advocacy.

The assessment guide set out in full below<sup>4</sup> is that used by the Institute of Professional Legal Studies, New Zealand, and has been specifically designed for its specific purposes, namely for entry level practitioners who need to master the skills concerned as a requirement for admission to practice. The assessment guide forms part of an integrated programme consisting of the elements of design, course delivery (training) and assessment. The designer of the course first identified the individual skills and sub-skills listed in the assessment guide and then designed the course so that those skills can be taught and learned in the time available for the course.

The assessments are conducted as mock criminal trials with trainees performing as prosecution and defence counsel. In each assessment the trainee has to make an opening statement, lead the evidence-in-chief of two witnesses, cross-examine two witnesses and present a closing argument. The witnesses are played by other trainees; the trainee's skill in briefing his or her witnesses is also assessed! Each case has built-in difficulties testing the trainees' competency in dealing with the usual incidents of trial, including handling exhibits, evidential issues, objections, prior inconsistent statements, refreshing memory, the protocols of the courtroom and ethics.

Assessments are set up so that each of the sub-skills in the guide comes into play. The sub-skills are weighted as some are more important than others. In order to demonstrate competency the trainee has to perform all the sub-skills identified as crucial correctly together with a prescribed number of the less important sub-skills.

The assessment tests proficiency in the skills and techniques taught during the delivery of the course. During the course the sub-skills are learnt separately but by the time of the assessment a complete

\* Paper delivered at the Barristers' and Advocates' Forum of the International Bar Association Conference in Durban on 24 October 2002.

trial has to be conducted without any breaks or interruptions. The assessed performance is recorded on video for record and appeal purposes. Practitioners may be asked to preside as 'judges' and instructors mark the performance according to the weighted assessment guide. There is also a procedure for moderation and for appeals against the grades awarded.

The degree of complexity of the cases used for assessments could be adjusted to accord with the learning objectives of the advocacy programme concerned. The sub-skills could also be weighted differently for similar reasons. For example, in New Zealand closing argument is only allowed on the facts in a summary criminal trial if the judge grants permission to counsel to address the court on the facts and the evidence. In other jurisdictions the importance of a closing argument could be dealt with differently, for example, by designing a course of instruction and an assessment guide emphasising a wider set of sub-skills.

**The IPLS assessment guide for defence counsel in a criminal trial**

**Defence counsel  
Judge alone defended hearing**

**Criteria**

**1 Protocol  
Complies with the standards of conduct required in court by:**

- 1.1 Announcing appearance and who acting for
- 1.2 Asking that defendant be allowed to sit at counsel's table
- 1.3 Ensuring that an order excluding all witnesses has been applied for
- 1.4 Ensuring only one counsel is standing at a time
- 1.5 Addressing judge using appropriate language and with appropriate deference
- 1.6 Objecting when necessary, responding appropriately to any objections
- 1.7 Dealing correctly with exhibits
- 1.8 Announcing close of case

**Paragraph 1 minimum requirement for Competent is sub-paragraphs 1.1, 1.4, 1.5 and 1.6 graded Competent, plus three other sub-paragraphs graded Competent.**

**Paragraph 1 will be graded Not Yet Competent if it does not satisfy the above.**

**2 Cross-examination  
Conducts cross-examination by:**

- 2.1 Asking closed, leading questions
- 2.2 Asking short, simple questions
- 2.3 Asking precise rather than vague questions
- 2.4 Avoiding commenting on answers
- 2.5 Asking one question at a time and allowing the witness to answer

- 2.6 Avoiding repeating questions unnecessarily
- 2.7 Avoiding asking one question too many
- 2.8 Avoiding arguing with the witness (concentrating on persuading the court rather than the witness)
- 2.9 Listening to answers and questioning witness appropriately
- 2.10 Avoiding questions which result in inadmissible evidence, eg bad character, hearsay, speculation, non-expert opinion etc
- 2.11 Challenging witness on all disputed facts within witness' knowledge
- 2.12 Following correct procedure for putting prior inconsistent statement
- 2.13 Avoiding repeating crown evidence unnecessarily
- 2.14 Only questioning on topics relevant to the defence theory of the case
- 2.15 Avoiding misstating evidence already given
- 2.16 Setting appropriate pace and volume for questions and answers
- 2.17 Maintaining eye contact with witness
- 2.18 Putting defence case to appropriate prosecution witnesses

**Paragraph 2 minimum requirement for Competent is sub-paragraphs 2.1, 2.2, 2.3, 2.5, 2.8, 2.11 and 2.18 graded Competent, plus eight other sub-paragraphs graded Competent.**

**Paragraph 2 will be graded Not Yet Competent if it does not satisfy the above.**

**3 Opening Address  
Presents oral submissions in the form of a defence opening address in a summary defended hearing by:**

- 3.1 Notifying the judge that evidence is going to be called by the defence
- 3.2 Explaining the defence and isolating the issue(s)
- 3.3 Acknowledging to onus and standard of proof
- 3.4 Summarising facts of defence case, without overstating
- 3.5 Notifying the judge of witnesses to be called by the defence
- 3.6 Briefly outlining the evidence of each witness
- 3.7 Making eye contact with the judge, avoiding reading
- 3.8 Speaking at appropriate pace and level

**Paragraph 3 minimum requirement for Competent is sub-paragraphs 3.2, 3.4 and 3.6 graded Competent, plus three other sub-paragraphs graded Competent.**

**Paragraph 3 will be graded Not Yet Competent if it does not satisfy the above.**

**4 Examination-in-chief  
Conducts examination-in-chief and re-examination by:**

- 4.1 Introducing and qualifying the witness
- 4.2 Directing/controlling witness using signposting, stopping witness when appropriate

- 4.3 Asking precise rather than vague questions
- 4.4 Avoiding questions that result in inadmissible evidence, eg bad character, hearsay, speculation, non-expert opinion etc
- 4.5 Listening to witness' answers and responding appropriately
- 4.6 Ensuring all gestures, demonstrations and measurements are recorded
- 4.7 Asking non-leading, open questions
- 4.8 Asking simple rather than compound questions
- 4.9 Avoiding fillers and commenting on witness' answers
- 4.10 Establishing rapport and eye contact with witness
- 4.11 Setting appropriate pace and volume for questions and answers
- 4.12 Following correct aide memoire procedure
- 4.13 Ensuring defence witnesses are thoroughly briefed
- 4.14 Eliciting all evidence relevant to defence case
- 4.15 Eliciting evidence in logical order

**Re-examination**

- 4.16 Re-examining when necessary
- 4.17 Asking non-leading, open questions
- 4.18 Only covering matters raised under cross-examination
- 4.19 Avoiding repeating evidence unnecessarily

**Paragraph 4 minimum requirement for Competent is sub-paragraphs 4.2, 4.3, 4.4, 4.7, 4.9 and 4.14 graded Competent, plus seven other sub-paragraphs graded Competent.**

**Paragraph 4 will be graded Not Yet Competent if it does not satisfy the above.**

**5 Closing address  
Present oral argument in the form of a defence closing address in a summary defended hearing by:**

- 5.1 Asking for leave to address judge on the evidence
- 5.2 Addressing the judge on any law relevant to the issue to be determined (not previously dealt with in the opening address)
- 5.3 Highlighting the evidence that supports the defence case on the issue to be determined
- 5.4 Highlighting the weaknesses of the prosecution case on the issue to be determined
- 5.5 Summarising the key points in support of the judge finding in favour of the defence

**Paragraph 5 minimum requirement for Competent in sub-paragraphs 5.1, 5.3 and 5.5 graded Competent.**

**Paragraph 5 will be graded Not Yet Competent if it does not satisfy the above**

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## Assessing competency skills

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### Grading

A trainee who demonstrates the standard required for competence at Paragraphs 1 to 5 will be graded 'Competent'.

A trainee who does not satisfy the requirements above will be graded **Not Yet Competent**.

### Endnotes


<sup>1</sup> In New Zealand the training and testing are done by the same organisation, the Institute of Professional Legal Studies. All

aspirant barristers and solicitors also have to pass the IPLS course as a requirement for admission. In South Africa the training is provided by the provincial Bars but the testing is conducted at a national level. The curriculum is overly academic, in my view. Training is voluntary; you can practise as an advocate without having received any practical training at all and without becoming a member of one of the provincial Bars. That is soon to change when the Legal Practice Bill becomes law as it envisages a compulsory training and testing regime for all aspirant advocates. That training and testing is to be undertaken by course providers under the control of the

proposed Legal Practice Council.

<sup>2</sup> J Alsop 'Designing a competency-based orientation for critical nurses' *Heart & Lung*, 13 (Nov 1984) 655-662.

<sup>3</sup> Jeroen JB. Van Marriënboer 'ID for Competency-based Learning: New Directions for Design, Delivery and Diagnosis' Interactive Educational Multimedia No 3 (Oct 2001) 12-26.

<sup>4</sup> The assessment guide is the intellectual property of the Institute of Professional Legal Studies, New Zealand and is protected by copyright. I am indebted to Mr Mark Mason, National Director of the Institute, for permission to use it in this paper. 

## Human Shield

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with the South Africans emerging after nights of relentless bombing to an increasingly damaged Baghdad, more human casualties and little hope that the bombing would cease.

Ultimately, the South Africans decided to return on schedule. Leaving Iraq was impossible by air. The group had to rent a bus and travel to Jordan. That trip was nerve-racking because of the heavy contingent of army vehicles heading into Iraq. Reddy recalled that bridges on the main highway had been bombed and at times it was not certain that the bus that they were travelling in would skirt the holes in the bridges without plunging through.

Eventually, the South Africans came upon a military roadblock and, with


approximately 50 guns and tankers aimed at them, had to emerge with a South African and a peace flag hoisted high. Australian soldiers who had set up the roadblock, upon learning that the team was heading back to South Africa, made special arrangements to escort the South Africans to the border post through a different route.

Reddy believes that the South African human shields publicised and drew attention to the atrocities[!] committed in Iraq. Despite their limited numbers, the human shields in Iraq kept in close contact with international media to present a more balanced version of events than that presented through the 'embedded' CNN reporters. Reddy also believes that the human shields, at the very least, presented balanced accounts of events in Iraq and in Baghdad.

Reddy said that he is tired of people asking him why he went to Iraq as a human

shield: 'They would not understand, so I don't bother explaining anymore.' For Reddy, his principles compelled him to go and he believes that despite their limited numbers, the human shields did make a difference, by bearing testimony to the atrocities of a super-power.

Having experienced what he described as the most terrifying time of his life, I asked Reddy whether he would do this again? 'Yes, I would. There is no question about it.' Reddy cautions against being caught up in the 'apparent importance' of our lives as advocates and, in particular, urges those who have criticised his efforts in Iraq to find ways to make their contributions to society.

As I walked back to chambers from my meeting with Reddy, I had to confess that I still did not understand why he did what he did – but then, I cannot claim to know the being that he is. I do know that I came away feeling a little more inspired. 

## Regter Talla Claassen

Vervolg van bladsy 31

die prokureursfirma wat vandag bekend staan as Dyasons. Sy vader het aan die Johannesburgse Balie gepraaktiseer en na sy aanstelling as regter het hy vir vyf jaar in die destydse Suidwes-Afrika as regter-president gedien. Hy is daarna na Pretoria verplaas waar hy op die Transvaalse regbank aangestel is. Talla se broer Neels, wat in Johannesburg as advokaat praktiseer het, is ook 'n regter op die Transvaalse regbank.

Talla het in 1973 sy LLB aan die Universiteit van Pretoria behaal. Gedurende sy studiejare was hy ook vir twee jaar 'n regtersklerk. Hy het sy leerklerskap by Dyasons voltooi en is in Junie 1974 toegelaat as prokureur. Nadat hy vir 'n kort tydperk as staatsaanklaer gewerk het, het hy in Augustus 1974 lid van die Pretoria Balie geword. Hy verwerf senior status in Julie 1990. Een van die bekendste

sake waarin Talla Claassen as advokaat opgetree het, was die *BK Tooling*-saak. Hy het die appèl aanbeveel en uiteindelik ook op appèl geslaag.

As regter en advokaat in die destydse Ciskei, was hy betrokke by die eerste 'grondwetlike' sake in hierdie land, wat insluit die saak van *ANC (Border Branch) v Chairman, Council of State, Ciskei* 1992 (3) SA 250 (Ck) en *S v Majavu* 1994 (4) SA 268 (Ck). Hy was vir 18 maande lid van die Spesiale Tribunaal wat in Oos-Londen gesetel was en moes grootliks toesien tot die praktiese inwerkingstelling van die hof en aanstelling van personeel. Hy het ook die eerste aantal sake daar behartig. Talla is verantwoordelik vir die bywerking van die *Dictionary of Legal Words and Phrases* 2 ed (Butterworths). Hy het ook wye belangstellings buite sy beroep en is 'n kranige gholfo- en tennisspeler. Hy hou van stap en lees en het al die Argus fietstoer in vier ure voltooi. Hy en

sy vrou Linda het drie kinders. (Die bynaam 'Talla' het 'n interessante herkoms. As kind kon sy ouer broer, Gert, nie die naam Roger uitspreek nie en het hom 'outjie' genoem. Hulle huishulp het dit vertaal as 'Madala' wat later in die omgangstaal verander het in 'Matalla' en later net 'Talla'.)

Met sy permanente aanstelling op die regbank, was hy waarskynlik die advokaat wat die langste tydperk as waarnemende regter gedien het – sewe en 'n half jaar in totaal. Hy het groot lof vir die Balie as instelling en beskou dit as 'n fantastiese en 'n unieke plek om te kan werk, met kollegialiteit wat 'n mens nêrens anders in die wêreld teëkom nie. Dit was dus vir hom nie maklik om na 30 jaar afskeid te neem van die Balie nie. Hierdie gevoel is wederkerig. Talla Claassen was die afgelepe 15 jaar feitlik op 'n permanente basis lid van 'n Balieraad – in Pretoria en in die Oos-Kaap – en sy waardevolle insette sal gemis word. 