This is not a reasoned academic text. It is a polemic. It is about being good in court—no messing, no guff, no clever arguments, no tedious endless proofs and justifications. It tells it as it is.

It is about how to do the job really well in your early years.

***

So it applies to *all advocates of up to five years' experience.*

It is designed to be read easily by anyone interested in becoming effective in court—*effective*, important word, not "brilliant"—whether presently at school, in university, at law school, or in the early stages of doing the job at the Bar or as a solicitor.

It is written with crime in mind. But many of the rules apply to the courtroom in civil practice too.

The book will make sense wherever the justice system is *adversarial*.

This means wherever there is a Common Law tradition, found through the Commonwealth and in the US. However, with the emergence of international criminal trials, in the last five years these advocacy techniques are permeating into non-adversarial legal cultures. So a lot of what is in this book is now being taught—and sometimes I've taught it—in Scotland, Ireland, Holland, Poland, Russia, Israel, Lebanon, Egypt, Tunisia, Libya, Dubai, India, Bangladesh, Cambodia, Hong Kong, China, South Africa, Zimbabwe, Malawi, Tanzania, Kenya, Uganda, Rwanda, Congo, Nigeria, Ivory Coast, Sierra Leone, Liberia, Senegal, Cameroon, Gambia, Ghana, Australia, New Zealand, Mexico, Canada, and of course the US.

The rules of advocacy are travelling widely.

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The rules of advocacy are travelling widely.

***

I've written this work in pretty much my style of speech from when I teach advocacy students. The book should read like I am talking to you, with colour and enthusiasm. It shouldn't feel like you are reading. I am hoping the style will be effective in communicating what may otherwise be a series of rather dull rules. Apologies if I appear to over-egg it in places—and drive you a bit nuts—you'll see what I mean.

But at least, you'll probably remember what's been said.

And where I refer to an advocate or judge, or anyone really, I will use the expression "he" in one chapter, and then "she" in the next, alternating, in an effort to be gender neutral.

***

You won't agree with everything you read.

Good.

At least you are thinking.

Thinking about advocacy.

About what works and what does not.

And why.

The book is called *The Devil's Advocate* because it may make you see advocacy from a new perspective.

Your assumptions will be challenged.

***

Each page will contain one or two thoughts, usually not more. You may have noticed this already.

Some pages will therefore be short.

Like this one.

Try not to fly through the book.

Instead, think about each page as you read it. Lodge each thought in your mind.

Don't skim. Think.

***

As for myself, I don't pretend I can do advocacy right every time in court, but I think I've come across what works.

And I know I will
always
always
always be learning.

It is part of why I love teaching—I learn a new idea every time I teach a class.

So, this book is everything I have learned—up to now—I hope it helps.

***

Chapter 6

PERSUASIVENESS

Advocacy—which is your job—is the skill of persuasion.

Your job is to persuade the tribunal of your case.

Not to shout at them.

Or moan.

Or complain.

Or be terribly clever.

Persuade.

***

What is persuasiveness?

How do we measure it?

Are there techniques to improve it?

***

Here is my suggestion as to what is courtroom persuasiveness:

An advocate is persuasive if the tribunal prefers her case when weighed against the burden and standard of proof.

Let's say that again.

AN ADVOCATE IS PERSUASIVE IF THE TRIBUNAL PREFERS HER CASE WHEN WEIGHED AGAINST THE BURDEN AND STANDARD OF PROOF.

Notice persuasiveness is not simply where her case is preferred.

Right at the core of persuasiveness is the burden and standard of proof. A jury may prefer a prosecution witness, but cannot be sure beyond reasonable doubt; they may prefer the prosecution case, so that they think it highly probably right—but with the burden on the prosecution to prove the case so that they are sure, not of what is highly probable, in the final analysis it does not matter who the jury prefer—the defence still wins.

***

So an advocate must firstly IDENTIFY TO WHAT STANDARD MUST THE TRIBUNAL BE PERSUADED.

In crime, for the prosecutor, her case must be beyond reasonable doubt. For the defence, her case must simply be reasonably possible.

Advocates are often heard talking to each other about cases, and it is clear no one is thinking about the burden and standard of proof. Prosecutors sometimes say their case is clearly the more obvious explanation. But is it the only explanation? That is the real question. The defence sometimes worry the jury will find it hard to believe the defendant in evidence. But is the jury *sure* she is lying? That may be the real question. And remember, it is more difficult for a jury to say they are sure someone is lying, than for them to say simply they find it hard to believe her, which often is not the same thing.

Think about this.

***

In how many speeches have we heard a prosecutor invite a tribunal to consider that an injury is consistent with the allegation of a punch. Yet the more precise issue is whether the injury can *only* be explained by a punch.

Is it equally consistent, as the defence suggest, with a blow from tripping over?

Or even, is it merely *possibly* consistent?

Is it enough to persuade the tribunal if the prosecutor simply says the injury is consistent with her case?

No.

***

How is persuasiveness measured?

By getting the tribunal to

REALLY,
REALLY,
REALLY
THINK ABOUT YOUR CASE.

Advocates cannot win every case.

Some are just bad cases, spoiled by bad witnesses, where it is pretty clear no one can be relied upon.

Some cases are won without the tribunal having to give it much thought—lawyers often say these cases resolve themselves and that advocates were actually unnecessary.

But most cases do require advocates to be persuasive. What may seem obvious can be turned upside down by a persuasive advocate, because she persuades the tribunal to *really, really, really think* about her case.

***

Chapter 14

EXAMINATION IN CHIEF

Some say this is the most difficult skill.

In some jurisdictions it is called *direct* examination.

It is more difficult than cross-examination.

Why?

Because without leading the witness, we must extract the relevant evidence.

WITHOUT LEADING.

***

With police officers and experts, this can be easy since they can refer to their notes.

Civilian witnesses on the other hand rely on MEMORY.

Incidents can appear different to them months later, and often they will wander off the point and must be brought back to what is relevant.

A witness at ease, to whom you have smiled, and gently settled with clear opening questions, is more likely to say what you require.

Always remember, the mind of an uneasy witness is generally blank.

***

On matters in dispute, you cannot lead.

ON MATTERS IN DISPUTE.

There is nothing wrong with leading where matters are not in dispute.

ASK YOUR OPPONENT WHAT CAN BE LED.

Sometimes the answer is nothing.

But usually, things like the date, location, time of an incident, and the name and occupation of the witness can be led. By leading on these matters you can break the witness into the witness box gently, and settle them.

***

A leading question is one which suggests the answer.

It's a pretty simple concept.

However, the dividing line between leading and non-leading can be blurred.

Sometimes it can be as subtle as voice intonation.

Experience will ultimately tell you the difference.

The problem with leading is not simply that it can be objected to by the opposition. It is the reason it can be objected to you must understand.

If you lead, the tribunal knows you have suggested the answer, and so the value of the evidence is diminished.

Leading will undermine your own case.

***

As a rule of thumb, a non-leading question will begin:

WHO,
WHAT,
WHY,
WHEN,
WHERE,
HOW,
PLEASE DESCRIBE?

Questions which begin in this way are so non-leading, they can be called OPEN QUESTIONS.

***

But there are other types of non-leading question.

CLOSED QUESTIONS are questions which limit the witness's choice of answer. Remember, there must still be a choice, and that's the key to why they are non-leading. The choice has to be genuine.

Of course, while closed questions are non-leading, they can get dangerously close to leading.

There are two types of closed questions:

the word-choice,

—and—

the yes-no.

***

The word-choice closed question gives the witness a choice of words: *was the man tall, or short, or average height?* The word-choice offers a series of words to the witness which need to cover the whole range, and the court awaits which the witness will pick, namely tall or short or average.

The yes-no closed question invites the witness to answer yes or no: *was the man tall?* The choice is yes or no. This is very close to leading, but may not be, depending on how the evidence has developed. The danger here is that it may be thought you are suggesting the witness is tall.

***

So, be careful of asking closed questions without first having laid FOUNDATION through open questions for the basis of your closed question:

Who were you with?
A man.
Please describe the man
He was quite big.
When you say quite big, was the man tall or short or average height?
He was taller than average.
Was the man tall?
Yes.

In the course of these questions, which are a mixture of different types of non-leading questions, foundation is laid from the earlier questions and the answers given, for the closed word-choice question and then the final closed yes-no question.

If you had asked the last question as the second question, you ought to be able to see you have gone too quickly to the closed word-choice, so that your opponent may sensibly object that you appear to be encouraging the witness, and therefore leading her, without foundation, to say the man was tall.

***

With closed questions, BE VERY CAREFUL OF VOICE INTONATION. You may be accused of suggesting the correct choice of answer from how you ask the question.

For example, you can't quietly mutter the first two words in the choice, and then resoundingly declare the third with a cheery grin, as it would be clear that, again, you would be encouraging, and therefore leading, the witness to say "tall".

***

With closed questions, BE VERY CAREFUL TO PROVIDE A GENUINE CHOICE.

I've mentioned it earlier, but it bears repeating.

If the answer you want is obvious among several choices, you will be criticised:

"Was it so dark you could not have seen anything, or maybe just a bit, or were you able to see well enough to have a clear view of the burglar's face?"

In theory, there is a choice, but assuming you are prosecuting, it is pretty obvious what you want the witness to say. The choice is not genuine. The question is leading.

***

On the other hand, the questions might be:

What was the lighting like? (Open)
– There was street lighting.
Was it light or dark or dusk? (Closed word-choice)
– It was dusk.
What distance could you see? (Open)
– 10 metres.
What could you see over that distance? (Open)
– I could see the burglar.
What of him could you see? (Open)
– I could see his upper body.
Could you see his head? (Closed yes-no)
– Yes.
What could you see of his head (Open)
– I could see his face.
Did you say you could see his face? (Closed yes-no—repetition for emphasis)
– Yes.

If in doubt about whether a question might lead the witness, ask yourself what you would think if you were for the opposition.

***

Avoid the standard phrase: WHAT HAPPENED NEXT?

Sometimes the witness gives a marvellous answer.

Mostly however, the question offers no control, no parameters, and the witness either gives too much detail, too little, or just plain wanders off the point.

***

Chapter 18

EXPERTS

Questioning experts is not impossible.

So don't panic.

There are two killer features to calling or cross-examining an expert:

PREPARATION & LANGUAGE.

***

Experts can be on many things—though in court, most usually concern DNA, forensics, medicine, money, or engineering—in international tribunals, they may also deal with regional politics or history.

The first thing a young advocate usually thinks when contemplating what to do with an expert is that the expertise will be too hard to understand. After all, that is why there is an expert. Whatever the expertise, it must all be too complicated for ordinary minds.

Here's how it goes—you see a report from a structural engineer, with lots of figures and graphs—or from an accountant with even more graphs—or from a scientist offering maths to show the statistical improbability of a chance DNA match—or from a pathologist on the effect of carbon monoxide on haemoglobin. And you think: *OMG, what am I supposed to do with this*!

Then take a deep breath.

Advocates are clever folk. If you have got this far in your career, then odds on, you do not have an ordinary mind. Be confident in your ability to get to grips with the expertise.

So, just what do you do with that complicated report?

***

Well, *read it—carefully.*

Do not mark the report yet—just let it wash over you. Relax. Enjoy it. Most reports are a great read. You have a case, you know what the issues are, so read the report knowing it is not from outer space—it is relevant, and much may turn on it. Smile at all the maths, the chemical formulae, the big words, the pie charts, the x/y axis, and any venn diagrams—they will all make sense soon enough.

Remember, the report has to be relevant to an issue. Identify the issue. And look for what is said specifically about that issue. A lot of the clever stuff is often background, merely leading up to engaging the issue, and looks good, intimidating even, but is not the point. With your training, work out what the point is, and then work backwards to why the expert thinks she can nail that point.

In any case, whether civil or criminal, usually someone is just plain wrong—the person may be lying, or mistaken, or negligent, or maybe a bit weasly—no matter how many pages, or how complicated it can be made to seem, usually someone has made a mess—so find out who and work the case.

Now turning to the report, and how it deals with the issues, look with care at the steps leading to the critical point. See if they make sense. Ponder the language of the report. Use a dictionary. Make sure you understand what is written. If you do not, then again, *don't panic*! As you will have a conference with the expert at some point, if only at court.

***

A conference with an expert should not begin with: *tell me what this is about?* —you should already know—from intelligent reading—and you should only really have questions *for clarification* or *on the issue*.

When questioning either, USE LANGUAGE LIKE THE EXPERT.

You really need to get this—please listen up.

You need to be able to ask questions in a way the expert understands. Words will have specific meanings—find out what they are.

Importantly, you want to avoid the expert correcting you in court as to your use of language—pointing out how sloppy you are—or how you don't understand a precise meaning—all of which makes you look dumb. And if thought dumb, you may not be persuasive later.

It is so easy to avoid this mistake—just read carefully and, I mean it, use a dictionary—if you don't, you will look dumb, promise.

***

There are usually two experts—yours and theirs.

With yours, in conference, always ask these five questions—always, always—

1. who is more experienced—yours or theirs,
2. what is our best point,
3. what is their best point,
4. if you were on the other side, what would you attack and why,
5. how do we win this?

***

You will usually find that where there are two reports, they will not be far apart, as experts do not like to call each other "flat wrong"—as despite all the maths and charts, there are usually many areas of grey.

This is important to note, as a killer question can often be, of the expert on the opposition's side:

> *Is it right that the degree of difference of opinion between the two reports is perfectly normal within this area of expertise, so that you cannot prove the other expert wrong?*

***

When dealing with theirs, do not get sharp in court. Ever.

Experts are regarded as civilised sorts, above the fray. It is unbecoming to put them through a cross-examination grinder. Questions should be designed to tease out bottom lines, and sometimes points of fine distinction, but not to harangue them as liars.

It sits ill with a judge or jury to see an attempt to destroy an expert. Sure, she may be wrong, and even biased, a hired gun, always supporting something which cannot be proved wrong, being always for one side, and therefore with a financial interest to find the same fact—for example, maybe, that a patient is suffering from "whiplash", which is often an injury with no physical symptoms, and which can provoke big debate among doctors—but be careful, an attempt to destroy will usually strike an odd note.

And moreover, most experts will see the strength of a point you wish to make, so that they will often find a way to agree with it in part, to avoid all-out confrontation, where they know there is grey.

So, with their expert, NEVER FORGET COURTESY.

***

And let's talk language again—when cross-examining their expert, this is where you will come unstuck most easily—namely, if she can correct your use of language, and show you up as stupid. So make sure you understand what specific words mean to her—there is no excuse for not understanding scientific terms—to have become an advocate, you will have had a good education, rely on it, open the books, and get to grips with the expert's world.

Thorough preparation ought to mean you become an expert too!

On that point—for that case—on that day—you're another expert.

***

And be sure each question is focused, precise, one point at a time.

Most examinations of an expert go wrong, whether in chief or on cross, for want of knowing precisely what you want each question to establish—so, like I say, really prepare.

This is the one area where *it is wise to write out many questions in advance,* to get the use of language right, weeding out ambiguities, and to refine the focus of the advocate.

***

Sometimes there is just one expert, appointed by the court, whose evidence is supposed to be agreed between counsel.

I am sceptical this works. It relies on the theory there is only one answer to a matter, when often expertise is more an art than a science, with much room for different views.

If dealing with one expert, then more than ever you need to be an *expert for a day*, to bend in pre-trial conference the position of the lone expert most favourably to your positon. Such a conference usually takes place in the presence of both counsel, and it amounts to a delicate questioning process, outside court, with the other counsel listening in and seeking to steer the expert her way.

When this occurs, the counsel who has prepared best will usually win. This is because—firstly the expert will see you have become quite an expert yourself, as distinct from your opposition, and sensing your potency while knowing there is often grey, will want to find the middle ground to agree with you and not be shown a fool—and secondly, if you know exactly what you want, and what is feasible, how to use language right, and understand the area well, then you'll usually make sense to the expert, reach agreement, and therefore get your way.

***