

# Kenya School of Law

**ADVOCATES TRAINING PROGRAM**

**2015-16 ACADEMIC YEAR**

Trial Advocacy

**DIMENSIONS, RULES AND PSYCHOLOGY OF ADVOCACY**

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# OUTLINE

**Dimensions**

**Rules**

**Psychology**

# Dimensions

Courtesy ,Keith Evans in “The Golden Rules of Advocacy”

Are Four in number.

1. Trial NOT an exercise to discover the truth but to persuade arrival at a certain opinion.
2. Human animal is more video than Audio.
3. People do not like Lawyers.
4. Time

# Dimension 1

**Fact finder not being asked to unearth the truth.**

**Demonstrated by exclusive rules of evidence; Umpire rarely questions (adversarial system).**

**Advocates primarily are trying to persuade the fact finder to arrive at an opinion in the Advocate's favour.**

**It is NOT a licence to be dishonest.**

**The court process is not a duel but a controlled atmosphere for making of presentations.**

# Dimension 2

Human Animal is far more video than Audio.

From Psychology of communication:

60% of a message is conveyed by body language and visual appearance.

30% conveyed by TONE of voice.

10% through words.

Only 10% of what is heard is remembered.

If see something connected with what you hear, will remember 50%.

# Dimension 2-contd.

We all have body language.

Have you looked at yourself in a video recording?

**DRESS**

Disintegrating, torn, shabby clothing speaks about you to client's disadvantage.

**IMPRESSION OF FRIENDSHIP WITH OPPONENT-**For justice to be seen to be done.

**Smiles, laughter, Jokes-** Don't seem to be enjoying humour in your own world alone.

# Dimension 2- Impressions

- ❖ Appear sincere at all times.
- ❖ Don't convey an unintended visual signal.
- ❖ Ensure fact finder always has something to look at.
- ❖ Visual aids-Plans, photographs, enlarged portions of paragraphs.
- ❖ Eye contact with fact finder: But don't overdo it.

# Dimension 3-People don't like lawyers

Lawyers have borne the brunt of coarse jokes.

Therefore:

- ❖ Stick rigourously to the truth.
- ❖ Don't appear to be manipulative.
- ❖ Don't sound like a lawyer(Use simple, plain language).



# 4<sup>th</sup> Dimension-Time

5 hours listening to a boring lawyer can be a torment.

All players have other things to do-Expert witnesses have their practices to go back to; Witnesses have their occupations; Judge has rulings and judgments to write; Prosecutor has other cases...

Let client know being concise is a secret weapon.

Don't repeat yourself-Don't go over and over a point you have already made.

# RULES

1. Don't express your personal opinion in court.
2. Don't testify from the bar.
3. In submissions speak only of what was touched on in evidence.
4. Don't "PUT IT TO" the witness.
5. Never refer to Criminal record (unless it was brought up or was likely to be brought up).
6. Never put words into your witness' mouth.

# 1. Don't express your opinion

It's your client's case, not your case.

Cab rank rule was devised to avoid people finding no one to represent them.

Thomas Erskine defence of American revolutionary, Tom Paine.

(Erskine-“I will lay aside my role as an Advocate and address you as a man”

Lord Campbell-“You will do nothing of the sort. The only right and licence you have to appear in this court is as an Advocate”)

# Personal opinion-contd.

Avoid words like “I think” or “I believe”.

**Instead use words like:**

“The evidence shows”...

“From the testimony of...”

“It has been found that ....”

“All reasonable indications point to...”

“Subjected to the test of a reasonable man...”

“Measured against the standard of ....”

“Experience has shown...”

# EXERCISE

**Without expressing personal opinion, give phrase you'd use:**

Where the opponent is frivolous and vexatious.

Where the accident was due to defendant involuntarily losing memory.

Where the opponent is holding to a very rigid, opinionated position based on personal conservative cultural beliefs.

Where there is blatant dishonesty and deliberate concealing of information.

# Rule 2: Don't testify from the bar

Giving evidence makes one liable to being cross examined on it.

Don't use words like, "My client personally told me..."

In opening statement say, "We will lead evidence..." or "the evidence will show..."

In submissions, say, "It came out in evidence ...or the evidence tendered showed..."

# Rule 3: In submissions speak only of that which evidence touched

Can refer to what can be taken judicial notice of, such as:  
Documented state of the environment.

Commonly used Biblical and English literature expressions.

Specifics that needed evidence ought to have been testified about, e.g. service records at time of accident; recordings on speed camera; date of last inspection of fitness or safety of fire equipment.

# Rule 4: Do not “Put it to”

Was taken from English practice of “putting across” to the witness your version of events.

Can accomplish it by the form of cross examination.

E.G if your version is that it was self defence, ask questions that show a build up to a state where defendant or accused were actually acting in self defence.

If you “put it to”, they’ll simply say, “That is not true”, and lead to an argument of my word against yours.



# Rule 5: Never refer to Criminal record or settlement offers

Have in mind:

- ❖ Presumption of innocence.
- ❖ Constitutional protection against self incriminating evidence.

Unless past criminal record is relevant to the trial and so you need to minimise its negative impact by bringing it out first.

Offers of settlement: Are always on without prejudice basis.

# Rule 6: Don't put words in mouth of witness

In examination in chief, don't ask leading questions.

Leading questions are asking witness to agree or disagree with you.

Leading question: That which can be answered as either "Yes" or "No".

Evidence always has to come from witness.

Putting words in witness' mouth closes out giving of detailed evidence.

# PSYCHOLOGY OF ADVOCACY

Process of arriving at an opinion by the fact finder involves both “Thinking” and “feeling”.

Remember the fact finders are human.

# Fragility of Advocacy materials

The fragile thought and feeling process of the fact finder.

In a manner of speaking, you want to lead the fact finder along the garden path of the theory of your client's case.

# Being Likeable

Your likeability should not seem like a cover up.  
It should be consistent.

Don't snap till they ask, "Was that the same person"?

We all have a nice side. Take this nice side to court. Take the real human being to court, not the grim, serious, solemn, grave and pompous person.

# Sympathy Rule

Are converting a number of people previously unfamiliar with you to be sympathetic to your cause.

If succeed will have them:

- Listen to you willingly.
- Give kind interpretation to what you say.
- Feel reluctant to deny what you ask.
- Feel inclined to overlook your mistakes.

Mentally put yourself in the Judge's seat.

# Rule of Equals and Opposites

For every push you make there is an equal and opposite push.

Pull is resisted; Insistence is turned down.

**What you do:**

Invite, don't demand.

Suggest, don't insist.

# First person plural

Makes the fact finder feel included.

It's about “We”, not “they”.

“We are here for this case”, not “The court is listening to the case in which....”

“Tell his Honour” or “Tell the Court”...



# Preparation

Deal with weaknesses in your case  
beforehand.

It helps mitigate their impact.

It takes away the element of surprise.

Lay the right foundation.

# Being an Honest Guide

Its about presenting case in an honest, sincere manner.

Are not a hired gun to do anything for a price.

Are a professional with professional responsibility and professional pride.

In first 20 mins fact finder should have already trusted you.

# Honest guide-contd.

Don't ask for believing of the unbelievable.

Don't pretend about the weak point in your case.

Don't misquote evidence.

Come across as being fair.

Keep objections to a minimum.

# Demonstrate Competence

**Refer to:**

Case law

Statute law

Regulations.

A NO, NO: “I leave it to the court”.

Remember the court has other workload.

# Listening

Is not automatic; it has to be practiced.

Temptation is that “I have to ask all my questions”.

Get someone to take notes and write down answers to your questions so you can pay attention to listening to the witness.

# Know when to stop

When you make a wrong statement.

When you realise you are lost.

Use words like:

“Let me take that again...”

“Let me rephrase my question...”

# Repetition

Be used sparingly.

Be tactful in changing the end of the question:

E.G: “The shirt was blue?”

“The shirt had a colour?”

“The shirt was not white?”

“The shirt was not yellow?”

# Repetition-contd.

## In submissions:

May want to emphasize a theme:

Spread it after every sub-heading.

**Example:** “Innocent father, looking for bread for his children”.

## Sub-headings:

- His normal character through his lifetime.
- How he arrived at the scene.
- Behaviour upon arrest.



# Show the way home

What do you want the court to do for you?

What is the goal? The objective?

You have been taking the people on a tour; have been their guide. How do they get home?

**Remember:**

Decision making is difficult. Make it easier for them to make the decision.

# Q and A

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