The Modern Concept Of Bar Advocacy

By The Honourable Chukwudifu Oputa –
(Retired Justice of the Supreme Court of Nigeria)

Bar Advocacy is an *all important* but *sadly neglected field* in the legal profession. It is because of this neglect that Sir Malcom Hilbery was forced to observe:

> *Advocacy is an Art without any school except that of experience. The very fact is perhaps the reason why so many fail. They get chance to perform, they do it without schooling or rehearsal and there is no master to correct them, no one to point out the errors and short comings. Yet in the case of the young professional advocate, it may be that on his first performance he is being finally judged by many potential clients among those who happen to be listening to him.*[1]

What Then Is Advocacy?

Advocacy comes from the Latin *Advocare* meaning – to call to; to summon counsel; to consult for legal advice. In its ecclesiastical connotation it means to avow; to admit a clerk to a benefice – thus *advocati ecclesiae or advocates of the church* were patrons retained to argue the cases of the church as pleaders or to attend to its law matters. In Roman law, patrons, pleaders, rhetoricians and speakers were called and referred to as *Advocati*. From the Latin we got the English word *Advocate*. In the verb form to *advocate* means to speak in favour of; to defend by argument; to support; to vindicate or recommend publicly. In its noun form, an advocate generally speaking means one who assists, defends, or pleads for another. Legally defined, an advocate is one who renders *legal advice and aid* and *pleads* the cause of *another* before a court or tribunal. It thus means a person learned in the law and duly admitted to practise (Solicitors are admitted but barristers are called); a person who assists his client with advice and pleads for him in open court. What then is Advocacy? The short and simple answer is – what the advocate does. Referring to the lawyer advocate it is what he does *both in his chambers* and in *open court.*

Oratory And Advocacy

The expression "Advocacy" at once conjures up in the minds of new

---

1 Sir Malcom Hilbery, Duty and Art in Advocacy.

comers to the Bar something of the art of rhetoric, something of the dazzling oratory of an Edmund Burke, or a Robert Sheridan or a Charles Fox during the impeachment of Warren Hastings. Their speeches detailing the high crimes and misdemeanours of the hitherto illustrious Warren Hastings produced an almost incredible and sweeping sensation. The great eloquence of Lord Cowper, that great whig lawyer, who never opened his lips in public without universal applause or failed to hold, as if spell-bound, the hearts and understanding of his audience, testifies to the force *behind* and to the power of the spoken words. The compelling oratory of Lord Erskine bent on "breaking the rod of the oppressors" or going back still further to the Roman jurist – to Cicero, the prince of ancient orators and his defence of Cluentius in his "Pro Cluentio" which was oratory at its best and advocacy at its highest – a consummate blend of humour and pathos, of narrative argument, of description and declamation – going through the speeches of these famous pleaders one arrives at the inevitable conclusion that *the most important element in all advocacy is the art of attractive and persuasive speech on all occasions that call for its exercise.* But the newcomer to the Bar should be seriously warned against empty rhetoric. It never wins any case, for whatever the brilliance of a speech, as such, its success must, in the final analysis, rest on a solid foundation of facts. A lawyer's reputation must therefore be built on the *rock of real professional knowledge, ability* and *acquirement* rather than on sandy and shaky foundation of mere words however ornate. Modern advocacy therefore implies in addition to forensic eloquence, a proper grasp of the principles of law applicable to the facts of the case in hand.

> *Forensic ability is shown chiefly in thinking decidedly, in being able to identity the crux of any matter – the central issues in any dispute, in methodically marshalling one's evidence and argument, in knowing the rules of court and the modes of procedure, in possessing a sound grasp of the common law as well as statute law, in enunciating clearly with a melodious voice which will further enhance the lawyer's elocution – these come only by diligent study and practice – all these constitute the modern concept of advocacy.*

The modern advocate must thus possess two prior qualifications, two indispensable gifts namely – 1. Ability and 2. *Imagination.* Add to these two – Sincerity and Truth – and we have a perfect Advocate. Sincerity and truth are qualities which scarcely fail to produce their effect anywhere but more especially in a court of justice where the sole and great object of investigation is professedly some matter of fact.

Requirements Of Modern Advocacy

The Advocate is usually the product of his age. During the Victorian Age, the golden age of lofty thought and lofty words, of refined and ornate diction of sentimentalism and of emotionalism, famous Advocates used to move juries, at will, to tears or to laughter. That age produced the Edward Charles, the Charles Russells, the Rufus Isaacs, the Marshall Halls, etc. But that age is gone never to return. Things have changed quite considerably. There has been a very marked decline of the passions", of sentiment and of emotion in forensic eloquence. For us in Nigeria where there are no juries to impress, an Advocate addressing a judge (and judges are supposed to be cold, down to earth, devoid of emotion or passion) should shun emotionalism and concentrate on realism. The modern advocate should have a very high appreciation of the facts of his case because without the knowledge of those facts the whole adventure becomes an exercise in futility. Without known facts it will be impossible to know the law on those facts, which is what any trial is all about.

It will be of great assistance to present to you on the threshold of your career as "Solicitors and Advocates of the Supreme Court of Nigeria", the very practical problems associated with modern advocacy. *First and foremost* you have to understand the role of the advocate. He is merely a pleader called upon to present the case of his client. The case is the case of his client. He is not called upon to present his views, his beliefs or his conviction. He should therefore not put forward his own belief or his own views. He has no right to do that. His function is to present the case of his client with accuracy, brevity and clarity (the A,B,C of all legal undertakings). *Secondly,* no advocate can present any case without knowing the f*acts* of that case. As everything else will revolve around the facts of the case it is imperative that the advocate knows fully and intimately the facts of his own case. But then he who knows his case, knows but half the case. Therefore, he is a better advocate who can anticipate the case of the other side and get prepared to meet it. *Thirdly,* in presenting his case the advocate should be continually conscious of his manifold duty:

(i) *To the Court* – Duty to respect the court; the duty to assist (the court) and never to mislead the court. This implies complete and absolute frankness with and to the court.

(ii) *To his Colleagues* – Duty to strive mightily but to eat and drink as friends. The fraternity at the Bar imposes a duty on every member to be fair and friendly. It abhors any form of sharp practices or running down one another. There is no profession which binds its members in closer fraternity than the Bar. And this is understandable as Barristers and Judges are all ministers in the sacred temple of justice, and as servants of the law they have a

common devotion to a great ideal – the due administration of justice and the promotion of the orderly progress of civilization.

(iii) To Himself – The lawyer owes certain duties to himself. Foremost among which is the duty to be *honourable* in and out of court and in all his dealings. Thus the legal profession abhors *touting* in any shape or form. No lawyer should *advertise or solicit* for work. That has never paid. No amount of touting; no amount of patronage; can build and sustain a steady practice for an incompetent man. What has paid and will ever continue to pay is *unrelenting exertion*, *continuous hard work*, *assiduity*, *honesty* and *probity*. These are what a learned and honourable profession requires of its members and they are some of the essential requirements of modern advocacy.

Qualities Needed For Successful Advocacy

Hard work though useful to Bar Advocacy may in the end prove a bad master instead of the useful servant it is meant to be. Hard work if misdirected may become a very unruly horse which may carry you from your goal. I have seen Briefs of very considerable length studded with an impressive array of decided cases from far and near and which did not address themselves to the crucial issues in dispute. In *Oladiran v. The State*[2] , I made the following significant comment:

The Brief of the Appellant looks overpacked with decided cases from far and near, from Australia, from England, from Hong Kong and from Nigeria. *That shows hard work. It also shows scholarship.* But these two are just not enough. Provocative has been clearly defined by our law as well as the circumstances under which provocation as thus defined can reduce murder to manslaughter. The first and in fact the most important thing to consider in this appeal, is the question whether *or not the facts and surrounding circumstances* of this case accord with the relevant sections of our law dealing with provocation and the full court's decision in *Obaji v. The State (1965) 1 All N.L.R. 269*, our *locus classicus* on provocation. One does not start with decided cases. No. The reason is that courts do not decide cases so that they may in future serve as precedent. That is merely an incidental aftermath based on the common law doctrine of precedent and *stare decisis*. Rather, *decisions are primarily made to settle the particular issues in the particular cases before the Court.* A decision therefore draws its peculiar quality of justice, soundness and

2 (1986) 1 N.W.L.R. 75 at pg. 2.

profoundness from the particular facts and surrounding circumstances of the case it has presumed to adjudicate vis-à-vis the applicable law.

Hard work should therefore be properly directed to tackle the main issues for determination. For this the Advocate needs:

(a) A clear head.
(b) A good memory.
(c) A strong common sense.
(d) An aptitude for analysis and the capacity to discern the essential, vital and live issues in the case or appeal.

Other Qualities For Successful Advocacy

(i) The Advocate is an actor on a very critical stage. He should therefore always look his best. A *good personality*, a *neat* and *decent appearance*, a *pleasant disposition* – these are very effective weapons in the armoury of the successful advocate.

(ii) The successful advocate must have a *sound knowledge* of *human nature* since he has to deal with his clients, his adversaries, and the court. *He should be able to decipher and estimate the impact in any given situation of the human elements of pride, envy, courage, fear, nobility, guilt, etc*. This will prove invaluable in the difficult but fascinating art of cross –examination. *Also the advocate must know how to win and retain the respect and confidence of the court before which he appears*. Judges are human beings with all the human frailties. A knowledge of human nature will help the advocate to study each judge and learn how to get along smoothly with him. There is no earthly reason for an advocate to antagonize a judge. That is a course that is fraught with danger and that does not yield any dividend either.

(iii) *Orderly Arrangement And Logical Presentation*

Order, it is said, is the first law in nature, and orderly presentation of his facts or arguments is a prerequisite for successful advocacy. The strength of most successful advocates lay in their clear and lucid statement of complex and complicated facts with apparent ease. Nothing is more exasperating and irritating to the Bench than the picture of an advocate meandering through his papers aimlessly in a confused and confusing manner. This creates a very bad

impression in the mind of the court. Order is *cosmos* while disorder is *chaos.*

(iv) *The Power Of Argument*

This is a quality of inestimable value to the advocate. Here a knowledge, however rudimentary, of the basic principles of logic and scientific method will stand the advocate in good stead. The advocate should be able to detect the fallacies in any argument; he should be able to see the hidden cracks in the case of the opposite side; he should be able to exploit the lacuna in the case or argument of his adversary and what is more important able to repair any damage done to his case by the argument of the opposing counsel.

(v) *Good Command Of Language*

He may be a legal mechanic but certainly not an advocate who has not got a confident and comfortable command of the language of the court which happens to be English. Some lawyers do more gesticulation in court rather than addressing the court with ease and confidence. Gesticulation may serve as a dumb language but that is not the language of the court. Inability to express himself may ruin every other attribute of the advocate. The primary aim of counsel is to persuade the court and language is the only vehicle for such persuasion. Words are the lawyer's tools of trade. Every lawyer should therefore do well to cultivate the use of words by patient and continuous study. If you have no storehouse of eloquent words and phrases, start right now to build one by reading the great authors of the English Language and drawing inspiration from the literary giants like Francis Bacon, Macaulay, Carlyle, Milton, Gibbon, Shakespeare, etc. The Bible is another gold mine of beautiful words, phrases and of dramatic imagery, also, judgments of our various courts, especially the Supreme Court, can be read for the beauty of their language. But from whatever source you draw, just make sure that your language will be the language of the decorative artist in words addressing reason through eloquence.

The Advocate In Chambers: Legal Opinions

Part of the duty of the advocate is to give legal advice to his client. Here again the advocate should acquaint himself with the facts – the full facts. He should then look critically at the applicable law and clear his mind of all doubt. It is good to remember that your client wants your honest opinion and not your

doubts. Having thus painfully considered his advice the advocate should then courageously give it not minding whether it is palatable to his client or not. The most important thing is that it is honest and as far as he can see legally correct. In writing your opinions, endeavour to be definite and positive, never neutral and vacillating. Avoid the use of equivocal words and phrases. Call a spade a spade. Avoid ambiguities. These may involve your client in costly litigation designed merely to interpret the real meaning of your equivocal and ambiguous opinions. One can be excused for being wrong but not for being in doubt or confusing.

Pre-Action Preliminaries

A case is won or lost in Chambers. What an advocate does in court is but a reflection of what he did in Chambers. Good, effective and efficient chamber work makes the going in open court smooth and confident. An advocate appearing for a plaintiff will do well not to issue his writ first and then collect his facts next. This will be like putting the cart before the horse. The proper order is to collect his facts, analyse them, and see whether they amount to a cause of action; whether they can establish a *prima facie* case. If the answer is no, then, that is the end of the matter and the advocate has both the moral and professional duty to tell his client so, otherwise the action will be speculative. If the client insists on his going on then he can be advised to brief another counsel. If he does that and eventually loses in court he will brief you for his next case.

If the facts placed at his disposal can establish a prima facie cause of action the advocate should go further and see if he can meet any possible defences open, on those facts, to his adversary. He is a better advocate who can equally anticipate and prepare to meet any possible defences open to the other side. As there is more than one side to every issue so also there are two sides to every case and the advocate who knows his client's case knows only one side of the entire case. This preliminary "searching of mind" in Chambers will definitely influence if not dictate the tone and tenor of the pleadings and the eventual outcome of the litigation. There are very important matters to be accomplished in Chambers before the advocate is in court. Failure to advert and/or attend to these matters diligently may result in the advocate feeling uneasy and uncomfortable during the trial and making a fool of himself in full view of the Court, to his own discomfiture, and to the disgust of his client, and other potential clients who happen to be present. And this is a serious matter for any advocate.

Issues And Onus Of Proof

In Court, the advocate has to continually come face to face with these two

expressions "**ISSUES**" and **"ONUS OF PROOF"** It is therefore good to have a clear idea of their meanings and their roles in proceedings before the Court. In both civil and criminal proceedings, the outcome will depend on whether or not the advocate had *proved* his case by relevant and credible evidence. In criminal cases it is *proof beyond reasonable doubt* while in civil cases it is proof by preponderance of evidence. There, the court is supposed to be holding an imaginary scale or balance containing the evidence led on both sides. He wins whose evidence tilts this scale. What is a party supposed to prove to succeed? When is the onus of proof cast on a party? What is an onus or burden of proof? I attempted to answer these questions in various decisions of the Supreme Court. In *Akintola v. Solano,*[3] I observed:

> It is necessary to have a clear idea of the *meaning* of and the *need for evidence* in proceedings before the Court. If a thing is self evident then it does not require evidence. What then is evidence? Simply put, it is the means by which any matter of fact, the truth of which is submitted for investigation may be established or disproved. *Evidence is therefore necessary to prove or disprove an issue of fact*. If a fact is not in issue, it will be either redundant (or unnecessary) to tender evidence in proof; or otherwise, *as evidence is nothing but proof legally presented at the trial of an issue.*

In a criminal case if the accused pleads *guilty*, then no issue is joined between the prosecution and the defence; then again no evidence is led. There the trial court will just find the accused guilty and pass sentence. But if the accused pleads *not guilty*, then issues are joined on all the constituent elements of the offence charged. When it is said that the burden or onus of proof is on the prosecution what is meant is that the prosecution has to adduce evidence to prove its charge which the accused denies.

In civil cases the same rule applies. An onus of proof does not exist in *vacuo.* The onus is merely an onus to prove an issue. There cannot be any onus or burden of proof when there are no issues in dispute between the parties. If a plaintiff's case is admitted by the defendant then that is the end of the story. Again, if a particular averment in the plaintiff's statement of claim is admitted by the defendant's statement of defence, then that particular averment is taken as proved or established and no further evidence will be necessary: *Onobruchere v Esogine*.[4]

---

3. (1986) 2 N.W.L.R. 598 at p. 621
4. (1986) N.W.L.R. at p. 806

What Then Is An Issue?

"Issue" is a very important concept in proceedings before the court. It is therefore necessary at this stage, that you have a very good appreciation *of its meaning and its import.* An "Issue" is a disputed point or question to which parties to an action have *narrowed their several allegations* and upon which they are desirous of *obtaining the decision of the court.* When the parties to an action have answered one another's pleadings in such a manner that they have arrived at some material point or matter affirmed on one side and denied on the other, the parties are said to be at "issue" or "to have joined issue" and the question thus raised is called an "Issue or one of the Issues" in the action. Generally he who asserts the affirmative of an issue proves it. When he has tendered his *evidence in proof,* then the *opposite party* will try to disprove that issue either by effective *cross examination* or and by rebuttal evidence. The onus of proof can therefore mean the onus of proving and establishing the entire case or of proving an issue.

Examination In Chief And Cross Examination

It is through witnesses that the advocate tries to lay the solid foundation of proved facts; that he tries to offer proof of the various issues in the case. The process is called examination –in-chief and cross-examination.

Some Useful Tips

1. *Examination in Chief* should be conducted with masterly ease as though it was a spontaneous conversation, with one point logically or/and chronologically following another. It will be like a jig saw puzzle that reveals the entire picture when the different parts are placed in position.

2. To be able to examine in chief effectively, the advocate should have intimate knowledge of the facts as well as an intimate knowledge of the make up of his witnesses. Some witnesses appear tongue tied in the witness box; others go there to show off, while still some others suffer from verbal diarrhoea and like "old man river" it keeps on flowing, it keeps on "rolling along". The advocate should know how to deal with his own witness no matter what type he happens to be. If he cannot, he should not call him as a witness.

3. A good advocate should never show disgust at or disappointment with any answer given by his own witness. He has to pretend that no harm has

been done by his evidence and then try another style to get the answer he really wants – the right answer that will mend any damage done.

4. Coming to Cross Examination the advocate should realize that it is not just a routine or necessary ritual. If there is no purpose, nothing to be gained by asking any particular question then that question should not be asked. There is never a cause contested in a trial court, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross examination.

5. Cross examination should be aimed at *testing the veracity* of a witness and the *accuracy and completeness of his story*, for sometimes a half truth may be more dangerous than a total lie.

6. Cross-examine to destroy, if possible, a material part of the evidence in chief, that is evidence adverse to the case of the party cross-examining, is cross-examination well directed. This implies the appreciation of what *really is material*, an appreciation of *on what the case of either party rests.* It is better to score one solid and material point than to dwell on several irrelevant and immaterial points which will make no difference at all to the case of either party.

7. If evidence cannot be destroyed by cross-examination an attempt should be made to dilute its impact – to show that other possibilities are open and that a favourable construction can be put on the facts deposed to in chief.

8. If the witness is a truthful witness the cross-examiner has more problems in his hands. There he has to decide whether it will serve any useful purpose to ask him further question. But if this truthful witness must be cross-examined at all, extreme care and skill are required, and the aim will be merely to dilute the impact of his evidence by establishing that on the accepted facts, other possibilities are also open.

9. As the search in both criminal and civil proceedings is for the probable truth (not absolute truth as that is not possible in human affairs) the effort of the cross- examiner will be to develop the probabilities in or of the case in hand. This calls for the exercise by the cross-examiner *of the most active imagination and a profound knowledge of men and events.*

10. *Cross-examination can be to credit.* Instead of attacking his evidence directly the cross-examiner attacks the credibility of the witness. If a

witness is shown not to be credit – worthy then what ever he said in chief will not be believed. At the end of the day what counts is credible evidence, evidence that is believed.

11. Cross examination to credit will take account of the fact that *knowledge is only the impression on the mind and not the fact itself*. Different people observing the same fact may have different impressions. These different impressions may be the result of *bias or interest, conscious or unconscious partisanship, motive, trick of memory, etc.*

12. The cross examiner should religiously avoid the abuse of cross-examination as to credit by refraining from asking questions solely designed to disgrace, humiliate or embarrass the witness while throwing no light upon the real issues in controversy. It is unprofessional to thus attack the character of a witness.

13. He is not a good advocate who yields to his client's hatred of the witness and his desire for revenge. An advocate should never turn the liberty to cross examine into a licence to abuse.

14. Witnesses are entitled to be treated with the same consideration and respect due to them and their private affairs ought to be held as sacred from public gaze as those of judges and counsel. Witnesses are a necessary part of our judicial process. This should always be borne in mind by the cross-examiner.

15. The cross-examiner should avoid the dangerous and fatal temptation of carrying his cross-examination too far. This may either dilute or completely wipe out all the points gained earlier on.

16. Purposeful cross-examination must be well thought out and properly planned in the cool recesses of the advocate's chambers and the appropriate strategy carefully worked out namely *insinuation or probing or confrontation or a mixture of all three.*

17. It is important for the beginner to note that the *art of cross- examination is not to examine crossing.* There is no need antagonizing a witness. Befriend him, flatter him and you will certainly, that way, get more from him. The most deadly cross-examination had been the most courteous. Such can damage a witness beyond repair.

18. The first question in cross-examination should always be carefully thought out. If properly and meticulously delivered, such a question may have the effect of unsettling the witness for good.

19. The advocate should always remember that the ability to conduct a successful cross-examination depends on the materials available to the advocate. "I put it to you" is good but it is mere bluff if there is really nothing to confront the witness if he disagrees.

20. Attempt should be made to collect all available facts (including visiting the locus in quo where necessary) and documents as well as the antecedents of the witnesses to be cross-examined. That done, cross-examination becomes easy; that omitted cross-examination becomes difficult and purposeless.

Prospective members of our learned and honourable profession I have tried to merely scratch the surface of the important subject of Bar Advocacy. More, much more, needs to be said. I do hope the opportunity will offer itself to discuss in more details that very important aspect of Advocacy, namely, Cross Examination.