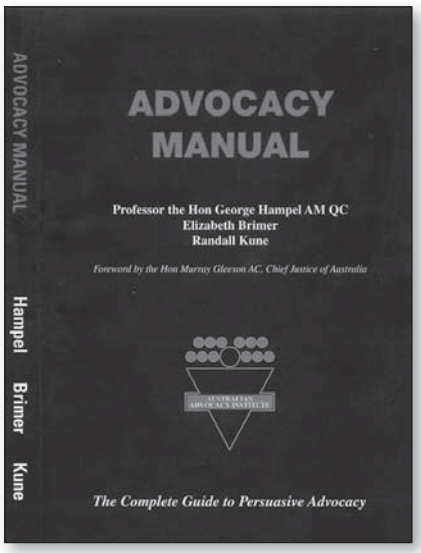
The Advocacy Manual

Professor George Hempel, Elizabeth Brimer and Randall Kune | Advocacy Institute | 2008



The Advocacy Manual, written by Professor George Hampel, Elizabeth Brimer and Randall Kune, is an outstanding work, which will no doubt become the text book of choice for Bar Reading and other courses designed to teach the elements of persuasive advocacy. It is doubtful whether any other Australians are better qualified to write a manual on advocacy than these three authors. At all events, it would be difficult to find three other authors whose experience in teaching advocacy exceeds their combined experience. Professor Hampel was a superb advocate at the Victorian Bar for 25 years, an outstanding trial judge in the Supreme Court of Victoria for 17 years, the foundation chairman of the Australian Advocacy Institute and, since 1970, a teacher of advocacy in Australia, New Zealand, USA, England, Scotland, Hong Kong, Singapore, South Africa and Malaysia. Elizabeth Brimer, who has practised in criminal, commercial, administrative, environmental and sports law, has been an instructor in advocacy at Monash University, the Australian Advocacy Institute, the Leo Cussen Institute and the Victorian Bar Readers' Course. Randall Kune, a member of the Victorian Bar, has been an instructor at the Australian Advocacy Institute since 2002.

In 246 lucidly written pages, packed with telling examples, the *Advocacy Manual* teaches the inexperienced advocate the lessons that earlier generations of advocates learned only from years of practice, observation and sometimes humiliating experiences. It would be a mistake, however, to think that the manual is a work for tyros. Even the most senior and experienced advocates are likely to find that it contains useful tips that are either new to them or that they have forgotten. (Despite 23 years as an advocate and 21 years as an appellate judge, I had not previously heard of the practice of developing a case theory by preparing a four column table that lists the elements of the claim or defence in one column and then relating the 'facts' of the case to those elements by dividing them into the categories of 'good', 'bad' and 'neutral'. This strikes me as a better and more comprehensive practice than the practice I followed at the bar of simply noting on a single sheet of paper the ultimate facts that established my client's claim or defence and the facts that made those ultimate facts more probable than not. I then conducted the case – whether examination in chief, cross-examination or addresses - by reference to the facts noted on that sheet. The single sheet technique of noting a number of basic facts provides for flexibility in conducting a case, but the four column approach gives a better overall view of the case. It is also likely to assist the advocate to understand and consequently undermine or resist the strengths of the opponent's case. I now think that the single sheet technique is probably best used after preparing and analysing the four column table.)

The centrepiece of the *Advocacy Manual* is a case study of the prosecution before a judge and jury of a person employed in a bottle shop for knowingly supplying an alcoholic beverage to an intoxicated person. The reader is given the statements of a Licensing Squad constable and a witness who was present in the shop when the alcoholic beverage was allegedly supplied, the locality plan which included a plan of the interior of the shop, the record of interview between the employee and the constable and the employee's instructions to his counsel. These materials are then used to explore, explain and illustrate the basic principles of trial advocacy. From them, the authors show how the prosecuting and defence counsel should each prepare and develop a case theory, make an opening address, lead and cross-examine evidence and prepare and deliver a closing address. In the course of doing so, the authors provide valuable insights concerning complying with ethical obligations, arguing questions of law, fact and admissibility of evidence, taking objections, preparing expert witnesses, organising materials and preparing and using notes and communicating with – in the sense of 'getting through to' – the judge and jury.

Other advocacy texts such as the Australian edition of *Fundamentals of Trial Techniques* by Mauet and McCrimmon, *The Advocate's Deskbook: The Essentials Of Trying A Case* by Irving Younger and the massive *Advocacy: Its Principles and Practice* by R K Soonavala contain more detailed examples of advocacy on more subject matters than are found in the *Advocacy Manual.* However, the latter work loses nothing in comparison with these well known texts. Indeed, for the inexperienced advocate, the technique of concentrating on a single case that illustrates the basic principles of advocacy would seem a better teaching tool than a more detailed work.

In addition to the principal case study, the *Advocacy Manual* contains a case study of a plea in mitigation on behalf of a young woman charged with burglary and assault occasioning bodily harm. The reader is supplied with the instructions to counsel and various matters that counsel learns as the result of a conference with the defendant as well as the report of a clinical and forensic psychologist who asserts that the defendant needs 'consistent and ongoing psychiatric treatment.' The authors emphasise that the 'plea can be the ultimate feat in the art of persuasion because in that role the advocate can most effectively influence the outcome for the client', a view shared by all experienced criminal advocates. In 18 concisely written pages, the authors provide illuminating guides concerning the preparation and presentation of a plea in mitigation.

Three other notable features of the work are a chapter on written advocacy – which daily becomes more important as the common law retreats from its oral tradition to greater

reliance on written materials – a chapter on advocacy in mediation and a chapter on communication. Here again the *Advocacy Manual* contains many valuable insights into and analyses of these subjects.

The *Advocacy Manual* does contain, however, one important statement with which I disagree. In the chapter on cross-examination, the authors declare (p.112): 'Don't ask the question if you do not know the answer' 'unless you can contradict the witness if he or she gives an unhelpful answer or you can live with an unfavourable answer.' The authors assert that '[c]ross-examination at trial is not an inquiry, an opportunity to investigate, or a 'fishing expedition'.' Each of these statements are derived from the fourth of the Ten Commandments of Cross-Examination formulated by Professor Irving Younger. This commandment may work well in the USA where pre-trial depositions enable the advocate to know what opposing witnesses will assert. But much useful evidence would be lost if it was literally applied under Australian conditions where the advocate frequently does not know at the beginning of a cross-examination what answer the witness will give concerning a material fact.

A much better approach to cross-examination is that which I learned from the late J W Smyth QC who was without a doubt the best cross-examiner that I ever saw or have read about. He repudiated the view that you should not seek the answer to a question if you did not know how the witness would ultimately answer it. Instead, he contended that in such a situation you could only get an answer that hurt your case if you were negligent. His approach which, as his junior, I saw many times, was to build up to the decisive question by a series of questions which cumulatively increased the probability that he would get the answer he wanted to the decisive question. Using this technique allowed him to back away from putting the decisive question – often at an early stage in the series of questions – if he judged that he was likely to get an answer to the ultimate question that was unfavourable to or might hurt his case. Later he might come back to the issue from a different direction. But more often than not, the step-by-step approach to the ultimate question so built up the probability of getting a favourable answer that the witness could not logically deny it. If the witness did persist in an unfavourable answer - despite its inherent improbability in the light of the witness's previous answers, the unfavourable answer became the platform for a devastating attack on the credibility of the witness. Sometimes the attack occurred in a final address but more often it occurred in a series of further questions where the witness was forced to admit the inconsistency between the unfavourable answer and the logical consequences of the earlier answers. This would often lead to the question, 'Don't you think you had better admit it?' which either got the admission Smyth wanted or an embarrassed and unconvincing denial that destroyed the witness's credibility.

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Few advocates have Smyth's quickness of thought or ability to dominate a witness by a series of short questions that keep the witness on the defensive. But even for the moderately skilled or experienced cross-examiner, his technique seems to me a better guide to cross-examination than a general command not to ask a question unless you know the answer.

Moreover, literal compliance with Professor Younger's fourth commandment would presumably preclude the probing cross-examination, which frequently results in the undermining or even the reversal of a witness's evidence. Hearings in the abolished Commonwealth Industrial Court were invariably a form of trial by ambush with issues being defined in the most general terms and no advance notice of the evidence that might be called by the other side. In that context, much to my leader's and my chagrin, I once saw a probing cross-examination by Smyth get a critical witness to reverse his evidence and support the case for Smyth's client. The cross-examination began by getting a concession that, when the witness had delivered a document to an address, he believed that he had delivered it to the correct address. The cross-examination then explored the influences which had caused the witness to change his mind and conclude that he had delivered it to the wrong address. Ultimately, the witness was led back to his original belief that he had delivered it to the correct address.

But whether or not one agrees with the *Advocacy Manual's* adoption of Professor Younger's fourth commandment, this is a most valuable work that will repay reading and re-reading by even the most experienced advocate. It should be on the shelves in every advocate's law library. I would not only adopt the statement in the Foreword by the Honourable Murray Gleeson AC QC, one of the greatest advocates that the Australian legal profession has produced, commending 'this valuable work to all aspiring legal advocates', I would also commend it to the experienced legal advocate.

Reviewed by Michael McHugh AC QC