US trial lawyers

Time to revisit US advocacy style? It's a holistic, insightful and constructive approach with a dash of razzle dazzle

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In 1993 I was living, from time to time, in a rent protected apartment on 5th Avenue, NYC. Jackie Kennedy Onassis was in the building next door. When I wasn't gawking at the former First Lady I would amble down to the Federal Courthouse on Foley Square. There I would observe the various trials and all my preconceptions of American trial advocacy were atomised. The work was conducted with simplicity and understatement. It did not depend on charisma or bravado but reflected methodical preparation, quiet precision, and purpose. I was stunned. This was not what I'd expected.

When I returned to the apartment, after my forensic spectating, I looked at my lawyer landlady's American Bar Association magazines. Here was something new! Advocacy could be taught. It was a craft. Skills could be imparted and one could practise and improve. Great performances could be analysed and recreated. I read of the legendary Edward Bennett Williams and his famous defence of John Connally on corruption charges. Then I studied Michael Tigar's recreation of Bennett William's epic cross-examination of the snitch. So I bought his book *Examining Witnesses* too. Here the trial process and the inordinate pressures defendants were subjected to were analysed with humanity and compassion. In comparison, Richard Du Cann's QC *The Art of the Advocate* seemed fettered by a sense of almost Olympian detachment.

Not long after my permanent return here, I was fortunate to be given a place on the first Keble advocacy course, and soon appreciated the immense debt it owed to the US tradition of teaching that its founders (Sir Geoffrey Nice QC and Tim Dutton QC) freely acknowledged.

Nowadays, the teaching of advocacy over here is wedded to the Australian Hampel method. Indeed, the Bar Standards Board stipulates that that method is 'expected' (a euphemism for 'required') to be used on the Bar Professional Training Course, but the National Institute for Trial Advocacy (NITA) came first. I have a copy of a 1977 NITA lecture on teaching advocacy that was years ahead of anything comparable in the UK (or Australia). It was analytical, structured and grounded in observation. Has the student thought through the specific problem and strategy? How did they execute the task? Was the sequence of direct examination or cross logical, with all evidentiary issues noted? What are the student's choice of words? Tone of voice? Pace? Is their performance enhanced or impaired by their physical habits, posture or gestures?

It is somewhat unfortunate that our current adherence to Hampel results in the potential for pupils mimicking the discrete behaviours of the trainers, rather than thinking about the whole process of a trial. The American approach is more insightful, and holistic. Moreover, there is an abundance of literature on the effective performance of trial advocacy in the US tradition, in comparison to the paucity of such works by practitioners in our jurisdiction. Take, for example, the work on cross-examination by Larry Pozner and Roger Dodd (*Cross-Examination: Science and Techniques,* LexisNexis). Now in its third edition, this not only teaches one how to cross examine, with three simple rules, but also rigorously distils case preparation, providing systems for developing the theory of the case. This is done by using the 'chapter method' of case preparation. Larry Pozner describes this as 'a series of small stories that introduce and place into context the best facts' upon which the outcome of the case depends. I have used Pozner and Dodd since 1993, when it was first published, and it has been invaluable in my practice. The techniques for controlling the witness and impeachment have been of vital importance. As the editions have evolved so too has the philosophy of constructive cross-examination, deploying the methods to make one's case out of the opponent's witnesses, as opposed to hostile cross-examination. So, too, does *Modern Trial Advocacy* by Steven Lubet, which (like Pozner and Dodd) integrates all aspects of the trial, and trial preparation under a unifying narrative. The theory of the case (sometimes referred to as 'the narrative') is an American invention for which we give insufficient credit. This approach requires a huge commitment in time and preparation, but the effort expended facilitates an apparently effortless performance in court.

A fascinating distinction between our systems is access to the jury, and the US research on how juries reach verdicts. Given the right of US attorneys to *voir dire* potential jurors prior to jury selection, and their ability to interview jurors post-verdict, proscribed here by the Contempt of Court Act 1981, American trial lawyers are far more attuned to how juries approach their task. They also use focus groups to test their strategies, thus assaying the narrative they propose to advance. Their understanding of the psychology of jury decision making is profound and they adapt their advocacy accordingly. It is questionable how many barristers think about the psychology of how to influence jurors, or study the American research.

I was privileged to be mentored by Roger Dodd on the thematic analysis of a case last year in which the strategy was to evoke in the jury the same feelings of trauma and disorientation felt by the witness, as if by proxy, so they could imagine, or empathise at a visceral level the predicament the witness had been placed in. An excess of emotion and lack of objectivity are hindrances for barristers, but for juries the opposite is true – US research has revealed that most jurors are affective in their reasoning process. Pathos is the hook: it now comes first before logic in cases arousing strong feelings. Logic is not abandoned, but emotion underpins the functional logic that juries so often apply.

There may, regrettably, be even greater divergence between our systems in the future. Until very recently, the paradigm of the Anglo-American legal system is the adversarial process. In our jurisdiction this fundamental principle is in jeopardy. We would do well to remember this and guard against further restrictions on our right to confront and cross-examine, which we exercise on behalf of our clients (in the tradition of Erskine, Brougham, Carson, and Hastings) only because those that went before us obtained them at bitter personal cost. In the US the sixth amendment is zealously defended, and it is recognised that it is a fundamental right not to be diluted. It has been held as follows: 'For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the Law' *Perry v Leake*, 488 US 272, 283 (1989).

Recent innovations to our system imposing limitations on this right have been countenanced at the risk of undermining the presumption of innocence and rigorous analysis of critically important evidence. It would be the worst of ironies if the practice of cross-examination atrophied in its founding jurisdiction. This is not a concern limited to the criminal courts, as Lord Neuberger, controversially, in almost a valedictory lecture expressed the view that, 'as for cross-examination, most of the best points that emerge from questioning can be made much more shortly in argument'. This is very far from Wigmore's 'greatest legal engine invented for the discovery of truth'.

An advocate is not a weathervane – advocates play a crucial role in society and there are times when we must stand firm against the prevailing wind, whilst recognising (quoting Pozner) that 'trying to win through force of personality and rhetorical fireworks are out-of-date techniques'.

There is, however, an exception to every rule. Enter Ben Brafman, the New York defender, formerly representing Harvey Weinstein. I want to conclude with his opening salvo in his successful defence of Sean 'Puff Daddy' (now Diddy?) Combs on firearms charges:

[Mr Combs stands]

'Ladies and Gentlemen, this is Sean 'Puff Daddy' Combs. You can call him Sean, you can call him Mr. Combs, you can call him Puff Daddy, or even just plain call him Puffy, but what you cannot do in this case, you cannot call him guilty, because from the facts, from the evidence, from the Law, you will conclude that he is not guilty.'

[Mr Combs sits down]

Sometimes you just need a bit of the old 'razzle-dazzle' don't you?

About the author
Edward Henry QC defends in serious fraud, organised crime, and regulatory matters. He is privileged to represent clients in the most grave and complex investigations. Edward has avidly studied the technique of advocacy for 25 years, and is always learning.

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UK JURY STUDIES: The UCL Jury Project, led by Professor Cheryl Thomas, pioneered the study of the jury system over here (*Are Juries Fair?* Ministry of Justice Research Series 1/10, 2010): bit.ly/arejuriesfair