



## **ELBA ADVOCACY TRAINING**

### **Practical Hints on Tribunal Advocacy**

**Paul Epstein QC**

**Cloisters, Temple, London EC4Y 7AA  
020 7827 4000, [pje@cloisters.com](mailto:pje@cloisters.com)**

### **Be Prepared**

1. Have a system for reading the case before the hearing. Read the pleadings first, then witness statements, then documents, and finally any cases and the law.
2. For your own benefit, prepare a list of the issues. Often you can take the main issues from the pleadings. List the issues, and identify the points for and against you. Try to imagine what the Tribunal will want to know about these issues.
3. Prepare a Chronology. This is a very important document. This will be your guide in times of trouble. The Chronology should have three headings, Date, Reference and Event.
4. Write your Closing Submissions. This is a useful discipline. It helps you with case analysis. You will make alterations to your submissions as the case proceeds.
5. Note the points that you have to put to the other side's witnesses.

6. Work out which side will go first. Figure out the order of your witnesses. This order takes into account who will be your good witnesses, who will be your less good witnesses, and the witnesses' own convenience.
7. Have the music in your head. After you have prepared the case, take a bath, and think about the issues.
8. Get plenty of sleep. You are unlikely to perform as brilliantly on 4 hours' sleep as you will on 8 hours' sleep.
9. Make sure you arrive at the Tribunal building in sufficient time. You may need to have a pre-hearing conference with your Client. Look at the Tribunal location on a map the day before. Work out how you will get to the building. Catch a train one before the train you think you really need. If you are walking from a train or bus station, work out how long the walk will take you. Bear in mind that you may have heavy bags. It does not inspire confidence if the advocate appears only moments before the hearing, bathed in sweat, carrying heavy bags.
10. Make sure that you eat breakfast. Have carbohydrates. Drink water. Otherwise by lunch-time you will be feeling faint and will have a pounding headache.
11. Take headache tablets with you.
12. Hold the plastic water cup when pouring water into it. Think long and hard before leaving a half full water cup on the table. You will only knock it over.

Drink it. Have a ready supply of napkins for when you knock over the plastic water cup on your table.

### **The Art of Persuasion**

13. Your function at the Tribunal hearing is to persuade the Tribunal of your Client's point of view. Everything that you say and do and how you appear contributes to the persuasive effect.
14. Dress appropriately. If you attend the hearing wearing a Texan cowboy string tie and suede boots, you will be less persuasive than an advocate in a smart suit, tie and collar.
15. Maintain eye contact with the Tribunal. Look at the Tribunal during the hearing to see how they are responding to your case and the other side's case.
16. Do not bury your head in your notes.
17. Try not to be boring. Modulate your voice.
18. Avoid the use of pompous or overtly formal legal language. Advocates using the words "hereinbefore" and "hereinafter" are usually indicating a level of anxiety.
19. Be an honest guide. Make sure that you are the advocate whom the Tribunal trusts. Attempt to be correct in everything you say. If you make an error, acknowledge that you have done this.

20. Beware your non-verbal leakage. For example, don't tut, or shake your head vigorously, or show expressions of disbelief (particularly when your own Client is giving evidence). Make sure that your witnesses do not make obvious noises or gestures whilst the other side is giving evidence (however preposterous that evidence may seem to them).
21. If you prepare written submissions make sure they are well presented, legible, and clear. No dog-eared dirty pieces of paper in single spaced 9-point font.

### **Preliminary Matters**

22. Read all Orders and decisions made by the Tribunal. Check that you have complied with those Orders. If not, find out why not, and if this is raised by the Tribunal, explain.
23. Try to agree with your opponent who goes first. If the other side is a litigant in person, you may well be asked to go first, even if that is not the usual running order.
24. Clarify with the Tribunal at the outset of the hearing whether it is liability only, or liability and remedy. Typically Tribunal directions now say that the hearing will consider liability and remedy (if appropriate). Find out what the Tribunal understands by this.
25. Clarify whether (if the Tribunal is not going to deal with the question of financial compensation) it is nevertheless going to deal with questions such as injury to feelings and contributory fault.

26. The Tribunal may want to take some of the time at the start of the case in order to read documents or witness statements. Identify in advance what the essential reading for the Tribunal will be. You can easily make a note of this on the Chronology, or the Index to the Bundle. Use an asterisk.
27. Usually a Tribunal will not want an opening. In a straightforward case, it will usually be unnecessary.
28. If there are issues that could usefully be raised in opening, mention this to the Tribunal. Do not be afraid to do this even if the Tribunal has said nothing about opening, and has instead just asked you to call your first witness, and that witness is heading towards the witness table. Say “there are some matters which it may assist you if I mention before the evidence is called”. Explain those points. If you have prepared a brief written opening, use this.
29. Sometimes you may be asked to open the case. You may not have prepared an opening. However, if you have prepared your written Closing, you can adapt this.

### **Taking Notes**

30. It is vitally important that you keep a proper note of the Tribunal proceedings. Bring a generous supply of paper and pens.
31. In relation to submissions/procedure, it is not necessary to make a verbatim note of what is said. Provided that you have the main points, that will usually be sufficient. Sometimes, a precise note of exactly the way in which the case is put can be useful.

32. When a witness is giving evidence, your note-taking needs to be very different. Some people make a note separately of the question asked and the answer given. Others make a note incorporating the question and answer. For example, Method 1 would note "*Q: What time did you see Fred?*" "*A: At 8 p.m.*" Method 2 note-takers would note "*I saw Fred at 8 p.m.*" The first method is preferable. It shows whether the question was leading or not, and the precise answer given by the witness. Some people draw a line down the page, and note questions on the left and answers on the right.
33. Note the page number of any document referred to. Some people do this by having a very narrow column on the left of each page in which the page number is noted. Then you can see at a glance which documents have been referred to at particular points in the evidence.
34. It is not possible to take a verbatim note of the evidence. However, try to make it as full as possible. If you yourself are asking questions, and there is no other note-taker, it is impossible to make a full note of what is being said. In that case, since you need to have a note of the key points, stop when a key answer has been given, and note it down. Although the pause may feel awkward, this is acceptable to a Tribunal.
35. When your witnesses are being cross-examined, make a note, perhaps in a different coloured pen, of any points about which you wish to re-examine. Also make a note of any key parts of the evidence that you may want to refer to in closing. Write "XX" or "RX". Put a post-it on the page.

36. Note down the times when particular events occur. For example, when your Client, the Claimant, gives evidence in chief, note: *“Claimant. Sworn. EIC. 10.45 a.m.”*
37. If there are breaks or adjournments, note the times of the breaks, and the reasons for them.
38. If the Tribunal gives a decision during the course of the hearing, try to note the decision down word for word.
39. From time to time during the case you will need to remind yourself of documents you need to obtain, or questions that need to be asked, or other steps that need to be taken. Keep a *“To Do”* list separate from your other notes. Refer to this at lunchtime and at the end of each day.

### **Examination In Chief**

40. Remain quiet during the oath/affirmation. Do not write whilst the oath/affirmation is administered.
41. Make sure that there is a copy of your witness’s statement on the witness table.
42. Ask your witness to identify his statement, verify his signature, confirm that he has recently read the statement, and that it is true and accurate. If there are typographical corrections, ask *“subject to typographical corrections is it correct?”* If they are more than typographical, ask *“I believe you wish to make some small*

*corrections as you read your statement/before it is read, subject to those, is the statement true and accurate?"*

43. The Tribunal needs to be referred to the documents. Remember that the Tribunal will not previously have seen these documents. It will not look at them, and therefore will not take them into account, unless they are referred to in the course of the hearing. If your witness reads his statement, at appropriate moments whilst the statement is read, take the Tribunal to the document. It is unnecessary for you to read the document out. It is unnecessary for the witness to read it out. Refer the Tribunal to the relevant parts. If it is a long document, for example a note of a disciplinary hearing, you may ask the Tribunal whether it is convenient for them to read it there and then. It may then be read over the next 5 or 10 minutes. Do not be alarmed by this silence.
  
44. Should the witness statement be taken as read, or should the witness read it out? (NB There will be an EAT judgment on this shortly, which may supersede this paragraph). First of all, look at whether there are any directions about this. If there are no directions consider the pros and cons. There are pros and cons for each approach. If the witness statement is short, and the Tribunal has sufficient time for all witnesses to read their statements, it is often convenient for the statement to be read out. That then also allows the Tribunal to look at the documents in context. If there is a significant conflict of oral evidence, it is often wise for at least those passages to be read out loud. Reading out the statement settles your witness.

45. Do not ask leading questions. A leading question is one which suggests the answer e.g. *“Were you absolutely shocked and horrified when you saw how badly your employer had discriminated against you?”* Compare this with *“What did you feel when your employer dismissed you?”*
46. Generally, supplemental questions should be kept to a minimum. The Tribunal will not allow you to ask very many supplementals. Only do this if it is necessary.
47. At the end of your witness’s evidence, you can conclude by thanking him, and saying that your opponent will now cross-examine him. Try to avoid the use of hackneyed phrases e.g. *“Will you wait there please, there may be some questions for you”*.

### **Cross-Examination**

48. The purpose of cross-examination is to put your Client’s case and to undermine the witness’s case.
49. This is not LA Law/Ally McBeal/Fish.
50. Cross-examination is not examining crossly. Always be polite. If you are not, this may harm your case.
51. Try to start and end your cross-examination with a good point.
52. Generally speaking, ask leading questions. This gives the witness less wiggle room.

53. Decide whether you will cross-examine in themes, or chronologically. If the chronology of the case is a mess, themes are often better. It makes it easier for the Tribunal to follow.
54. Cross-examination on inconsistent documents: Make the witness commit to a story, then put the killer document. For example, if you know that the witness was not at a meeting, but he says that he was, and you have a killer document that shows he was not, ask him questions about who was at the meeting, how long it lasted, what people were wearing, what refreshments there were, etc. and then put to him the document that shows that he could not possibly have been there. Do not put the document first, and then ask, *“So how do you explain that?”*
55. Do not accept equivocal answers. If you ask the witness *“Did you see Jim on the 26<sup>th</sup> September”* and the witness answers *“I did not see him on the 27<sup>th</sup>”*, do not leave the answer hanging. Follow it up.
56. Do not interrupt the witness. The Tribunal may think that you are trying to hide an answer which is unhelpful to you.
57. Your views are irrelevant. Do not ask questions beginning *“I think that”* or *“It seems to me”*.
58. If you have forgotten to ask something and you only realise later, and the witness is still present, ask the Tribunal for permission for you to put it to the witness. Often, the Tribunal will let you do this.

59. Never show that you are hurt by an answer. Sometimes, you can even turn an unhelpful answer to your advantage. You might say “*exactly*”. Choose your moment. Only try this once in a case.
60. Avoid annoying tics and habits, such as saying “*Thank you*” after every answer or repeating the witness’s answer back to him.

### **Re-Examination**

61. The point of re-examination is to repair damage done by cross-examination.
62. You may only ask questions in re-examination on issues that have been raised in cross-examination.
63. No leading questions.
64. Only re-examine if it is necessary. Often, if you re-examine on points, it will simply highlight the damaging evidence against you that has come out in cross-examination. Re-examination has been called the last refuge of the desperate.
65. Avoid the big red button question.

### **Submissions**

66. Be clear in your submissions. Signpost what you are going to say. With neon. Have an introduction which identifies the causes of action. Then examine the issues, dealing with the facts and the law.

67. Do not summarise the evidence the Tribunal has just heard. This is really boring for the Tribunal. They will stop listening. If you must refer to the evidence in any detail, highlight the main important points.
68. Often advocates try to focus on the credibility of a witness. Remember that in general the Tribunal does not want to find that witnesses have been lying, committed perjury, or have committed criminal offences.
69. If there is a credibility issue, the Tribunal will decide it by looking at the contemporaneous documents, any independent objective evidence, internal consistency of the witness's account and considering as a matter of common sense what is likely to have happened. Refer to these four things.  
Demeanour is not usually a relevant factor
70. Deal with difficult points made against you. If you do not, then you may find them decided against you by the Tribunal.
71. Do not assume if you do not mention something that the Tribunal will consider it. If you do not mention it, it may not be determined at all.
72. Listen to the Tribunal questions. If the Tribunal asks questions, it is because particular points are on their mind. This is your opportunity to persuade them to decide those points in your favour.
73. Consider actively asking the Tribunal if there are any points that they particularly wish to have addressed on any of the particular issues.

## **Rules of Procedure**

74. The Tribunal is not governed by strict rules of evidence. It therefore tends to allow evidence in, rather than excluding it. It will then attach the appropriate weight to the evidence that is admitted.
75. Make sure that you have considered jurisdictional points, such as time limits.
76. Finally, bear in mind that the Tribunal is (within reason) the master of its own procedure. It will attempt to use creative solutions in order to have the case heard. Do all you reasonably can to assist it.

© Paul Epstein QC,

7 April 2011