

The Technique of Persuasion by Sir David Napley, Fourth Edition, 1991, London (England), Sweet and Maxwell, 158 pp. ISBN 042143340X

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A disclaimer : The reviewer was aware of the large and favourable following that the three previous editions of *The Technique of Persuasion* had garnered for the author, Sir David Napley. And, that the book's success was due in large part to its masterful exposition of the fundamentals of advocacy, to the author's command of the English language, to the ease with which he reduces seemingly complex problems to simple propositions and to the dash of wit which underscores the significance of key passages. This review was undertaken with this bias, and I could conclude it summarily by stating that the fourth edition is no less useful, scholarly and entertaining. However, to allow the reader a more objective basis for evaluating the merits of *The Technique of Persuasion*, the following comments are included.

Sir David begins his text by making plain his rationale for having rejected the possible title "The Art of Advocacy". His explanation is instructive and warrants repetition :

I have rejected the title "The art of advocacy" [...] because the use of the terms "art" [...] conjures to one's mind a natural gift rather than an acquired skill; it gives support to those — whose views I do not share — that many of the essentials of advocacy cannot be taught. [In fact,] the vast preponderance of skilled and successful advocates have done little more than acquire a technique; and one, at that, which any person of reasonable intelligence and aptitude can acquire by patience, application and practice. [...]

[A] second reason for rejecting that title is to disabuse, from the outset, the belief that advocacy for the lawyer is something to be practised only in a court of law, on one's feet, cross-examining witnesses or persuading a judge, if not to decide in one's favour, then at least to keep awake and listen. As a moment's reflection will remind you, virtually all tasks undertaken by lawyers on behalf of clients are for the most part, themselves a form of advocacy — the employment of the technique of persuasion.

Of note, the author has summarised the benefits that will accrue to the advocates who devote the necessary time and study to master these techniques, with the delightful *bon-mot* : "all [judges] will regard your presence with greater warmth, if they feel your prowess is such that you are able to assist them in their own endeavours to avoid making mistakes".

The fundamentals of the technique of persuasion are too numerous to summarise, but reference to these may be of assistance :

- the advocate should study the psychology of human behaviour;
- the advocate should always have a plan in mind, in order to know what the near, mean and ultimate objectives are, and how the next step that is proposed to be taken will advance the seeking of these objectives;
- the advocate must not seek to destroy the opponent's case, argument, witness or even question, unless it is strictly necessary to achieve the objective — if the impairment of one strand of the opponent's case will suffice to bring about a favourable contest, no more should be attempted;
- the advocate must seek to concentrate all available force at the decisive point, as one would in battle;
- the advocate must draw back from every experience in which persuasion was sought, to measure the merits of the technique employed in order always to improve;
- the advocate should strive, in his [or her] method of delivery, to achieve (i) clarity, (ii) simplicity, (iii) to put the points succinctly, (iv) to develop them in an interesting way, (v) to present them with integrity and, (vi) to do so without any trace of pomposity;
- the advocate must always consider the question, “What is my hearer thinking?”;

At page 112, the law as settled by the *Rule in Browne and Dunn*, (1893) 6 R. 67 (H.L.) is discussed, with respect to the duty to cross-examine lest the opportunity to contest the unchallenged version of facts by means of submissions be foreclosed; of interest, no reference to the case is made. Pages 34 to 36 are instructive for prosecutors as they discuss the means by which preliminary inquiries may serve to assist the Crown, notably by pointing out areas of weakness that may be supplied by further investigation.

The author's greatest strength appears to be his signal ability to craft a subtle mix of ‘black letter’ fundamentals about advocacy that cannot be deviated from lightly, with sound advice respecting the role and ethics of the advocate and a certain number of subjective views portending future developments in the law. For example, the thorny issue of the extent to which counsel must obtain ongoing instructions in a criminal case is discussed with lucidity. It is suggested at page 73 that the

[...] true proposition may more correctly be stated as follows: whereas barristers and solicitors are agents of the client, [...] the nature of their engagement is such that they cannot reasonably be expected constantly to stop the course of proceedings in order to take instructions on every aspect of the conduct of the case. It probably arises by implication [...] that, in pursuit of the advocacy, each of them is free to conduct the proceedings in such way as he [or she], in his [or her] proper discretion, considers appropriate; if, however, on any particular matter the client has given express instructions to the advocate not to pursue a particular course, then, [...] he [or she] cannot override those instructions.

The equally controversial question involving the extent to which counsel may interview and even cross-examine clients prior to trial is considered at page 45. The learned author suggests that “it is essential that a witness should be fully tested on every aspect of his [or her] evidence to ensure, so far as possible, that neither he [or she] nor you are taken by surprise at the trial”. However, the

resolution of this issue will escape unanimity, as may be evidenced by Mr. Justice O'Sullivan's unfavourable comments in *R. v. Laramée*, (1991) 65 C.C.C. (3d) 465 (Man. C.A.) respecting the fact that Crown counsel had interviewed a child who was to testify as to a sexual assault. As His Lordship noted :

On the question of rehearsing and coaching, I am aware that it is now apparently the practice of counsel to review with witnesses statements made by them after the incident as to which they are witnesses and before trial. Speaking only for myself, I had thought such review of witnesses's pre-trial statements could amount to coaching a witness, contrary to ethical practice. But I note that the practice has been approved in many cases.

A comment, at page 58, to the effect that it would be improper for counsel to suggest that some other person had committed the offence charge, must be criticized for being too general. For example, in a case where the client was in possession of a bag containing narcotics which was tossed away from the table where he or she was seated together with others, when the police entered, it would not be improper, it is suggested, to cross-examine the police officer to the effect that it was equally or more likely that the person who threw away the package was someone else.

The students who participate in the legal clinics associated with the various law schools devoted to the representation of individuals of modest means and who are called upon to defend accusations of shoplifting must review pages 77 to 84. No better plan for the defence of such a charge will be found, nor will a more thorough and insightful yet brief discussion be available in any other text, in my opinion. However, this text does not discuss the technique of interviewing an accused person in a summary fashion, prior to his or her court appearance, as are daily called upon to do lawyers who appear as duty counsel before the various courts. Of course, no major work on advocacy appears to consider this issue as fully as the importance of this form of advocacy warrants.

In sum, the Canadian Bar should welcome the recent publication of the fourth edition of Sir David's wonderfully interesting text, *The Technique of Persuasion*.