Kluwer Arbitration Blog

The Art of Advocacy: Storytelling from Socrates' Athens

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The trial of Socrates

In 399 BC, the philosopher Socrates was tried on the charges of *asebeia*, or impiety, and of corrupting the youth of Athens. The trial is famous for, inter alia, Socrates' *elenchus*, or cross-examination, of his accuser, Meletus. While Socrates' cross-examination was doubtless an impressive sight, he ultimately failed to successfully advocate for his own life. Convicted and condemned to death by a jury of 501 citizens, the wisdom of Socrates failed to live up to the task required, that of Socrates' acquittal. For further reading see Plato's *The Apology of Socrates*, or, e.g., the Encyclopaedia Britannica.

No corrupt youth to see here

Over 2,400 years later and another international arbitration moot season is now upon us. This blog post summarizes some important advice and insights into dealing with oral and written advocacy, including cross-examination.

In preparing this post, the authors, being one current and one former moot court participant (the Cross-Examination and Willem C. Vis International Commercial Arbitration moots, respectively), have drawn inspiration from the recent ICDR Y&I Skills Training Workshop on Written and Oral Advocacy in Investment Arbitration ("Workshop") held in July 2022 in Athens, the Hellenic Republic, as part of a Summer Law School in Investment Arbitration organized by the European Law Students' Association and the Athens Public International Law Center."

The Workshop was led by renowned lawyers and arbitration practitioners Rebecca James (Linklaters), Barton Legum (Honlet Legum Arbitration), Alexander G. Leventhal (Quinn Emanuel), Marc Krestin (PGMBM) and Marily Paralika (Fieldfisher), each of whom offered incisive tips that are valuable to many new and aspiring students and practitioners as they hone their skills for use in moot court competitions and beyond.

Coordinated advocacy

First, coordinate your team. A well-coordinated team is the foundation of any successful case. It is seldom you will be working completely alone, and it is important to understand each other's strengths and weaknesses and to take advantage of these.

Relatedly, consider the division of work early and to start writing as soon as possible. The writing of submissions or sections thereof should be kept as consistent and equal as possible between the drafters. In this regard and depending on the team dynamic, it is often helpful to brainstorm together. Things move faster and two heads are generally better than one.

Where the individual components of the submission continue to be written separately, it is advisable to merge the individual parts first as soon as possible and then to coordinate the styles.

In the authors' experience, the team's more junior associates generally build the basic framework of the submission, while the more experienced team members then finesse the fine points. Ask questions of your peers, seniors, partners and coaches. There are no silly questions. In general, the goal should be to draft logically with simplicity and precision. Developing a solid legal and evidentiary basis is very important.

Mind the gap: effective signposting

Second, it may be trite, but it is very effective to put up "signposts". These include key words to hold on to, but also stylistic devices that weave a golden thread through the submissions, oral or written.

Lead your submissions with the strongest arguments. There is no time for a warm-up act. End your arguments on a high, there may well be no encore. In real life there may be a post-hearing brief, alas not so for Socrates. Ordered signposts will help you here in terms of structure and ordering.

The authors are aware of the conundrum as to what extent an advocate should take into account the preferences of an arbitral tribunal with regard to the presentation or the order of their submissions. In principle, it is possible to take such preferences into account, but it is not necessarily conducive to good advocacy. What should be uncontroversial is the view that it is essential for an advocate to truly understand their case and to give the arbitral tribunal the impression that it is being presented with serious and important issues to decide. For Socrates' Ancient Athenian jury, this question should have been made especially clear.

Goodies versus baddies: persuasion through storytelling

Third, the Workshop panelists stressed the importance of the advocate persuading the arbitral tribunal to view the facts as they see them and *not* as opposing counsel sees them. To do this, the best advocates present their case in the form of a story. In particular, the arbitral tribunal should be made to feel as if they are *directly* involved, acting as the "avenger" in righting a wrong. To achieve this, the advocate must ensure the arbitral tribunal also becomes part of the story.

To this end, it can be useful, nay important to cast one's client in the role of the victim as much as possible. But how can the advocate portray their client in a way that makes them appear as the

victim? The authors concede that this question cannot be answered in a one-size-fits all manner. As the lawyerly adage goes, “it depends”. It depends both on the individual circumstances of a dispute and, in the case of investment arbitration, on the nature of the investment. The most important thing for the advocate here is to be able to explain, for example, why the client’s expectations were not met, or why their story is the more credible one.

“Know thyself”

Fourth, it should be emphasized that the narrative or “story” of the case becomes clearer towards the “pointed end” of the proceedings. Presenting this story persuasively is ultimately the advocate’s main job. Therefore, and this is considered particularly important, an advocate must also focus on themself. There can be tragic consequences if an advocate forgets their “personality”, i.e., who they are and what their particular style and preferences are.

Oral testimony: what is it good for?

Fifth, what is oral testimony and is it truly needed? While the art of advocacy appears firmly established as a cornerstone of every jurisdiction, the value of oral testimony and the concept of cross-examination remain alien to many. At the Workshop, the scenario of the client who insists on testifying to have their “day in court” arose. Unsurprisingly, this is only necessary or helpful in rare cases. For the authors of this post, the strong emotional attachment of such a witness to the dispute contradicts Aristotle’s notion that the “law is reason free from passion” and can jeopardize both the advocate’s credibility and persuasiveness. Indeed, one of the Workshop panelists referred to a case they worked on in which the witness being cross-examined admitted to committing criminal offences, which led to his subsequent prosecution. Such testimony should therefore be discouraged.

It should also be recalled that, for the layperson, the task of testifying can be very difficult and stressful. A good advocate will ensure their witness has had every opportunity to be well-prepared for the examination, cross-examination, and reexamination, if applicable.

Successful cross-examination demands control, responsiveness, and adaptability. When cross-examining, avoid questions to which you do not know the answer.

Tips for hearing preparation

Sixth, how to prepare for the hearing. The Workshop panelists provided some useful practical tips as guidance. Outside the competition requirements that might guide moot court advocacy, the advocate’s opening statement should not take longer than 90 minutes and this is generally not the opportunity for detailed discussion of damages calculations.

Moreover, it is of crucial importance that the advocate presents themself as well as possible during the submissions. In the Zoomiverse, basic tips include keeping the speaker’s microphone facing the right direction and the optimal distance from the speaker’s mouth, if such technology is available.

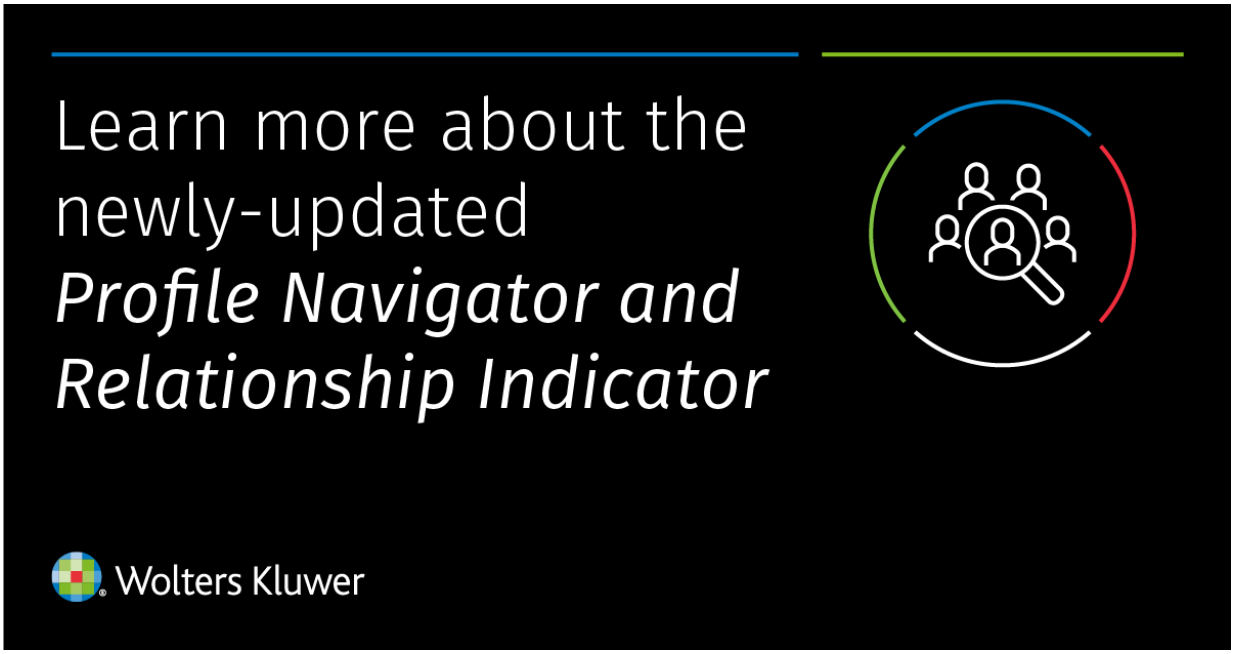
The advocate should speak slowly and with a varied intonation to engage the arbitral tribunal. The advocate's focus should stay on the arbitral tribunal in order to respond to any reactions.

An advocate should also be cautious of excessive hand gesturing. To what extent is the use of a script or outline more appropriate? Again, it depends on the advocate's preferences. Both options have advantages and disadvantages, but both should be used as a prompt rather than something to rely on throughout the submissions.

A top tip from the Workshop is that advocates should prepare for their hearings by, for example, recording themselves in videos and then watching them in order to refine their presentations and arguments. In the event that the advocate receives a question from the arbitral tribunal during the hearing to which they do not have an appropriate answer in the heat of the moment, it is not a problem and may be advisable to give the answer later in the hearing or, if necessary, to have it answered by another member of the team.

"We cannot live better than in seeking to become better"

Among the most valuable tips for advocates that the authors have learned from the Workshop and beyond thus include the importance of a coordinated team, storytelling, a good knowledge of self, an orderly consideration of the broader context of the client and their case, the need for clear communication, and of course, sufficient preparation. We would like to think that perhaps even Socrates himself might have found a small piece of wisdom or two.



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