

**DF Jackson QC advocacy dinner, TC Beirne School of Law, University of
Queensland**

“Advocacy”

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Some time ago, in a court in a different country, a trial was held for the murder of a very prominent citizen. The victim’s son was accused of the murder.

The court was absolutely packed. After the prosecution described the charge, a 26 year old advocate rose and commenced his address for the defence.

The advocate had never argued a case in court before. The crowd fell utterly silent.

Many in the crowd knew how the defence was going to be conducted. The advocate was going to allege that the son had an alibi. The advocate was also going to allege that the murder was conducted by two other people on behalf of a very important man who wanted to get his hands on the property of the deceased.

The advocate was going to make all of these allegations without calling any witnesses and without leading any forensic evidence.

Perhaps even more remarkably, the advocate began his opening address with 5 minutes which were all about himself. Here is what he said:

You must find it very surprising, judges, to see all these notable advocates and eminent citizens firmly rooted in their seats, whereas I, on the other hand, am standing up here and addressing you. For, after all, I cannot compare with these seated people in age, and still less in influence. It is true enough that every one of them – every single man you see here today – is utterly convinced that the charge on which this case is based is an *unjust one* which it *is imperative to refute*, a charge

which only an unprecedented act of criminality could ever have concocted.

Nevertheless, *they* do not actually venture to undertake the refutation themselves – owing to the hazardous times in which we live. They are here because they consider it their duty to be here. But they want to stay out of danger. And that is why they are keeping so quiet.

Do I imply by these words that I am a braver person than they are? Far from it. Or do I mean that I am more conscientious? No, I certainly don't covet that sort of praise – if it means diverting it from some else.

You may well ask then, what is my real motive in undertaking this defence, which the others were so reluctant to touch? Well, my motive was this. These men of whom I speak are important men of authority. If any of them had made a statement, and if anything in this statement had possessed political implications (a thing which would have been inevitable in a case like the present) then people would have made out that he was meaning a great deal more than he had actually intended to mean.

On the other hand, I can say every single thing that needs to be said. I can say it with the most complete freedom, without there being the slightest question of my speech becoming known or achieving publicity to the same degree. For the others are men of rank and position, and nothing they say can pass unnoticed; besides, they are of such ripe age and experience that no allowances will be made for the smallest indiscretion they may commit.

But my case is quite different. If I speak out of turn, either nobody will ever hear of it, because I am someone who has not even started his public career, or, if they do hear of it, they will pardon the lapse on the grounds of my youthful years ...

Another reason why I accepted the commission is this ... the approach to myself came from men whose friendship I regard as carrying enormous weight; I cannot forget all the services I have received from them, not to speak of the high positions they occupy in the state. The kindness they

have done me, as well as the importance of their rank, seemed to me too great not to disregard; and so I felt that I could not possibly ignore their wishes.

Those are the reasons why I agreed to undertake the defence. It is not a question of having been singled out as the most talented pleader. No, the point was that I was the person left over, the person who could plead with the least danger. To say that I was chosen in order to guarantee the best possible defence would not be the truth. I was chosen in order to ensure that he had any defence at all.

The first five minutes of his speech thus explained, with false but highly eloquent modesty, the reasons why this 26 year old advocate had acted so bravely in accepting this case of the unjustly accused defendant. He simultaneously lowered expectations of himself, referring to his youth and inexperience. At the same time, without much subtlety he pointed out his own bravery in a way that helped the son's case substantially.

Only then did he turn to the facts. The advocate's opening speech then continued for hours.

You will be aware that the trial was a very long time ago. No-one would ever open or run a criminal trial in that way today: (i) either to speak all about himself or herself or (ii) to run a trial by pure oratory skill and without evidence.

The trial was of Sextus Roscius in 80 BCE. Sextus Roscius had been accused by a senior supporter of the Consul, and dictator, Sulla during a time of great political unrest. Sextus Roscius was acquitted. And with that acquittal the young advocate, called Marcus Cicero, made his name.

Those of you who were present at the first of these dinners in 2012, will recall the speech, published online, given by David Jackson QC in whose honour this evening is dedicated. Like Cicero, David has been, for many years, a leader of our Australian advocates. I might add, however, that I hope that when his career as an advocate eventually ends it will conclude in a different style from that of Cicero.

When David gave his presentation in 2012, one of the important points he made concerned the fluid nature of advocacy. In the time in which he has been the leader of the Australian bar, the High Court, like the highest courts in many common law countries, has moved from almost prohibiting written submissions to having written submissions form the backbone of an appeal and sometimes also much of the flesh of the appeal.

With such dramatic changes in advocacy just in part of a lifetime, we should not be surprised by the great difference in the style of effective advocacy between 80 BC and today. In fact, even at a single point in time, advocacy that is effective before one court may be poor advocacy before another.

There are, however, at least three common themes all of which shine through Cicero's oration and, I believe, are consistent in all good advocacy. The first is the need for hard work. The second is the need for clarity. And the third is, on occasion, the need for bravery. It is impossible to read or watch the speeches of any truly great advocate without noticing these qualities.

Let me say something about each of those.

First, as to hard work, this is the foundation of all good advocacy. Lincoln's Gettysburg address lasted only a few minutes, but it went through many drafts, at least five of which survive as complete handwritten drafts. Its language drew from years of learning including resonances from the language of Pericles' funeral oration, perhaps one of the best orations ever given.

None of you this evening will be strangers to hard work. Your successes will have come from extremely hard work. The Jessup team, for example, in the largest and most competitive mooted competition in the world worked extremely hard for their success this year, including qualifying first in the intensely competitive Australian rounds, albeit ending at the hardest place – the semi-finals – in a split decision at the hands of a team that whose name I will not mention. In Jessup you will probably have encountered your first occasion of working not merely through one entire night, but through multiple nights, prior to submission of memorials.

I turn then to the **second element I have mentioned: clarity**. Let me tell you one story about that. Perhaps the greatest advocate at the English bar, Lord

Grabiner QC, appeared in a trial in 2008. His junior had prepared the written submissions on a very complex point of the law of unjust enrichment. The evidence ran to dozens of lever arch files of documents. There were many witnesses. Lord Grabiner QC opened his trial address in this way cutting through the vast swathes of evidence and complex law:

My Lord, my junior informs me that this case involves an extremely complicated question involving the law of restitution. That may well be so, but they have our money and we would like it back.

Lord Grabiner's client was successful.

Finally, as for bravery, we are extremely fortunate to live in a country where advocates are rarely required to show bravery by placing their lives, or even their careers, at risk through their advocacy. But, at different times, and to different degrees, every advocate encounters moments when a choice must be made and the right decision involves some bravery. That is the choice that the great advocate will make, although hopefully without the Ciceronian flourish of explaining your bravery in great detail to the jury.

I congratulate you all on your successes this year, and wish you all well in your future careers as advocates. You will receive advice on many matters concerning the style and content of your advocacy during your careers. But if you work hard, if you express yourselves clearly, and if you make the right choices, even when they require a little bravery, you could follow the path marked by the great advocates who precede you.