

ADVOCACY TIPS

1. I agreed a basis of plea in the magistrates court but when the matter was committed for sentence, the Crown Court Judge refused to accept it? Can he do this?

Yes. Whenever an agreement between the Defence and the Prosecution is made on a basis of plea, it must be signed by both parties. This must then be forwarded to the Judge. The Judge has the sole discretion as to whether he accepts it or disregards it and uses it as a basis for sentencing. If the Judge rejects the agreement then a Newton Hearing should be held to determine the proper basis on which sentence is passed. R v Underwood [2005] 1 Cr App.R 178. If the Judge forces a Newton Hearing which is found in your client's favour, full credit should still be awarded.

2. I was been asked by a defendant to take him and his witness through a mock trial to ensure they give the best possible evidence at trial – can I do this?

Advocates have a duty to ensure that evidence in support of their client's case is presented to the best possible effect and that witnesses, especially vulnerable ones, are put at ease and understand what is expected of them. It can be very difficult dealing with witnesses without crossing the line from the legitimate assistance in helping a witness to prepare to the improper coaching of a witness in what to say.

In R v Momodou [2005] EWCA Crim 177 (paras. 61-65 of the Judgement), the Court of Appeal made it clear that "witness training for criminal trials is prohibited" It was made clear that improper witness training may lead to an honest witness feeling influenced to alter their evidence in support of a particular set of facts and a dishonest witness "rapidly calculating how his evidence may be improved"

The guidelines set out stated in part that Familiarisation could and should include explaining court procedure, advising witnesses to keep their evidence slow and address the jury, letting the witness know that it is vital to make it clear if they don't know the answer to a question or didn't understand it. It was also possible to provide expert guidance to expert witnesses who were to give evidence of a technical nature to resist the pressure to go further in evidence than their specific expertise.

You should only take part in a mock trial if it's purpose is simply to give your witnesses greater familiarity with and confidence in the process of giving evidence. If you feel that there is any risk that your involvement might lead to a witness "doctoring" their evidence then you should refuse to take part in or approve it.

If you use an outside agency to prepare your witnesses be aware that the Court said that it was " a matter of professional duty on Counsel and Solicitors to ensure that the trial judge is informed of any familiarisation process organised using outside agencies."

3. The case is almost finished and I just have to close? What should I concentrate on?

A strong closing speech is the high point of the Defence case. A good one can make the Jury forget those cross examination nightmares, whilst a bad one can scupper even a good case. It helps if you write your closing speech before the trial starts. As the trial proceeds, you should add relevant points to your speech which support the Defence and highlight errors and gaps in the Crown's case. Whatever forum you are in, do not be pressurised into making your closing speech immediately the Defence case finishes. Your client is entitled to sufficient time for you to prepare properly. Ask for time to finalise it but don't take all day.

Start by setting out the points the prosecution have to prove and remind the Jury of the burden of proof. Don't just repeat the evidence, but comment on it as well as explaining why it assists your case and not the Crown's. Never assume the Jury missed the bad points of your case and deal with them. Explain why they are not fatal. Only refer to what was given in evidence and don't be tempted to embellish what was said. There is nothing more damaging than having a prosecutor or a judge interrupt you to correct a mistake.

Finally be expressive and look at the Jury - if you believe in what you are saying and are passionate about it then the Jury are more likely to be swayed than if you just stand there, head down, in a monotone voice reading your speech out to them. Jury's expect a bit of theatre and the closing speech can get them on your side by giving it to them.

4. My client is due to be sentenced and now I have to mitigate on his behalf. Surely everything the judge needs to hear is in the pre sentence report. Do I really need to do much more than draw his attention to the important bits?

Oh yes. Mitigation is vitally important. Firstly, look up the most likely sentence. You can do this in Current Sentencing Practice by D A Thomas Q.C. There is bound to be a similar case to yours, which will give you a sound basis on which to address the Judge who will certainly have looked too. Secondly, call Character witnesses, preferably in person, but if not then provide the Court with original, signed documents. Thirdly, differentiate your client's case from other types if it puts it in a better light i.e. the dangerous driving was not in a residential area or past a school or the burglary was of unoccupied commercial premises rather than a night time burglary of occupied residential premises. Fourthly, go through all the

sentencing options and explain why each one is either attractive or not, linking the most appropriate one to the case you looked up! Fifthly, Suggest a realistic sentence option and don't forget to remind the Judge politely of the credit that may be afforded to a client under s 144 of the CJA 2003 if he pleaded guilty. It also helps to stress if he was cooperative with the police. Finally, don't over-egg the pudding. Know when to stop before the Judge becomes more concerned with how long your address is going on for, than the appropriate sentence to give to your client.