



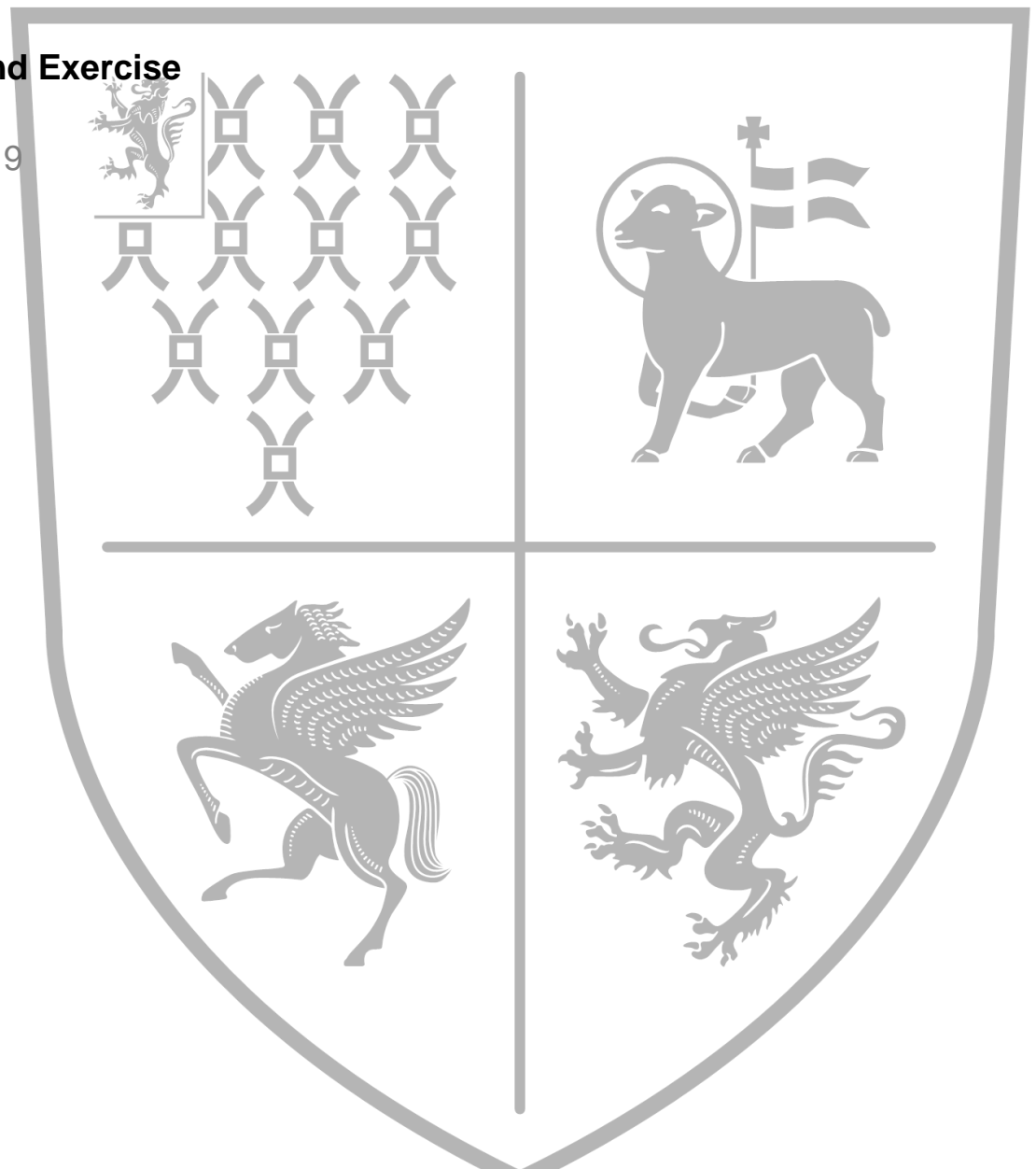
The Inns of
Court College
of Advocacy

American Inns of Court

National Advocacy Training Program: Legal Submissions

Information and Exercise

September 2019



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OVERVIEW

UK Definition

- An argument - based on the appropriate legal principles as applied to the facts of your case - made to a judge, in order to persuade him to make a ruling in favour of the side you represent.
- Such submissions may be made at any stage of the proceedings
- “Argument” in this context, means the following:
 - A series of structured propositions
 - Supported by reasons
- The argument may be one which is purely legal e.g. the interpretation of a statute or the applicability of some legal principle or authority
- It may be a factual one e.g. in a criminal case an application for bail based on the nature of the crime alleged and the circumstances of the defendant
- More usually it is a mixed legal and factual argument e.g. an application for the exclusion of evidence, or a final address in a trial, or an appeal.

US Definition

- What would be called an Oral Legal Submission in the UK would generally be called an Oral Argument in the USA. There really is no significant difference between the two.
- Issues arising before and during trial which require a legal ruling are always the province of the judge and your task as an advocate to persuade the judge of the correctness of your position.
- In the UK, you are submitting your points to the judge and in the USA you are arguing your points to the judge. Again, there really is no difference.
- During this training, you will be making oral legal submissions to a judge on the International Criminal Court. As noted above, you will really be making an oral argument.

THE STRUCTURE

- The key to effective argument is that it is designed to persuade.
- It is **not** a list of facts or a series of assertions.
- Aristotle said persuasive argument contains the following elements:
 - *Logos* i.e. **logic**
 - *Ethos* i.e. **credibility**
 - *Pathos* i.e. **empathy**
- **Logic:**
 - Identify the logical strengths of your case and the logical weaknesses of your opponent.
 - A logical argument is a conclusion(s) supported by the reasoning process based on the evidence and the legal principle(s).
- **Credibility:**
 - It applies both to the argument and the advocate presenting it.
 - A credible argument is both realistic and balanced.
 - A credible advocate is one who has:
 - Prepared in advance
 - Does not mis-state facts or law
 - Does not overstate the argument
 - Does not pursue unsupportable arguments
 - Is prepared to make appropriate concessions
- **Empathy:**
 - This means making a realistic connection with the thinking of the decision-maker.

REQUIREMENTS

In advance of the exercise, participants are requested to prepare a short written skeleton argument (summary). This should be no more than a page and should be given to the trainer at the beginning of the exercise. Some people prefer to do this in advance of the training, but most wait until after a day of training and prepare it as homework the night before.

For the purposes of this exercise the participants are divided into pairs. The respondent to the submission will be expected to deal specifically with the points raised by the applicant. Decided cases on the issue may be used in support of the submission but copies should be available for your opponent and the trainer Judge. [The submission can be handwritten.]

Time allowed for application and response will be 10 minutes each.

ASSIGNMENTS

T8 will apply for the provisional release (bail) of Walkinshaw **before** trial. The grounds for this application are:

- i. the length of time which the accused has already spent in custody and that which will elapse before the trial can take place;
- ii. that the Accused's mental health is being adversely affected by his incarceration;
- iii. that he has instructed a UK firm of lawyers and preparation for his defense will be assisted if he is in the UK;
- iv. that he can live with his wife and report as required to the local police station in Newton Stewart. If this address is not deemed suitable he can live with his parents who now reside in Carlisle.

T4 will oppose the application on behalf of the Prosecution.

T3 will apply to add a count to the Indictment, at the start of the trial, charging an Offense contrary to the provisions of Article 7(1)(d) of the ICC Statute.

T7 will oppose this application.

T6 will object to the admissibility of the confession made by Walkinshaw (Exhibit NV/1).

T1 will submit that this evidence is admissible.

(N.B. For this exercise it is to be assumed that Walkinshaw has been called to give evidence, on this topic alone, before the legal submission and that his evidence reflected the matters set out in his Proof)

T5 will submit, at the close of the Prosecution's case, that there is no case for Walkinshaw to answer on the grounds that the evidence implicating him is so unreliable, no reasonable trier of fact could arrive at a conviction beyond reasonable doubt.

T2 will oppose that submission.

(N.B. for this last exercise, the advocates should rely on the evidence given during the exercises in their court).

During the legal submission exercise in this case, you will be assigned as counsel for either the prosecution or Walkinshaw and be required to make legal submissions which are simply oral arguments to support your position.

BACKGROUND FOR ARGUMENTS

PRE-TRIAL RELEASE OF WALKINSHAW ON BAIL

In this exercise, counsel for Walkinshaw has asked the court to release him on bail pending trial and the grounds for his request are set out in the materials. In deciding whether to release him, the court will look at whether there are conditions for release which will reasonably assure his appearance at trial or the safety of the community.

Put more simply, the court will have to decide whether he is a flight risk or a danger to the community. The court wants submissions/oral argument on the request for release on bail. In making this decision, the court will examine the following factors:

- 1) The nature and circumstances of the offense
- 2) The weight of the evidence against the person
- 3) The history and characteristics of the person and
- 4) The nature and seriousness of the danger to the community that would be posed by his release.

ADDING A COUNT TO THE INDICTMENT, AT THE START OF TRIAL, CHARGING AN OFFENSE CONTRARY TO THE PROVISIONS OF ARTICLE 7(1)(D) OF THE ICC STATUTE

The original indictment against Walkinshaw charges him with a crime against humanity for murdering the civilian inhabitants of Mochrum. The prosecution now wants to add another charge – deportation and forcible transfer under Article 7(1)(d) and the court wants submissions/oral argument on the prosecution's request. The prosecution are basing this application on the evidence given by Louise Wallace of the HTA activities as a whole, not simply the incident of the fire.

In deciding whether to allow the addition of this count to the indictment, the court would focus on the question of whether or not the defendant would be reasonably ready to defend against this charge at trial without the necessity

of further preparation and a continuance. The defendant would need to show specific and substantial prejudice to his defense by adding the count and proceeding to trial to prevail.

OBJECTION TO THE ADMISSIBILITY OF WALSKINSHAW'S CONFESSION

Walkinshaw gave a confession in this case and has objected to its use at trial on the grounds that the confession was involuntary. The court wants submissions/oral argument on the issue.

The burden is on the prosecution to show the confession is voluntary. To find the confession voluntary the court would have to conclude that the defendant made an independent choice of his own free will to confess and that his will was not overborn by the pressure and circumstances surrounding the confession.

The court would generally look at the following factors to determine whether the confession was voluntary:

- 1) The defendant's lack of education or low intelligence
- 2) The length of the defendant's detention prior to the confession
- 3) The repeated and prolonged nature of the questioning
- 4) The use of punishment such as deprivation of food or sleep
- 5) Whether the police used promises or inducements

EXERCISE 4 - IS THERE SUFFICIENT EVIDENCE TO SEND THE CASE TO THE TRIER OF FACT?

At the close of the prosecution's case, Walkinshaw, through counsel, tells the court that there is no case for Walkinshaw to answer and that the case should be dismissed. This is the equivalent of a motion for judgment of acquittal in the USA. The court wants a submission/oral argument on the request

In ruling on the motion, the court must decide whether a reasonable trier of fact could properly convict on the evidence presented taking the evidence at its highest. Stated another way, could the court, after viewing the evidence in a light most favourable to the prosecution, determine that a reasonable trier of fact could find guilt beyond a reasonable doubt.

The submission/oral argument should focus on the elements of the offense and whether a reasonable trier of fact could find that the elements had been proven beyond a reasonable doubt.

TIPS & TRICKS

TEN (ADVOCACY) COMMANDMENTS

- 1) Be prepared
- 2) Start with something which will engage listeners' attention
- 3) Be simple
- 4) Be clear
- 5) Be relevant
- 6) Be polite – don't lecture
- 7) Answer the judge's question but take time to think if necessary
- 8) If using authorities, state the principle rather than reading out great chunks
- 9) Be audible
- 10) Be funny (if appropriate!)

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