

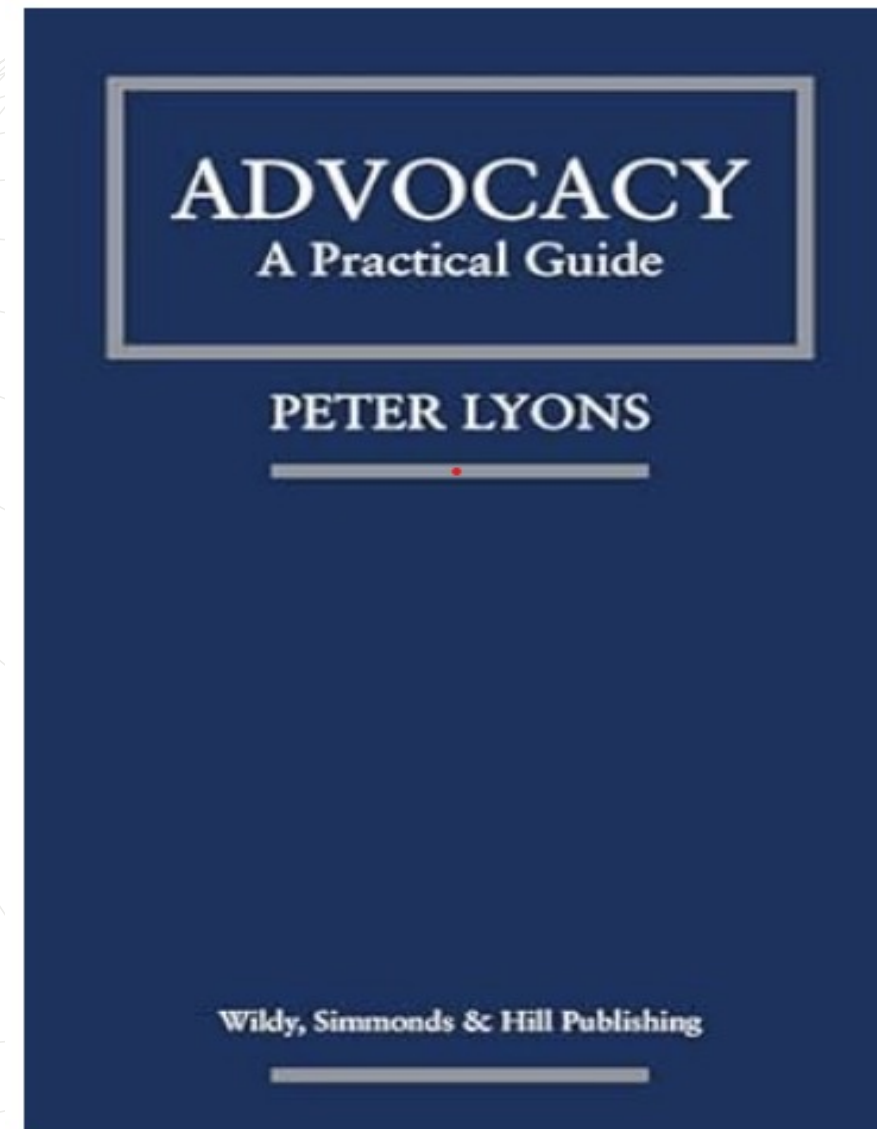
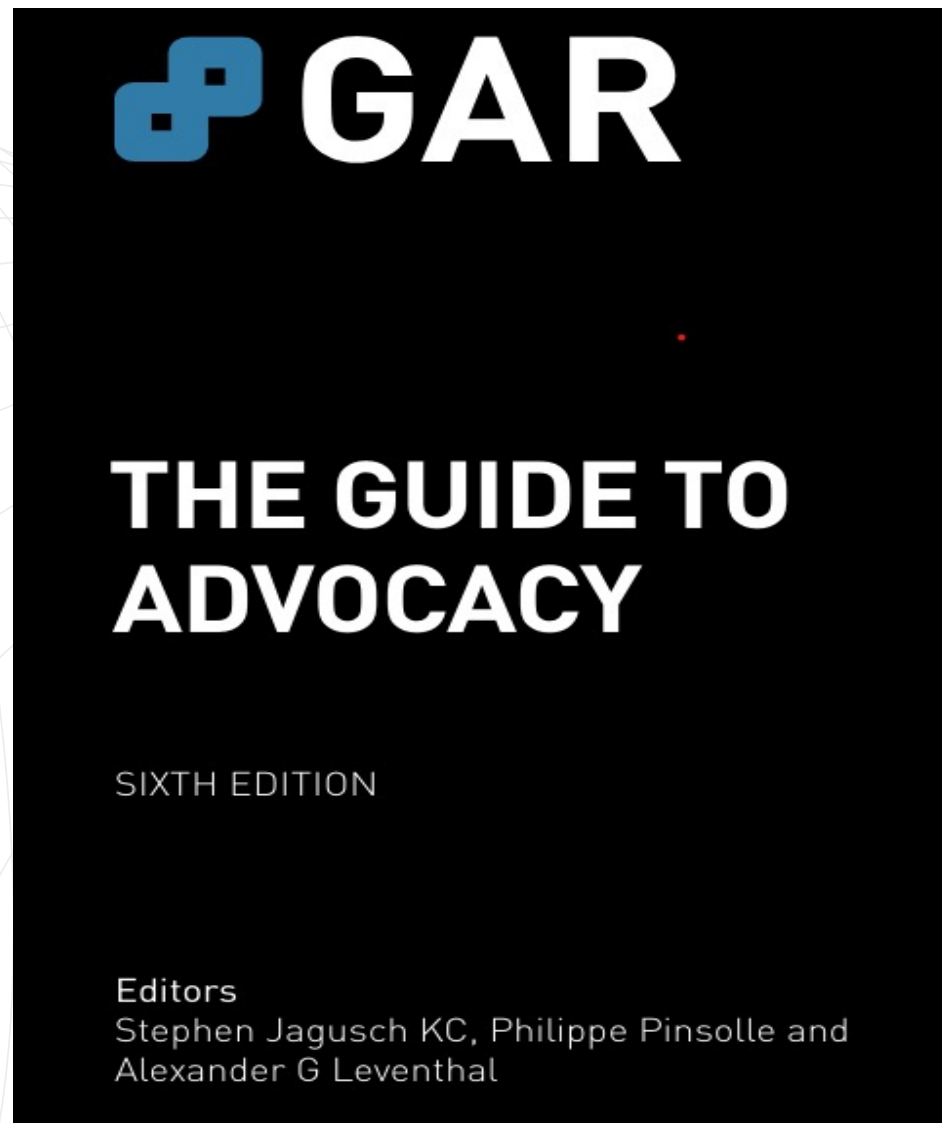
Advocacy Skills

Arbitration Lab
21 June 2024

Dr Vlad Meerovich, Partner

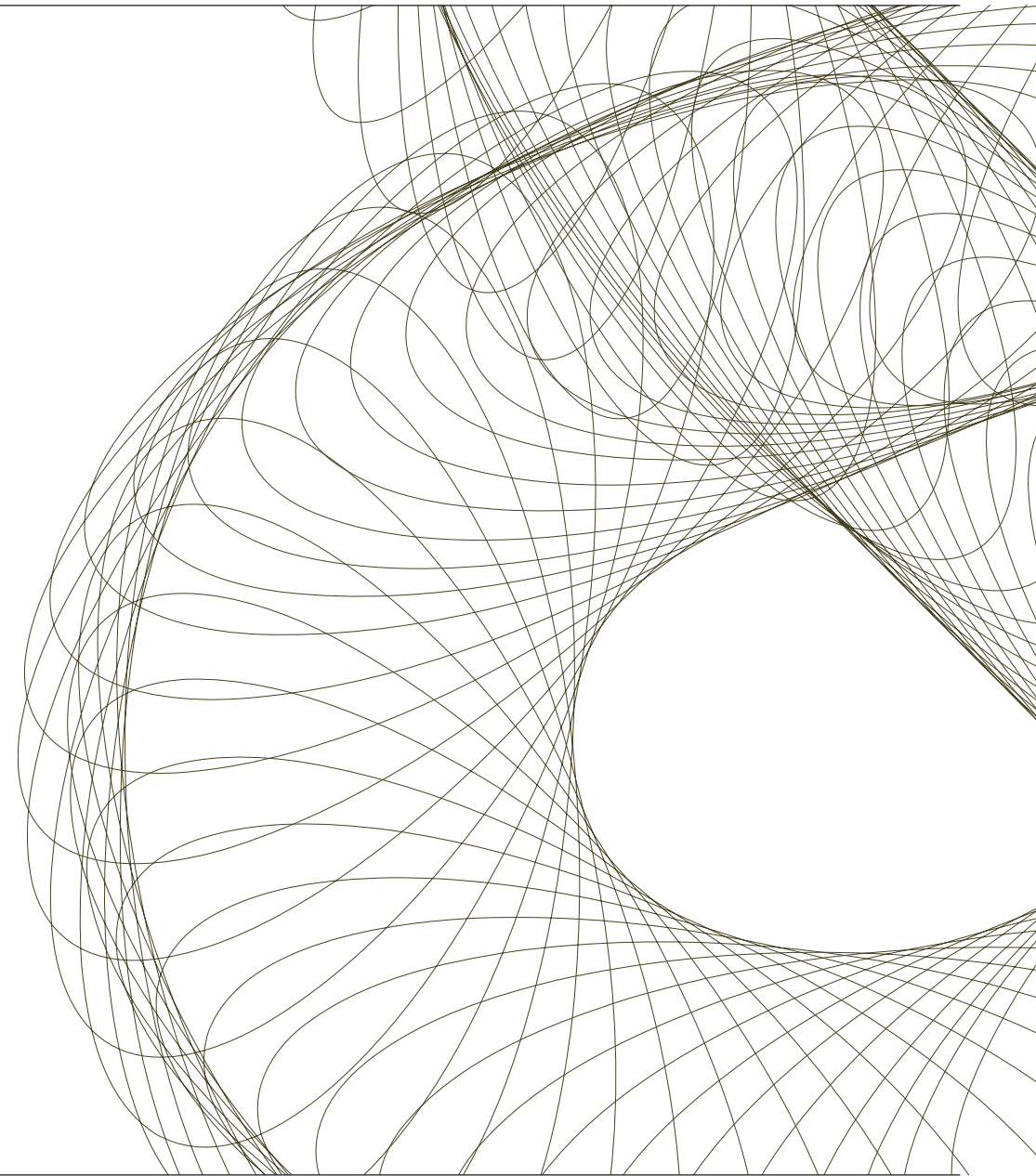


**Further
reading:**



Contents

- General points
- Written advocacy
- Oral advocacy



Does oral advocacy make a difference?

“In a significant minority of cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench. The change is seldom a full 180 degrees and I find it is most likely to occur in cases involving areas of law with which I am least familiar.”

Chief Justice Rehnquist of the United States Supreme Court

What is advocacy in international arbitration?

*“No general
worldwide consensus
of the function and
meaning of advocacy
in international
arbitration.” – Colin
Y.C. Ong*

Do you agree?



advocate meaning



advocate

noun



noun: **advocate**; plural noun: **advocates**

/ˈadvəkət/

1. a person who publicly supports or recommends a particular cause or policy.
"he was an untiring **advocate of** economic reform"

Similar:

champion

upholder

supporter

backer

promoter

proponent



2. a person who puts a case on someone else's behalf.
"care managers can become advocates for their clients"
 - a professional pleader in a court of justice.
"solicitors may act as advocates in Crown Courts"

Similar:

barrister

lawyer

counsel

counsellor

professional pleader



SCOTTISH + SOUTH AFRICAN

LCIA CASE NO. [REDACTED]

ANNEX A TO PROCEDURAL ORDER NO. 6

Date	Procedural Activity	Actor	
20 December 2021	Statement of Case (together with all documentary evidence, witness statements and expert opinions, if any)	Claimants	
25 April 2022	Statement of Defence and (if applicable) Counterclaim (together with all documentary evidence, witness statements and expert opinions, if any)	Respondents	
30 May 2022	Document production	Simultaneous document production requests (<i>inter partes</i>), if any, in the form of the Model Schedule (rows A to B of the Model Schedule)	Parties
20 June 2022		Simultaneous responses/objections to document production requests (<i>inter partes</i>), if any (row C of the Model Schedule)	Parties
4 July 2022		Reply to objections to document requests (row D of the Model Schedule), if any, and submission to the Arbitral Tribunal of: (i) completed Document Production Requests (requests, responses/objections and reply); and (ii) applications to decide on disputed requests, if any	Parties
11 July 2022		Production of requested documents to which the requested party does not object (only <i>inter partes</i>), if any	Parties
18 July 2022		Decision of the Arbitral Tribunal on the Parties' requests for production of documents (row E of the Model Schedule)	Arbitral Tribunal
5 September 2022		Production of documents ordered by the Arbitral Tribunal (only <i>inter partes</i>), if applicable	Parties

30 December 2022	Respondents to produce to Claimants the documents listed in ¶ 1 of Claimants' Disclosure Application dated November 21, 2022	Respondents
13 January 2023	Statement of Reply and (if applicable) Statement of Defence to Counterclaim (together with all documentary evidence, witness statements and expert opinions, if any)	Claimants
7 April 2023	Rejoinder (together with all documentary evidence, witness statements and expert opinions, if any)	Respondents
17 April 2023	Communication of lists of expert(s) and witness(es) required for cross-examination in the Hearing	Parties
1 May 2023	Agreement of the index of the hearing bundle(s)	Parties
[w/c 15 May 2023]	Pre-hearing conference	All
22 May 2023	Production of the hearing bundle(s) in a form to be agreed between the Parties and the Tribunal	Parties
5 June 2023	Exchange and filing of pre-hearing written submissions (shall not contain new arguments and evidence))	Parties
12 - 16 June 2023	Hearing	All
TBD	Simultaneous Post-Hearing Briefs (if so decided)	Parties
TBD	Simultaneous Cost Submissions	Parties
TBD	Award	Arbitral Tribunal

“A case without a case theory is like a car without a steering wheel.”

“The case theory is the best explanation on the available facts logically showing why your client should win. It is short, simple and persuasive. It comprises the three or four best facts and any legal proposition that is relevant.”

*After the judge has heard your case theory, you want her to say to herself
“I understand the case. If they prove that, they win.”*

Peter Lyons, Advocacy a Practical Guide

Case Theory

C's Case:

- 1) D, in a telephone call, told C she had an Assyrian sculpture circa 681- 669 BC for sale
- 2) As a result C paid D £820,000 for the sculpture
- 3) The sculpture is not Assyrian but is a Victorian copy worth £3,000
- 4) C is owed £820,000 by D

D's Case:

- 1) The sculpture is Assyrian
- 2) If it is not, C knew more about Assyrian art than D and relied on his own judgement
- 3) The description was not sufficiently important to become a term of the contract
- 4) C is not owed anything by D

An arbitration is only as good as the arbitral tribunal



Written advocacy 1 – general good practice

A lawyer is a person who writes a 10,000-word document and calls it a "brief.", Franz Kafka

- Avoid legalese –how would I say this if I was not being a lawyer?
- Use short sentences
- Active voice
- Number paragraphs
- Signpost with accurate headings
- Begin paragraphs with topic sentences – different theme/different paragraph
- Put dates at the start
- Avoid repetition
- Avoid unnecessary definitions/abbreviations
- Don't draft in anger / avoid hyperbole / reduce the temperature, don't raise it



Written advocacy 2:

Request for Arbitration and Answer /Response

- Not a mere formality (but ensure complies with the relevant rules)
- Critical first impression by each side
- State your case clearly (but inform not argue)
- Answer/Response – include:
 - any jurisdiction challenges
 - silver bullet defences (e.g. statute of limitations)
 - flag interim applications (bifurcation, security, stay)

Written advocacy 3:

Statements of Case and Defence

- Centerpiece of your case and require the most investment of time
- informs each party of the case they have to meet
- help identify facts and issues in dispute
- Must articulate your case theory:
 - Cover all important points in sufficient detail (relevant facts, legal submissions, relief, documents relied on.)
 - But be succinct for the case theory to stand out
 - Make it easy to read front to back but also as an ongoing key reference material (e.g. case summary and table of contents are a must)
- Don't rely on adjectives / Do rely on contemporaneous documents

Written advocacy 4:

Statements of Reply and Rejoinder

- Avoid repeating Soc and SoD
- Ignore common ground
- Ignore irrelevant controversy (“interesting but so what”)
- Focus on points advanced against your case that really matter

Written advocacy 5:

Pre-hearing submissions / Skeleton arguments

- Define and confine areas of controversy
- Short and persuasive
- Answer your opponent's case (make concessions where case has evolved)
- Don't quote from documents/authorities (use hyperlinks instead)
- Include reading list of key documents

Written advocacy 6:

Post-hearing submissions

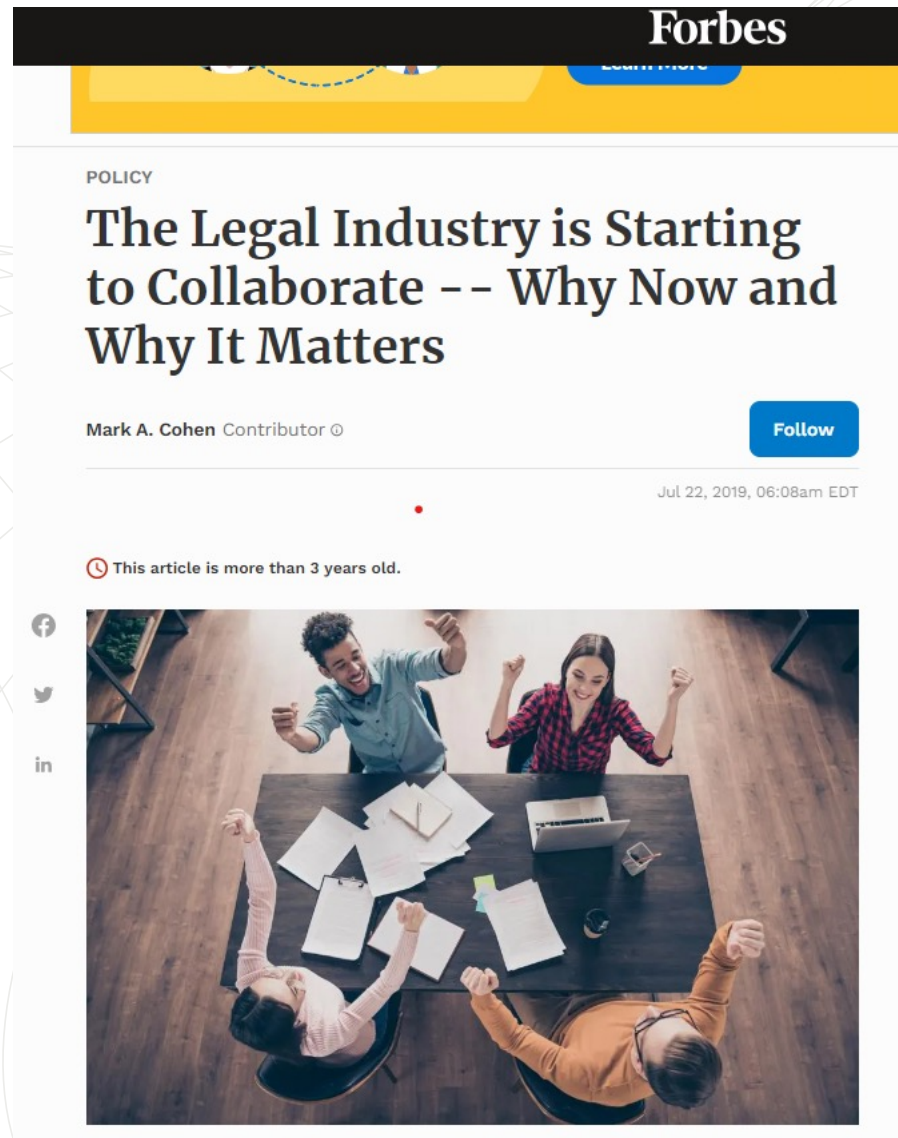
- Not always ordered – another set of documents for the tribunal to read
- Review transcripts to highlight key issues and major developments from the hearing
- Revisit your case theory with a realistic eye
- Address difficulties in your case
- Am I helping the tribunal write its award?

Oral advocacy - contents

- Case management/initial hearing
- Opening speeches
- Direct and re-direct examination
- Cross-examination of witnesses of fact
- Cross-examination of expert witnesses
- Closing speeches

Oral
advocacy 1:

Case
management
/
initial
hearing



The image shows a screenshot of a Forbes article. At the top, the Forbes logo is visible in a black bar. Below it is a yellow banner with a blue button that says "Learn More". The article is categorized under "POLICY". The main title is "The Legal Industry is Starting to Collaborate -- Why Now and Why It Matters". The author is "Mark A. Cohen Contributor @", and there is a blue "Follow" button next to it. The date and time are "Jul 22, 2019, 06:08am EDT". A warning icon and text state "This article is more than 3 years old." Below the text are social media sharing icons for Facebook, Twitter, and LinkedIn. The main image is a top-down view of four people (two men and two women) sitting around a dark wooden conference table. They are all smiling and raising their hands in a celebratory gesture. On the table, there are several papers, a laptop, and a smartphone.

“The mark of success of a good opening speech is that when the advocate sits down, the judge should be thinking, “if they prove that, they will win.””

Peter Lyons

Oral advocacy 2:

Opening

- Over-prepare and make the most of the opportunity
- Address Tribunal
- Do not read from the written submissions
- Careful with analogies or jokes
- Use less than your allocated time
- Emphasize and repeat the strength of your case
- Usually pays to address your weaknesses in the opening (allows you to frame and marginalize the weak point)
- Address o/s arguments raised in the written briefs
- Answer Tribunal’s questions

**Oral
advocacy 3:**

**Direct
examination**

*“I keep six honest serving men,
They taught me all I knew
Their names are What and Why and When
And How and Where and Who.”*

Rudyard Kipling

Is it worth it?

Mr Cavendish, May I take you to 29 April? What were you doing that afternoon?

I was in my shop when I got a phone call

Who called?

A woman called Mrs Downham

What did she say?

She said: "I have a Mesopotamian sculpture for sale. It is of a soldier and 2 horses. Circa 661 – 669"

What did you do?

I wrote down what she said on a piece of paper

Why?

Because it was important

Where is that piece of paper today?

I don't know. I lost it. But I remember what she said.

Oral advocacy 4:

Re-direct examination

MADRAS:

Must arise from cross-examination

Aim to rehabilitate

Direct to the point you want to ask about

Re-runs of the direct exam not allowed

Ask open, non-leading questions

Sparingly



Mr Cavendish it was put to you in cross examination that you relied solely on your judgement?

It was

And you replied "that's not correct"?

I did

Why did you say that?

Because I relied solely on what Mrs Downham told me about the sculpture

Oral advocacy 5: *“...a method of using your opponent’s witness to highlight the good facts of your client’s case and the bad facts of theirs. It is also used to show the omissions in your opponent’s case.*

Cross examination of a witness of fact

It is all about control. I have heard it said that the cross-examiner is really telling her client’s story, fact by fact, through the mouth of her opponent’s witness”

Peter Lyons

- Two purposes:
 - (1) Strengthen your client’s case by eliciting helpful facts from your opponent’s witness
 - (2) Undermine or discredit your opponent’s case by showing that the witness's evidence is unreliable
- Is it necessary?
- Younger’s 10 commandments
- Hilary Heilbron KC – what not to ask:
 - (1) questions on every single point
 - (2) what they think another person meant in their letter or document
 - (3) to construe words in a contract (that’s for the tribunal)
 - (4) hypothetical questions

CAVENDISH-V- DOWNHAM

Mr Cavendish, Mrs Downham called you?

Yes

On the morning of the last Tuesday in April?

Yes

She told you that you were welcome to see the carving?

Yes

At any time?

Yes

You went to Downham Gallery?

Yes

The next morning?

Yes

You looked at the relief?

Yes

Thought it was damaged?

Yes

You were not impressed?

Yes

The stone appeared to be a little too yellow?

Yes

You looked at the sculpture?

Yes

With Mrs Downham?

Yes

She told you the asking price was 850?

She did

But you could have it for 820?

Yes

You thought it was a reasonable price?

I did

You made her an offer?

Yes

No one accompanied you that day?

No

You did not bring an expert with you?

I didn't

You did not ask if you could have the sculpture examined?

No

Mrs Downham did not stop you?

She did not

You made your offer then and there?

I did

Of 820?

Yes

Oral advocacy 6:

Cross examination of an expert witness

- (1) Independent?
- (2) Qualified?
- (3) Is opinion consistent with previously expressed views?
- (4) Has the witness applied appropriate methodology correctly?
- (5) On what facts and assumptions the opinion is based?
- (6) Have certain issues been left out from the opinion? Why?

Mr Worthington, you examined the sculpture, did not you?

Yes

You carried out a chemical analysis of the sculpture?

Yes, I did

You have a Bachelors and Masters of Arts?

Yes

You do not have a science degree?

No, I don't

Or a qualification in chemistry?

I don't

Or in chemical analysis?

I have experience in carrying out chemical analyses

You don't say that in your report?

I don't

....

You did not compare the sculpture to photographs of similar sculptures?

I did not

Or to drawings or sketches?

No

You did not compare the bas-relief to sculptures of the same period?

No

...

You say that the stone is significantly harder than that found close to the Tigris River in northern Iraq?

Yes

During your examination, you did not have stone from the Tigris River?

I did not

CAVENDISH-V- DOWNHAM

Professor Fournier, you were sent 10 digital photographs of the carving?

I was

By Mrs Downham?

Yes

You concluded that you had no need to examine the carving itself?

That's correct

You were not told who took the photographs?

I was not

...

You do not know what the lighting conditions were?

I don't

Or the temperature of the room?

What has that got to do with it?

You do not know the distance the camera was from the sculpture?

No

Whether or not a zoom lens was used?

No

You could not measure the depth of the indentations?

I formed a view

You could not tell the hardness of the stone?

No

Or what it was made of?

No

...

If you had been given the choice between looking at photographs of the sculpture or the sculpture itself, which one would you have chosen?

Oral advocacy 7:

Closing

- Oral closing submissions tend to be rare
- The more complex the case, the more likely it is that written closing submissions will be of greater assistance to the tribunal
- Answer the tribunal's questions
- Am I helping the tribunal write its award?

Thank you