The Australian Bar Association Bar Readers' Trial Advocacy Course – Closing Dinner

Trials of Advocacy

Chief Justice Robert French AC
8 July 2011, Perth

Thank you for the invitation to speak to you tonight. Although I am grateful for the invitation, 25 years as a judge has deprived me of any qualifications to say anything about advocacy except as a consumer of it. I became aware of this a few years ago when, as a Federal Court Judge, I attended a Young Lawyers' Advocacy course at Bunbury and took part, as one of the counsel, in a mock trial at the end of the course. I discovered that whatever skills I had in practice in cross-examining had completely vanished.

Despite my lack of qualification as an advocate, I am delighted to speak in support of the Australian Bar Association Bar Readers' Trial Advocacy Course.

Trial advocacy training of the Bar by the Bar is in the public interest because it is designed to ensure that persons holding themselves out as advocates meet minimum standards of competence. This is not only in the interests of consumers of legal services, but also in the interest of the administration of justice. Further, it is in the interests of the Bar as a whole because it helps to secure the competitive advantage in the market for representational services that well-honed advocacy skills provide.

In Western Australia, as in some other States, the public and the profession have a substantive choice between representation by persons acting solely as barristers and advocates practising within firms. Without in any way detracting from the importance of a strong, well-organised and truly independent bar, I think that choice is a healthy thing.

The character of the profession in Western Australia as a fused profession, which has continued to operate as such, is a product of its history as a small and geographically isolated community. It is also a function of the fact that highly qualified and competent advocates, not least the newly appointed State Governor, have carried on advocacy practices within law firms. Nevertheless, the development and strength of the Independent Bar in this State reflects its capacity to provide high quality advisory and advocacy services to the profession and to the community.

Western Australia is a State that welcomed, earlier than some others, counsel practicing in other States. For many years, advocates practicing in Western Australia at the Independent Bar and within law firms have had the benefit of working with, opposing, and learning from, visiting counsel from other States.

I recall in the early 1980s jousting with James Allsop, now President of the Court of Appeal of New South Wales, over interrogatories in the *Westham Dredging Case*.[1] In the same case, I had the pleasure of working as a junior counsel to the redoubtable Robert Ellicott QC. I also learnt, from working with a leading Victorian silk, about the rationale for the two-thirds rule of happy memory. As he explained it to me: 'We don't want any cut-rate juniors.'

Sometimes a degree of parochialism was permitted. On one occasion counsel from the Sydney Bar, in an interlocutory argument before Toohey J, then a Judge of the Federal Court, told his Honour that a ruling he proposed to make did not accord with the practice of any of his brothers in the East. Toohey J gave him a Western Australian response: 'You are not on your home turf now.'

I have read the description of the approach and methodology adopted by the Australian Bar Association for the coaching of barristers in its intensive advocacy courses. It is, if I may say so with respect, an impressive, but rather frightening

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[1] *Westham Dredging Co Pty Ltd v Woodside Petroleum Development Pty Ltd* (1983) 66 FLR 14.

document. It suggests, for example, that the performance phase of the course involves 'mock' performances which 'are usually more difficult and more stressful for the barristers than an equivalent "real" performance in court.'[2] There follows the statement, which is not particularly comforting, that:

> The key to these performances working effectively as a learning experience is to make them as close to reality as possible *and* to ensure that they are done in an atmosphere of genuine professional support where making a mistake is not perceived to be an embarrassment but is seen as a learning opportunity.[3]

Many of us who have learnt from experience in the law know, however, that visceral and searing embarrassment is the teacher whom we never forget.

The necessity to attend to detail in the preparation of documents for court was driven home to me when, as an articled clerk, I attended before Hale J on an application for directions in a testator's family maintenance matter. My client was the allegedly alcoholic and adulterous widower of the deceased who, because of his perceived deficiencies of character, had cut him out of her Will. As I sat down before Hale J in what were, thankfully, private chambers, he looked over his glasses at me and said: 'How do I know she's dead?' I realised at that point that I had not included a death certificate in the papers. I stammered something about having her Will. His Honour responded haughtily: 'Well, there are people who have my Will and although they say I have one foot in the grave, I am not dead yet.'

My wife Valerie, then Valerie Lumsden, appeared before the same judge with a file given to her at the last moment by a partner in the law firm in which she was articled. She sought an order lifting a restrictive covenant. Unfortunately for her, her application was heard in open court. Observed by the ranks of her assembled

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[2] Australian Bar Association Advocacy Training Council – Essential Trial Advocacy Coaching Methodology, March 2011.

[3] Ibid at 7 [63].

peers waiting their turn, she was taken excruciatingly through each of the defects in her application and ultimately sent off by his Honour to start again with the gratuitous advice: 'Next time you appear before me Miss Lumsden, I suggest you bring down a more senior member of the firm to hold your hand, so to speak.'

A general improvement in the practice of law since those times is that it is now regarded as bad form for a judge to be rude or sarcastic. This development appears to be reflected in the conduct of your coaches and judges on this course whom, I might add, are to be thanked for the considerable pro bono contribution which they have made to the profession over the last few days.

The printed methodology for the trial advocacy course indicates that your coaches and those who act as your judges have been instructed to demonstrate empathy and sensitivity to your anxieties and possible inadequacies. The psychology of the assessments seems to be dominated by a good news and bad news approach as in, 'I have good news and bad news for you. The good news is …'. The bad news then follows, designated in the printed methodology as 'the major comment'. For those of you who are unaware of it, I should read from the ABA instruction to coaches:

> The post performance methodology.
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> …the coach will allow a moment for the barrister to settle. The coach will observe the barrister's demeanour after the performance and tailor the opening comment to suit. For example, if the barrister appears uneasy, the coach can start by identifying what the barrister did very well and then move to the *major comment*. Another approach is to engage with the barrister by asking the barrister how they thought the performance went and then run off those comments. Some new barristers are unduly harsh on themselves. If that has occurred, some reassurance provides a useful way to connect with the barrister before providing the *major comment*.[4] (emphasis added)

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[4] Ibid at 9 [85].

There is also a fine appreciation of the attention span of people subject to critical review:

> Most people find it very difficult to listen to and fully comprehend what is said to them when they are apprehensive. They are too busy waiting for the experience to end.[5]

Miscellaneous Advocacy Tips

Let me conclude by offering, as a judicial consumer of advocacy services, some miscellaneous advocacy tips in no particular order:

1. Preparation is everything. Preparation of the relevant law should include careful consideration of the array of statutes that may affect the resolution of the legal issues. You should obviously have a thorough awareness of the facts of your case and their interactions with the relevant law. At a practical level, you should know where to put your hand on any document or exhibit that you might want to refer to, or that you might be called on to refer to. My preferred metaphor for the well prepared trial advocate, as well as for the well prepared appellate advocate, is that he or she will have knowledge not just of the path to be followed to get to the desired result, but also the landscape to be traversed. The landscape of the case will consist of hills, valleys, streams, traps, woods and brambles. There may be more than one path across it. You should be familiar with all possible paths and be ready to adapt to the vicissitudes of the forensic journey.

2. Do not try to blame the judge if things are going wrong. Once I appeared in a civil case before a very experienced judge of the Supreme Court of Western Australia who is now long retired. My opponent was having difficulty getting through his cross-examination without interruption from the judge. After a luncheon adjournment he told his Honour that he had been instructed

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[5] Ibid at 9 [86].

by his client to ask the judge to disqualify himself because of his interventions. His Honour replied: 'You may assure your client that because I intervene to restrain your tedious, irrelevant and repetitious cross-examination, it does not mean that I am biased against him.'

3. You should avoid rhetorical questions in cross examination. You might get an answer you don't want from either the witness or the judge. Experienced senior counsel appearing before me in a competition law case some years ago was cross-examining a mild mannered competition economist. Frustrated by the responses he was getting, counsel said to the witness:

> 'You will say anything won't you?'

I remember commenting at the time on the uselessness of the 'question'. On another occasion, again in a civil case under the *Trade Practices Act 1974* (Cth), counsel was cross-examining his client's former de facto wife whose testimony was proving damaging to his client's cause. He asked: 'Have you heard the saying – hell hath no fury like a woman scorned?' I intervened to suggest that this was a sexist question. However the witness, nothing fazed, responded: 'Yes, and I agree with it', and went on to give further damaging evidence.

4. Do not be overbearing in address or demeanour with the witness. Sometimes this can occur unconsciously. One senior counsel, now a judge of the Federal Court, enhanced the natural advantages of his great height and intimidating Scottish brogue by his particularly threatening mannerism of flexing a pink brief ribbon in the manner of a garrotte while cross-examining the witness. I am not a great believer in judging witnesses by their demeanour, but observing a witness being cross-examined in this manner I came to the conclusion that his fear was palpable and that it would be of assistance if counsel wound up the pink ribbon. That was unconscious behaviour by the advocate. What seemed to me to be a more calculating device, to which I took objection, involved another counsel who was fond of asking if he might approach the witness under cross-examination to show him or her a document

and to point out a particular passage in it. The advocate however tended to remain looming into the witness' personal space, continuing cross-examination well beyond the point at which that proximity had become unnecessary.

5. Be calm, courteous and rational with witnesses and also with other counsel and solicitors. Bickering and silly mind games at the Bar Table, even if confined to times when the judge is out of court, are likely to infect the atmosphere of the trial and may become known to the judge. They detract from the professionalism that is required for the painstaking and difficult exercise of presenting a case. Tensions can arise not just between opposing counsel, but sometimes between leader and junior on the same side. Junior counsel and their leaders should have a clear understanding of their respective roles and, in particular, the ways in which junior counsel is expected to assist his or her leader.

6. In submissions be clear and concise:

- Provide a short and clear outline, preferably not more than three pages, for both opening and closing addresses in addition to any substantive written submissions which might have been filed pursuant to directions. This document should provide you, and hopefully the court, with a clear picture of the legal and factual propositions you wish to advance and the causes of action which you invoke.

- If you are going to assert in submission that you have five points to make, make sure it is only five. The judge will be counting. Decimalised sub-points are particularly irritating.

7. Do not get carried away by the justice of your client's case by becoming emotional in address. It is the reasonableness of your propositions that should work their magic on the judge, although a glint of moral steel showing just above the forensic scabbard can be a help.

8. Make concessions, if concessions are inevitable or otherwise appropriate. An appropriate concession can enhance advocacy. An inappropriate concession might cost you the case.

9. Be candid and ethical at all times.

Concluding Remark

What your advocacy course is all about is the acquisition of practical competencies necessary to any advocate. In that connection, I will repeat a passage from a sermon I once heard on the life of St Paul at Gray's Inn by the late Reverend Roger Holloway. I have often quoted the passage to law students and young advocates, particularly those with a burning sense of social justice:

> What the life of St Paul teaches us is that God helps the meek and the humble. He also helps the articulate and the pushy – and particularly the competent.