THE SEVEN DEADLY SINS OF ORAL ADVOCACY

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1. It is a truth universally acknowledged that as soon as someone is appointed to the bench, she (or he) begins suffering from the delusion that she is a much better advocate than any of the current crop of advocates now appearing before the court.

2. In an effort to avoid such delusional thinking, I have decided to present my observations on this topic from the point of view of a listener - a "consumer" of oral advocacy rather than a former provider of such.

3. In this session you will hear from two very experienced currently practising advocates about "how to do it" – or I suppose more accurately given the topic of this session "how not to do it". But first you will hear from me "a few things that work on me as a listener". I hope they may be of some assistance.

4. Time being limited, this morning I have decided to identify some key "sins of oral advocacy" in two stages of a criminal trial – the opening and eliciting evidence in chief – and then to talk a little bit

about potential "sins" (and corresponding virtues) in making submissions – that is when attempting to persuade.

5. Before I do, I would like to offer this generalisation: I suggest that the more specific sins can generally be traced back to one of three basic failures:

- failure to prepare properly;
- failure to organise properly; OR
- failure to think about the purpose of what the advocate is doing.

The Opening:

6. The opening is the prosecutor's opportunity to grab the audience's attention. But sometimes we get something like this.

7. Twelve people who almost certainly believe they have better things to do with their time have just been chosen to sit on a jury. Some of them are annoyed; some are anxious. They have just heard introductory remarks from the judge who has told them:

- all about the burden of proof in some considerable detail;
- about their role and the judge's role; and
- something about what evidence is and how to assess it;

and has cautioned them to pay careful attention.

8. The prosecutor stands up to open the case for them. The judge has told the jury that the prosecutor will tell them what the case is about. They perk up a bit. This could be interesting (the judge's remarks having been unusually dull). Then the prosecutor proceeds to tell them:
   - all about the burden of proof in some considerable detail;
   - about their role and the judge's role;
   - something about what evidence is and …… you get the idea.

9. He then makes some largely incomprehensible remarks about one or two of the legal issues in the case out of context and embarks on a lengthy and repetitive recitation of what he "anticipates" various witnesses will say about various aspects of the case in no particular order. The annoyed jurors are now even more annoyed. [On the plus side, the ones who were anxious are probably not so anxious any more – they are annoyed too.] And they have no real idea what the case is about.

10. This plethora of sins may not involve the sin of sloth. Counsel may have spent a lot of time preparing. It does involve a failure to prepare properly; a failure to properly organise the material;

and, above all, a failure to think about the purpose of the opening – which is to tell the jury what the crown case is.

11. The corresponding virtue of course is to tell the jury what the Crown says happened, simply from beginning to end, painting a vivid picture. "The accused went here and did this. Mr Z saw him walk down X street. Ms B saw him outside the shop at 10.00 o'clock. He was wearing the same dirty red T shirt he had worn for the last week. He went to A's house and into A's bedroom. etc" This avoids the tedious and repetitious, "You will hear from Mr Z who, I anticipate, will tell you he saw the accused walk down X street."

12. Sometimes defence counsel choose to do a brief "opening" after the Crown opening, and some defence counsel choose this time to simply remind the jury about the burden of proof. This is unnecessary and a waste of time. They've just heard it from the judge – and if they are unlucky, from the prosecutor too. Also, heavy emphasis on the burden of proof and the presumption of innocence at this point in the trial, before the jury know anything about the defence case, to me at least, sends the message, "Look my client might be guilty – probably is guilty in fact - but remember, the prosecutor has to prove it." (Thus focusing their attention on the Crown's case.)

13. Again, the "sin" is a failure to think through to the purpose of what the advocate is doing.

14. The corresponding virtue? A frank, straightforward acknowledgement of matters which are not in dispute – pointing the listener to the real issues in the case – is generally well received. It inclines the jury to feel that counsel is being straight with them. "Ladies and gentlemen, this case is about self-defence. There is no dispute that Mr X hit Mr Y with a tyre iron. You will hear from the witnesses how that came about. The issue for you to decide at the end of the trial is – are you satisfied beyond reasonable doubt that the prosecution has proved he was not acting in self-defence. That is the question the defence asks you to focus on as you listen to the evidence." (Focusing their attention where counsel wants it – achieving her purpose.)

15. If this is not possible – it may be best to say nothing.

Eliciting the evidence:

16. "Advocacy" is not confined to addresses and submissions. Eliciting the evidence from the witnesses is a big part of effectively making the case.

17. The major sin here is being disorganised which is a root cause of being boring, confusing and annoying.

18. To give an example: The witness has told of an argument between herself and the accused in the lounge room of their home, she tells how the argument continued as she and the accused moved into the kitchen where the accused picked up a knife. Then counsel says, "Now witness, I just want to take you back to what you said about the couch. Where exactly on the couch was the accused sitting?" No. We want to know what happened next! Does it matter where the accused was sitting on the couch? Almost certainly not – and if it does, why didn't counsel ask the witness this when she was talking about the couch?

19. Corresponding Virtues? The jury needs to know what happened. What happened is a story. Ideally it should be an interesting story told from beginning to end as far as possible without stops, starts or intrusions.

20. Brevity is good. No-one likes having their time wasted. Of course counsel needs to paint a picture and this will require eliciting detail – especially visual detail. But unnecessary detail is frustrating, annoying, and distracting. There is an almost universal practice of asking witnesses how long everything took and how far away everything was which I have never been able to understand.

21. To return to the example: we're back in the kitchen. The witness has described how the accused picked up a knife, she describes how he advanced on her, holding the knife raised in his right hand. Tension in the court room is high. Then counsel asks, "And how far away from you was he when you first noticed the knife?" What? Who cares?

22. To take another example: the complainant in a rape case has just described in emotionally charged detail what the accused did to her. The jury is engrossed, perhaps horrified. Then counsel asks, "And how long did he do that for?" The witness has no idea. If it happened to counsel – counsel would have no idea. And nothing turns on it. Usually, the witness will look puzzled then pick a number out of thin air – often 5 minutes for some reason, sometimes half an hour – the only possible effect of which is to cast doubt on the reliability of the witness.

23. It is surprising how much time is taken by such unnecessary details - frustrating the listener, interrupting the story and breaking the audience's attention. When I am using the transcript to summarise the substance of what a witness has said on a particular topic for the purpose of summing up, I have often reduced 5 pages of transcript down to 2 paragraphs.

24. What is the basic "sin" in this? It is a failure to organise properly and to think through to the <u>purpose</u> of the questions.

Submissions:

25. Finally, I would like to say a few things about potential sins (and corresponding virtues) in the context of submissions in general – that is to say in explicitly persuasive advocacy.

26. Before doing so, I would like to offer another generalisation. In addition to the three basic "sins" I have already identified, I suggest that **some** of the specific sins committed in the course of making submissions can be traced to the more general sin of forgetting that one is talking to another human being.

27. When engaging in oral advocacy (or in the case of some practitioners indulging in oral advocacy – in extreme cases even committing oral advocacy), the advocate can bring added value to the exercise – or detract from it - through her personal physical presence.

    <u>Here are five "tips" about what works on me as a listener.</u>

    <u>Tip no 1</u>:

    - Counsel who make <u>themselves</u> the focus of the address, using rhetorical tricks and flourishes, talking in generalities, using

inappropriately informal language, or trying to be funny, invite suspicion and scepticism. (This is the sin of pride.)

- The corresponding virtue? Counsel who are businesslike and serious about what they are doing and who talk logically about the facts and the issues inspire trust and confidence.

  (The basic sin, again is a failure to think about the purpose of what counsel is doing which is to persuade the decision-maker to decide the case in the client's favour – not to persuade them what a fine fellow counsel is.)

  Tip No 2:

- Counsel who sound confident inspire confidence.

- For young advocates - it can be hard to sound confident when you are shaking in your boots but some people practice in front of a mirror. And of course the more thorough and focused the preparation the more confident the advocate will actually be.

Tip No 3:

- The advocate needs to engage the audience.

- Eye contact is important.

- Reading submissions from the page is a mortal sin. (It's unimpressive; it's impolite and in my experience, especially irksome to juries.)

- It really pays the advocate to pay attention to the reaction she is getting. If you see a judge begin to make a note of what you are saying, it probably means they think that point is important – don't race ahead regardless onto your next point. Let him get it down. If you see a puzzled frown you might want to slow down – or expand a little on that point.

(Remember you are talking to another person – or people.)

Tip No 4:

- Listeners can only take in and retain so much. A logically structured address that focuses on the best point (or couple of points) is more effective than one which exhaustively makes every available point no matter how trivial or unconvincing.

- Too many points can cause the listener to lose interest and concentration.

- Confidently urging a bad argument can cause the listener to become sceptical of your good arguments.

- On a related point – overselling something sets up consumer resistance. To use a jewellery analogy: it might be a very nice garnet and the tribunal might be willing to buy it as such, but if you try to sell it as a ruby, you will lose the trust of the listener and they may well not buy it at all.

- One word that sets up automatic consumer resistance in me is "clearly". It is usually a signal that what follows is anything but obvious.

Tip No 5:

- An interesting voice keeps my attention - juries too. Using variations in pitch, volume and speed of delivery to enhance meaning and give emphasis can be effective – provided it serves that purpose. So can the use of strategic pauses to emphasise a point.

- Oh, and speak up! Some of us are over 60.

Conclusion:

28. In the end it comes down to the same old message "preparation, preparation, preparation" – but the key message I wanted to get across in this list of "hints" from one of your listeners - is the importance of the right kind of preparation and organisation, which begins with thinking through the purpose of what you are doing and shaping the preparation to advancing that purpose at each stage and in each aspect of your advocacy – and also remembering that you are talking to and attempting to persuade another human being.

29. These observations have come across as a little negative because the topic of this session is the seven deadly sins of oral advocacy – so I wanted to end by saying that, while I have had some advocacy inflicted on me (some even committed in my presence) – by and large I have had the privilege and pleasure over the last 10 years to experience admirably competent, intelligent and skilful advocacy from counsel at the Northern Territory bar and from interstate.