

# Through the Looking Glass

*As the nature of practice at the bar changes with greater use of alternative dispute resolution and changing financial climates, advocacy experience doesn't come as easily as it once did. While one may regard the effectiveness of one's advocacy style as reflected by the*



*workflow, there is no doubt that advocacy style is in a constant state of evolution. Over time, every advocate develops their own particular approach to structuring an argument, as well as idiosyncrasies and mannerisms which, while they may be endearing to some, may be irritating to others, particularly those the advocate is seeking to persuade.*

While books and papers on effective advocacy are an important tool to a barrister in developing an effective advocacy style, they of course cannot serve as a substitute for experienced advocates and members of the judiciary observing and commenting on how you present both your written and oral argument. The ABA Appellate advocacy course serves to do just that by placing the performance of the participants, both in terms of the written and oral presentation of a mock case, under a magnifying glass and having both members of the judiciary and experienced silks observe and comment on the performance. While the process sounds daunting it is one worth undertaking to assist a barrister to further develop essential skills focussing on the strengths of one style and discarding less effective methods and perhaps annoying habits.

The Australian Bar Association introduced the appellate advocacy course in September 2012 apparently after some urging by some members of the judiciary who identified a need for some barristers to improve their skills when appearing before them in appeals. Such an improvement was necessary to assist the courts to meet growing case management of appellate proceedings.<sup>1</sup>

The appellate advocacy course for September 2013, took place in Sydney in the Federal Court. The barristers attending the course varied in seniority from middle Bar to Silks from a number of different States and Territories, with one barrister attending from New Zealand. A wealth of talent was gathered from the judiciary from both Federal and State Courts as well retired members, including the Honourable Michael McHugh AO QC, formally of the High Court. Justice Fraser and Justice Martin were amongst those who generously gave up their time to sit as Judges, as did Mr Michael Copley QC who attended to assist in the coaching of the advocates. Kelsey Reisman also provided support to all attending and ably kept the show on the rails.

The course participants attending the course were briefed with a mock case that involved seeking leave to appeal from a judgment in the Federal Court and then appearing at the appeal. Prior to attending for the three day course, each participant had to provide written submissions for one party for both the leave to appeal and the appeal. Inevitably you find that it requires more time to prepare the submissions than you have set aside. Juggling that

with your practice results in a few late nights but it ensures that participants extract the most they can out of the course by being well prepared and having given thought to the problem. As you receive feedback on both your written and oral advocacy it also serves to highlight the points of distinction between them in the presentation of a case and the differing focal points.

The ABA course operates on the premise that the best way to test and improve skills is by placing advocates in the position of arguing a mock case. Experience indicates that is the most effective method. Given the focus of an appellate advocate is solely on persuading three members of the judiciary as to the correctness of your client's position, the ABA sought the involvement of the judiciary to sit as Judges to hear the argument. Asking Judges to explain what they find persuasive and why, and what they find distracting or lacking utility, informs the advocate's task of persuasion.<sup>2</sup> Senior Silks sit in and observe the participants and provide more detailed feedback. Thus participants have the benefit of feedback from both the Bench and the Bar who provide a healthy cross section of commentary. This approach avoids the notion that there is a "one size fits all" advocacy style and helps advocates focus on their own individual style and how to improve that individual style when seeking to persuade to the court. In addition, one has the benefit of appearing against advocates from all over Australia and observing their techniques as well as having the benefit of the commentary in relation to their style.

Advocates are then paired up and appear generally before a Judge or retired Judge. After receiving comments from the relevant judicial member, each advocate then has a coaching session with the two silks who had been sitting observing the argument. They provide feedback while playing back a DVD recording of the performance. The coaching session dissects all aspects of your performance, including not only the structure of the argument, but voice projection, eye contact, hand movements, use of written notes, reference to cases and the posture at the lectern. While such a process is inevitably confronting for the participant, the comments are presented in a constructive, albeit direct manner focussing on your strengths and weaknesses and providing suggestions as to how you may improve your performance. It is particularly helpful to be made aware of habits that you are not conscious of when you are speaking which may be distracting to the bench you are seeking to persuade, as well as your more persuasive techniques. In the afternoon session, the same process is undertaken with a different opponent and Judge, but each participant must argue for the opposing party to the one that they represented in the morning.

The first day begins and ends with comments from the Judges and Coaches. Mr Todd Alexis SC, chaired the three days. On the first day the Honourable Justice Beazley AO, President of the New South Wales Court of Appeal and the Honourable Justice Allsop AO, Chief Justice of the Federal Court of Australia, provided an overview of the Court's expectations of appellate advocates and how they may be met. Mr Phillip Greenwood SC also provided an outline of what the course seeks to achieve. The day ended with a panel discussion consisting of members of the judiciary and some silks on "Engaging the bench and Engaging with the bench".

On the Saturday the focus was on the appeal. Again, each participant had to argue both sides of the argument, one side in the morning and one side in the afternoon, before a bench of three. The bench generally consisted of a Judge sitting with two silks. Time limits were provided for arguments and were enforced. Again after the finish of the appeal, comments were made by the Judge in terms of the performance and arguments presented. The Judge

then left the room and the two silks who had sat as part of the Bench then provided a coaching session.

Much thought has gone into structuring the course to ensure participants derive the greatest benefit. For instance, a participant must prepare an outline for leave to appeal for one party and an appeal outline for the opposing party so they are in a position to argue both sides of the argument. Separating the argument for the leave to appeal and appeal to separate days permits participants to experiment with some of the suggestions made on the first day when arguing the appeal.

On the last day, participants are divided into groups and a judge or retired judge who has reviewed the written submissions of each person in the group provides comments on each person's submissions. Participants are given the opportunity to rewrite their submissions over the weekend prior to the review if they wish.

The course is not for the faint hearted and requires significant preparation, which would warm the cockles of Justice Fryberg's heart. Our profession is not however one for the faint hearted. As with all of these courses you get out of it what you put in. All of the Judges and the silks who act as coaches come well prepared and are ready to put advocates under pressure. The quality of those running the course and those judging the arguments tends to steel the focus of all who are participating. It is however a case of providing a forum for a barrister to ask the questions that you always wanted to ask after presenting an argument but, of course, can't ask.

The course is not all work. On the Saturday night, participants and those undertaking the training are invited to attend a dinner. A fabulous Italian restaurant was chosen and a lot of fun was had.

Every child wins a prize and each participant is sent home with a memento of their performance. Each participant is given a USB stick with the video of his or her oral performance to take and review at your leisure. It may have the added benefit of providing a cure for insomnia.

The course is well worth doing. I would suggest it is more worthwhile for barristers who have been in practice for more than five years and have undertaken some appeals. It inevitably takes far more time away from your practice than you have set aside and having signed up to the course, you wonder, when you are preparing written submissions late at night, why you did this voluntarily. But of course, advocacy is one of the key skills of the Bar which separates us from the rest of the profession and like every skill, the more you work at it the more effective you are as an advocate. Even if you walk away from the course with nothing more than reassurance that you are on the right track and suggestions of some subtle changes which will prove that the persuasiveness of your style, that is an enormous benefit.

So if you get a call from the charming Stewart QC with his dulcet tones enticing you to undertake one of the courses, I would encourage you to take up the gauntlet. At the end of the day our task is to persuade and the opportunity to have those who listen to us or appear against us commenting on whether we achieve that goal cannot be overvalued.

**Sue Brown QC**

- As to the genesis of the course see C P Shanahan SC "Appellate advocacy: A new course for barristers" (2013) 36 ABR 310
- Appellate advocacy - a new course for Barristers, CP Shanahan SC, (2013) 36 ABR 310 at 312