

## APELLATE ADVOCACY

### LEGALWISE SEMINARS "ALL YOUR CPD POINTS AND MORE"

24 February 2017

In January 2013 I had the dubious honour of convening the week long Australian Bar Association Advanced Advocacy Course at the then new and quite magnificent Queen Elizabeth II Courts of Law in Brisbane.

One of the overseas coaches participating in the course was renowned English silk Nicholas Green QC who had flown more than halfway across the world given that he had come to Brisbane directly from a "train the trainers" advocacy course in Johannesburg.

Nicholas presented a paper entitled "Submission Advocacy" which embraced a number of different things but of course among them, the subject of addressing appellate courts.

The paper focused on 13 points which I propose to include in one way or another in this presentation if for no other reasons than that I can't think of any others and that I couldn't put them any better than Nicholas did. I will say a little more about some of the rubrics on which Nicholas based his paper however I would like to commence by quoting him on what I believe to be the most important aspect of oral appellate advocacy which in the modern era involves presenting argument to an appeal court on the back of previously delivered written submissions.

That most important of all hints was, "Identify a small number of key points".

Green QC put it by way of an analogy which in my view repays keeping firmly in mind at all times, particularly before busy appeal courts and particularly before courts where the judges have already received detailed written argument from both sides. He said:

"Part of my practice is in European law and over the past 25 years I have appeared in over 100 cases before the European Court of Justice in Luxembourg. This means that advocacy occurs before a panel of judges who will hail from a variety of civil law jurisdictions ranging from Malta to Lithuania. In that court you are given strict time limits, usually 20 to 30

minutes. I was told by a very senior judge when I first started appearing that you had to imagine that the panel of judges were like passengers on a train departing the station. You have a crucial message to convey to them but the train is starting to move and your message is complex. Your task is to convey the pith and substance of your message quickly and effectively. The key is always to seek to identify those very few points that if they are accepted will win you the case. Build those points up and make them the centrepiece of your submissions."

Remember what has been dubbed the "infection" theory of advocacy – your weak points infect your good ones.

In a paper presented by Allsop P, as his Honour then was, at Lincolns Inn in January 2012 his Honour said much the same thing in these terms:

"Remember – your court will be busy. They will have read your written submissions – perhaps more than once, perhaps once. They are quite likely not to have fully absorbed them. You have a group of intelligent, busy people who may have a jumbled or confused understanding of what you want to say. You have to ensure that the structure and detail of their understanding accords with your argument. What must they grasp? What structure of argument? What central body of facts? Take them in the materials to what you wish them to understand. Do not just read the written submissions. Time is precious. Think about what case, what facts, what parts of the trial judgment you wish to read – then and there."

In my experience the real difficulty presented by the very valuable transition over the last decade from chiefly oral argument to principally written submissions is to know how to present to the court in a persuasive way, which of course is the essence of good advocacy, the essence of your written argument, the pith and substance as Green QC puts it.

Of the very fine advocates I have had the privilege of appearing with or against what each of them had in common was that their oral argument plucked the very heart from their written submissions but did not necessarily refer to the submissions expressly or even speak directly to the written document. The worst possible advocacy is to waste an appeal court's time by reading out word for word your written submissions or even paraphrasing them paragraph by paragraph.

Finding the balance is not always easy as not all appeal court judges will have had time to read everything in the appeal book and the written submissions filed.

In Tasmania, Practice Direction No 6 of 2005 states at paragraph 2.1.2 that you may assume that the judgment below or the summing up and the notice of appeal have already been read by the Full Court. However often with a busy court with no separate Court of Appeal that is all you may assume. If a member of such a bench calls upon you, either expressly or impliedly to address your written submissions in more detail then you will need to do so, whatever I may have said or am about to say in this short paper.

On the other hand, in Victoria and New South Wales before dedicated courts of appeal and before the Full Federal Court and the High Courts of Australia you can take it that you will need to address only the essential features of your case and not your written submissions.

As I have already said the difficulty is to know how to cope in every circumstance.

My practice as counsel, even before the requirement of the High Court to hand up a written outline of oral submissions in addition to the written submissions earlier filed, was to prepare a single page typed page of oxymoron equally entitled "written oral submissions". I would work from that document and not from the written submissions.

It needs to be remembered that it ought to be taken as read that as counsel you rely on the written submissions that have been filed. Out of excessive caution it does no harm to state that clearly to the court. However, given that those submissions have been filed and are relied upon the best advocacy in my view involves starting with that one-page distillation comprising short paragraphs or even dot points, each of which hopefully pick up the essence of each major point contained in the written submissions in a logical order and then to see how that distillation develops into a dialogue with the bench.

Often you will find that a few sentences into your oral submissions you are asked questions which take you away from the order in which you have set the issues out in your document. At an appellate level interruption from the bench is inevitable. Indeed, if it is missing altogether counsel should regard it as ominous.

When interruption occurs, if you have your "written oral submissions" set out in self-contained short paragraphs you can then go directly to the paragraph that contains the answer to the question you've been asked (or hopefully does) and you can then come back quite easily a little later to where you were and start again. It is not quite so easy to do that if you are working from the long and detailed document that contains your written submissions.

This is what Hayne J in his paper given to the Western Australian bar in Perth in October 2004 entitled "*Advocacy and Special Leave Applications*", referred to as "cutting and pasting". That is to say you simply "cut" the paragraph that contains the answer and "paste" it at the position you are at, picking up again where you have left off after you have addressed the question

On the other hand if the question requires more by way of an answer than you have set out in the short paragraph in your "written oral submissions" that document will still work for you as an index to your longer written submissions to which you can then justifiably go and direct the court's attention to what is set out there.

On the subject of questions from the bench I offer a number of comments.

You must stop immediately; engage the judge who is asking you the question listen to the question carefully. You must not be over anxious to answer the question just because you think you know the answer. You need to think about it. The question may not be as simple as you think and it might well contain a deeper underlying issue. There may be a knife in the napkin, or like *The Life of Pi*, a lion in the life raft.

You must not, either in your anxiety to answer the question, or for any other reason, speak over the top of the judge who is asking the question. If you do, apologise.

On the other hand do not be obsequious. Limit the number of "your Honours" and "if it please". Overuse of these phrases is irritating and it is not necessary in order to be respectful to pepper everything you say with these ritualised incantations.

You can be conversational in the presentation of your oral argument with considerable effect, so long as you are not disrespectful in tone or inflection.

Allsop P had this to say on the subject:

" 'Why are you taking us to this Ms X, the references are all in your very helpful submissions? his Lordship asks, not without a touch of impatience. 'Yes you're Lordship; they are, but I wish to take you to selected parts of the evidence of the meeting to demonstrate that there can be no doubt that the learned judge's findings on the central issue were wrong. I will take you to the first three references in [61] and leave the court to read the other seven there referred to which are in like terms' "

Allsop P said "judges love that" because you are showing you have a command of the paper, you have a command of the facts and your brief, and you have the command of the court. His honour said that well-structured submissions enable you to achieve what all advocacy is about, that is control of the occasion and persuasion.

While on the topic of the sparing use of transcript references I should say in my view that equally sparing use should be made of authorities. The relevant authorities will be in your written submissions with page references and important passages set out in full. Nothing is more annoying to the judges of an appellate court than to have counsel read passage after passage from the judgments or from the quotations from them set out in the written submissions. Only the most important, highly authoritative, and never trite case law should be read to the court aloud.

Several authorities for the same proposition should not even be cited in your written submissions, except perhaps as footnotes. The leading case from the highest authority is sufficient. Other judicial articulations of the same point are not helpful to the court unless somehow the way in which a particular judicial explication is framed puts as well as you could wish for the gravamen of the particular point that you advancing in persuasive or powerful language.

Another of Nicholas Green QCs 13 points was to "avoid repeating the point". What he was saying, which ties in to an extent with what I was saying about listening carefully to judges' questions to gauge the level of abstraction, was not to assume that a judge has failed to understand the point and then to repeated again just for good measure. It goes without saying that a point is not improved by repeating it or by embellishing it with epithets or intensifiers.

Headlining the points that you propose to make at the outset of your oral submissions is often no bad thing and can provide the court with a roadmap of your submissions. However as Green QC pointed out in his paper, if you say

you have four points then stick to them because the judges will have written down the four points and if it turns out that there are six points, or worse still, four points each with five subparts, your headlining will have proved confusing and not helpful.

Knowing your bench is obviously important. I have already alluded to the difference between dedicated courts of appeal and busy judges sitting in term between court sittings such as occurs in Tasmania. You need to watch and listen carefully in order to understand whether a particular point needs to be stressed to a particular judge and to avoid labouring a particular point if it appears to be grasped.

In New South Wales when the judges' allocation comes out to members of the Court of Appeal for a particular sittings, the list will have a star against the name of one judge who has been assigned the role of drafting the first judgment for the consideration of the other members of the Court, before the court sits. Sometimes that happens elsewhere and it is useful to be alive to the possibility that a more intricate aspect of the argument you are advancing would benefit from being addressed to a particular judge.

Green QC makes a point that wit and humour can be effective if used that sparingly and successfully. Another school of thought is that all jokes are best left to the judges.

Nicholas tells the story of being led by the legendary Sir Sydney Kenbridge QC who was addressing the Supreme Court in London on behalf the Law Society the day after his 90<sup>th</sup> birthday. He opened his submissions by saying "I have three points: One is very good: one is quite good and the third is not very good. Upon being asked from the bench to tell the Court which was his very good point Sydney replied "that is for me to know and for you to find out".

Kenbridge was renowned for his wit and deadpan delivery. As an advocate in South Africa he had acted for Nelson Mandela and Archbishop Desmond Tutu in the 1950s for Chief Albert Luthulu, then president of the ANC. He was played by Albert Finney in a film of the Stephen Biko inquiry.

Personally I would wait until the day after my 90<sup>th</sup> birthday before imitating Sydney's humour.

Finally I would like to say that it must be remembered that advocacy is a performance art. At the Advanced Advocacy Course I mentioned earlier and at

other such courses throughout Australia each year the Australian Bar Association engages performance coaches to work with the registrants.

In 1904 Francis Wellman published what is regarded as the seminal work on cross-examination, entitled *The Art of Cross-Examination*.

During your careers, you will see very few brilliant cross-examinations but you will experience many ineffective ones.

Wellman himself had cross-examined some 15,000 witnesses over 25 years when he styled his book *The Art of Cross-Examination*. He may not have appreciated that his thoughtful approach to the subject was drawn from that very experience. In my view cross-examination is not a gift somehow granted genetically only to some individuals, it is a performance art that can be acquired by anyone and used effectively through careful planning and preparation.

Advocacy and in particular appellate advocacy is exactly the same. Like tennis or golf your skill levels can be improved by careful attention to the components of the performance and the thoughtful execution of those components.

Justice Stephen Estcourt

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