CLINICAL EDUCATION UNIT UTAS LAW SCHOOL

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"I didn't have time to write a short letter, so I wrote a long one instead."

Mark Twain

Advocacy is a performance skill. It is not a gift somehow granted genetically only to some individuals. It is a performance skill that can be acquired by anyone and used effectively through careful planning and preparation. 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.

The relevance of Twain's quote is that the thoughtful execution of the components of the performance is painstaking because of the need for brevity and clarity in the presentation. The best advocates you will hear make it look easy with their clear and economical use of language. But that is the result of a mastery of the relevant facts and law and the reduction of the points to be made into simple statements.

The framing of the issues into no more than about 75 words phrased in separate sentences is a useful technique in achieving that goal.

An example of framing the issue often given is the case of a man charged with murder whose doctor is unavailable to give evidence at his trial, and an application for an adjournment has been made. The issue might be framed this way, in three sentences.

John Smith will likely be convicted of murder and sentenced to life imprisonment at next week's trial unless he can present evidence of his mental

condition. Smith's psychiatrist must undergo emergency surgery to remove a tumour that his doctor has only just discovered. It would be unfair not to grant an adjournment of the trial.

However, in order to frame the issues you need to first find the real issues, and in order to find the issues you need to go through a process of disposing of everything that doesn't go to the heart of your argument. Do I need this to make the point?

It is hard work and requires a disciplined approach. Each word you use must be carefully chosen so as to endeavour to make crystal clear to a first time listener what are frequently complex propositions.

Remember that a point is not improved by repeating it or by embellishing it with epithets or intensifiers. A good argument speaks for itself.

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

An English friend, barrister Nicholas Green QC 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 90th 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 and, in the 1950s for Chief Albert Luthulu,

then president of the ANC. Kenbridge was played by Albert Finney in a film of the Stephen Biko inquiry.

But it's better not to run weak points at all, and as we will see in a moment, it is not ethical to advance hopelessly weak arguments.

Another useful technique is "headlining" the points that you propose to make at the outset of your oral submissions. It is no bad thing and can provide the court with a roadmap of your submissions. However, if you say to the court that you have four points, then stick to them because the judge 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.

The guiding principle is that you must be able to present your argument in a way in which you are engaging the Court. Counsel who puts his or her head down in order to read a prepared speech, or a slab of judgment, foregoes any opportunity to engage the Court.

The key is practice of course. As I quoted in my paper *Appeal Advocacy – Written and Oral* (delivered at the New Technology and Trial Practice Workshop Port Moresby, 18 – 20 March 2019), Justice Robert Jackson, a former Associate Justice of the United States Supreme Court, said that as Attorney General he made three arguments in every case:

First came the one that I planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

As to ethical advocacy in the court room, the best-known exposition of the parent duties is in *Rondel v Worsley* [1969] 1 AC 191 at 227. It

was there said that every counsel has a duty to his or her client to fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he or she thinks will help the client's case. However, importantly, it was also said that, all of that notwithstanding, the overarching principle is that counsel must not mislead the court.

This obligation is now enshrined in rule 24 of the *Legal Profession (Solicitor's Conduct) Rules* 2020 which provides that a lawyer must not deceive or knowingly or recklessly mislead the court and a lawyer must take all necessary steps to correct any misleading statement made by him or her to a court as soon as possible after becoming aware that the statement was misleading.

A lawyer will not however, have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by his or her opponent.

Although it arose in the context of mediation, in *Legal Services Commissioner v Mullins* [2006] LPT 012, Byrne J found a barrister guilty of intentional and fraudulent deception by remaining silent, during negotiations, about his client's reduced life expectancy brought about by the recent onset of very significant secondary cancers and the commencement of chemotherapy.

Incidentally, I think that the topic of ethical limits in negotiations and in mediation is much neglected. If you are interested, there are two very good papers available on the internet - *Effective and Ethical Negotiations* by Campbell Bridge SC, published in February 2011; and *The Ethical Limits of Advocacy in Mediation* by Robert Angyal SC, published in May 2011.

Next, it must be recognised, I think, that counsel, be he or she solicitor or barrister, is independent in presenting a client's case and must not misuse court time. This means that counsel must refrain from irrelevant cross–examination and from pursuing submissions that are really unarguable, even though the client may wish "to chase every rabbit down its burrow", as Mason CJ put it in *Giannarelli v Wraith* (1988) 165 CLR 543 at 556.

All clients are entitled to express their wishes about the conduct of a case and have them considered by their lawyers. They are also entitled to an explanation as to what is being done and why. However, it is improper for a lawyer to act as the mere mouthpiece of a particular client in court. It is up to the lawyer to decide what is to be said and done in court.

Sometimes this obligation may be difficult to communicate to a client. However, it is of fundamental importance. The court process is part of the government of a civil society. Judges depend upon lawyers fulfilling their duties as court officers to be able to conduct court proceedings that are fair and efficient. The duty of lawyers to the court is paramount and must be performed even if the client gives instructions to the contrary.

This was recognised by McHugh J in the High Court in *D'Orta-Ekenaike v Victoria Legal Aid* 2005] HCA 12, 223 CLR 1, [111] - [113], where his Honour said:

Thus, in many situations arising in the conduct of litigation, the common law requires an advocate to act contrary to the interests of his or her client. I doubt if there is any other profession where the common law requires a member of another profession to act contrary to the interests of that person's client …

This paramount duty to the Court is now enshrined as rule 7 of the *Legal Profession (Solicitor's Conduct) Rules*.

Another sometimes difficult area of ethics is the independence of counsel. Where independence of counsel may be undermined, then counsel must not act for the client. This clearly occurs where counsel may have previously acted for the opposite party or may be a witness in a case, or where there is a classic conflict such as a personal interest, one way or another, in the outcome of the case.

The point I alluded to earlier about hopeless arguments was neatly summed up in *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683 at [24]. The Queensland Court of Appeal put it this way:

I would prefer to say that it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it. In my opinion, with respect, it is improper for counsel to present, even on instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable.

As to witnesses, I expect that everyone appreciates that there is no property in a witness, including an expert witness, that you should not confer with witnesses together, (other than perhaps some interdependent expert witnesses), and that no witness may be coached, including an expert witness.

There are now specific rules about the integrity of evidence, but if you would like to read more in the area of dealing ethically with expert witnesses, there is a very useful paper by Declan Kelly SC and Dan Butler presented to a Bar Association of Queensland seminar on ethics on 1 December 2010, entitled, unsurprisingly, *Ethical Considerations in Dealing with Experts*. It is published online in *Hearsay,* the journal of the Bar Association of Queensland. There is also an article in the Autumn 2013 edition of our own Law Society's *Law Letter* by G Blake SC and P Doyle-Gray entitled *Can Counsel Settle Expert Reports?*

Understand also though that precisely the same rationale that produces those rules, namely the protection of the integrity of evidence, underpins the rule that prohibits counsel from conferring with a witness, including an expert witness, under cross-examination.

Now, I think that it is universally understood that a lawyer to whom a client has made a confession of guilt may nonetheless continue to represent the client if he or she wishes to plead "not guilty", and indeed, subject to the new conduct rules, must continue to do so if the confession is made during the course of the trial. However, the obverse seems less well appreciated, that is, the situation that arises where the client denies guilt, but wishes to plead "guilty".

In that situation, counsel is not ethically prevented from representing the client on the plea in mitigation, notwithstanding that it would, at first blush, appear to amount to misleading the court. In *Meissner v The Queen* (1995) 184 CLR 132 at 141, Brennan J (as he then was) and Toohey and McHugh JJ explained that a person charged with an offence is at liberty to plead guilty or not guilty to the charge whether or not that person is in truth guilty or not.

The plurality in *Meissner* went on to explain that there is no miscarriage of justice in a court acting on such a plea of guilty entered in open court by a person who is of full age and sound mind, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea.

People have all sorts of good reasons for wishing to plead guilty and get a matter over and done with, but in order for it to be a free choice it must be an informed choice and it must be in their best interests.

Counsel should seek to ascertain the reasons for the client wishing to enter such a plea, and should also advise the client of the prospects of an acquittal on a plea of not guilty, and of the consequences of a guilty plea, including the fact that the plea of guilty is an admission of all of the elements of the offence, and that any plea in mitigation must accept those elements as proved and cannot be quibbled with.

Next, it is also well established that counsel must not, without his or her client's instructions, disclose to the court the client's prior convictions, of which the prosecution, and thus the court, is unaware. However, it must be remembered also that counsel must not in any way imply to the court that there are in fact no prior convictions.

Observing this ethical rule however, may sometimes have concealed ramifications for the client. I have discussed this in a paper I presented to the Law Society Litigation conference last year. It is entitled *Ethics and Court Appearances* and can be found on the Supreme Court website under Publications – Speeches and Articles.

I would like to finish with a word or two about unethical cross-examination. While there are some differences between the disallowable and improper questions provisions in the Uniform Evidence Law in force in most Australian States and Territories, they all render disallowable, and therefore, in my view, unethical, questions that are misleading or confusing, or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or oppressive: *Evidence Act* 2001 (Tas), s 41.

The provision also renders disallowable otherwise unobjectionable questions that are put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate.

And in Tasmania and in Victoria you may not ask a question that has no basis other than a stereotype. Section 41 prohibits specifically, but not exclusively, stereotypes based on a witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability.

There are, however, other questions that are impermissible and thus unethical. You must not put to one witness that his or her evidence is contrary to that of other witnesses, and expressly or by implication invite an opinion as to the reason. The best known example, of course, being, "She is a police officer, what reason would she have to lie?"

You must not ask a witness to speculate about the reasons someone else did or said something. You must not put a hypothetical question to a witness other than an expert. And you must not put a question that invites the drawing of an adverse inference from the exercise of the common law right to silence. While legislation in some States is changing as to this, a well-known example of a question impinging upon the right to silence is, "why did you not tell that to the police officer when she arrested you?" (For a coverage of the additional constraints on a prosecutor conducting cross-examination in criminal proceedings, see *Whitehorn v The Queen* (1983) 152 CLR 657 at 663 – 664.)

There is also a very valuable discussion of the common law limits to ethical cross-examination by Heydon J in *Libke v The Queen* [2007] HCA 30, 230 CLR 559 from [127], where his Honour deals with unethical advocacy involving compound questions, questions assuming the existence of a fact in controversy, argumentative questions, questions that are only comments, and the cutting off of answers before they are complete. As Heydon J points out, all these

rules rest on the need for fairness and on the need not to mislead or confuse a witness. Deliberate breaches of them are unethical.

Finally, remember also that s 37 of the *Evidence Act* which deals with leading questions in examination-in-chief and re-examination, actually entirely prohibits their asking, stipulating that, except in the situations allowed by the section, "a leading question *must not be put*". So it is not just poor advocacy to ask leading questions, it is, strictly speaking, unethical advocacy.

Justice Stephen Estcourt AM

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