Staying afloat and navigating homeward: Practical tips from the Bench on Advocacy in the Local Court

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1. Preface

All writers begin with a putative reader in mind: for these observations, mine is a young, bright but inexperienced lawyer keen to get into court and to build his or her advocacy skills. This reader knows already how daunting it can be to rise to one's feet in court and start a case but is still open to ideas. She or he has yet developed no patina or carapace of bad habits. So, while some older lawyers could, with advantage, learn something from these remarks, I am placing my trust in the eagerness of youth.

2. To begin

If all advocacy is an exercise in persuasion, that exercise begins well before a court case starts. Do the things that can be done in a case as soon as is reasonably possible – there will be more than enough things that come up in a case in court to keep you busy without adding to the pressure by trying to fix problems that should have been addressed days, weeks or even months earlier.

Court cases, large or small, criminal or civil, are project management exercises. Judges and magistrates expect the parties to control their own projects and are gladdened by the well-prepared but are distinctly unimpressed by those who do not appear to have more than a weak grasp on the essentials of their case, the evidence, law and so on. They find it easier to listen to and respect the arguments of an advocate who appears to have his or her case under control than those of somebody who is thrashing around in panicky disorganisation.

3. What does preparation involve?

Preparation may involve many things but the things virtually all cases demand attention are:

(i) The elements of the offence or cause of action – what does the prosecution or plaintiff have to prove to succeed?

The various elements have to analysed separately and evidence capable of proving each element to the requisite standard has to be marshalled. Advocates from time to time make assumptions that are not backed up by evidence. Preparation has to cover all the relevant issues or face potential disaster.

(ii) Gathering and analysing the evidence

The advocate must carefully scrutinise his or her own evidence and that served by the other side and analyse it in accordance with the elements of the offence or cause of action and the rules of evidence.

That analysis will show whether further evidence is needed for your own case or to test your opponent's. Further witnesses may be available and should, if at all possible, be sought out well before a hearing commences. Witnesses may have to be subpoenaed. Documents may have to be subpoenaed. Conferences should be held with witnesses and statements taken from them in proper form. If it is envisaged that those statements may be tendered, the evidence contained has to be in admissible form.

(iii) What is your case anyway?

American writers on advocacy emphasise "the theory of the case" – the hypothesis that seamlessly explains all the evidence for both parties. The multi-faceted theory of the case ("It wasn't me – I wasn't there; if I was there it was the other fella; if it was me, I didn't mean to do it; if I meant to do it, I must have been off my mind") does not inspire confidence from the Bench. The scatter-gun approach to a case is to be abhorred. It may confuse juries but magistrates, sitting listening to a melange of undeveloped or badly developed ideas, and knowing that they will ultimately have to sort the mess out, tend to find that sort of presentation unpersuasive.

It is, whether we like it or not, much easier to persuade a judge or magistrate with simple, well-organised, compactly presented ideas than with a case that resembles a bowl of spaghetti. Ockham's Razor is the principle proposed by William of Ockham in the fourteenth century: "Pluralitas non est ponenda sine necessitate", which translates as "entities should not be multiplied unnecessarily". In short, keep things as simple as possible given all the data that you have to deal with.

While on this point, it is worth emphasising that when a case begins the judge or magistrate is the only person in the courtroom who comes to the case cold. A well-structured, simple outline or opening of a case is often a very useful tool, especially in criminal matters where the pleadings are very rudimentary compared with those in civil actions.

(iv) Anticipate the issues

When analysing the evidence it is important, as far as possible, not only to consider how you propose to prove your case (if a burden of proof lies on you) but how your opponent is going to. Try not only to go through the legal issues but the tactical ones – where will your opponent attack you? Try to look at your own case as dispassionately and objectively as possible for its weaknesses. If possible, find answers to those problems. Anticipate the objections likely to be taken to your evidence or your cross-examination and prepare responses.

(v) Learn the Evidence Act, the procedural rules and the professional rules

No one expects a young lawyer to have a QC's knowledge of the rules of evidence but the basics are expected. The Evidence Act, the relevant procedural rules and the ethical rules are the courtroom lawyer's toolkit. Magistrates and judges expect advocates to have a working

knowledge of these matters. Anyone who has not should not be in a courtroom. It is bad for the client, bad for the profession, bad for the justice system, and therefore for the community as a whole, if a courtroom lawyer tries to conduct a case without that grounding. Under pressure in the middle of a hearing is no time to be learning the basics. Anyone appearing in the Local Court should have a good working knowledge of the Chief Magistrate's Practice Notes.

(vi) Views

It is not an extravagance to take a view. You will understand the evidence much better if you do. You will ask better, more informed questions and you won't waste time (as far too many poor advocates do) trying to build up a picture in their minds of the scene by asking questions of witnesses who often are unable to articulate the sort of word pictures beings sought. You will also subliminally convey to the Bench, by questions which are based on an intimate knowledge of the scene, that you know your stuff. A view can take a few minutes but it is *always* time well-spent.

(vii) Conference the witnesses

It is amazing to me how often witnesses reveal in court that they have not read their statements since giving them months before, or have only done so for the first time while waiting at court to give evidence. In my view, unless there is some very good reason, an advocate should rarely start a case without having had a conference with his or her principal witnesses. (I am not talking about witnesses who merely giving formal evidence of some sort but of witnesses whose evidence is likely to be challenged.)

It is, of course, imperative that witnesses not be coached or prompted or told what other witnesses will say but they can be taken through their statements and any issues clarified with them. They should be asked to read their statements over carefully and asked if there is any other relevant material they can remember. If necessary, supplementary statements of evidence should be prepared. It is best, if possible, however, to avoid the production of supplementary statements because the suggestion may be made that the witnesses have reconstructed the fresh evidence or even fabricated further evidence to suit the case of the party calling them. This emphasises the need for the careful and thorough preparation of the initial statements.

Parties have no property in witnesses. It is open for a defence lawyer, for example, to seek to interview a prosecution witness. If necessary, a lawyer can ask the court for a short adjournment to speak to the witness before that witness gives evidence. In this way, the lawyer finds out the answer to his or her questions without asking them blind in cross-examination. (On the other hand, the lawyer may not want to give away the question prior to cross-examination -- it all depends on circumstances.)

Witnesses can also be given instructions about where to go to court, how to dress appropriately and so on.

(viii) If necessary, brief counsel

In some instances, a case may demand that counsel be briefed. If so, this is a matter that should be dealt with earlier rather than later. Once matters are set down for hearing, the Local Court will rarely adjourn hearings because of the unavailability of a barrister. Courts take the

view that there are nearly 2000 counsel in Sydney and if one is unavailable another will be able to step into the breach.

4. Into court: the preliminaries

(i) Smoothing the way – manners and etiquette

Good manners do not distinguish good lawyers from the mediocre but most good lawyers, in my experience, are also well-mannered in court. Courts will tolerate skilful but liverish lawyers because they don't have much choice. On the other hand, a combination of lack of skill and insolence will have many magistrates and judges looking for a fast way to terminate the case, usually to the disadvantage of the uncouth one's client.

Lack of courtesy is, of course, not a one-way street. One of the most difficult situations a young advocate may have to face is that of the cranky judge or magistrate. This is a bit like talk-back radio: most of the power in the conversation is at other end. If a judge or magistrate is being unfair or a bully, the sad fact of the matter is that, in such circumstances, the advocate is required to behave better than his or her venerable elder. A complaint to the Judicial Commission may be an option after the event but, in the courtroom, that is no remedy or consolation.

The best way of dealing with petty tyrants is to remain calm, absorb the attack with dignity and not to engage in a squabble with the Bench. Self-deprecating humour can be a saving grace on such occasions.

Lord Birkenhead (F.E. Smith QC), when he was a young barrister early in the 20th century was famous for taking on judges. It is recorded that on one occasion he had the follow close encounter:

> **Judge**: Have you ever heard of a saying by Bacon--the great Bacon--that youth and discretion are ill-wedded companions?"
>
> **F.E. Smith**: "Yes, I have. And have you ever heard of a saying of Bacon--the great Bacon--that a much-talking judge is like an ill-tuned cymbal?"
>
> **Judge**: "You are extremely offensive, young man!"
>
> **F.E. Smith**: "As a matter of fact we both are; but I am trying to be, and you can't help it."[1]

It is also a matter of record, apparently, that while Birkenhead soared to lofty heights in the law and politics, the English Bar was littered with the wrecks of the careers of men who were as cheeky and discourteous as he was but lacked his ability.[2]

[1] See Gilbert, M *The Oxford Book of Legal Anecdotes* Oxford, 1989 p.279.
[2] See Lord Alexander of Weedon QC "The Art of Advocacy" *Bar News* Summer 1991 9-15 at p.9.

(ii) Basic rules of court etiquette[3]

Stand when speaking to the Bench. I once saw a QC receive a humiliating ticking off from Chief Justice Gleeson in the Court of Criminal Appeal for failing to stand when making an objection.

Bow when entering or leaving the courtroom if the court is sitting. Bow when the judge or magistrate enters or leaves. Stop talking at the Bar table when the judge or magistrate enters the court and stay silent until the court is called into session.

Don't leave the Bar table unattended. It is old-fashioned courtesy to wait until excused or another practitioner joins you at the Bar table once your matter has concluded.

Announce your appearance. Don't rely on the Bench to remember your name. Some of us see hundreds of people in a week and have senior moments from time to time. It is also helpful for the monitor who has to record a name on the court transcript log if the name is announced. However, while it shows a practitioner is well-mannered, it is unnecessary and a waste of time for a lawyer to announce an appearance before a matter is mentioned by the Bench or before the case is ready for mention by the parties.

Honorifics. Call your lawyer opponents "my friend" or "my learned friend" but don't call an unrepresented party "my friend". The Bench is addressed as "Your Honour" in court. Judges are called "Judge" outside court. Magistrates are generally addressed as "Mr X" or "Ms Y" or "Mrs Z" out of court. Address witnesses by their names or as "Sir" or "Madam", not as "Witness!"

Don't approach witnesses in the box without leave from the court. Leave that to the Americans.

Don't chat with the Bench. If for some reason there is a lull in proceedings, and the magistrate stays on the Bench, don't embarrass him or her by starting a conversation. If you wouldn't do it in the Supreme Court, don't do it in the Local Court either. Both are representative of the rule of law and are therefore formal places.

Do not speak to the judge or magistrate about cases except in court. If you practise in a country court where the pleasant old-fashioned custom of the practitioners having morning tea with the magistrate still prevails, NEVER discuss your case with the magistrate. In rare instances it may be necessary to raise something with the judge or magistrate in chambers. If so, you must first speak to your opponent and explain what you want to do and why. You must never approach a judicial officer privately in the absence of your opponent.

Be on time for court. If there is a call-over list, be there when the call-over starts. If you are in court for a hearing, be there on time. Return from morning tea at the time appointed. If you need to have discussions, come into court at the start time for the case and seek to have the matter stand in the list. Better still, have them *before* court starts. Call your opponent the night before the trial (or the week before). If you have to be late for some reason, call the courthouse and leave a message for the magistrate or judge with an estimated time of arrival. Don't expect the court to wait until 3pm for you to arrive.

[3] See Appendix A for Young J's rules of court etiquette. It is a more extensive checklist than mine.

(iii) Annoyances

Although minor infractions of the ordinary courtesies are simply that – minor – they are irritating and sometimes distracting to the Bench and other practitioners:

Talk outside. It might be a statement of the bleeding obvious but the courtroom, when a case or a list is being conducted, is not the venue for prolonged discussions that don't involve the Bench. If you have things to talk about with your opponent, talk outside.

Keep the noise down. Don't bang the doors coming in or going out.

Turn off your mobile phone.

(iv) Disagreeing with the Bench

One of the more awkward situations an advocate may find him- or herself in is to have to disagree with the Bench or to correct an error the judge or magistrate has made. It is important that advocates assist the Bench not to make appealable errors. That means that the advocates ought be prepared relevant authorities and legislation to assist the Bench to apply the law correctly. If it is evident to an advocate that the law is being applied incorrectly by, for example, the magistrate or judge referring to the wrong section of a piece of legislation, the lawyer is duty bound to assist the court by pointing out the error respectfully but firmly.

That kind of situation generally causes no problems. Most judicial officers are humble enough to realise that they sometimes need help, especially in a field that is unfamiliar to them. If, however, a judge or magistrate is foolish enough to refuse such assistance and gets it wrong, there is little the advocates can do about that except appeal (if it is an important point).

Where, however, an advocate has been given a full opportunity to put an argument relating to a point and the Bench has ruled, it is very poor advocacy to seek to continue the debate. There is simply no point in beating your head against a brick wall.

Furthermore, it is unwise to antagonise the Bench with a display of pique if the ruling is unfavourable. Lawyers who throw books on the Bar table, or roll their eyes or stamp around the courtroom when a ruling goes against them do themselves and their clients no favours. The judge or magistrate will not change his or her mind in that case but will certainly remember the advocate in future with distaste. Furthermore, they will talk to their judicial fellows about the lawyer and thus the lawyer may develop a regrettable reputation of which he or she may not be aware.

On the other hand, a polite disagreement is a form of discourse well understood and even enjoyed by people who respect one another. A judge or magistrate is much more likely to respect an advocate if treated with respect than otherwise. Respect cannot be measured but it is a powerful, subliminal weapon when deployed in a courtroom. An advocate who has won the respect of his or her fellow lawyers (including the judiciary) is, because of that fact alone, likely to be more persuasive in relation to close decisions than someone who has not. All other things being equal, the arguments of the respected person will carry greater weight psychologically than those of the person who has not won respect.

If the Bench is against you, accept the ruling and move on. You may be wrong, in which case you will only make things worse by arguing. If you are right, you have an appeal point but the judge or magistrate has made up his or her mind. It is discourteous, futile and, indeed, puerile for an advocate against whom a ruling has been made to threaten to appeal. I would strongly advise against such histrionics.

(v) Winning and losing the court's respect

The Bar Rules on advocacy ought be learned by heart by all advocates before they enter a courtroom. Frankness with the court is mandatory and is one of the marks of a professional lawyer.

In summary, the Bar Rules[4] in relation to frankness to the court are these:

- An advocate must not lie to the court and must take all necessary steps to correct any misleading statement made by the advocate to the court as soon as possible after the advocate becomes aware that the statement was misleading.

- In a civil matter, however, an advocate must take all necessary steps to correct any express concession made to the court by the opponent in relation to any material fact, case-law or legislation only if the lawyer knows or believes on reasonable grounds that it was contrary to what should be regarded as the true facts or the correct state of the law and he or she believes the concession was an error.

- An advocate seeking any interlocutory relief in an ex parte application must disclose to the court all matters which are within the advocate's knowledge; which are not protected by legal professional privilege; and which the advocate has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client. Where certain information that would be relevant is protected by privilege the advocate must seek to have the client waive privilege and, if the client will not, the advocate must inform the court that he or she cannot assure the court that all matters which should be disclosed have been disclosed to the court.

- An advocate must inform the court of all relevant authorities and legislation whether or not they favour his or her party's case. If judgment or a decision is reserved and the advocate becomes aware of a relevant authority or legislation, he or she must inform the court and the opponent of the reference to the case or legislation or by requesting the matter be relisted at a convenient time for both parties to make further submissions.

- In a criminal case, an advocate who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions in the hope of a negative answer, but the advocate is not obliged to reveal the client's previous record.

[4] See NSW Bar Rules 21-31.

- In a civil matter, an advocate must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as the barrister becomes aware of the misapprehension.

As far as judges and magistrates are concerned, a lawyer's reputation is generally formed by his or her performance in court. A reputation for frankness and honesty with the court is treasure for an advocate. A reputation for dishonesty, on the other hand, is virtually indelible. When a magistrate sees a lawyer for the first time, the magistrate will assume that the lawyer will be true to his or her oath and the rules of advocacy. If, however, a lawyer does something slippery or mendacious for a short-term advantage in a case and the judicial officer finds out or comes to suspect dishonourable conduct on the part of the lawyer, that person will not be trusted again and will always be regarded as "tricky" – not a reputation to cultivate.

Outright dishonesty is one thing but more commonly seen is a style of advocacy which is merely crafty or sneaky. The crafty ones are the lawyers who misrepresent the evidence or the case law or who "forget" to tell the Bench about the authorities which are against them in the hope that their opponents will not bring the case to the attention of the bench or that the judge or magistrate will be unaware of all the relevant cases. Lawyers who practise in this vein also soon gain unsavoury reputations both with the Bench and their fellow lawyers. It is a low form of cheating.

On the other hand, the lawyer who acknowledges the difficulties that the evidence or the law causes his or her client and attempts to provide a reasonable solution favourable to his or her party will earn the respect of the Bench and the other side.

In the same vein, a lawyer who capably analyses both sides of the case, works out what is and is not in dispute, makes reasonable concessions and admissions, honing the case down to the contentious issues, is regarded in all courts and by most other lawyers as a valuable asset and as a worthy and fair opponent.

Fairness as an advocate is not only a question of honour, it has a powerful effect on tribunals of fact. We have a cultural predeliction for fairness. We want fair trials run by fair judges, fair prosecutors and fair defence teams. The late Judge Joe Ford QC was regarded as a brilliant and devastating Crown Prosecutor. Justice Peter Hidden of the Supreme Court regards him as one of the best Crown Prosecutors he saw during his career at the Bar. It was said by some that he could make juries eat of his hand. He prepared his cases meticulously but one of the reasons juries found him so persuasive was that he was always impeccably fair to the accused and to his opponent in court. The combination of high intelligence, excellent preparation and fairness rarely left juries with a doubt about the guilt of the accused. (On the other hand, many an apparently strong Crown case has resulted in an acquittal when a jury has formed an impression of unfairness on the part of the prosecutor or the police.)

The converse is the person who seeks to score insubstantial points or to be obstructive. In Jonathan Harr's *A Civil Action,* his brilliant true story of the massive class action brought by Boston cancer victims in the 1980s, he has the senior litigation partner for the defendant's lawyers advising young lawyers, "Keep evidence out if you can. If you fall asleep at the Bar table, the first thing you say when you wake up is, 'I object'".[5] I can think of no judge or magistrate who would encourage such an approach and I doubt that many American judges

[5] Jonathan Harr *A Civil Action* Random House, New York, 1995 p.88.

would either. With all their diversity one thing unifying all judges and magistrates is their desire to get to the real issues.

(vi) Dealing with opponents

The Bar Rules outline the key rules relating to dealings between opponents[6]. In a nutshell they are as follows:

- An advocate must not knowingly make a false statement to the opponent in relation to the case.

- If an advocate unwittingly makes a false statement to an opponent, he or she must take all necessary steps to correct the misrepresentation as soon as he or she becomes aware of it. (On the other hand, the advocate is not obliged to correct an opponent's mistaken understanding of some fact.)

- An advocate must not deal directly with the opponent's client unless the opponent consent or the circumstances are so urgent as to require direct contact AND there would be no unfairness to that party in doing so. (An advocate is, however, allowed to speak to the party to inquire whether he or she is represented and by whom.)

- Generally, lawyers must not have any communications with a court in the absence of their opponents. The exceptions allowed under the rules are where a court requires an answer from the lawyer; where, after disclosure of the nature of the communications, the opponent consents or where there is an ex parte application or hearing of which proper notice has been given to the opponent. A lawyer is only permitted to raise in court those things which he or she has disclosed to the opponent and for which consent has been granted by the opponent. If such a communication does take place, it is incumbent on the advocate to promptly notify the opponent of what had passed in the court.

Any breach of these rules will be regarded as unprofessional or as professional misconduct.

Lawyers can also diminish their own standing in the court's eyes in the way they deal with opponents in less formal ways. In my view, there is rarely, if ever, any need for hyperbolic, melodramatic denunciations of one's opponent either in correspondence or in court. It is one thing dispassionately to make a complaint about an opponent's conduct and another to launch into a florid rodomontade. It is stressful enough in court for everyone simply running a case without the burden of inflamed emotions being added.

Bickering, tantrums, sledging, petty point-scoring at the Bar table all compound the difficulty of a case without in any way assisting in its resolution. For that reason such displays are universally abhorred by judicial officers. On the other hand, lawyers who are reasonable to one another, make their arguments rationally and with a degree of gravitas are likely to assist their clients (or at least do no harm to them), to run a case efficiently and to find the Bench attentive to them.

This is, of course, the counsel of perfection. From time to time, you will find yourself against an opponent who sledges, who is irritating, who may even be untrustworthy. Some lawyers are incompetent and unprofessional and consequently can't help irritating their more professional

[6] See Bar Rules 51-58.

opponents. In other cases, they are competent but have adopted an unnecessarily aggressive approach in the hope of gaining some short-term tactical advantage.

In a highly competitive profession like law and in the even more competitive environment of a courtroom, it is easy to become distracted by an opponent's antics, particularly if the Bench does not seem to be interested in intervening to prevent the misbehaviour.

My advice, however, is that you maintain your dignity, you concentrate on your case, that you cocoon yourself as best you can against the opponent and that you direct your attention as much as possible to the court and away from him or her. Whether it is obvious or not, the Bench will be observing the behaviour of both advocates and will almost certainly look more favourably upon the advocate who is the still point in the storm. (This is not to suggest that by doing so you will win the point because the court will still decide that on its merits but you will certainly hold your ground more easily by staying calm.)

I would add two further points. First, litigation is a stressful and therefore a sometimes unhealthy occupation. Those who keep their blood pressure down and do the job professionally will do it longer and will enjoy it more than those who are constantly seething with anxiety, anger and adrenalin. Second, what goes around comes around. If people act unprofessionally, it catches up with them one way or another and glad are the hearts of many went it does.

Finally, be fair to unrepresented opposing parties. Most judges and magistrates I know do not like lawyers bullying unrepresented people. Just as offensive is the approach some lawyers adopt of seeking to enlist the Bench, with a sort of a nod and a wink, as a fellow lawyer against the unschooled unrepresented person.

(vii) Duty to the client

The lawyer is not a mouthpiece for client. A lawyer's duty is to his or her client but this does not mean that the lawyer is the client's mouthpiece. While an advocate will, obviously, take into account the desires of his or her client, the lawyer takes responsibility for the tactics used in the courtroom. Many an accused has been convicted because a lawyer has decided to follow his or client's instructions to ask a question or a line of questions which has proven fatal to the accused.[7] You are not in court to provide emotional support for the client or to boost his or her self-esteem but as his or her legal adviser.

Lawyer cannot be a material witness for client. An advocate or solicitor cannot be a material witness for his or her own client.[8] The potential for actual or apparent conflict of interest is obvious. Interestingly, three times this year I have seen solicitors called to give evidence in breach of this rule. It is embarrassing for them and for the court when it happens. If you cannot avoid being a witness in a case, you must withdraw in accordance with the rules.

5. Onto your feet in court

A case can only be prepared up to a certain point. Once an advocate rises to examine or cross-examine, a different set of skills comes into play. The skills of examination-in-chief and cross-examination have been the subjects of many books and articles. Although I will offer a few ideas

[7] See Bar Rules 16-20, especially Rules 18 and 19.
[8] See Bar Rule 76 and Solicitors' Rule 19.

here on them, they are specialist topics worthy of much deeper consideration than is appropriate here. What follows is a list of tips, in no particular order, which may help the inexperienced advocate:

(i) Style and presentation

Don't repeat a question several times. Judges, magistrates and juries are not stupid. If a witness prevaricates or is unresponsive or argumentative, they will ask themselves why and the answer will usually be obvious.

Don't argue with witnesses, opponents, the Bench. It looks bad, it is a distraction from the main issues and, besides, labouring a point is a waste of time.

Don't interrupt the judge or magistrate when being spoken to. As discussed above, you are entitled to politely disagree with the Bench but interrupting to contradict the judge or magistrate is highly counter-productive.

Don't interrupt your opponent's address. If you disagree with something your opponent states in submissions, make a note and deal with it in your turn. If your turn has passed, seek leave to raise the point anyway. You are entitled to correct misrepresentations or misapprehensions the court may form as a result of something said by an opponent. It is the sign of an inexperienced advocate to "object" to things said in submissions.

Do your tie up. Most judicial officers are reasonably relaxed about lawyers' attire these days but undone ties look sloppy. Try to look the part.

Build your voice. If you have a weak or a light voice, you are handicapped as an advocate. In many courtrooms the acoustics are poor and the microphones do not amplify. These difficulties are intensified in places like the Downing Centre and Central by doors banging, the noise of air conditioners, court officers calling out names and so on. Some lawyers are naturally able to cope with such impediments. Others, however, need to work at it. Simple breathing exercises can improve volume and delivery enormously. Secondly, an advocate with a voice that sounds pleasant has a distinct advantage over those with disagreeable voices. If you were locked in a room for six hours a day would you prefer to listen to Cate Blanchett or Judge Judy? It is not critical but it may make a difference on the margin.

Use simple, direct language and be economical with it. Verbose, prolix lawyers are not only boring but sometimes become figures of fun. I don't know about others but I find the Baroque patois of some lawyers, who habitually employ phrases such as "I rise to object…" or "What has fallen from Your Honour…", grandiloquent but vacuous. Their thinking tends to be as ponderous as their phraseology. (While on the point, don't use Latin unless you can translate it into English.) On the other hand, a powerful verbal picture or an elegantly simple sentence is a pleasure to listen to and a valuable advocacy tool. Build your vocabulary by reading – the best advocates I know are well-read in history and literature. I would add philosophy, science and the visual arts as great furniture for a mental library.

(ii) Useful techniques

Use chronologies and summaries. We are culturally highly attuned to chronology and orderly revelation of plots – since Aristotle's day we have enjoyed hearing our stories with beginnings,

middles and ends.[9] The preparation of a chronology, especially in a complex case, is a very useful way of synthesising and digesting all the relevant evidence.

Use maps, digital photographs, physical exhibits. About 50 per cent of our brains are devoted to vision and the processing of visual information. Not surprisingly, the quickest and most efficient way for most people to absorb information is visually. BUT if possible prepare diagrams and maps beforehand. It is a witheringly boring experience having a witness attempt to draw a diagram in the witness box. We also like to touch things as we look at them. If possible, use physical exhibits rather than pictures – they have a much more powerful effect on the imagination.

Written submissions. Written submissions can be very useful but, like Powerpoint presentations, can be vastly overdone. Courts often make the mistake of seeking written submissions and this can lead to a ocean of paper in which the critical issues are submerged. Oral submissions tend to be focussed on the key facts and legal issues. Nevertheless, written submissions, if succinct, or outlines of submissions are powerful organising tools.

Working copies of exhibits. It is the invariable practice that judges be provided with working copies of critical exhibits in the superior courts. The usefulness of having copies while a witness is examined or cross-examined about the exhibit is self-evident yet in the Local Court it seems to be the exception rather than the rule that copies are brought to court.

Copies of authorities and legislation. In my view, it is unprofessional, discourteous and unfair for a lawyer to seek to argue a point of law without first providing a copy of the authority or legislation relied upon to his or her opponent. Alternatively, the lawyer should provide the reference in sufficient time for the opponent to obtain a copy. It should also go without saying that copies are to be provided for the Bench. Unfortunately, however, many lawyers in the Local Court not only ignore their opponents' needs but fail even to provide copies for the Court.

(iii) Taking cues

Many, but not all, judges and magistrates offer cues as to how they see a case or an argument going. Ordinarily the cue is a question. Sometimes the Bench will engage in a sort of Socratic dialogue with the advocates. None of this is designed to create difficulties or to thwart the advocate from advancing his or her case. Rather, it is intended to focus the discussion on a particular point troubling the court.

Sometimes the judge or magistrate will simply say, "I don't need to hear from you, Ms Smith", meaning that there is no necessity for her to make any submissions because the case or the point is going to be decided in her favour. On occasion, the judge or magistrate may say, "I don't need to hear from you on such-and-such a point, but what do you say about X ?" This is obviously an indication that she must then address X but need not deal with the other point because that will go her way. It is always useful to conclude submissions by saying something along the lines of, "Unless there is anything else on which I can assist Your Honour, those are my submissions". Sometimes at that point something will occur to the Bench with which the advocate can then deal.

[9] See, for example, Aristotle *The Poetics* Ch.7 "The Scope of the Plot".

If a judge or magistrate makes a ruling, that is NOT a cue for a further round of debate. When he or she says, "I'm against you on that, Ms Rumpelstiltskin" that means "Sit down, shut up and get on with the case."

(iv) Asking questions

Learn when it is and is not appropriate to ask leading questions. What is a leading question? One that (a) implies the answer or (b) assumes the existence of a fact which is in dispute. An example of (a): Is your name X? An example of (b): When did you stop beating your wife? You may ask leading questions in examination-in-chief when the answer is not contentious. For example, you may ask leading questions if the expected answer is not in dispute or to lead the witness to a topic.[10] For example, in leading to a topic, it is permissible to ask a question like, "Was anything said when X came into the room?". That question obviously anticipates a certain answer and is therefore leading and so should be followed by a non-leading question. The exchange might go like this:

Q: Was anything said when Mr Smith came into the room?
A: Yes, Mr Smith spoke to me. He was panting.
Q: Very well, what did he say?
A: He said, "I just ran over a bloke down at the junction. I think I killed him."

Whether or not it is against the rules to lead when in chief, it is an error, in my opinion, for advocates to use leading questions in contentious parts of the evidence because to do so reduces the impact of their own witnesses' testimony. Generally speaking, it is more persuasive for the court to hear the witness's story directly rather than through the mouthpiece. In cross-examination, on the other hand, leading questions are not only permissible but are, indeed, desirable.

Learn how to ask non-leading questions. Inexperienced advocates often have difficulties in formulating non-leading questions. Non-leading questions are open-ended. The easiest way to ask non-leading questions is to use "when, where, who, why and how" questions. It is hard to go far wrong using that technique.

Don't ask improper questions. Section 41 of the *Evidence Act 1995* prohibits improper questions. It is improper to ask misleading questions. It is improper to ask "unduly annoying" or offensive questions.

It is also improper but, unfortunately, common in the Local Court for advocates to ask witnesses to offer a comment on the truthfulness or otherwise of another witness's testimony. So, for example, an advocate might ask a question along these lines: "So, Detective Smith, if Mr Miller said that he not present when the gun was found that would be a lie, would it?" That kind of question is not only improper but is futile. It is for the magistrate, not the witness, to assess the credit and credibility of other witnesses.

Develop and employ techniques of controlling witnesses to avoid problems. For example, to avoid inadmissible hearsay coming out, the advocate might preface a question in this way: "Without telling us what was said, did you then have a conversation with Mr Churchill?" If a

[10] See *GPI Leisure v Herdsman Investments P/L (No 3)* [1990] 20 NSWLR 15 at 25, Young J.

witness has a tendency to ramble, reel them in by saying something like, "I'll stop you there for a moment and ask to you to tell us…"

(v) Objections

Object promptly. It is difficult to make a worthwhile objection once an answer has been given.

Don't interrupt the question. Some advocates, however, make the opposite mistake of objecting before the question is complete. Don't go off half-cocked.

Give a short reason for the objection. I suggest you says something like, "Object. [PAUSE FOR A MOMENT] Hearsay." The basis for the objection won't always be obvious to the Bench and a one-word explanation will save an inquiry being made. You are setting yourself up to be dumped, however, if you say, "I can't see the relevance of that!" All too often the reply from the Bench will be, "Well, I can. Please answer the question Mr Big."

There is no rule of law that conversations must be given in direct speech. It is preferable that the evidence of a critical conversation be given in direct speech because that is the best evidence but it is not mandatory. Nor is there a proper objection as to "form" if the conversation is given in indirect form.[11]

Learn the first-hand hearsay rules. It is a matter of some amazement to me that, 10 years after the *Evidence Act* commenced, I am still hearing objections on the basis of "hearsay" to material which is admissible under Pt 3.2 Div 2 of the Act as first-hand hearsay.

"The document speaks for itself". This is not a rule of law as such but a formulation of the opinion rule.[12] A witness is not permitted to offer opinions about a document any more than about other sorts of evidence. On the other hand, it is permissible for a witness with the relevant expertise to decipher symbols, acronyms, abbreviations and so on. The document may also, in certain limited circumstances, come within the exception to the opinion rule if expert evidence is required to understand its contents.[13]

Expert evidence. The jurisprudence in relation to s.79 of the *Evidence Act* has developed considerably since 1995 and is quite complex. If expert evidence is relied upon by either party it should conform with the requirements of s.79 as interpreted by the Court of Appeal (especially Heydon JA as he then was) in *Makita (Australia) Pty Ltd v Sprowles.*[14] Objections to expert evidence should be based on the test laid down in *Makita.*

(vi) Cross-examination

This is not a treatise on cross-examination but a few pointers on matters that seem frequently to arise in the Local Court:

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[11] See *LMI v Baulderstone* (2001) 53 NSWLR 31.
[12] See s.76 of the *Evidence Act.*
[13] See s.79 of the *Evidence Act.*
[14] (2001) 52 NSWLR 705. See also the decision of the High Court in *HG v The Queen* (1999) 197 CLR 414, especially the judgment of Gleeson CJ for a general commentary on the dangers of unrestrained "expert" evidence.

Cross-examination is about listening and observing as well as asking questions. I don't think that cross-examination can be learned from books or even from other people although some good tips can be picked up from both. Excellent cross-examiners prepare but preparation is not the panacea to all the problems of cross-examination. The best cross-examiners are very good listeners. As well as having an intimate knowledge of the evidence in the given case, they rely on their imaginations and experience of life. The best cross-examiners demonstrate a powerful understanding of how people think and feel and act in certain situations. They are shrewd observers of other human beings. They know, or have a very good idea, of what is realistic and what is implausible in the circumstances of the case.

Watch the witnesses as much as possible. If you have been served with the statements of the other side's witnesses, it should be unnecessary to take notes of their evidence verbatim. I suggest that the best cross-examiners observe the witnesses closely and simply make the occasional note of a question they may want to ask rather than burying their heads in their notebooks. It takes a lot of confidence in your own grasp on the evidence simply to watch the witness you are about to cross-examine without taking a full note but this is where the time spent preparing really pays off.

The best cross-examinations gain concessions. Many inexperienced or poor cross-examiners think that their sole job is to "destroy" the witness by massive confrontation. Not so. The best cross-examiners will frequently use cross-examination as an opportunity to gain useful evidence from the other side's witnesses to advance their own cases.

Don't cross-examine unnecessarily. Many times I have seen advocates attempt to undermine the credit of witnesses whose evidence is purely formal. For example, I have seen police officers who attended the scene of a road accident and whose only evidence is that they saw two motor vehicles smashed in the roadway cross-examined at length about their notes, the (immaterial) differences between their notebook entries and the COPS entry made on the police computer. None of this evidence was in issue or even relevant beyond proving that a car accident had taken place at a certain location. Why they bother asking a single question, let alone proving that it is several months since they made their statements is beyond me. It is boring and a complete waste of time and indicates that the lawyer cannot see the wood for the trees.

Ask simple questions. If possible, let each question contain only one proposition.

Think carefully about cross-examination on prior inconsistent statements. Most books and papers on cross-examination spend much time discussing the undermining of the credibility of a witness by the use of prior inconsistent statements. There is, however, a trap for poor advocates in using the prior inconsistent statement. I suggest that advocates ought not cross-examine concerning a prior inconsistent which is less favourable to their parties than the answer they have already got. If the prior inconsistent statement is proven it is in evidence for all purposes and may be used as evidence against you.[15] I have seen a situation in which an independent prosecution witness was reminded by the cross-examiner of what she had stated in her statement to police. That evidence was stronger against the accused than the version she gave months later when her memory had faded somewhat. She agreed that the earlier statement was correct and said that, due to the passage of time her oral evidence in court was

[15] See ss.43 and 60 of the *Evidence Act.*

incorrect. Then, having had her memory refreshed in this way, she gave further evidence even more damaging to the accused.

Learn the rule in *Browne v Dunn*. Once upon a time I wouldn't have thought it necessary to suggest this because even the most inexperienced advocate should know and abide by the rule. Nevertheless, I have seen it breached many times, sometimes by experienced but not very competent lawyers. I was surprised recently, in a case I heard at Burwood, to hear a defence witness give an account of something that had happened when, despite the fact that the defendant was represented by a barrister, that witness's version of events had never been put to the prosecution witness whose account was being directly contradicted.

I was even more astonished, when I raised the issue of *Browne v Dunn* with the barrister at the end of the case, to be told by him that he believed that, since this evidence was being given by a witness other than the accused, the rule in *Browne v Dunn* did not apply. A failure to comply with *Browne v Dunn* is a serious tactical error. It both allows the other side to suggest that the evidence given in breach of the rule is recent invention and to call evidence in reply[16].

On the other hand, it is unnecessary to go through the tedious of process of "putting" propositions to a party upon whom evidence has been served previously in statement or affidavit form, thus putting that party on notice. This is because the rule in *Browne v Dunn* is one of procedural fairness: propositions must be put so as to give the witness or the party a chance to offer an answer or an explanation. If the proposition has already been put by serving, for example, a police brief or a collection of affidavits of, say, the plaintiff's evidence, the defendant or accused (as the case may be) has been put on notice of the evidence to be led and has the opportunity in his or her case to give contradictory evidence to meet it.

Don't cross-examine in relation to credit without proper instructions. It is critical that advocates learn and understand the advocacy rules in relation to cross-examination of witnesses on credit. Advocates must not make allegations against other persons unless the advocate believes on reasonable grounds that the factual material already available provides a proper basis to do so. [17] Bar Rule 37 is particularly important:

> A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
>
> (a) available material by which the allegation could be supported provides a proper basis for it; and
> (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

(vii) Closing addresses.

These remarks relate mainly but not exclusively to criminal cases but have general application.

Plan your closing address *before* the case starts. If you have analysed the issues and the evidence you should know that what you plan to say in final submissions is, for example, that the prosecution has not proven beyond a reasonable doubt that your client was not acting in

[16] See s.46 of the *Evidence Act*.
[17] NSW Bar Rules Rule 36. See generally Rules 36-40.

self-defence. Everything you do during the case ought to be aimed at reinforcing that submission. Anything that does not, ought be jettisoned from your plan.

Ian Barker QC's tips for closing a defence case.[18] Mr Barker addressed the SA Legal Aid Commission conference in 1984 and made the following suggestions for final addresses for defenders. First, if possible assert the accused's innocence and rely on "reasonable doubt" as a fallback position. Second, deal with the issues first and the credibility of the witnesses second. Third, meet the Crown's assertions head on. There is no use pretending they are not there – if the accused's lawyer does not do so, the assumption will be made that the accused is trying to avoid the issue. Fourth, put the accused's case clearly and explain the difficulties in it as plausibly as possible. Fifth, deal confidently and clearly with the law. Sixth, if you have a good point emphasise that – don't lose it in a blizzard of minor points. Keep an eye on the spinal column of your case.

Use logic and structure. One of the best addresses I have seen was by Bret Walker SC in the Federal Court where he appeared on behalf the Commonwealth on an appeal by Mr Phillip Smiles, a NSW MP who had been charged with tax offences. Mr Walker got and began his address by saying something like, "We submit that Your Honours ought refuse this appeal for the following reasons: 1…, 2… , 3…, 4…, 5…, 6…" The argument was tight and structured and very persuasive. The technique is very effective whenever any kind of submissions are made.

Justice Haynes's six commandments. In October 2004, in a paper to the WA Bar Association, Hayne J laid down six rules for advocacy in the High Court.[19] They are a useful checklist for structuring submissions in any court:

- counsel must know the facts of the case;
- counsel must know the law that applies to the case;
- counsel must know what order that he or she wants the court to make;
- counsel must know how he or she wants to achieve that result;
- counsel must convey that to the court; and
- counsel must avoid distracting the court from the path that he or she wants it to follow.

6. Pleas

Although much of the above applies to pleas they present some special traps for young players.

Be ready before you stand up to speak. Have your client in the courtroom ready before standing up to commence a plea. Even if only a couple of minutes are wasted while the client is called into court, these little bits of time accumulate and, by the end of a busy list, can add a significant amount of time to it.

[18] Ian Barker QC "Opening and Closing Addresses to a Jury" in Eames, G. *Criminal Law Advocacy* Legal Aid Commission of SA, Adelaide 1984.

[19] http://www.hcourt.gov.au/speeches/haynej/haynej_25oct04.html

Confront the problem. The problem for a given accused may be the objective seriousness of the offence to which he or she is pleading guilty, his or her past record or both. No amount of fudging will eliminate the problem. Nor will brazen denial of the seriousness of the problem diminish it. A useful technique I have seen employed by a very able solicitor, Mr Greg Murray, is to commence by saying, "Your Honour will be troubled by …". It is much easier for a judicial officer to accept a plea in mitigation when he or she is satisfied that the accused fully understands and accepts the seriousness of the issue. Conversely, a refusal by an accused's lawyer to do so tends to lead to a certain sense of indignation on the Bench.

Structure the plea. A plea should have a framework. The elements of that structure include (a) the objective facts of the offence proffered by the prosecution; (b) any additional account given by the accused to explain his or her conduct at the time of the offence; (c) the accused's criminal history, if any; (d) the accused's subjective features at the time of the offence; (e) the present circumstances of the accused; (f) any extraneous subjective material, such as testimonials; (g) a submission as to the appropriate outcome for the accused.

Contrition. It seems to me that the element of contrition is often underrated or even overlooked in a plea. As a matter of legal principle, a plea of guilty is said to imply contrition but this will often not be evident in the presentation of the case in court. A concrete demonstration of contrition by an accused is far more powerful than a mere plea of guilty, especially in the face of a strong prosecution case. For example, it is far easier to believe that a person who, the day after he is arrested, writes a letter of apology to a police officer whom he has assaulted in a drunken incident at the Rocks is sincerely contrite than someone who enters a guilty plea three weeks later but offers no direct apology or whose "apology" comes in the form of a lawyer perfunctorily announcing, among other submissions, that his or her client is "sorry". Evidence of *sincere* contrition is a powerfully mitigating factor on a plea.

Rehabilitation. If a suggestion is to be put to a court that an accused undertake, for example, drug counselling or psychological therapy, the court will want to hear concrete details. Mere speculations about an accused entering some program or other are of no assistance to a court engaged in a sentencing exercise. Very often magistrates hear pleas in which it is put that "Mr Dillon would like to do", say, a residential rehabilitation course. What this suggests is that lawyer has, just before commencing the plea, popped this suggestion into the mind of the accused so as to have something – anything -- to put to the magistrate. Most experienced magistrates won't buy these sorts of vague suggestions. The better course is either, if time is available, to make an arrangement by telephone with the relevant service provider to come to court and assess the accused there and then or to seek a short adjournment to have the accused assessed by the service provider.

References and testimonials. General character references are useless. To have impact they must say that the referee knows that the accused has pleaded guilty to committing the specific offence before the court. It is unnecessary to provide a lever-arch folder of documents – courts do not have time for a complete biography when dealing with a plea. Select your best three or five references and tender those.

Don't make bold predictions about the future. "You will never see this man again in a courtroom." This statement or something like it, so often declaimed in the Local Court as to be almost a mantra, is both bold and pointless. The Irish would see it as a temptation to Providence. It adds nothing to a plea.

7. In conclusion

Judges and magistrates are sometimes criticised for being tyrannical. If judicial officers are cranky and impatient it is usually because they are under great pressure to complete a significant number of cases. Time is precious to them. They appreciate efficiency and economy at the Bar table and are irritated by inefficiency, slowness, lack of preparation.

Probably the best way to improve as an advocate is to work with top-class advocates but those opportunities will be rare for most young lawyers. You can law a considerable amount from watching good advocates at work. I would not spend a great deal of time watching advocates in the Local Court if only because the quality varies so much. While there are excellent advocates appearing before magistrates, the best spend most of their time in the higher courts. Reading advocacy books will help to some degree.

Good advocacy in any court is not easy but neither is it an ability given only to a select few. It is not Olympian in its exclusivity. It is a logical and rational skill. Anyone capable of earning a law degree ought be capable of becoming a reasonably competent courtroom lawyer.

A month before the American Civil War broke out, that great courtroom lawyer Abraham Lincoln, in his First Inaugural Address appealed to the people of the South to maintain the Constitution by hearkening to "the better angels of our nature." It is, I think, no coincidence that he elided the concepts of the rule of law and angelic humanity in contrast to the barbarism of armed conflict.[20]

The legal system is imperfect and lawyers are not popular figures. Nevertheless, whatever might be said of us on talkback radio stations and in tabloid newspapers, good lawyers are an indispensable pillar of a working democracy governed by laws rather than guns or money. This ought not make us arrogant but humbly proud of our profession.

The better the legal system works, the greater the confidence the public can have in its legal institutions. The higher the quality of advocacy, the better our legal institutions work. Saul Bellow, in his great novel *The Adventures of Augie March,* saw the genius of America as making "nobility of us all". In a less exalted, but nonetheless real, way advocates are in pursuit of a noble dream too. Without necessarily being conscious of it, every day they demonstrate civilised and democratic values as they battle one another with words and documents rather than bombs or Kalashnikovs. Advocacy is a worthy calling and therefore worth pursuing excellently. I hope that these observations will help some young lawyers in that pursuit.

[20] He was right of course: over 500,000 American lives were lost in the Civil War.

Appendix A

Justice PW Young's Rules of Court Etiquette[21]

Courtesy to an opponent

1. Always inform your opponent if you are going to be late.
2. Do not sledge.
3. There is no duty to help fools.
4. Respect the procedure.
5. Do not mention more than two matters at a time.
6. Respect seniority.
7. Be courteous in correspondence.

Courtesy to the court administration and witnesses

8. Estimate the time accurately.
9. Always advise the court as soon as a matter has settled.
10. Lists of authorities are to be provided in due time.

Conduct in court

11. Put your name on the list.
12. Observe the Advocacy Rules strictly.
13. Observe the etiquette of the Bar table.
14. The Bar table is not to be left unoccupied whilst the judge is still sitting.
15. Do not leave the court whilst a judge is delivering an oral judgment.
16. Speak from the Bar table.
17. Call persons producing documents early.
18. Endeavour to minimise the time witnesses wait around.
19. Do not abuse the witness.
20. Observe the rules concerning pagination of documents.
21. Do not confer with witnesses under cross-examination without the consent of your opponent.
22. Silence must be kept whilst a witness is being sworn.
23. Respect subpoenaed documents [and court files].
24. When tendering subpoenaed documents announce to whom they should be returned by the court.
25. Generally speaking, do not ask the judge for advice.
26. Respect the court staff.
27. Speak for the transcript.
28. Do not speak while someone else is speaking.
29. Do not talk loudly inside the courtroom.

[21] For the full list and treatment see Young, PW "Court Etiquette" (2002) 76 ALJ 303

30. Avoid approaching witnesses in the witness box.
31. No mobile phones in court.
32. See your opponent early.
33. Write out the orders.
34. Do not talk about the case or a judge in the lift.
35. Do not read your newspaper in court.

Courtesy to the judge

36. Be on time.
37. Do not patronise the judge.
38. Do not disparage the judge.
39. Help the judge.
40. Give the judge something to hang his or her hat on.
41. Keep your distance from the judge.
42. Do not communicate with the judge out of court.
43. Always stand when addressing the judge.