David Bennett[*]

THE ART OF PERSUASION THROUGH ORAL ADVOCACY[†]

What I'm going to say to you is going to sound more like a sermon than a paper. The reason for that is that you are going to go away after I've finished speaking and say to yourselves, 'That was a waste of time. I knew all of that.' The point, of course, about most of the techniques of oral advocacy is that we do know them, but most of us don't use them all the time. That's why in a sense what I should be doing is delivering a sermon telling you why you should do it, rather than telling you what you should do.

I've divided my speech into four sections — the four 'M's — called Milieu, Manner, Matter and Method.

MILIEU

Let me start with milieu. There are seven things to bear in mind under this topic. The first is the first thing that was said to me by my master when I started at the Bar, and it's the most important lesson anyone can give you. If you remember and observe this, you will be grateful. The rule is, *'Always go before you go to court, whether you want to or not.'* That is absolutely the number one rule. There is nothing worse than being on your feet, getting more and more uncomfortable and wondering whether you can say 'Your Honour please may I go to the toilet?' It takes your mind off the case. It is inimical to sound advocacy. So always remember that rule, especially as there is usually no longer a morning tea break. It also enables you to clear your throat by drinking the water with a clear conscience, except, of course, in Adelaide where you have to bring your own mineral water because you obviously can't drink what comes out of Adelaide taps.

The second thing about milieu is equally obvious; get a good night's sleep before the case.

Thirdly, be unaffected by any substance that you've been abusing, especially cannabis.

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[*] Dr David Bennett AO QC, Solicitor-General of Australia.

[†] This article is an edited transcript of the speech originally given at the AACL Selway Conference.

Fourthly, I want to say a little bit about clothing. There has been a debate in New South Wales recently because a male judge made some unkind comments about women solicitors appearing before him wearing low-cut dresses. I'm not putting this on a sexist level, but it is important when you're not wearing robes to dress neatly, and it is often useful, again, of course, if you're not wearing robes, to dress in a manner that is not likely to put the judge off. If you have a very conservative judge then, if you're a man, you don't wear a tie which has a huge picture of a yellow bellied parrot on the front (except if it is a case about wind farms) and, if you are a woman, don't wear a low cut outfit. You don't dress flamboyantly in front of a conservative judge. If you're before a fairly radical and iconoclastic young judge, you can, of course, identify a bit with the judge by dressing a bit more flamboyantly. But dress for the judge, not for your clients, not for your opponents and not for your barrister if you're an instructing solicitor.

Fifthly, one of the sad things about the gradual demise of wigs is that one has to worry about one's hair. I never used to care if my hair was a mess and I still don't in the High Court where I wear a wig. But if I don't wear a wig I do have to worry about my hair being neat and it is a great nuisance. That applies of course, to both sexes.

Sixthly, your face. If you are a man, make sure you shave and if you are a woman make sure your makeup isn't too extreme, or too lacking if your face needs it. Your face should be neutral and not distract from your argument.

And finally, in relation to glasses, I do recommend very strongly, if you do a lot of court work and you need glasses to read, that you get either multi-focals or bifocals. I prefer multi-focals. Otherwise, you constantly have to take your glasses off between looking at documents and looking the judge in the eye, and this can be distracting.

Those are the matters concerning milieu.

MANNER

Now, let me come to manner. I only have three points that I want to make here. The first is, don't move around. If you try and address a court while constantly moving, it is totally distracting and the judge is watching where you're moving rather than listening to what you're saying. I remember having a lecturer at law school who used to walk up and down. I hardly remember anything he said in his lectures. We sometimes used to run a book on how many times he would walk up and down in class.

For similar reasons, it's a good idea to avoid using a lectern. You'll notice that I haven't stood behind this thing. This is a very bad type of lectern. It's not as bad as some of them. At least it stops at chest height. Some of them go on to head height.

A lectern that comes from your chest to your neck makes you look like a talking head and it prevents you from interacting or interrelating with your audience. There's a barrier between me and you. And it's the same with the judge. If you stand behind a lectern at the bar table, the judge can't see your body-language and you're separated from the judge, rather like you are in a video presentation. If there is a movable lectern on the bar table, I never use it; but what I do is offer it to my opponent in a show of great generosity.

In the High Court, unfortunately, you've got no choice, but in most courts where you do have a choice, it's a good idea to avoid using a lectern. That applies to making a speech at a wedding when you're at a big hotel where they always have lecterns that turn you into a talking head. Get the microphone and switch it to the side, or get a hand-held microphone.

The second issue about manner is how you use your hands. First, where you put them. They're best by your sides if you're not using them. There are certain places where you mustn't put them. You mustn't fold them. You mustn't put them in your pockets. That looks arrogant. Don't pat your backside with them. The best place for them is by your sides. And as far as use is concerned, don't be rigid. I remember that there was a picture in my year book at Harvard, which showed one of the Harvard professors standing before the class with his two arms stretched out from his sides. The caption said, 'Professor X demonstrates the balancing test. Clearly the considerations he has placed in his right hand outweigh those he has placed in his left hand'.

That sort of use of hands is alright, but it should be gentle and not disruptive and when you use your hands, don't have your index finger pointing. That's quite offensive, and for similar reasons if you're using your hand a bit, it's a good idea either to use the hand you don't write with or to make sure you put your pen down, because, if you are moving your pen around in the air, it looks very much as if you're pointing at the judge which leads to the same sort of problem. So that's hands.

The third aspect of manner is voice. This is fairly obvious. You want to have a well-modulated voice of medium decibel content so the judge can hear you clearly without having to strain. You don't want to raise your voice. Keep your voice to a medium level and speak slowly and clearly. So, that's manner.

MATTER

Now matter. Obviously the most important thing is preparation; remember that what you are doing is seeking to persuade, and to persuade an individual judge. One thing that's very useful is at some point you should say to yourself in relation to the judge (or each of the judges in an appellate court), 'How is that judge likely to react to this case before coming into court?' Bearing in mind what I know about that

judge's attitude, prejudices, general approach to law and so on; how will the judge see this case? What is the judge likely to think of the issues in a broad sense and how is the judge likely to want to decide. Then of course, the next question is, how do you keep the judge in that direction or move the judge from that direction, but that has to be your starting point.

You're doing something that you're doing every day, whether you talk to your partner at home, or to a child, to a parent or to an official in a government office, where you need some kind of service. In any of these situations you're seeking to persuade someone. We seek to persuade people every day. At work we seek to persuade people lower down the line than us to do things for us; maybe more than they want to do. We seek to persuade people higher up the line than ourselves how good we are.

That's all part of the daily persuasion that we all do, and that is what you're doing with a judge. You must never forget that you are not mechanically putting the argument you have so carefully prepared. It's not like that. You're persuading a human being to come to a particular viewpoint, and that's terribly important. That's basic to everything about matter.

Now the most important situation where that manifests itself is in relation to questions from the bench. A question from the bench is a godsend. There is nothing worse than appearing before a silent judge, who sits there and never says a word. For all you know, the case is going to be decided against you on some matter you've hardly mentioned, or on some point you've said only one or two sentences on because it seemed to you so obvious. A judge who asks you a question gives you a window into his or her mind, which enables you to know what you've got to concentrate on. It is usually, but not always, better to answer the question there and then, even if it takes you out of your beautifully prepared order of submissions, even if it means dealing with your third point before dealing with your first.

That's not always the case. There are situations where one doesn't do that, particularly in appellate courts where the view of one judge may not matter. There are also cases, of course, where the difficulty of being taken off your course is so great that you need to defer answering. In 99 cases out of 100 it is better to answer the question there and then, because that's what's worrying the judge, that's what the judge is thinking of.

Now, most questions you get in an appellate court are questions which take the proposition you're arguing for to a logical conclusion and ask about the extreme situations. Let me give you an example. Suppose you have a case where a solicitor has been convicted of driving at a speed dangerous, and there is then a disciplinary proceeding based on that conviction. Now suppose you argue for the solicitor that a traffic offence can never justify disciplinary proceedings. What's the first question you're going to be asked? 'What about drunken driving causing death?' Suppose

you're for the Law Society and you argue that any infraction of the law leading to a criminal sanction is capable of justifying disciplinary action. What is the first question you're going to get? 'What about a parking ticket?'.

The primary point about that example is that a competent advocate will have thought of those questions before going into court.

The second question could be answered in two ways. You could answer by saying, 'even a parking ticket justifies disciplinary action'; or you could answer by saying, 'driving at a speed dangerous is different from a parking offence. You could take either approach.

What you should not do is say, 'Oh, Your Honour, that doesn't arise in this case and Your Honour doesn't need to decide that.' That's wrong. It is also wrong in most cases, unless you're running a clear alternative case, to say 'Your Honour we submit that driving at a speed dangerous is very different to parking, but we also submit, in the alternative, that, even in the case of parking, it would be sufficient to justify disciplinary action.' That's avoiding the question. What the judge wants is an answer. And what you should have done is thought about the case before court and said to yourself, 'What is the test I am promulgating and how does it apply to that question?'

If, for example, your test was 'is there a risk to human life?', you might say, parking does not ordinarily involve a risk of life unless you are parked in the middle of a highway in a fog. Similarly, speeding may not involve a risk to life, for example doing one or two kilometres an hour over the speed limit, but in many other cases it would. You have there chosen what your test is and you answer the questions in relation to that test.

It's important, in your preparation phase, to work with your team, and this is where a team approach is very important, where you need the juniors, the solicitors, the paralegals and possibly even the clients, to discuss with them how the questions you anticipate should be answered. It gives you a wonderful feeling of warmth and deep-down comfort when you have prepared the answer so well with your team and then you get to court and the judge asks the question.

The final thing about matter is the old cliché, 'should you argue your weak points'. There is a real problem here. A lot of people, including judges and experienced advocates, will say to you 'you should stick to your strong points and abandon your weak ones'. There's a problem with that. What is a strong point? Who decides? You may think a point is weak but the judge may actually see something in it. I can think of many cases where I've had two points. I think that one is strong and one is weak, but I've lost the strong one and won the weak one. Like most advocates, I've been wrong about what was the weak and what was the strong point. That's why

you do have to be careful about identifying weak points. If you're really satisfied as to what they are, discuss them with your team before you abandon them.

METHOD

Finally, method. The first thing to remember is that you should always start your submissions with a table of contents. I did that today, I started with the four 'M's. The first advantage of having a table of contents is that the judge doesn't get bored. If you're sitting listening to someone drone on and on and on, it can be dreadfully boring. But if you've got a table of contents and you know that the speaker is up to point five out of seven, you're thinking 'oh well, this really isn't so bad'.

The second advantage of a table of contents is that it makes it less likely that the judge will interrupt you when you're dealing with point one to ask you a question about point three. The judge is sitting there, obsessed with point three. He or she can't wait to get stuck into your point three. Having heard your table of contents, hopefully he or she will wait until you get to it, which may bode better from the point of view of your argument. It also makes it easier if you know where the person is going and what the person is talking about. In a document, a table of contents makes something easier to read. You've probably discovered this in reading learned legal articles. It is much easier to read if you read the conclusion first, then you read the article. It all makes much more sense because you know where the author is going.

As far as the opening is concerned, it's nice to be able to open with a resounding single sentence and just demolish your opponent, especially if you're responding. It's not very often that you can do it. I did have a case recently that I appeared in the High Court, a case called *Magill v Magill,*[1] involving the construction of a section of the *Family Law Act 1975* (Cth) that said you can sue a spouse in contract or tort. The issue was whether a husband could sue his wife for common law deceit, where she had falsely represented that he was the father of a child. I was able to start by asking a rhetorically colourful question of my opponent, '*What part of the word "tort" don't you understand?'* You can sometimes begin with a line which is a nice demolishing sort of line. Remember also that, when you start speaking, that is the time when the audience is all listening. I can't expect you to be listening to me anymore. But, what I said when I started is more likely to have caught your attention.

Special leave applications. This kills me. One hears advocates get up and say something like this:

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[1] [2006] High Court of Australia Translation 163 (7 April 2006), available at http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/HCATrans/2006/163.html?query=magill%20v%20magill. (Accessed 26 May 2007).

> Your Honour, this is an appeal from the decision of the Full Court of the Supreme Court of South Australia consisting of Chief Justice Doyle and Justices Perry and Bleby, which dismissed an appeal by the defendant from a decision of Justice Jones. Justice Jones found for the plaintiff in a traffic accident case and quantified the personal injuries from at one-hundred and thirty-two thousand, six hundred and thirty-eight dollars and twenty-five cents. In the Full Court Chief Justice Doyle would have dismissed the appeal, but Justice Perry and Justice Bleby allowed the appeal and reduced the judgment to sixty-three thousand two hundred and ninety-seven dollars and seventy-five cents. We support the approach of Chief Justice Doyle.

Everything that I just said is something that they know, something which, if they don't know, they can look up. Why waste time with it? Why give the precise numbers when round figures would have made the submission much easier to follow. Wouldn't the advocate have done much better by getting up and saying 'the issue in this case is whether you can get damages for a carer for a person who is otherwise able-bodied, but unable to work because of the accident.' If you state the issue, you will get far more attention. Giving that sort of predictable drone won't advance the case any further.

Notes. This is something else people get wrong. It's not a good idea to write out in long-hand the whole of what you're going to say. The best way of doing it is to have a page in front of you with your headings, typed in 20 point Times, and capital letters, so that while you're on your feet, you have a security blanket of knowing that you can glance down at it if you really need to and see what your next point is.

It's important to have your authorities organised. It's better to photocopy them than to use books. If you have your own books you can scribble on them. I find it much easier to work with books that someone else has marked the important bits on.

Don't read long passages. There's nothing wrong with saying, 'Justice X says A then B therefore C.' It's much better than tediously reading a whole page. It's amazing how many people are frightened of summarising judgments. They fear that their opponents can say that they are taking them out of context. Take that risk, it's worth it. If it's just one sentence, then by all means read it.

It is very good tactics to be on your feet when the court adjourns for the day, or adjourns for lunch. It gives you a chance to regroup and discuss with your team what you're going to say next, discuss answers to surprise questions, and so on. The problem is that lengthening one's submissions so as to achieve this may not be in accordance with the highest professional standards. But, it's very good tactics if you can be on your feet when the court adjourns for the day.

Political correctness is something else that's worth thinking about. You should be careful not to say 'he' when you mean 'he or she'. Don't make racist or sexist comments. You need to be careful.

I'll give you an example from recent submissions I made in a case about the mirror taxes legislation.[2] The Commonwealth was imposing in Commonwealth places taxes which were equivalent to the State taxes in the States in which the Commonwealth places existed. One of the arguments was that the tax was discriminatory under section 99 of the *Constitution* because the Commonwealth charged one rate in Victoria and another rate in South Australia. We said, of course, that it was not discriminating because, in each State, it reflected the tax that would have been charged in that State were the place not a Commonwealth place. The example I wanted to give was that Woolworths doesn't discriminate when it charges the same price for a mirror, whether it sells it to an ugly person or to a good looking person, the point being that a mirror doesn't discriminate although it shows different people different images. I decided that the example was too politically incorrect to use.

Humour can be useful as an advocate's tool, but be careful with it. There's no harm in being facetious occasionally, but don't do it if the case is one which is particularly tragic or one where a litigant may feel that you are making a joke of his or her misfortune.

Thus endeth the lesson.

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2 *Permanent Trustee Australia Limited v Commissioner of State Revenue* (2004) 211 ALR 18.