Advocacy Institute's Workshop on Appellate Advocacy

(Two perspectives on the Bar Association's Workshop on Appellate Advocacy)

On 19-21 February 1993 I attended the Australian Institute of Advocacy's workshop on appellate advocacy held in the Supreme Court of New South Wales. The Institute has held a number of advocacy workshops around Australia since it was established in September 1991 but this was the first on appellate advocacy. The purpose was to improve style and technique.

About 40 advocates participated from all States and Territories except Tasmania, including half a dozen from the NSW Bar. Surprisingly, most were very experienced. There was a high ratio of instructors led by the Institute's Chairman, Justice George Hempel of the Supreme Court of Victoria. The instructors included a strong contingent from the Victorian Bar and four Sydney silks: O'Keefe, Jackson, James and Donovan.

Kick off was on the Friday evening with a succinct address by Gleeson CJ on the elements of good appellate advocacy. He spoke of the need to be sensitive to the occasion and the audience, of tactful appreciation of the likely response, and of courtesy. Above all other considerations, he said, are the merits of the case. If the merits are against you, wider considerations such as the application of the law in other cases may assist. He pointed out the three main differences between appellate and other advocacy. First, there has already been a decision. Second, there is a multiplicity of judges. Third, the law may not be settled at the appellate level. Many appellate judges are confident of their legal knowledge but all are anxious not to misunderstand the facts. In an appellate court, there is a greater premium on directness. It is necessary to come to the point quickly and to simplify and concentrate submissions. One should be appropriately tenacious. The multiplicity of judges on an appellate bench raises communication problems. It is common for one of the judges to have been assigned beforehand to write the first judgement (perhaps ex tempore) and it is therefore likely that that judge will be asking most of the questions. To whom do you address the argument? You have to appeal to all minds. A silent judge is a chilling judge. So encourage interchange to find out what he thinks he knows.

Justice Hempel told us that communication skills were critical to the art of persuasion. There was theatre in advocacy. Judges were human, he reminded us. Tell a good story concisely and powerfully or seductively. Appellate judges are looking to see if something has gone so wrong that they must interfere.

Over the next two days, the advocates each argued three cases before a mock court. Two of the arguments were videoed. Each advocate was allowed only seven minutes for argument. This was followed by comments from the three person bench and a review of the video by another instructor outside the courtroom. Obviously, in seven minutes there was time to put only part of an argument, and it was necessary to do so crisply. In my first case I artfully put my best points forward first, confident that there would not be time to reach the weak ones. My theory that it is easier to be stylish with a strong point than a weak one proved to be correct. This tactic did not work in a later case where the mock court unaccountably allowed me to run over time until the whole argument, warts and all, finished.

A regional divergence was disclosed and its dangers solemnly discussed. In some regional jurisdictions it is acceptable practice to address the judge as "sir" as an alternative to "Your Honour". Jackson QC warned against this practice in the Federal Court or the High Court lest the regional advocate encounter a judge from a State where to be called "sir" might be regarded as insufficiently respectful.

A fascinating thing occurred when, in due course, advocates were allowed to sit on the bench and adjudicate on other advocates. Often these judges became interventionist, with a keen interest in putting the mercilessly hard, if not unanswerable, question.

I think that the workshop was worthwhile for three main reasons. First and foremost, the videos enabled you to see yourself as judges see you and to compare the reality with your own preconception. Second, constructive criticism of your arguments by others was helpful. Third, the views of others as to the principles of appellate advocacy were often stimulating and sometimes informative. ❑ Peter Biscoe QC

In the Winter 1992 edition of *Bar News*, Donovan QC reported on an Advocacy Seminar conducted by the Bar Association. The Australian Advocacy Institute has gone one step further, conducting an Appellate Advocacy Workshop over the weekend of 19-20 February, 1993. The Workshop was designed for experienced advocates, and some 40 practitioners from all States and the Northern Territory participated. Most had at least 10 years experience in advocacy, and several Silks became "students" for the weekend. As Julian Burnside suggested in the recent edition of the *Victorian Bar News*, one might think that in a profession where humility is not a prominent virtue, a workshop aimed at teaching senior advocates how to run an appeal would fail to attract sufficient starters. However, the response and the level of participation was enthusiastic.

Any thought that this would be a relaxing view of how to run an appeal was dispelled when a large bundle of papers arrived from the Australian Advocacy Institute in the week before the Workshop. The materials covered 6 appeals. Each participant was expected to be familiar with all the materials, and was to argue 3 appeals, either as appellant or respondent. The cases included appeals involving a strike out application, joinder of parties in a Land and Environment Court matter, a conviction for theft, a Family Provision Act matter, a sentence appeal involving Commonwealth drug offences, and an application for a stay in a commercial matter. Researching and preparing submissions in the course of a busy week before the Workshop required some sacrifice, but some of the more

diligent students even had chronologies and outlines of submissions prepared by the time they stood up to argue their appeal.

The Workshop was led by Hempel J of the Victorian Supreme Court, with assistance from a team of Silks and senior juniors, including O'Keefe QC, James QC, Jackson QC and Donovan QC. Proceedings commenced on Friday evening with an address by Gleeson CJ and an overview of the appellate process by Hempel J.

The real fun began on Saturday morning when we broke into small groups and argued the appeals before a bench of three. Both appellant and respondent were generally subject to frequent interruptions and attempts by the bench to divert the train of thought. James QC was particularly active in that area! At the conclusion of each submission the advocate was subjected to detailed criticism from the bench and, frequently, the balance of the class. The dreaded moment then arrived - reviewing one's own performance on video, in an individual session with one of the teaching faculty. Donovan QC was so pleased with the performance of Biscoe QC that he allowed him to take home the video tape of his own argument in one matter.

Another very useful dimension was added when students sat as one of the appeal judges. One quickly appreciates from that perspective the many nuances of style and presentation which attract or irritate the bench.

The Workshop concluded on Sunday afternoon with a detailed review by Hempel J and comments from the balance of the teaching panel.

The preparation and organisation by the Australian Advocacy Institute was first class. The willingness of the eminent range of teachers to devote their time to the weekend is to be applauded. Comments from all students indicated that the weekend had been extremely constructive, and no doubt the next Workshop will be an early sell out. ❑ Mark Williams

Get Smart

Q. "I think in about June 1983 that you commenced working for the Government Motor Services."
A. "That's right."
Q. 'Was that a position of a motor mechanic, classification 99?"
A. "That's right, yes."
Q. "Do you know what the significance of 99 is?"
A. "It means Maxwell Smart's girlfriend, I think. " ❑

(Franklyn-Smith v Government Motors)

Compulsory Reading

Cripps JA: "Where was the new Rule introduced?"
Poulos QC: "It is in the New South Wales Government Gazette."
Cripps JA: "I knew I had read it somewhere. " ❑

(Admax Processing Pty Ltd v Pan Court of Appeal 14 December 1992)

Beginner's Legal Dictionary

ABATE	A food for catching fish
AFFIDAVIT	A device for launching half a lifeboat
APPROBATE	Fish food used by experts
AMEND	The last word on pleadings
ASSIGNOR	Graffiti artist
CORROBORATION	Food served to aboriginal dancers
CUSTODY	Tasting like old-fashioned dessert
EX PARTE RELIEF	A glass of Berocca
EXPECTORATE	Pregnant with octuplets
FORFEIT	A quadruped
ILLEGAL	A sickly bird of prey
LIABILITY	Skilled in mendacity
LITIGATE	An opening for rubbish
NEGLIGENCE	Sleepwear worn by men
NUISANCE	Information about small insects
PLAINTIFF	An airborne assault
PRIVILEGE	On the outskirts of town
PROCESS SERVER	A professional boardrider off Bondi
TERMINAL ILLNESS	Sometimes fatal symptoms occurring while waiting for your flight to leave
TORT	A mental process which sometimes precedes speech
TRESPASS	A cleared area of forest
WARRANT	A declaration of hostilities

❑ Peter Deakin QC

Goulburn Gossip - Supreme Court Circuit

1. At the circuit dinner John McDonald of and concerning Mr Justice McInerney:

> "His Honour is a man of infinite patience who suffers fools gladly."

2. In court on 24 March 1993 (*Richards v R E Neal & Co Pty Ltd* [in arguendo]):

> McInerney J: "What do you say to that, Mr Gleeson?"
> Gleeson QC: "Your Honour ..."
> McInerney J: "Don't you 'Your Honour' me." ❑