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Persuasion – An impressive case

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Much has been written about advocacy – the golden rulesⁱ, the seven lampsⁱⁱ, advocacy to win – a most *inspiring* work, as this overhead of its cover demonstratesⁱⁱⁱ, advocacy with honour^{iv}, and much on advocacy even as art.^v Perhaps the most surprising analysis I have come across is a 19-page work on “Love poetry and the art of advocacy”^{vi}!

For my own part, I would suggest there are three key elements to persuasive court presentation - a firm grasp of the law and the facts, efficient case presentation – including in writing, and elegant delivery. The finest advocates will display these three and more – that undefinable extra something which marks the truly great. But an advocate who masters the basic elements over time will be persuasive, impressive indeed.

Life as an advocate is not easy – as has been said, it is never a bed of roses, but either all roses and no bed, or all bed and no roses! The persuasive advocate must work long and hard to master, in every case, a comprehensive understanding of the facts of the case and the applicable law, and even if, as is said, 95% of the necessary preparation is, as things turn out, apparently wasted: the key is to be prepared to deal with all eventualities. The brief is essential primary reading. If this sounds self-evident, consider the experience of one prosecutor who asked his first witness: “*Are you Dr Singh Mbbs?*” “No,” came the reply, “I am Dr Singh. MBBS is my qualification.”^{vii}

One English advocate is credited with knowing the law so well, that when the Judge he appeared before exclaimed, *‘If that is the law, Mr Curran, I may burn my law books’*, he tartly replied *‘Better read them, my Lord.’*^{viii}

Of course the advocate must also be intimate with the rules of procedure and evidence – plainly the law and the facts are useless to an advocate unable properly to present them. This may sound arid. On the other hand, one text points out, aptly in this medico-legal forum – if the advocate were instead an anaesthetist, meticulous preparation would be taken for granted.^{ix} And the advocate knows that in every court appearance, both case *and* reputation are at risk.

Only by fully conquering the facts and the law will an advocate be ready for all the contingencies of the trial. A good example of “the unexpected” is a reminiscence of Eric Crowther OBE, who once appeared in the English Court of Appeal opposite a distinguished junior and his unfortunate pupil. On arrival to start the hearing, it was clear the preceding case would run substantially overtime, and the distinguished junior took a “calculated risk”, commencing another matter elsewhere, leaving the unfortunate pupil to wait. Two days later, the earlier appeal case concluded abruptly. The next case was called. While Crowther obligingly kept the Court of Appeal “at bay”, the unfortunate pupil scurried off to find his distinguished junior, vigorously cross-examining elsewhere. He returned to a restless Lord Denning, who requested he open the case. The horrified pupil revealed he had not even read it. Said Lord Denning: *“Oh dear, oh dear. What have you been doing these last two days? Some*

young men would give their ears for a chance like this. You're not going to throw it away, are you?"

"Yes please, my Lord" came the reply.

"Well, it's all a great pity, but we can't lose time," sighed the ever courteous, yet time-conscious Denning. "You'd better open the case, Mr Crowther... You're a very fairminded man, I'm sure."

Efficient court presentation is my second recommendation for impressive advocacy. Waffling never impresses; clear, concise argument always does – or “cool, controlled economy” as one text suggests.^x Of course a case should be afforded as much time as is just. But the interests of justice have never been served by time wasting, and especially in contemporary times with judicial time limited – and neither has time wasting advanced the interests of the client. Judicial patience is sorely tried by bumbling barristers, as yet another English advocate’s experience illustrates. After addressing the court for an entire morning’s session, this “loquacious orator” enquired of Lord Ellenborough whether he might have the pleasure of continuing. His Lordship replied *“You may continue your argument, but the pleasure was gone some hours ago.”*^{xi} Hardly persuasive practice!

Third, impressive advocates argue elegantly. They apparently effortlessly create the impression they truly believe in their case – and that so too should the Court! They use language masterfully. They present well before the court. Of course, I do not here refer to physical appearance, although that might have figured in days long past. It was said of the celebrated advocate Sir Edward Marshal Hall that “Nobody could

have been as wonderful as Marshall Hall then looked.”^{xii} That must have been a popular phrase, for it is nearly repeated in relation to another famous great advocate, Edward Lord Thurlow : “no-one ever was as wise as Thurlow looked”^{xiii}!

By court presentation I of course refer to demeanour – particularly important before juries. I doubt the jury were endeared by the counsel who elicited this comment from the bench: “*Mr X, you seem to be of the opinion that cross-examination consists of examining crossly.*”^{xiv} Polite, courteous performance will instead surely encourage the Court, *so far as is just according to law*, to see the argued view. As one text delightfully advises: “Confront difficulties with unflinching perseverance and good humour, and they will disappear like fog before sunshine.”^{xv}

The great advocate is a master of vocabulary. After all, in the battlefield of the courtroom, words are the only weapons – and this is sometimes fortunate! An extensive, *interesting* vocabulary is something all advocates should cultivate. Read widely! The persuasive advocate sparkles, but is also discriminating – his or her presentation will differ depending on the tribunal. Lawyers presenting a case before juries sometimes need reminding that not *everyone* is inspired by legal jargon, let alone understands it! An illustration: A potential juror was once being examined as to his qualifications in a trial involving a large sum of money. He was asked:

“*Do you understand what is meant by a preponderance of evidence?* – Yes, Sir.”

“*Let me have your idea of it.* – I understand it, I tell you ”

“*Well, what is it?* – Why, anybody can understand that.”

“I would like to have your definition of it. – It is evidence previously pondered.”^{xvi}

They are the keys, I suggest: mastery of the facts and the law, efficiency before the court, and what I have termed “elegance” in presentation. Ladies and gentlemen, while truly outstanding advocacy may be rare, impressive, persuasive advocacy can be cultivated – and we not infrequently experience it in this State. And may I assure you: it is never lost on grateful judges!

ⁱ Evans, K. 1993. *The Golden Rules of Advocacy*. London: Blackstone Press Limited

ⁱⁱ Parry, EA. 1923. *The Seven Lamps of Advocacy*. London: Fisher Unwin

ⁱⁱⁱ see for example: Selby, H. 2000. *Winning in Court: an Introduction to Advocacy*. Melbourne: Oxford University Press

^{iv} Phillips, J. 1985. *Advocacy with Honour*. Sydney: Law Book Company Limited

^v see as examples: Beloff, MJ. 2000. “Advocacy as Art”, *Margaret Howard Memorial Lecture*, Oxford; Du Cann, R. 1980. *The Art of the Advocate*. Harmondsworth: Penguin; Hardwicke, H. 1894. *The Art of Winning Cases, or Modern Advocacy*. New York: Banks.

^{vi} Julius, A. 1997. “Love poetry and the art of advocacy”, *Critical Quarterly*, vol 39(2), pp 3 – 21.

^{vii} Crowther, E. 1990. *Advocacy for the Advocate*. Second Edition. London: Longman, p 7.

^{viii} Soonavala, RK. 1960. *Advocacy: Its Principles and Practice*. Bombay: NM Tripathi Private Ltd., p 304

^{ix} Evans, K. 1983. *Advocacy at the Bar: A Beginner’s Guide*. London: Financial Training Publications Ltd, p 181

^x Evans, K. 1983, p 183

^{xi} Soonavala, RK. 1960. P 306

^{xii} Aitken, LJW. 1990. “Success at the Bar: Lessons from Literature and Prosopography”. *NSW Bar News*, Spring 1990, 25-28, p 25

^{xiii} Kelly, BW. 1921. *Famous Advocates and Their Speeches*. London: Sweet & Maxwell

^{xiv} Sergeant Ballantine’s Reminiscences, Vol I, ch 10, quoted in Singleton, JE. 1933. *Conduct at the Bar and Some Problems of Advocacy, Being Two Lectures*. London: Sweet & Maxwell Ltd.

^{xv} Krishnaswami Aiyar, KV. 1945. *Professional Conduct and Advocacy*. London: Oxford University Press, p 73

^{xvi} Soonavala, RK. 1960. P 331