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WINNING ADVOCACY CHALLENGES AND TECHNIQUES

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By The Honourable Justice Henry

INTRODUCTION

"It is difficult for any [person], however wise or eloquent, to speak for himself [or herself], when fortune, reputation, happiness, life itself, are in jeopardy and rest on the decision of strangers, sworn before God to find an impartial verdict on the evidence brought before them. Hence has arisen the honourable and necessary profession of the advocate; it is indeed a high and responsible calling; for into [the advocate's] keeping are entrusted the dearest interests of other [people]. [The advocate's] responsibility is wider in scope than the physicians', and more direct and individual than that of a statesman; [the advocate] must be something of an actor; not indeed playing a well earned part before painted scenery, but fighting real battles on other [people's] behalf in which in any moment surprise may render all rehearsal and preparation futile."

Those words of Edward Marjoribanks writing in his book on the life of Marshall Hall remind us at the outset of the importance of this session's focus: meeting the challenges of the role of the advocate.

The title assigned to this session, was "Winning Advocacy Techniques and Challenges". I reversed the latter sequence of that title to "Challenges and Techniques", to better reflect my theme today. That is, to identify the challenges most commonly confronted by advocates and then identify the techniques you might use to meet those challenges.

Advocacy is a broad field of learning. Much has been written about advocacy and advocacy training is increasingly commonplace. It would be folly to try and cover all challenges in the field in an hour. Accordingly I have allowed self interest to guide me. Since becoming a Judge I have noticed some shortcomings in advocacy before me are more common than others. The more common of those shortcomings likely reflect the challenges of advocacy that warrant particular attention in a session such as this. It is a simple thing to identify a common failing, for instance "Lack of preparation" and recast it

as a challenge, for instance "Be prepared". The real demand of this session lies in identifying techniques to meet the challenges.

The failings I have selected and their recasting as a challenge are as follows:

Failing	Challenge
1. Lack of preparation	… Be prepared
2. Lack of skill	… Strive for self improvement
3. Distracting from the merit of your cause by getting the basics wrong	… Avoid distracting behaviours
4. Lack of purpose	…Focus on purpose
5. Incoherent presentation	…Present coherently
6. Failure to meet opposing arguments	…Meet arguments against your case
7. Not using opportunities for persuasion	…Make the most of opportunities to persuade
8. Becoming flustered, emotional or Aggressive	…Remain calm and polite
9. Not absorbing what the witness or Judge says	…Listen
10. Being inconsiderate of the Judge or jury	…Remember your audience

1. BE PREPARED

Time and again experts on advocacy have opined that preparation is the key to successful advocacy. Sir David Napley in his book "The Technique of Persuasion" said:

> *"A carefully prepared case may be brought to a successful conclusion by one who, by nature or otherwise, is a poor advocate when on his feet; but an inadequately prepared case is unlikely to be won unless presented by an unusually able advocate, on one of his lucky days, before either a singularly good or a singularly bad Judge. There has never been a great advocate who could have achieved his position without the conscientious preparation which must have gone into the case before it was presented to the court. ... It can rarely if ever occur, however, that the most skilled advocate can succeed where the work of preparation has been shoddy, incompetent or inadequate."*

Some advocacy trainers invoke the five p's: "proper preparation prevents poor performance". Others call it the six p's and insert one more p word prior to the word "poor". More emphatic speakers on the topic simply invoke the mantra, "preparation, preparation, preparation".

The importance of proper preparation cannot be understated. Virtually every failing in court can be traced back to a lack of proper preparation. For instance, your witness may reveal for the first time a fact that should have been ascertained by a more through pre-trial witness conference. Your opponent may advance a legal argument that you were not anticipating because you were so focussed on your own case you neglected to think about what the other side might say. From not having a plan of the scene to not having a legal authority on point, virtually every shortcoming in the advocacy of a case has its genesis in a lack of preparation.

Case preparation begins with obtaining all of the relevant documentary materials and assembling them in a logical sequence in a properly indexed brief. It also requires research of the relevant law and the inclusion in your written materials of copies of the legal authorities upon which you will rely.

Merely reading the content of your case materials is not enough. You must develop a complete mastery of the facts they contain. To that end deploy aids such as underlining, tabbing, summaries and chronologies but above all think about the facts.

Analyse the case. Consider not just what happened but why. Is there a viable, unifying theory that explains what occurred in a way favourable to your case? Think about and develop such a case theory. Identify the inconvertible facts that you can be sure to prove, the facts that provide the foundation for your case and your case theory. Think about what the court's likely view of your main arguments and your main evidence will be. If that view is likely to be adverse what might you do differently to change that? If it is likely to be positive what might you do to safeguard that likely effect?

If you are preparing for a trial or other hearing in which witnesses will be called it is vital that you confer with your witnesses. Remember, you may be prepared but your witness

might not be. A conference will force the witness to think again about the events in question. Do not assume the witness will still have a copy of his or her statement or affidavit, let alone have read it to refresh memory. Ensure the witness actually has a copy and encourage the witness to read and reread it. This will serve the dual purpose of refreshing memory as well as checking for error. It is important to comply with the ethical rule against coaching a witness but there is nothing improper in asking a witness questions about matters you may ask the witness about in court, both with a view to double checking the information the witness will likely give in court and getting the witness comfortable with talking about the facts in a question and answer format.

Many lawyers do a good job of obtaining and mastering the relevant facts and law during case preparation yet fail at the final hurdle. They do not prepare themselves for their performance in court. This performance preparation phase is critical. The good advocate thinks about how the case should be presented before the relevant audience, be it a Magistrate, a Judge or a Judge and jury. The sound advocate may have prepared a written opening but the good advocate will have practised it and reduced it down to a short series of notes. A sound advocate may have prepared a written outline of submissions but a good advocate will then prepare notes for the oral address so that address will not just regurgitate the content of the written outline already before the court. The good advocate will plan and makes notes about what needs to be achieved in examination in chief of the advocate's witnesses and in cross-examination of the known witnesses of the opposing party. In short the good advocate thinks through what needs to happen at court and plans and prepares the performance that will make it happen.

2. STRIVE FOR SELF IMPROVEMENT

Read widely. Words are the tools of an advocate. A broad vocabulary is important, not to impress with obscure words but to be able to pick the right word for the purpose at hand. It is a skill that allows the advocate to convey correct meaning, briefly and clearly.

Educate yourself in the skills of written communication. What are the attributes of great written work? Now is not the occasion to cover that topic but I suggest one of the greatest attributes is simplicity of expression. George Orwell's rules for effective writing included:

- Never use a long word where a short one will do.
- If it is possible to cut a word out, always cut it out.
- Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.

The work of the world's great speakers is less well recorded than of its writers but ample records exist of great speeches. Read them and read the analyses of them. Discover what it is that made them so great. Now is not the time to enlarge upon this topic either. However, I suggest simplicity of expression is again among the leading qualities of great speeches. Many teachers of oral rhetoric cite the example of Abraham Lincoln's Gettysburg Address as one of the greatest speeches in history, yet it was only 271 words long (I have spoken over 1300 words to you already this afternoon).

Accumulate the equipment of the wordsmith to help you search for the right word. In a recent paper on written submissions retired Judge of the Court of Appeal the Honourable Richard Chesterman AO RFD QC said :

> *"It is essential that a Barrister has more than one dictionary. I think a thesaurus is useful as well. ... It is customary in addresses on this topic to recommend the use of style guides, but I never used one, getting by with the occasional reference to Fowlers Modern English Usage and an Oxford Dictionary of Grammar."*

To his Honour's assembly of the tools of the trade of the advocate I urge the acquisition of a good book of quotations.

Read about and observe advocacy. There are many books on advocacy. Reading only a selection of them will soon demonstrate there are certain constant recurring themes identified by all authors. Watch advocacy training videos, foremost among them, the Irving Younger classic, "The Ten Commandments of Cross-Examination" – it is even on YouTube. Seek out and read the transcripts of trials where good advocates have been at work. In a similar vein when a good advocate is appearing, try to attend court and watch him or her ply the craft of advocacy. Curiously you are likely to learn even from poorly

performed courtroom advocacy – and it is easily recognised - because it so readily demonstrates what you should avoid doing.

Practise the skills of public speaking. These skills can be practised through speech making, debating and acting; through speaking in any forum in which there is an audience. However, an audience is not essential to practise the skills of public speaking. You can do it alone at home. Practise a speech in front of the mirror observing your delivery. Record yourself speaking, play it back and identify what can be improved. Are you talking too quickly? Are you talking in a boring monotone? Is there enough fluctuation? Are you using pauses? Are you pronouncing words clearly? Are you projecting your voice so that you will be heard properly?

This process of self-review can also be adopted in respect of work that you have performed in court. After court, reflect on what you did well and what you did poorly. There is always room for improvement. If you have access to a transcript of the proceeding, read it. Think about how you may have put an argument better or led the evidence of a witness more clearly.

3. AVOID DISTRACTING BEHAVIOURS

There is no greater obstacle to effective persuasion than doing the simple things wrongly. There are many things litigation lawyers know they should not do yet still they do them. Now I have left the arena as an advocate and as a Judge am the target of advocates' attempts to persuade me, I value quality advocacy more than ever. Now the single greatest barrier between the advocate and me is the distracting impact of the advocate doing basic things wrongly. Doing the basics the wrong way detracts from the advocate's message. It distracts and annoys the audience.

Examples of doing the basics badly, unnecessarily distracting the court from the merit of your cause, include:

- Delaying the court. Be punctual. It is a simple courtesy. If you are going to be late, and you should avoid doing so at all costs, at least inform the court in advance of that fact. That may at least minimise the inconvenience and annoyance it will

cause. If you are engaged in settlement negotiations on the doorstep of the court and it appears the case will settle with a little more time, contact the court and ask for some more time.

- Not dressing properly for court. There is nothing more visually distracting than observing an advocate at the outset of a case who is not wearing the correct attire or is wearing the correct attire badly. The jabot should not be half spilled from underneath the bar jacket. The base of the bar jacket should not be spread unbuttoned because it is too small to contain your middle age spread – get a new bar jacket.
- Slouching and lounging about at the lectern or the bar table. It is excessively diverting. When at the lectern stand up straight, not with one foot perched on the chair behind you. Do not put your hands in your pockets. If you do not know where to put your hands rest them gently on the lectern in front of you. If you have a drink of water put it back down, do not hold onto it and keep talking as if you were holding a glass of beer in conversation at a local hotel. If you are seated at the bar table, sit up straight. Do not lounge about as you might in the privacy of your own office or on the lounge at home – you are being watched. Show some respect and do not detract from your audience's impression of you.
- Not standing up to take an objection. If your opponent is taking an objection, sit down while the objection is taken. These basic courtesies should not have to be the subject of reminders by the presiding Judge and it will annoy and distract the Judge if they occur.
- Not speaking so that you will be heard. Do not talk too fast or so softly so that you cannot be understood. If you know you have a propensity to do so do not wait to be reminded that you are doing so by the court. If that occurs the court will already have been distracted by your shortcoming. Practise overcoming such weaknesses elsewhere and write reminders to yourself in the notes from which you are working, such as "speak up" or "slow down".
- Speaking over the witness or the Judge. The witness may not have the experience or discipline to not interrupt but the Judge will expect the advocate does. The advocate that constantly interrupts or over talks the witness and does not let the witness finish will only annoy the very audience the advocate hopes to persuade.

- Taking objections which do not matter. There is nothing more annoying on a busy applications day than to have counsel at the outset of an application argue a series of objections to the contents of affidavit material when the material being objected to is of no material consequence.
- Not opening your case with a narrative. The opening should tell a coherent story, not meander from witness account to witness account. The "and the next witness will say…" method is notoriously ineffective advocacy. It is difficult to follow and makes poor use of the opportunity for forensic advantage the opening provides. The very fact it is engaged in by anyone holding himself or herself out as an professional advocate is distracting.
- Lack of familiarity with the technology you intend to deploy in court. If you are going to rely upon the playing of a dvd then check before court starts that the dvd can be played by the court's electronic facilities or take steps to provide your own. If you intend on using a video control then work out how to use it before court starts.
- If you are going to call a witness by telephone or video link not making sure the witness has an operational telephone or video link and will be ready when called. It is annoying to your audience to have to stand down and wait because the witness being called by telephone or video link is temporarily unavailable. Remember in the normal course the witness would have to have been outside the court room waiting; the court would not have been waiting on the witness.
- Not bringing copies of cases and documentary exhibits to court for distribution to the jury or Judge. It is annoying if documentary exhibits which are going to be referred to frequently are not at the fingertips of the decision maker as the case progresses. Similarly it is diverting if in the course of submissions a party relying on a particular case authority does not have the case authority to place before the court when discussing it.
- Not citing and using the official report publications of the cases you rely upon. If you do not give the Judge the official version then in later preparing the judgment the Judge will be put to the trouble of having to procure that version for himself or herself.

- Not being organised at the bar table. Have what you need at your fingertips so as to avoid long delays testing the court's patience while you search for what is needed.
- Not being accurate. Take care not to mistake the facts or the law. It will only erode the court's trust in you and in the argument you advance if you are inaccurate. That is a significant diversion from the court appreciating the merit of your cause.
- Overloading the court with unnecessary documents and cases. Since the advent of the Internet it has been easy for ineffective advocates to procure a barrage of copies of cases to place before the Court. Unfortunately a lot of cases are cited or relied on in an undiscerning way. The court is often left with an overwhelming volume of case law which proper analysis would have reduced. In a similar vein the parties often settle upon an exhibit book, which, because of the parties' failure to reach common ground about what is truly relevant, is invariably longer than it needs to be and contains documents that ultimately are of no real relevance to the decision in the case. Weighing the court down with an excessive number of judgments to read or an excessive volume of exhibit material to read conveys the impression you want the Judge to do your work for you; that you lack the discipline to identify the evidence which is truly relevant or the principles that truly apply. It will undermine the Judge's faith in your submissions. It will distract the Judge, who will be left with a time consuming task and the constant reminder while performing it of your failure to properly discern and assist the Judge with the critical issues.

4. FOCUS ON PURPOSE

A purpose to everything

Everything the advocate does in court should have a purpose. If there is no purpose to it then it should not be done. It only consumes time unnecessarily, confuses the audience as to what the advocate's case really is and runs the risk of accidentally bringing out information adverse to the advocate's case.

Case theory

To ensure the advocate's work preparing for court and at court is driven by proper purpose it is important that the advocate develop a case theory. The case theory guides your conduct of the case. It is the unifying theory advanced in the closing submissions. It informs your purpose throughout.

Begin with knowing how you want to end

Having identified your case theory you should plan your closing submissions during the preparation phase, well before the case begins in court. Work backwards from your planned closing submissions. This will bring purpose and direction to your preparation and performance in court. It may be that as the case progresses there is some fine-tuning of the planned closing submissions. However, by identifying at the start what it is the advocate wants to argue at the end the advocate brings focus to what needs to be established during the case to sustain that end argument.

In civil trials it is customary for advocates to provide the court with a written outline of submissions during the closing address phase of the case. The court welcomes the provision of a written outline of submissions at the conclusion of the case. In cases of any complexity most Judges have an expectation they will be assisted, not only by oral submissions but also by a written outline. Their expectation is not merely born of a desire to be properly assisted. It also reflects a belief they are not imposing a significant demand because they believe competent counsel should in any event have planned the closing submissions and drafted an outline before the trial even began. Their expectation is that as the trial progressed the written outline may have been modified to allow for unexpected developments and by the close of evidence counsel will already have a reasonably up to date written outline of submissions to place before the court.

Be certain of the foundations of your case

It has been said that no battle plan survives an encounter with the enemy. The saying is not entirely true of litigating disputes in court. Inevitably unpredictable things occur in the life of a case but it is rare as a hearing or trial progresses that the key legal and factual

foundations of the case will change significantly. What is more common is the failure of advocates to properly identify what those foundations are and build their case upon them.

To that end a good advocate is always able to identify the foundational legal thinking for the case to be advanced. It is a helpful touchstone from time to time to bring legal thinking in a case back to the relevant first principles in the field. This ensures that what is being argued is consistent with those principles, those being the principles that will inevitably guide the foundational thinking of the court hearing the case as well.

It is likewise important to double check the foundational documents for the case in advance, be they the pleadings, the indictment, the application, etc.. Those documents provide the limits for the foundation on which the case is to be built. It is distracting, unpersuasive and potentially fatal to the advocate's case if the case advanced is inconsistent with the case identified by the documents filed in the case.

Focus on the best points

Be discerning. Do not advance every conceivable argument. Strip away the bad points, the ambit points, the weak arguments. They serve no persuasive purpose. To the contrary, they detract from the force of your good arguments. Indeed in submissions your most attractive arguments should be revealed as early as possible. The sooner the court understands the force of your best points the more receptive it will be.

Only take risks critical to achieving your purpose

Do not take risks unless they are vital in achieving your purpose. Advocacy books are full of advice about the dangers of asking the one question too many and of asking a question you do not know the answer to. You should never ask a question without having a good reason for asking it. You should never ask a critical question without having reason to believe the answer will be favourable.

An often quoted example of asking one question too many involves an English case in which a young man was charged with unlawful carnal knowledge of an underage girl. A

prosecution witness who was a farmer gave evidence he had seen the couple lying together in the relevant field. Cross-examination ensued:

> "When you were a young man, didn't you take a girl for a walk in the field in the evening? - - Aye, that I did.
> Did you not ever sit and cuddle her in the grass? - - Aye, that I did.
> Did you never lean over and kiss her when she was lying back? - - Aye, that I did."

To this point the defence counsel had elicited helpful evidence but then asked the one question too many:

> "Anybody in the next field seeing this, might easily have come to the conclusion that you were having sexual intercourse with her? - - Aye, and they'd have been right too."

The risk in straying into an area of uncertainty or of continuing to ask questions when you have achieved your purpose is that you will elicit information unhelpful to your case. You should only take such risks when it is essential to do so; when your case may be fatally compromised unless you successfully take the risk.

Perhaps the most common phase of evidence in which advocates take unnecessary risks is re-examination. It may be the natural desire of competitive people to have the last say but re-examination is attempted far more often than it should be. By the time a witness is being re-examined the witness is likely to be mentally weary and quite possibly confused. Unless the advocate is sure the witness will understand the non-leading questions that must be asked in re-examination and is reasonably sure of what the witness will say in response there is a real risk the witness will give answers that only reinforce what has been achieved in cross-examination rather than undoing it.

Generally re-examination will be at its least risky in circumstances where a cross-examiner has obviously overreached. When that occurs the courtroom will be almost willing re-examination to set the record straight. An example of such an instance was quoted in the Bar News some decades ago to this effect:

> "A farmer suffered severe and permanent injuries in a collision between the horse he was riding and a motor vehicle. At the trial of the action, during cross-examination he was asked:
>
> Defence Counsel: Isn't it true that not long after the accident someone came over to you and asked you how you felt?
>
> Farmer: Yes, I believe that is so.
>
> Defence Counsel: And didn't you tell you him you never felt better in your life?
>
> Farmer: Yes, I guess I did.
>
> At this point counsel sat down with a satisfied look on his face. In re-examination the plaintiff's counsel asked only one question:
>
> Plaintiff's Counsel: Would you tell his Honour the circumstances in which you made that response?
>
> Farmer: Yes. Not long after the accident my horse which had sustained broken legs was thrashing around. A policeman from the accident appreciation squad came up to the horse and put his revolver to its ear and shot it dead. He then went over to my dog which had a broken back and was howling miserably. He put his revolver to the dog's ear and shot it also. He then came over to me and asked me "How do you feel?" I replied, "I never felt better in my life!""

5. PRESENT COHERENTLY

In submissions

It is important to properly consider the structure and sequence of the submissions to be made. Properly structured and ordered submissions allow your audience to quickly grasp the relevance of the particular submissions you are making. The use of an introduction identifying the key issues and headings headlining each area of the ensuing submission provides the court with the stepping-stones in thinking which favour your argument.

Identifying clearly what each of the main issues and arguments are ensures not only that you will be more persuasive in developing those arguments. It also makes it more likely

that the Judge will properly consider them in making the decision. Be obscure as to what your issue or argument is and the Judge may miss the point entirely.

Justice Mall is said to have observed on an occasion when counsel poorly presented a miscellany of facts to the jury:

> *"Mr Smith, do you not think by introducing a little order into your narrative you might possibly render yourself a trifle more intelligible? It may be my fault that I cannot follow you. I know my brain is getting a little dilapidated, but I should like to stipulate for some type of order. There are plenty of them: there is the chronological, the botanical, the metaphysical, the geographical, or even the alphabetical order would be better than no order at all."*

In leading evidence

Coherence is particularly important in presenting evidence in chief. This is the opportunity for the court to properly understand the evidence lead in support of the advocate's case.

Evidence in chief should ordinarily be presented in a chronological sequence allowing the witness to describe events as they unfolded. The questioner should refrain from constant interruption of the witness. Bear in mind that witnesses will find it easier to develop some flow in telling their story, at least until reaching a logical break in their narrative. When a witness is interrupted too frequently in initially giving an account of events and has to repeatedly stop and start the narrative their account will be difficult for the audience to follow and understand. If a witness is permitted to flow and misses a point or two or refers to something needing elaboration the questioner can always make a note of it and go back to pursue the point later.

Where a witness is describing an event of a physical nature plans, maps and photographs should be used to better explain that evidence. It is best to introduce them at an early stage in the evidence, to give the audience context and understanding as the narrative unfolds, rather than leaving them for the end and having to have the witness repeat much of what has been said.

6. MEET ARGUMENTS AGAINST YOUR CASE

If your case has a weak point, deal with it, do not ignore it. By acknowledging a weakness or difficulty confronting your case in the course of your submissions you blunt the inevitable attack upon it by your opponent and you pay your audience, whether a Judge or jury, the respect of acknowledging that they will have identified the apparent weakness and would expect you to deal with it. The credibility the advocate acquires by acknowledging and by dealing with the weakness is useful in promoting a favourable reception to the advocate's submissions as to why the weakness is not as adverse as first thought.

In a similar vein advocates should acknowledge the legal principles and case authorities that are against them. By acknowledging their existence and dealing with them the prospect of the court erring and having to be corrected on appeal is reduced. Moreover a failure to do so can be highly damaging to the credibility and reputation of the advocate.

7. MAKE THE MOST OF OPPORTUNITES TO PERSUADE

Opportunities that are legitimately open to an advocate to persuade the court should be used, not be wasted.

The opening address is a powerful tool of persuasion yet too often it is poorly done or in some instances not done at all. It is surprisingly common in civil trials, at the outset of the defendant's case, for the defendant's counsel to ask, "Does your Honour require an opening?" It is remarkable that the question is asked at all. Why would counsel not want to utilise such a guaranteed uninterrupted opportunity for oral advocacy in the course of the trial? Even if counsel thinks that by that point all should be clear to the court why not take the opportunity, even if briefly, to ensure that it is?

Advocates who have been warned in advocacy training about the dangers of asking questions they do not know the answer to, sometimes take that warning too far. Some counsel seemingly become so risk averse they are reluctant to join issue with witnesses

when it matters. No advocate can predict with 100% certainty what a witness will say to every question. The advocate must manage risk but that does not mean risk must be avoided. Nor should it be used as an excuse to avoid engaging in a difficult area of cross-examination. It is imperative that when important witnesses against your cause are giving evidence you exercise the opportunity afforded to you by cross-examination to test them properly.

A further example of advocates not using the opportunity afforded by cross-examination is failing to have witnesses clearly concede facts. Advocates sometimes take short cuts in extracting or seeking to extract the information they are after from witnesses they are cross-examining and move on without properly proving the information. Typically this occurs when a prior inconsistent statement is put and the answer implies the witness probably agrees with the relevant fact but has an element of qualification or evasion to it with the consequence the relevant fact has not actually been conceded. In such situations the opportunity to extract a clear answer remains live and must be exercised.

In an era when it is common for expert witnesses in particular to be called by telephone or video link it is seemingly forgotten that witnesses are most persuasive if they give evidence in person. Even if there is not a contest of credibility between witnesses the Judge or jury is more likely to remember and give weight to the evidence of a witness who has given evidence in person. The decision to call a witness by telephone or video link involves surrendering a significant forensic advantage. It ought not be made lightly.

It is imperative that advocates are courageous in the face of adversity. There will be occasions where the presiding Judge does not grasp the importance of an argument critical to the advocate's case and is dismissive of it or pushes the advocate to move on. It is important in those situations to persevere. It may be possible to try a different approach to the argument giving the impression you are progressing as the Judge has requested. If not, politely but firmly explain that it is necessary to develop your point further in order to properly explain it and press on.

Persistence in this context ought not be confused with stubbornness or doggedness as explained by JL Glissan QC in *Advocacy in Practice* 4th Edition p9:

> *"Like confidence, persistence is a virtue in moderation. ...It is certainly true that persistence is essential. Cases may be lost but they should not be abandoned, and the courage to persist in a difficult cause is important. But..., a note of warning must be sounded – persistence must be distinguished from doggedness. Endless repetition brings no reward but interest and then loss of temper in the hearer."*

In an era when written outlines are often before the presiding Judge by the time of closing submissions it is all too common to hear lawyers say they rely on their written outline and make no oral submissions of substance. Again this involves surrendering a significant tactical advantage. While it might fairly be assumed the Judge will read the advocate's written outline it cannot so safely be inferred the Judge will understand it. Why surrender the opportunity to engage with the Judge in oral submissions? You should welcome the opportunity for such engagement. It increases the likelihood that the court will absorb and understand your arguments.

This is not to say that you should repeat in your oral submissions that is which is in your written outline. In performance preparation you should have made a fresh set of notes for reference in the course of your closing submissions rather then merely relying on the content of your written outline to prompt your oral submissions.

8. REMAIN CALM AND POLITE

In *Advocacy in Practice* 4th edition p 7 JL Glissan writes:

> "One rule that should never be violated is that under all circumstances the advocate should keep cool, and not lose his or her temper on any account. No matter how stupid the witness, how unexpectedly damaging the testimony, how exasperating the conduct of opposing counsel, or how erroneous you may think the rulings of the court, show no sign of discomposure. Aside from the fact that juries (and in the writer's experience, Judges) attach importance to the effect damaging testimony apparently has upon lawyers engaged in the trial of the case, by loss of temper you may say or do something fatal to the

> case, and to your reputation as an advocate. There are times when indignation should be *expressed*, but kept within bounds. The preservation of imperturbable good temper is a golden rule for good advocates. Never be moved to anger by anything, however provoking it might be, and however much you may *appear* to be in a passion. Absolute dignified self command is the greatest virtue."

It is vital the advocate remain calm at all times, particularly when the case encounters difficulty. Even if the advocate is concerned by the evidence of the witness taking a turn for the worse the advocate must not show it. The advocate must be like an actor or a poker player who is bluffing and appear to remain undeterred and undisturbed. This gives the impression to the Judge or jury that the evidence just given must not be as damaging as it at first blush seemed.

Trials can involve high emotion. The expert advocate should not become emotional or aggressive in the way the witnesses untrained in court craft might. The advocate who remains polite and courteous at all times will invariably achieve more with the witness and be more persuasive to the court than one who is emotional or aggressive.

Witnesses are not the only persons in the courtroom who might potentially cause an advocate to become flustered emotional or aggressive. Occasionally an opposing advocate may get under your skin. Whatever the reason for that it is imperative that you not show it in court. The risk of doing so is that it is you who will appear to the Judge or jury to be emotional, flustered or aggressive, and for no apparent reason. They are unlikely to know of the provocation you perceive your opponent has given you and more likely to perceive you as behaving unprofessionally. On the other hand if they are aware of any misbehaviour on the part of your opponent which gives you cause for anger they will be much more impressed if you do not react and instead remain calm and polite.

For instance, the occasional advocate will engage in distracting conduct at the bar table while you are on your feet. Most frequently that will involve loud purported whispering. Advocates who so conduct themselves at the bar table fail to realise that even if they are not being heard their audience, the Judge or the jury, can see that they appear to be talking

and if it becomes a pattern will be unimpressed by it. As time progresses they will have increasing admiration for your ability to press on, ignoring such rude behaviour and a commensurate decrease in respect for your opponent and in turn the arguments advanced by your opponent.

In the event that the loud whispers of an opponent distract you to the extent you have a lapse in concentration then pause, wait until your opponent stops speaking then pause a little longer after that before then resuming. It will generally be apparent when you do this, if not to your opponent then at least to the Judge or jury, that it is because of your opponent's rudeness. If you opponent persists with behaviour do not hesitate to pause again. The Judge will soon become annoyed by these interruptions to your momentum and say something to your opponent. If the Judge is slow to pick up on what is occurring at the bar table then endeavour to draw attention to it with good humour. For example, "I'm sorry your Honour I could not hear that over my learned friend's sounds here at the bar table" or "I beg your pardon it sounded like my learned friend wanted to say something to the court".

9. LISTEN

Advocates caught up in the stress of delivering their own performance sometimes neglect to listen to the contribution of the other players in the court room. It is important not to become so absorbed in what you are doing that you are not absorbing what else the other players in the courtroom are saying.

For example, in examining or cross-examining a witness you may well have planned questioning predicated on your expectation that you would receive a particular answer. If you receive a different answer it may then be necessary to modify your planned approach. On occasion it appears counsel have not heard an answer which is contrary to their expectations and they proceed on with their planned patterns of questions seemingly paying no regard to what the witness actually said. The Judge or jury would have heard what the witness said for they will not be distracted by thinking about the next question to be asked and will be focussing entirely on what the witness says. It is important that the advocate takes a similar approach and focus us on listening to the answer being given to the

advocate's question rather than focussing on what the next question will be while the witness is still talking.

In a similar vein advocates waiting to cross-examine may be so apprehensive about executing their planned cross-examination that they neglect to listen properly to the evidence being given in evidence in chief. The evidence given may vary from that which was opened or which the cross-examining advocate anticipated would be given in evidence in chief. The change may mean that cross-examination becomes unnecessary or may be significantly shortened. On the other hand it may open up a whole new area that the advocate had not planned upon that will now need to be addressed in cross- examination.

The damage the advocate can do to a case by failing to listen properly to evidence in chief is at its potential worst when the evidence in chief of a witness has not gone well for the party calling the witness and the party's only hope is that inept cross-examination may result in the witness correcting the evidence earlier given or bringing out the information the witness had failed to give in the course of evidence in chief. The good cross-examiner would have listened to the evidence that was actually given in chief and will ensure that the witness is given no such opportunity to mend the damage done.

It is of course also important to listen to what the Judge says. As with the examination of witnesses counsel are sometimes so caught up in executing their plan of what they want to submit to the Judge that they are not listening to what the Judge is saying in the course of submissions and are therefore failing to react to what the Judge is saying. As earlier explained, dialogue and engagement with the Judge in the course of submissions is helpful to both the advocate and the Judge. The advocate who listens to what the Judge is saying will gain insight into what the Judge is thinking and how the ensuing submissions should be tailored to encourage or discourage that line of thought, as might be appropriate.

On occasion counsel may not understand the point a Judge is making in the course of submissions. The safest course is always to admit that you do not understand with a view to the Judge further explaining what he or she is getting at. Do not be embarrassed to do so. You will do yourself greater embarrassment and your case potentially greater harm if

you press on not grasping what the Judge is getting at and thus fail to properly address the Judge's concerns.

10. REMEMBER YOUR AUDIENCE

In the course of a jury trial it is imperative that advocates are conscious of what the jury is seeing and hearing unfold before them. The all-absorbing eye of the jury will pick up on the subtle as well as the obvious. Take care while you are in jury's presence to convey an air of professionalism about your in-court conduct.

When you are addressing the jury ensure you do so loudly and clearly enough to be understood by them. Maintain a polite and respectful demeanour. Do not browbeat or be condescending or patronising. Remain humble. In "The Technique of Persuasion" Sir David Napley wrote:

> "Above all, do not be pompous. Many a young Barrister has discovered 25 years after his call that he is left with little to shew than his pomposity, and that the first essential of genius is humility."

When you are leading the evidence of a witness remember the jury must hear what the witness is saying. If necessary encourage the witness to speak up. With particularly soft-spoken witnesses adopting part of what the witness has said in the answer just given as part of your next question may assist the jury's understanding in what has been just said. If you are examining or cross-examining a witness about a plan or a document ask yourself whether the exercise will make any sense to the jury unless they can see the plan or the document as the evidence is being given. Be considerate of their needs, they are the ones who need to understand what you are doing with the witness.

These comments apply with equal force to the situation where the Judge is the trier of fact in the case. It is also important to watch the jury or the Judge as the case may be in the course of making submissions to them. This is well explained by Kirby P in the *10 Rules of Appellate Advocacy* (1995) 69 ALJ 964, 971-2:

> *"It is vital that advocates should watch those to whom they are addressing their arguments. In this way, they will be more likely to follow the tendencies of thought which may be expressed as much by body language and attitude as by oral expression. How many advocates I have seen clutching the podium as a support, lost in their books and in their reading ignoring the very people who's decision is vital to their clients cause?...Watching the decision-makers' reactions to arguments can help the advocate know how far to push an issue and when enough has been said."*

In addressing the Judge remember he or she will not be as intimately familiar with your outline and the filed materials as you are. The probability is that the Judge will have read the outlines and be alive to the basic issues in the case but may not have grasped the minutiae. Be considerate of the Judge's needs in the course of your address. Give the Judge time to finish making a note. Give the Judge time to find the passage in the case you are referring to. Clearly identify the filed document you are referring to by its court file number so that the Judge may find it more readily.

CONCLUSION

We have today addressed but some of the challenges faced by the advocate and the techniques you might deploy to meet those challenges.

Of the 10 challenges I have discussed I suggest two challenges from that list that are the most important of any potential list of challenges faced by the advocate. They are "be prepared" and "strive for self improvement". An advocate who attends court well prepared and prepared to learn is well equipped to meet the challenges of this important and honourable calling.