EVERYTHING YOU WANTED TO KNOW ABOUT APPEARING IN THE SUPREME COURT BUT WERE AFRAID TO ASK

Justice R G Atkinson AO, presented at the Queensland Law Society Modern Advocate Lecture Series, Thursday 26 October 2017

It must be accepted that appearing in court even when you have a very well prepared case for an honourable client is always a very stressful experience. How much more so that is when your case is ill-prepared or your client turns out not to be as honest as you hoped that he or she would be. There are some things you can do to try to reduce your stress levels and present your case well and so I will proceed to give you a number of tips that I have learnt from my long years of experience first as an Articled Clerk, then as a Judge's Associate, then as a Barrister and finally as a Judge.

I should say that my mantra at the Bar was that there are three rules of success at the Bar. I shamelessly borrowed from the real estate agent's mantra of three rules for real estate which are location, location, location. The three rules for appearing in court successfully are preparation, preparation and preparation. As a judge my mantra has now become always expect the unexpected. I always prepare for court now to cope with everything that I know that is going to happen, is likely to happen or that may happen. That is because the unexpected always happens and because it is unexpected you need all your energy and mental acuity to deal with it. If you are still trying to prepare for the known, expected or likely you won't be able to cope with the unexpected.

For newly admitted legal practitioners and those not familiar with going to court or a particular court, my first piece of advice is:

- Go to court.
- Go to court when you don't have a case on.
- Sit and observe what happens in the callover in applications or on a caseflow management day or at a sentencing hearing or at the beginning of a criminal trial or take a snapshot from a civil trial.
- It may be interesting; it may not be; but you will always learn something. It is extraordinary to think that the first time you might go to a court is when you have to perform something important in that court. So visit courthouses. Get to know those courts in which you have not yet appeared. Make the court your work place, somewhere where you feel familiar with the environment, the roles of all the people and the

expectations that judges and other courtroom personnel and registry staff will have of you.

My next piece of advice is to be polite to everyone in court. It is a work place and not a battlefield. Be polite in particular to the courtroom staff, the bailiff and the associate. They may act as the judge's eyes and ears and they are always the judge's stalwart supporters. If you are rude to court staff you run the real risk that the judge will hear about it and whilst the judge may or may not say something to you about it your reputation will be tarnished by your behaviour.

This includes being polite to your opponents. A judge is in court to solve a problem or many problems. Nothing grates on a judge like legal practitioners who are rude to each other or point score in an unpleasant way. That does not help the judge solve the problems before the judge, is distracting and again will make the judge think less of you, not of your opponent.

The need for courtesy is particularly true if your opponent is a self-represented litigant. I know, from my own experience, that such a litigant can be a terribly difficult person to appear against. Such a litigant also presents problems to the judge. Such a litigant will usually be much more stressed about this situation and about appearing in court than you are. They will be intensely emotionally involved in their case. It is your duty as a professional to endeavour to create, whenever you can, a calm atmosphere, and to organise the material so that the judge understands what the real problem is and therefore how to solve it. Self-represented litigants are often extremely disorganised because of their unfamiliarity with what goes on in court and the proper procedures and their often extreme state of heightened emotion. Therefore, you have the opportunity to organise the material and to present it in a calm and unemotional way to the judge. I have observed and trust me I remember the names of legal practitioners that I have seen adopt this approach. Such an approach will enhance your reputation with the court.

This brings me to really what is the central point for a legal practitioner in court. You may have a fine academic record, you may have landed yourself a good job, you may work with congenial colleagues and have interesting clients but the judge knows nothing of that. All the judge knows is how you behave and how well prepared you are in court. It is by your performance in court that you will earn your most important reputation: that is your reputation for honesty, reliability and knowledge. That reputation takes a lot of work and is hard won

but unfortunately it is also easily lost. However if you have built a good reputation in court for honest, reliable and skilled work, you will be much more likely to be forgiven for an occasional slip up when something you hadn't expected to be a problem, becomes a problem and you make a mistake.

Applications

As you will all no doubt know in the Supreme Court in Brisbane two judges usually sit in Applications. On Mondays, one judge will do applications under the *Dangerous Prisoners Sexual Offenders Act* but on each other day generally there are two judges sitting although that may change if a judge is urgently needed for some other matter and the list is closed down so that it is limited to matters only before one judge.

The Applications jurisdiction is always over listed so that more cases are set down than can be heard by the judge or judges who are sitting on that day. This is because matters may be adjourned, they may settle, or the parties may reach agreement so in order to maximise the time available to the profession to set matters down urgently the court always allows an over listing of each day. Consequently at the beginning of the day there is a callover in which the senior judge will want to assess how long your matter is likely to take.

When an application is listed in the Registry you will be asked for your time estimate. The general rule is that the matter should be expected to last no longer than two hours although if you and your opponent make an approach to the associate of the senior judge in Applications in the week in which you wish to list your matter, you may be allowed to list a matter that will take longer than two hours if there is time available in that list.

So at the callover you will be asked by the senior judge in Applications how long your application is expected to take. This is a very important question and the judge needs you to be as accurate as you possibly can. It is surprising, even shocking, to me how seldom it is that the time estimate given at the callover is the same as the time estimate that was given when the matter was listed. If it is because the matter will now take less time because the parties have discussed the questions in issue and reached agreement about certain matters or reduced the matters in dispute, there is no problem but there is a problem if a party who set a matter down for 20 minutes says it will take an hour and a half. As I've said, the applications are already over listed and so that extra hour you seek may make the list unworkable.

When you give your time estimate remember you are giving a time estimate for your submissions, your opponent's submissions, any submissions in reply, questions by the judge, reading time by the judge and then time to give an ex tempore judgment.

Before the callover a judge will commonly ask if there are any consents or adjournments. By adjournments, the judge is not asking for a contested adjournment where one party wants an adjournment the other party does not and the matter will have to be argued. By consents, a judge does not mean are there matters on which the parties have agreed but the court will have to read the material and exercise a discretion. That may be a short matter of say five to ten minutes but it is not a consent order.

If you and even the other side have decided you do not want to have an application heard on the day it is set down you cannot just not turn up. If it has not been successfully adjourned on the papers, it is your professional obligation to the court to appear to explain the situation. If you appear with what is truly a consent adjournment to another date make sure that you have checked the availability of the time you seek on that date so the judge can adjourn it to that date.

Hearing of Applications

As soon as you come into court for an application to be heard the bailiff will seek an appearance slip from you. Please make sure that you have filled it out correctly with the correct spelling of the names of the legal practitioners who are to appear.

It is not a usual practice to say "Good morning" or "Good afternoon" to the judge. You may think it polite to do so but there is a good ethical reason why unless the judge greets you in that way it is not appropriate for you to greet the judge in that way. The ethical reason can be fairly simply expressed. Many judges know many legal practitioners personally. After all, judges were in practice themselves prior to their appointment. They may have been in chambers with a barrister or they may have been in a firm with a solicitor who appears in court. They may even be personal friends. But in court any such relationship is irrelevant and, unless there is a conflict which means that the judge is or should be disqualified from hearing the matter, the judge will be hearing the application and treating each party dispassionately and without fear or favour. If a legal practitioner who knows a judge greets the judge in a more

familiar way, the other party, whether a legal practitioner but even more so when the other party is unrepresented, may feel that they have been excluded or are not a part of "the club". Any such impression would be to undermine the required lack of bias and appearance of lack of bias that a judge must always demonstrate.

After your appearance slip has been handed to the bailiff and been given by the bailiff to the judge, the judge will ask you for your material. To get off on the right foot in the beginning this is what you must do. You must hand up a list of the documents on the file that you wish the judge to read and you must hand up an outline of submissions. These should be separate documents so that the associate can be handed a list of documents to retrieve from the file and the judge given the outline of submissions.

It does not matter whether your application is simple or complex. You are required by amended Practice Direction 6 of 2004 to hand up an outline of submissions and it is not just there for a matter of form. If you have outline of submissions the judge can read it and be satisfied that you have covered all the matters that need to be covered before the judge can make an order, and perhaps even more particularly so when you have no opponent. As likely as not, if you have not prepared an outline of submissions you will have missed something essential to your application. It never ceases to amaze me when even quite experienced legal practitioners turn up without an outline of submissions because they did not think it necessary. However when it is done, in a relatively straight forward matter such as an application for leave to withdraw as solicitors on the record, the judge can immediately see that you have covered everything that needs to be covered, every step that needs to be taken has been taken, and you have thoroughly prepared your matter so that the judge can decide it quickly and with confidence in your work. From time to time I have even asked younger practitioners to pass on to the partners for whom they work that I have specifically asked them to tell the partner that the employee has done an excellent job and thoroughly prepared the matter to appear before me.

A more difficult situation arises when you are a junior person who is sent to court to appear in a matter about which you know nothing. To all the senior people present can I say do not do it. There is nothing more humiliating and demoralising to a very junior practitioner than to turn up in court knowing nothing about a case to be asked one or two questions by a judge who wants to know the answer who will then immediately realise that they have someone

before them who is no use to them at all. When that happens I feel quite angry towards that young legal practitioners' principals who have put the young lawyer in that situation and it is not helpful to your client. I have had to stand matters down to require someone who does know something about the file to come to court to answer the questions so that the matter can be progressed. A matter is not mentioned in court for the sake of it. It is always because the court wants to progress the matter.

If you are handing up submissions in a more complex matter and you are referring to legislation, rules or cases it is always an advantage to hand up a copy of the relevant material to the judge. When you are preparing your argument in such a matter do ensure that you know, and place before the court, any authorities that do not support the contentions for which you argue. A judge will not thank you for putting a one sided argument which just ignores any law or case which is to the contrary of your argument. You won't be surprised to know that judges want and need to make correct decisions. If a case is against you, perhaps you can legitimately distinguish it; or it may be that it means that your case is not tenable. When you do your research and are thoroughly prepared these are the matters that you need to think about. It is certainly the duty of an advocate not to mislead a court so that the court makes a decision that is wrong in law or ignores some relevant facts and in the applications jurisdiction in particular the judge will be relying upon you to bring all these matters to the judge's attention.

The next matter you should always consider before you come to court is the orders that you seek. After all you come to the applications jurisdiction either to seek or resist orders and even if you are resisting an application often there will be orders that you seek in order to defeat that application. If so then not only do you need to think out precisely what orders you seek but you should draw up a draft to hand to the judge so that the judge is more easily able to make those orders, if necessary.

You need to think carefully about when to hand up a draft order. If the matter is relatively uncontroversial the judge will be greatly assisted by having a draft order first. If however the matter is controversial and hard fought the judge may be taken aback if you hand up a draft order right at the beginning before the arguments have even been made. You will have to use your judgment on this one as to when to hand up a draft order. All I say to you is just to make

sure that you do have one so that you can hand it to the judge when the judge wants to make an order or to consider what orders can or should be made.

Can I remind you that ex parte communications with a judge's chambers are almost invariably inappropriate. If you feel you need to communicate with a judge, through the judge's associate, the correct approach is to first obtain the consent of your opponent and always copy any such communication to your opponent.

May I add some brief remarks about caseflow management days.

If your matter has been listed it is because you have not filed a request for trial date within 180 days of the pleadings being closed. The expectation is that cases should be ready to be heard by that time and the parties should have filed their request for trial date. If you have not, your case will be listed and you are expected in consultation with your opponent to draw up a draft set of directions which the judge can make that will ensure that your matter is prepared so that you can file a request for trial date by a certain specified date. There is a comprehensive practice direction governing case flow management. Practice Direction No. 17 of 2012 you should read it carefully and make sure you comply with its requirements. It is useful to read the court's webpage as it also contains a plain English guide to Case Flow Management: http:/www.courts.qld.gov.au/court-users/practitioners/case-flow.

If you have a civil trial in the court you should ensure that you have complied with Practice Direction No. 9 of 2010 in setting trial dates and ensuring that the matter is in fact properly prepared for trial. The court has been so concerned about lack of proper trial presentation that a new position has been created of Resolution Registrar. An experienced litigation lawyer has been appointed to that position so if you have a matter in which you have signed the request for trial date you can expect that your matter will now be more closely managed by the Resolution Registrar and if necessary a judge, to ensure that all of the matters which need to be attended to have been prepared so that the matter can be heard fairly and expeditiously and that there is no last minute need for amendments or adjournments and that as a result clients do not wear unnecessary costs of what is already a very costly business.

So you should be carefully considering a number of matters: the pleadings (are they in final form), what are the facts not in dispute, are there any issues no longer in dispute, what are the facts and issues that remain in dispute, do you

have evidence which deals with each of those issues, are there any remaining problems with disclosure, have the experts produced joint reports, have you given consideration as to how the experts will be giving their evidence, have you agreed a bundle of documents with the other parties, have you discussed and tried to resolve any objections to evidence or documents, do you have a realistic trial plan with all of your witnesses available during the trial and finally are you sure there are no ways of finalising any of the issues of the whole of the matter without a judge's decision. These are some of the matters you should be considering whenever you have a matter for trial.

Finally can I say to you that the judge's role is to solve problems as fairly and justly as possible. Your role in court is to assist the judge in that role by fairly and fearlessly representing your client in order to assist the judge in fulfilling that important role in the civic life of this State.