

ADVOCACY TIPS

Civil Advocacy - Hearts and Minds

It is probably a truism that all civil advocacy consists of attempts to influence what goes on in the Judge's mind concerning the issues in the case. The quality which the best of our civil advocates bring to bear, far more importantly than an encyclopaedic knowledge of their specialist area of law or a willingness to digest complex facts, is a rare talent for understanding which arguments will please the Court. There is a long standing tradition of Queen's Counsel at the very top of their profession becoming generalist practitioners again, perhaps after years of specialisation, and taking on difficult and challenging cases across a broad field of the law. In that role they often rely on their junior to educate them as to the relevant law and the nature of the test to be applied, and focus on framing an argument which is most likely to convince the Court of their client's case.

It follows that the basic question which all our advocates have to ask themselves as they endeavour to improve their professional skills is, "What is the Judge looking for from the advocates in any given case?" The first tip then that one can give to budding, or indeed experienced, advocates is that one should lose no opportunity to listen to what the judges themselves have to say on the subject. Increasingly, members of the judiciary are prepared to share their thinking process with advocates, whether solicitors or barristers, often in the course of meetings of specialist associations of the Bar or the Law Society.

One does not have to attend many such events before a number of common themes can be seen to emerge. We are all familiar with the sensation of appearing in front of a judge who is clearly far more the master of the area of law in question than we are. He or she may have been an acknowledged leader in that field until going to the Bench. For a host of reasons, judges are keen to get the law right when producing their judgments, in order to do justice between the parties and to avoid being overturned on appeal. However, it is easy for junior advocates to forget just how dependent the judges are on top quality advocacy in their efforts to achieve this.

Even judges themselves, when speaking in a suitable forum, will often come quickly to the theme of how limited are the research facilities provided to them by the DCA. One High Court judge recounted that, on his elevation to the Bench, the only books with which he was provided were the White Book, Muir Hunter on Insolvency and the Insolvency Handbook. He asked for a copy of *Gale on Easements* and the request was refused! At least the Royal Courts of Justice houses the Supreme Court Library - one may well imagine that the situation is far more difficult in some provincial Trial Centres. This story illustrates just how dependent judges are on high quality advocates producing first class skeleton arguments. In this light, it seems clear that the advocates' objective then should be to set out the test in as clear and authoritative a manner as possible so that the Judge can make his decision according to the right test.

One cannot discount the possibility of a cultural inclination on the part of members of the judiciary to place great importance on skeleton arguments from members of the Bar. One of the great challenges of what solicitor advocates do, as they seek to take advantage of their relatively recently-won privileges, is to overcome this inclination.

How can one best go about this? There is no substitute for meticulous research. The better the advocate's command of the law the more authoritative will be his written and oral submissions. Tendentious submissions as to the state of the law may best be avoided unless the client's case really makes it necessary and the view advanced can be supported by suitable reference to principle. An advocate who acquires a reputation of having an expert command of a specialist area may find that his submissions are accepted more readily than those of his opponent. Such an advocate will certainly have to put in the hours, and this may involve an acceptance that not all of the work done is chargeable to the client.

It is worth reflecting on the extent to which it is possible to delegate this work. One of the advantages that solicitor advocates have, especially those in a sizeable litigation department, is their ability to involve a flexible team of assistants and trainees of all degrees of seniority. Whilst it is clearly efficient to delegate as much "legwork" as possible, it is vitally important for the advocate to remember that he is personally responsible for everything that is said in Court whether in the course of oral

submissions or in the course of the skeleton arguments. There is no substitute here for a personal command of the authorities and statutes.

All this points to specialisation. It is no accident that most, if not all, of the current solicitor Queen's Counsel have highly specialised practices.

However, the fringe benefits of this hard work and specialisation are there to be exploited and enjoyed. Nothing cements knowledge of an intricate area of the law in one's head more effectively than having had to argue it before a probing and experienced Judge. Every skeleton argument is an increase in one's professional knowledge and in one's skills base and part of one's personal competitive platform within the market for legal services. For challenges presented by solicitor advocacy are there to be enjoyed and exploited by all who undertake them.

Prepared by Philip Read, solicitor advocate on behalf of SAHCA