

Talk to Des Voeux Chambers
15 June 2015 at 5:15 at Hong Kong Club
Topic : Advocacy: With an Emphasis on Appellate Advocacy
by Sir Anthony Mason

Introduction

1. Of all the counsel I have heard in the 43 years I have been a judge, there is one of whom I have an abiding recollection. He was a QC and was Solicitor-General for one of the Australian States. He was an able counsel but he gave the impression that he was rather pompous. In one case he ended his first argument with the words “Your Honours, that concludes the first branch of my argument.” To which one of my colleagues responded by saying “Mr Solicitor would not twig be a more appropriate word?” I don’t recall whether the Solicitor-General’s second argument was stronger than his first argument. Both were rejected.

The object of advocacy

2. Advocacy is the art of persuasion. So much is accepted as a matter of theory and is so often forgotten as a matter of practice. In the many years I have been a judge I have listened to counsel who seem to have forgotten that the art of advocacy is to persuade. And that is so whether the argument is addressed to an appellate court or a judge.

3. Counsel need to consciously ask themselves “How can I present this case in a way that will persuade this judge or this Court? My impression is that counsel often think that by simply making their points they will persuade the court. This criticism applies with equal, if not greater force, to the preparation of written submissions.

The advocacy landscape has changed

4. A colleague and close friend of mine, somewhat senior to me, described the legal scene in Sydney several years before I was called to the Bar in these terms.

“the Supreme Court administered justice with an air of brutal jocular. There were, of course, some judges who were brutal without being jocular and one or two who were jocular without being brutal... This attribute was shared by the Bar. Cases were, as a rule, hard fought and merciless.”

He went on to speak of counsel as having “embarked on the great ocean of judicial ignorance”.

5. Some years later, I was appearing with a Queen’s Counsel with whom I read when I was admitted to the Bar. He handed up to the Judge a note of our argument at the conclusion of his address. Our opponent at the commencement of his address asked if he could have a copy. My leader said “I don’t have an extra copy.” I then handed my copy to our opponent. When we adjourned my leader said “Don’t ever do that again. You are paid to help me with the case. You are not paid to assist the other side.”

6. Fortunately attitudes have changed, though members of the Bar in Sydney tell me that it is now quite common to make remarks during an opponent's address, remarks which are designed to discomfort him – a practice which is akin to the Australian practice of “sledging” in cricket. If this is a practice, it is most objectionable and should be stamped out. Surprisingly, in Philip Ayres biography of Sir Owen Dixon, Australia's greatest judge, who had been a brilliant counsel in his day, it is recorded that Sir Owen as counsel engaged in that very practice, ridiculing his opponent's argument as it was delivered.

7. Since I last appeared as an advocate, as Solicitor-General in 1969, the landscape of advocacy has changed quite dramatically – mainly as a result of the introduction of comprehensive written submissions. The earlier introduction of a skeleton argument did not have quite the same effect because the skeleton was not a fleshed out argument. It was an outline of points and not a substitute for oral argument. But the comprehensive written submissions do cover the whole ground and therefore they combine in that respect with the oral argument.

8. The combination of the two has resulted in changes to traditional approaches to advocacy. First, you must assume, unless the judges reveal their

ignorance - and sometimes they do so unwittingly - that they have read and understand the written submissions. I recall one instance of this occurring in Australia when one of my colleagues who was presiding in the High Court of Australia announced that the Court had read the papers and invited counsel to present his argument that special leave be granted. “But”, said counsel, “this is an appeal, not a leave application!” Undeterred, my colleague replied “I still maintain that the Court has read the papers. Proceed with your first ground of appeal”. I think that my colleague made a slip of the tongue.

9. So you must construct your oral argument on the basis that the judges have read and understand the written submissions – you pick up and expound the critical points instead of trudging through the written submission paragraph by paragraph, as some counsel are mistakenly inclined to do.

10. The second change is that written submissions have, to some extent, deprived counsel for the appellant of the advantage he had in the era of exclusive oral argument, of shaping the case to the disadvantage of the respondent’s counsel. In the absence of comprehensive written submissions, as counsel for the respondent you faced a difficult task if, when you rose to address, the ground had shifted or, even worse, the Bench had been won over to the appellant’s side, without detailed knowledge of how you were putting your case. The difficulty still exists, but at least the Bench now knows what your argument

is, whereas in the earlier era the Bench was aware of the judgment in your favour under appeal, but not your argument.

11. The third change is that written submissions have shortened the time taken in oral argument to quite a marked degree. Counsel no longer read extensive passages from judgment, as they did 30 to 40 years ago.

12. The fourth difference is that the reply no longer has its old importance because what was formerly a matter of reply has simply become part of the written submissions. In the earlier era, it was important to isolate a matter of reply and outstanding counsel were known for ability to use the right of reply to advantage – it conferred the benefit of the last word. Lord Alexander in England and earlier Sir Garfield Barwick in Australia were famous for their use of the reply. The appellant, of course, still has a right of reply and it can be useful. But it can also be abused when counsel simply repeat the argument or arguments they have advanced in support of the appeal. There is a tendency on the part of some Hong Kong counsel to fall into this error. There is a natural temptation to do this but it irritates some judges and I am one of them.

13. By all means use a reply to correct any errors or misapprehensions and to deal with matter that is properly in reply. But avoid, if you can, ending

up on a weak note. It creates an impression that your case is weak. Better not to reply at all than make a reply that is not worth making.

The written submissions

14. The object of persuasion applies just as much to the written submissions as it does to the presentation of oral argument. The written submissions should be composed with a view to convincing the reader that your arguments are the stronger. You won't succeed in doing that if you construct the written submissions simply as detailed particulars of the argument. You should, if you are the appellant, identify as quickly as you can the issues and focus on the perceived flaw or flaws in the judgment or judgments below. Where possible, illustrate the adverse consequences of those flaws. In other words, endeavour to engage the attention of the Court at the outset, providing a perspective that is favourable to your case. Likewise, with the respondent's written submissions.

15. If I were to make a criticism of counsel in Hong Kong from my experience, I would say that the quality of written submissions should be improved. It is a criticism I have made of Australian counsel as well. There is scope for improvement in terms of structure, style and expression.

16. Ideally the written submissions should be seen, along with the oral argument, as an entire strategy for winning the case. The one complements the other. The advantage for counsel of the written submissions is that the judges are or should be, aware of the totality of your case. So that the course of argument should not be interrupted, as it used to be by judges asking questions early on about what else you were proposing to argue.

17. As with the written submissions, the oral argument should identify the issues immediately and focus on the perceived flaw or flaws in the judgment(s) under appeal. Anything you can do to make the appeal appear to be important or entertaining so much the better. Judges like to be entertained and to think that the work they do is important. The oral argument will be shaped with a view to highlighting or sharpening the critical points in the written case. For respondent's counsel this is a more difficult exercise because the course of argument and responses from the Bench may demonstrate that there has been a change in the critical points. Apart from providing a focus on the critical points, it will often be necessary in the oral argument to spend some time in demonstrating, by reference to authority, the foundations on which your argument is structured. If so, concentrate your attention on the most important authority or authorities. Lord Pannick QC to my mind follows the approach to oral argument that I have just advocated. You can always learn from the way in which leading English counsel present argument.

18. Sometimes it is not altogether clear whether counsel is supporting the whole of his written case or whether there is an inconsistency between the two. If there is any departure from the written case, counsel should draw attention to it. Otherwise, the court is left in a quandary.

Use of authority

19. Before you take a court to any authority tell the court what it is you seek to get from the authority. “The case of *X v Y* is authority for the proposition that...” and then go to the case.

20. The value of authority is greater at first instance and in the Court of Appeal than it is in the CFA. The volume of authority that actually funds the CFA is much less than the volume of authority that funds the courts below. Moreover, judges of a final court of appeal think more in terms of principle and policy and are more relaxed about authority than judges of lower courts. So there is a difference in the advocacy to be adopted in the Court of Appeal and the CFA.

21. Only rely on an authority if it is clearly in your favour. Don't use it, if it has a “smudge” on it. By that I mean if the authority can be read as an authority against your argument don't use it. It will not convince a judge that your argument is right.

Questions from the Bench

22. Interrogation of counsel by the Bench is, generally speaking, more intense than it was in my days at the Bar. Sometimes you may get the impression that judges are competing with each other in their eagerness to ask questions, particularly hostile questions. When you are hit by a cascade of questions, isolate each question and answer it, dealing with them one by one.

23. The outcome of a case may often hinge on questions from the Bench and the answers given to them. So it is necessary to anticipate what the questions might be and how they are best answered to suit the case you are presenting. In doing so, you must clearly identify the boundaries of the argument you are presenting. Within these boundaries there will be some room to manoeuvre without contradicting the main thrust of your case. In other words, there is some scope for flexibility and this is important. You must keep these boundaries in mind when you make, or are asked to make, a concession. Obviously you must avoid making a concession that is fatal to your case. Likewise, you should be alert to take advantage of any suggestion from the Bench that may assist your case.

24. I cannot emphasise sufficiently the importance of answering questions put by the Bench. Counsel should regard questions as an opportunity to clarify and explain their case, even questions that are designed to show up a

weakness in the case. Questions not only tell you what a judge is thinking; they also present an opportunity to enter into a dialogue with the judges. It is important to answer questions when they are asked. Delay in answering a question is considered to be a sign of weakness. If you want to defer answering a question until after the next adjournment, tell the court that it is an important question and you want to give it more thought. Or you say that the question is best considered in the context of your next submission, if that be the case. Even better answer the question when it is asked.

25. The most effective counsel, in my experience as a judge, are those who succeed in striking up a conversation with the judges. It is what I call the “conversational” style of advocacy and it requires a thorough understanding of the law on the point under discussion. I recall two counsel, each a Solicitor-General, who excelled in this style of advocacy. It is not easily developed and it does require a high degree of recognition from the Bench. So not surprisingly you find that experienced counsel who frequently appear before a court engage in it.

26. On the other hand, the most successful counsel I knew, who led me on a number of occasions, though able to engage in the conversational style, was better known as a tough, aggressive counsel. He was an exponent of what I call “the confrontational style”. He was tenacious but very nimble of mind and

was not intimidated at all by a hostile Bench or by their questions. Indeed, he seemed to revel in such an atmosphere, partly because he always believed that he could persuade a court to his point of view. And invariably he made ground in responding to adverse questions. They gave him an opportunity to explain his case.

Advocacy problems

27. Questions from the Bench sometimes reveal that there is a difference of opinion between the judges. Such a difference of opinion can generate a problem for counsel. In some situations you may be able to present alternative arguments but in other cases not. You cannot risk alienating what you perceive to be your main judicial support on the court by presenting an argument that will please a judge who, for present purposes, I shall describe as a maverick. You may then win over the maverick but lose the rest of the court. Situations such as these call for sophisticated judgment and carefully thought out responses.

28. Counsel vary considerably in their qualities. It is very much a matter of making the best use of the qualities you have and of developing skills that you don't have. As far as junior counsel are concerned, judges are almost always impressed by young counsel who have done their homework and present the case to best advantage. Judges spend quite a lot of time talking about

counsel and assessing their ability. One point that junior counsel should keep always in mind is the relief they seek and the precise orders they want. It is embarrassing when counsel are unable to give a prompt answer when questioned on these matters.

29. As junior counsel you must be prepared to present the case or argument if, for whatever reason, your leader becomes unavailable. That happened to me on a number of occasions. I recall a case in which I was the junior when my leader was encountering stern resistance from the judge and the client suddenly said "I want Mr Mason to continue the address". My leader sought and obtained leave from the judge for me to continue the address. I would like to say that we then won the case. Unfortunately we went down to dusty defeat. My impression is that here in Hong Kong courts are inclined to grant an adjournment if a Senior Counsel becomes unavailable. That was not so in my day. So the junior was called on to the present case. The opportunity to do so sometimes enabled junior counsel to make a name for himself. These days, however, successful junior counsel do not often have the opportunity of presenting important cases themselves.

30. It is important that you begin with your best argument, unless there are good reasons, tactical or otherwise, for not doing so. Sometimes it is logical to begin with an argument that is not as strong as a later argument. If so, you

should make it clear that it is the later argument that reflects the real thrust of your case. And sometimes it is necessary to clear away the brushwood before embarking on our main argument.

31. I have been asked the question:

“Can you assume that the judge who asks the most questions will write the judgment, and, if so, should you direct your argument to him?” In answering the question, I would point out that it is doubtful assumption. There are judges who ask many questions and do not end up writing the judgment. Conversely, there are judges who ask two or three critical questions and end up writing the judgment of the Court. By all means direct answers to questions to the judge who asks the questions. Otherwise direct your argument to the entire Court.

Some things you shouldn't do

32. Don't present arguments that are not worthy of the Court's attention. You will forfeit all respect if you press arguments that are unarguable and you will annoy the court. Unless you are compelled to do so by reason of the poverty-stricken nature of your case, confine your submissions to those that have a reasonable prospect of success.

33. There is a limit to how far you can press your argument. Some counsel give the impression that they will go on until the court signifies its agreement with them. To press an argument that far is counter-productive. Don't exhaust the judge's patience. There is virtue in brevity.

34. If the Bench puts an authority that you don't know, say so. Don't give the false impression that you know the case. That can be disastrous. I recall one such incident where the judge asked counsel what did the case decide. Counsel was forced to admit that he didn't know.

35. It is a great mistake to overstate your case. The judges will soon find you out and they will think the less of you for it. I recall one well-known and successful Australian QC who was guilty of this fault. I found it annoying and I was inclined to discount what he said in opening an appeal because he had this tendency to inflate his case. Overstating your case may impress your client. It won't impress the court. At all costs you must refrain from conduct which may be regarded as misleading.

36. It is often said that these days counsel should not engage in flamboyant rhetoric because judges are looking for precise and thoughtful argument, not windy rhetoric. This, of course, is true – judges are not, or should not be, seduced by flowery language or glittering phrases. But there is scope for

some degree of rhetoric and the use of colourful expression, as long as it is not a substitute for rational argument and as long as it is not taken too far. I knew one QC in Australia who captured my attention because his diction was more archaic than modern. And there is no objection to rhetoric as a means of emphasising a point.

37. An advocate can employ humour to advantage but it needs to be spontaneous. Laboured humour will almost certainly fall flat, unless it comes from a judge. Then everyone will fall about laughing in order to keep on side with the judge.

38. I should mention one incident that occurred when we hearing a leave application presented on TV by digital transmission. We heard these applications in the High Court in Canberra with counsel presenting the applications is a studio in another capital city or cities, say Sydney or Melbourne. At one stage the transmission was interrupted and the images of comic strip characters flashed across the scene. The images were those of characters known as “Big Bird” and “The Count”. After the hearing counsel was asked by the Registrar what he thought of the interruption. His reply was “I didn’t notice any difference. The characters seemed to be just like the judges.”

39. In conclusion, I must say that the new CFA courtroom, the former LegCo chamber, is a splendid appellate courtroom. It should inspire you to achieve the highest level of advocacy.

40. On this note I shall conclude. Otherwise I shall be in breach of my earlier advice to you that there is virtue in brevity.