It's all a matter of judgment

Introduction

Mr Pro-Vice Chancellor, Professor Cassimatis, fellow judges, Mr Jackson, other distinguished guests, ladies and gentlemen.

1. First, thank you for inviting me to address this gathering. I've always loved talking to law students, especially those who show ambition towards and aptitude for the art of advocacy.

2. I must confess, however, that my enthusiastic embrace of opportunities like this has never been entirely altruistic.

3. I want good advocates arguing cases before me. It makes my job easier. Indeed, the better the advocate, the more enjoyment I get out of my job.

4. So - being essentially both lazy and hedonistic - it is a simple matter of enlightened self-interest which motivates me to give speeches like this. I want to do everything I can to help you so that eventually you can help me.

5. Against that background, what are my ambitions for my remarks tonight?

6. Well, young people, hearken unto me, for I am going to give you five simple rules, to help you on your way.

7. Five simple rules, adherence to which will guarantee success in all your future advocacy endeavours.

8. They're going to sound trite, but trust me when I tell you that bad advocates break these rules every day of the week. And good advocates almost never do.

9. I have to confess that what I am about to tell you is not all my own work: it is a development of the results of an informal survey which I made of the Supreme Court judges about 10 years ago, for the purpose of a paper I wrote, when still at the bar.

Rule No 1: Do the work

10. The solution to most legal problems lies in some form of syllogistic reasoning.

11. All you have to do is –

    (a) formulate a proposition of law;

    (b) identify the relevant facts;

    (c) then apply the law to the facts, to get the answer.

12. Major premise; minor premise; deduction so as to form a conclusion.

13. Simple really.

14. But you have to do the work to know the law before you can formulate the relevant proposition or propositions of law.

15. And you have to get on top of your brief to know the facts, or, in a trial, to put yourself in the position of establishing the facts, before you can start the deductive reasoning process.

16. Sometimes this is easy. More often it is hard and tedious.

17. But there is no excuse for not doing it. It is a breach of duty on every level. And it is immediately obvious to the Court.

Rule No 2: Separate the wheat from the chaff

18. The poor advocate will serve up every argument of which his or her imagination can conceive, in the hope that the judge will swallow one of them.

19. This often has the opposite effect to that which is sought.

20. The palatable becomes hidden amongst the unpalatable with the consequence that there is an increased risk of rejection of the whole dish.

21. You are far better off identifying the good arguments and jettisoning the hopeless ones.

22. In *Giannarelli v Wraith* (1988) 165 CLR 543 (at 556) Mason CJ expressed my rule in this way:

> … the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.

23. The truth is that one of the most trenchant criticisms which can be advanced of counsel is that they will run anything.

24. It is not a compliment. It means that the counsel either –

    (a) doesn't possess the discernment to identify the arguments which should not be run; or

    (b) doesn't have the willpower to exercise his or her independent judgment and stand up for it in the face of pressure from clients or solicitors.

25. If you have to make the call as to which arguments to run, how do you go about it?

26. It's much harder when you are inexperienced.

27. But what you must practise is clarity of thought. You must develop a keen eye for the relevant. Develop a case theory and run with it.

28. Of course, a particular case might require more than one case theory. You might have alternative arguments of similar worth. Nothing wrong with that. Indeed sometimes the judge might prefer what you thought was an alternative but essentially weaker argument. If you are going to run alternatives, what you have to do is make sure that they are all cases that are worth running.

Rule No 3: Don't put your head in the sand

29. Do not engage in a head in the sand approach to advocacy.

30. There are two ways in which such an approach could become manifest.

31. First, in relation to your own case, in either the incompetent or deliberate failing to face up squarely to the problems in it.

32. Second, in relation to your opponent's case, in failing to identify and to respond to the fact that there might actually be something to be said in its favour. You must face up squarely to the strengths of your opponent's case.

33. It is terrible advocacy, for example, to respond to a query from the bench about proposition Y, by saying merely "We say proposition X."

34. Everyone knows that you say X (because it's in your written submissions and you've probably said it orally at least twice). What the court wants to know is why X is to be preferred to Y.

35. You have to engage with the problem posed by the particular dispute. The idea is to have thought all of this through, and to have an answer which does not involve merely a repetition of your case, but involves giving the judge the means to evaluate the two cases and come down on your side.

36. The good advocates operate in the grey areas which exist between the two cases and find a way to shade those areas in a way which suits them.

37. Let me put this another way:

    (a) An advocate's task is only partially complete once he or she has prepared the argument which he or she wishes to present.

    (b) Still to come is the process of engagement with the Court. This is the most significant part of the task, because it is the pointy end of the persuasive role.

    (c) And can I say that the process of engagement is the most fun.

    (d) The advocate who is ready and able to respond with a clear and succinct statement of the best response that can be made to counter the best points made by his or her opponent is way ahead of the game.

    (e) How do you put yourself in the position to do that?

    (f) See rule no. 1.

38. Let me give you a three tips to aid the manner by which you go about the process of engagement with the Court.

39. The first tip: have a plan.

    (a) Good organisation is an attribute which can be employed at every stage of the advocate's task. It is a basic skill generally requiring only common sense and diligence, but one which the Court greatly appreciates. It saves time and makes the judge's role much easier.

    (b) The advocate who conveys the impression that he or she is going about his or her examination, cross-examination or submissions in a planned and structured way has an immediate advantage over his or her opponent who appears to be merely bumbling along asking questions or making submissions as the thought occurs.

(c) The latter mode of behaviour is at best annoying to the Court and at worst indicative of the quality of the questions and submissions.

40. The second tip: your plans must be flexible.

(a) No battle plan survives contact with the enemy.

(b) You may well have a plan and have explained it and it might well make perfect objective sense, but the judge might have other ideas.

41. The third tip: When questions are asked, answer them, directly and without evasion. Here is where having already done the work, and having real clarity of thought, will be critical.

Rule No 4: Keep calm and be courteous

42. Our system is adversarial. You are trying to win an outcome for your client, by defeating an opponent. Martial metaphors are often employed to describe the court system and the role of advocates. Such metaphors have a real validity.

43. But they should not be pushed too far. In the performance of your role in the heat of the battle, you must not confuse strength and assertiveness with discourtesy and uncontrolled aggression.

44. This is not an uncommon failing for inexperienced advocates, because they tend to overcompensate for their own weaknesses and fears.

45. It is an old saying that "Courtesy costs nothing and profits everybody."

46. As in life, so in the courtroom. Judges expect advocates to exhibit professional courtesy and view with disdain departures from it.

47. Indeed, courtesy is usually the rule even in what the inexperienced advocate might think is that most combative of court room techniques: cross-examination.

48. As John Mortimer once had Rumpole observe:

> The art of cross-examining, I have always believed, is not the art of examining crossly, and I started in my politest, gentles and most respectful tone of voice. Lull the witness into a false sense of security was my way, and ask questions she has to agree to before you spring the surprises.

49. Of course I do not mean that it is never necessary to bring the hammer down on a witness, but it is necessary less often than most people think.

50. And even when a degree of firmness is required with a witness (or even a judge for that matter), it can and should be done professionally and without discourtesy.

51. Opponents should always be treated with courtesy. More than one career has been ruined by counsel playing the man not the ball. Instead of having your opponent's instructing solicitor or client thinking that next time they should brief you, they might end up vowing that you'll never get a brief from them if it's the last thing they do.

Rule No 5: Sometimes you just have to screw your courage to the sticking-place

52. Lady Macbeth's famous encouragement to her husband in the face of his second thoughts on the regicide they were both contemplating, may be an unlikely source for a rule about advocacy, but it is a valid one.

53. In his book *The Art of the Advocate*, Du Cann said this of the advocate:

> He must also have courage. There must be no timidity about his performances. Resort to the law is a form of civilized warfare, the advocate the modern representative of the medieval champion. Courage, of course, cannot stand alone. There is a time to stand and a time to sit for every advocate, and unless he can solemnize some form of marriage between courage and judgment he will never reach the first rank of the profession.

54. Indeed, the Barristers' Conduct Rules emphasise the need for courage. The first rule in the collection of rules articulating the duty owed to the client is this:

> A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.

55. It's easy to overstate the question of courage when you are talking about advocacy.

56. We are not diving on grenades.

57. But we are talking about the performance of tasks which may be hard, or scary or unpopular or distasteful. As to the latter, contemplate for a moment cross-examining in sex crime cases.

58. Sometimes, although you'd rather be almost anywhere else, your job is just to suck it up and perform. On those occasions, you do have to make a conscious decision to put aside your fears and concerns and do your job.

59. It's not about you. It's about your client.

60. So, for example, the ability fearlessly to persevere in the face of initial judicial resistance is seen as one of the hallmarks of good advocacy.

61. On the other hand, the stubborn perseverance in something which is hopeless is regarded as one of the hallmarks of poor advocacy.

62. The trick is having the judgment to discern the difference between fearless perseverance and arguing the unarguable.

63. In my field, it is not uncommon to find weaker advocates go to water in the face of my expression of preliminary views adverse to them. What I find much more helpful is the good advocate who will find a way to seek to turn me around.

Conclusion

64. So to sum up, here are my five rules. For success to be guaranteed:

    (a) Rule No 1: Do the work

    (b) Rule No 2: Separate the wheat from the chaff

    (c) Rule No 3: Don't put your head in the sand

    (d) Rule No 4: Keep calm and be courteous.

    (e) Rule No 5: Sometimes you have to screw your courage to the sticking place

65. Having said that, I suppose that there is one other thing you need.

66. If you aspire to good advocacy, there is one attribute which you must develop.

67. It's an attribute which is easy to identify, but harder to obtain. But if you think about it, it underlies all of my rules.

68. Good advocacy? In the end, it's all a matter of judgment.

69. You have to be able to exercise a proper judgment at all steps along the way.

70. How do you do that?

71. Well it's hard to put an old head on young shoulders.

72. But you'll get there by watching and learning and copying your betters.

73. You'll get there by interrogating your successes for what worked, but more importantly, your failures, for what didn't.

74. Ladies and gentlemen, I offer my congratulations to all the participants in the 2017 UQ mooting programme.

75. I look forward to the day when you appear before me, to make my job easier.

John Bond

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