

# Persuasive advocacy in the Local Court

Knowing the nuts and bolts

# Disclaimer

- There are hundreds of papers and presentations on advocacy
- This presentation is a mix and match of those papers and presentations
- Some of the information I have used are taught to advocates at the NSW Bar Course
- Some of the information comes from papers presented at the NSW Bar Course
- So please don't think that these suggestions are all mine!

Three points for today...

1. What is advocacy?

2. Preparation is key

3. Practical tips

Advocacy is mounting an argument; not  
getting into an argument

There is a time and a place for  
arguing with someone but generally  
it's not in court and it shouldn't  
involve the magistrate

# WHAT IS ADVOCACY?

- Advocacy is all about persuasion
- It's about mounting an argument that is *believable* and *credible*
- A persuasive argument *is not*:
  - A statement of your position or
  - A recitation of the facts
- A persuasive argument *is*:
  - Logical
  - Credible
  - Empathetic

# Logical – it's all about Why? Because

To mount a LOGICAL argument you need STRUCTURE and REASONING

- So your proposition may be that your client should be given bail
- A good structure will state your proposition immediately

E.g. Your Honour, it's a bail application

- And then you give your reasons

E.g. She should be given bail for the following three reasons:

1. Bang!
2. Bang!
3. Bang!

# Credible argument – does it pass the ‘BS’ test?

- A credible argument must be balanced
- A credible argument must be based on reality
- A credible argument must be factually and legally correct
- The best way to test whether it’s credible is to see if it:
  - Makes common sense
  - Is based on the evidence
  - Passes the ‘mate test’
- Remember the importance of Why? Because

# Credible argument – the arguer **MUST** be credible

- You become credible by:
  - Being **PREPARED** and
  - Being **BALANCED**
- If you are **PREPARED** you immediately come across as credible

E.g. Magistrate: Counsel, you just said ...where do I find that?

Counsel: Page 47 of the transcript, line 16



# Credible argument – the arguer **MUST** be credible

E.g. Magistrate: Sergeant, what's the penalty notice worth for this offence?

Prosecutor: I'm not sure your Honour (the prosecutor may not know because she has a hundred other things to worry about!)

Ms Cooper: If I can assist your Honour it's \$825

- Simple things like that, showing you are there to assist the court gives you credibility
- The magistrate will remember you

# Losing credibility

Unfortunately credibility can be lost by:

- Being unreasonable
- Not conceding obvious points
- Misstating your position
- Over stating your position
- Arguing every point
- Taking every point
- Being rude to your opponent or the magistrate
- Not knowing your brief

# Empathy in argument

An empathetic argument needs to:

- Meet the needs of the listener – we do this by conversation
- Appeal to fairness
- Be aimed at both the heart and head

Whatever the matter, an advocate **MUST** be a good listener

# PREPARATION

- The importance of preparation is repeated *ad nauseam*
- We all know that it cannot ever be understated
- But how do we prepare?
- Whether it's a sentence, a bail application or a hearing, how do we prepare?
- How do we prepare when we work in a very busy environment like ALS, legal aid or private practice?

# Preparation in the perfect world

- Get the brief
- Organise it in a way that suits you
- Read the brief and don't write anything down
- Read it again and start to make your notes
- What's the offence?
- Is it Commonwealth or state?
- What are the elements?
- What are the penalties?

# Preparation in the perfect world

- Is it a summary offence or a table offence or is it a serious indictable offence?
- If it's not a summary offence, understand the process
- What is the evidence?
- Is it admissible?
- This is where we need to read and understand the *Evidence Act 1995*
- Stephen Odgers' Uniform Evidence law is a must for criminal practitioners

# Preparation in the perfect world

- Once we have read the brief and gotten an idea of the facts and the law we develop our CASE THEORY
- A simple example is a case where the prosecution is relying on the identification of our client by some witnesses
- So our case theory is simply that the witness identification is wrong – whether it's mistaken or they have an ulterior motive – they are still wrong

# Preparation in the perfect world

When I prepare for a hearing I ALWAYS do the following three things:

1. I prepare my closing address first.
2. I then prepare my cross-examination.
3. I then prepare my examination in chief.



# Preparation in the perfect world – closing address

- By preparing my closing address first I know exactly where I need to head with my cross examination and examination in chief
  - The closing address is always the most difficult part of preparation but once you've mastered it, the rest falls into place
  - So in your closing address lead with your strongest point first
- 'Ladies and gentlemen, let's open the windows and blow out the cobwebs.'
- For example in our identification case you may start with something like this:
- 'Your Honour an honest but mistaken witness may still be convincing, but that doesn't mean he got it right.'

# Preparation in the perfect world

- Do not be ashamed to write the opening line of your closing and say it word for word – it helps to get rid of the nerves
- Concentrate on the evidence
- You don't have to be a great advocate to do a good closing address
- Make your address a summary of the key points
- Bang! Bang! Bang! Bang!
- Don't read your address out verbatim but make sure you write it out
- Don't use fancy legal words
- Repetition can be good – repeat your strong points

# Preparation in the perfect world

- Make eye contact with the magistrate
- Use your hands – point 1, point 2, point 3
- Know the exhibits and refer to them
- Be courageous – you have a right to appear
- You have a client who is relying on you

# Preparation in the perfect world – Cross-examination

- We've heard the saying 'You don't need to cross-examine crossly'
- What about the idea that when you are cross-examining a witness you should 'invite them out to dinner'
- The aim of XX should be to:
  - destroy the material parts of the EIC;
  - to weaken the EIC;
  - to illicit new evidence; and
  - to undermine the credibility of the witness

# Preparation in the perfect world – Cross-examination

- Make the witness think that you know what happened better than they do!
- Stand at the bar table confidently
- Don't slouch, don't look away, engage the witness, eye contact
- Know EXACTLY what you want from this witness
- Do I actually need to ask this witness anything?
- NEVER SAY, 'I PUT IT TO YOU'
- The better way to say it is:

*'You see Mr Brown what really happened is that you couldn't see the accused's face because it was too dark?'*

# Preparation in the perfect world – Examination in Chief

- Generally leading questions are not allowed
- And the answers to leading questions are not as powerful as a witness that can be taken through their evidence in a coherent way
- Questions that start with:
  - What?
  - When?
  - Where?
  - How?
  - Why?
  - Who?

# SOME FINAL PRACTICAL TIPS

Preparing questions for XX and EIC

- It's okay to write out all of your questions
- As we get more experienced and confident it may be better to write out the answers you want
- I generally have my first few questions written out
- Then I go to a format where I list topic areas
- Within each topic area I then write dot points of what answers I want to elicit

# SOME FINAL PRACTICAL TIPS

So in the case of you taking your client through her evidence in chief in a matter where she has been charged with assault police, your preparation may look like this:

## Drinking at leagues club

- Started about 6pm
- With my girlfriend
- Abby
- About 6 drinks
- White wine



# SOME FINAL PRACTICAL TIPS

- Decided to leave
- Wanted to go next door
- The night club
- Because we had arranged to meet friends there

## Arrival at nightclub door

- In a queue
- Not long
- Just waiting

# SOME FINAL PRACTICAL TIPS

## Police arrive

- 10 minutes
- Uniform
- One of them walked over to me etc.
- Conversation
- What was said?

# SOME FINAL PRACTICAL TIPS

- This last tip is something I use in all facets of my preparation
- It's really good when you are preparing a sentence or an application
  1. Who you are – the accused, the applicant, respondent
  2. What do you want – s.10, bail, adjournment
  3. Can you have it – this is where we need to know the law, the regulations, the court practice notices
  4. Why should you have it – this is where we make our persuasive argument – supported by the facts, the evidence and subjective material