Advocacy - preparation is the key

by The Hon. Justice Riley

> "Preparation is the be-all of good trial work. Everything else – felicity of expression, improvisational brilliance – is a satellite around the sun. Thorough preparation is that sun."
>
> *Louis Nizer*

Advocacy, as we all know, is the art of persuasion. As with genius, effective advocacy is 99% perspiration and 1% inspiration.

In my experience the best advocates in Australia are also the hardest working. They are at ease on their feet because they know the content of each brief thoroughly and they have mastered all of the relevant law. What you see in Court when such an advocate appears is the tip of the preparation iceberg. Much of what has been read, considered and researched will not emerge during the course of the hearing but, should the opportunity or requirement present itself, the advocate can address competently on any issue of fact or law.

The first rule of advocacy is simply stated. Be prepared.

In order for an advocate to be adequately prepared it is necessary that he or she has a complete understanding of the case and a plan for the presentation of the case designed to ensure the best available outcome for the client. This means that, prior to the commencement of any hearing, the advocate must:

(i) be thoroughly familiar with all of the relevant facts,
(ii) have identified the issues which will or may be raised,
(iii) have a clear understanding of how those issues are to be approached and resolved to serve the best interests of the client, and
(iv) have a knowledge of, and ready familiarity with, the applicable principles of law and the relevant case law.

To commence a hearing without having satisfied these prerequisites is to do a disservice to the client, yourself and the system of justice within which we work.

Mastering the Facts

By the time you are in a position to commence final preparation for trial you should have available to you the complete and detailed statements of all relevant and available witnesses, whether those witnesses are to be called or not. These statements will generally provide you with all, or almost all, of the information necessary to enable you to prepare your case. If you do not have the necessary statements you should obtain them yourself or insist that they be provided.

The statements of all witnesses should be presented in an orderly and logical form. This will often involve a chronological recounting of the history but, in some cases, other approaches may appeal. The statements of the various witnesses should cover all matters related to the proceedings. They will go beyond the information necessary for the proceedings and cover matters that are not only clearly relevant but also those that are marginally or peripherally relevant. This broad approach is necessary to ensure you have a complete picture of events and to ensure you are prepared should a witness, at the hearing, digress or be taken into an area you had not anticipated would be touched upon.

Familiarity with the facts often goes beyond a consideration of what the witnesses have to say. For example in many cases there will be exhibits which have to be read and understood. Similarly in cases which turn on matters of fact, it will often be an appropriate precaution to visit the scene in order to obtain a complete understanding of the information provided through the witnesses.

In all but the simplest of factual disputes the use of a chronology will prove invaluable. The chronology should be sparse in the detail it records but complete in that all incidents and events are recorded. It should also identify the source of the information it contains so that this may be readily located at any future time. The style of chronology adopted is a matter for personal preference but a useful example may be as follows:

Date, Facts & Source

10/1/1999 Deceased arrive in Darwin (Smith par42)
11/1/1999 Deceased purchased vehicle (Smith par43, receipt)
12/1/1999 **10.00am** Deceased left home address (Jones par14)
10.15am Deceased entered Casuarina Square
10.30am Deceased entered Casuarina Square (Adams par23). (Jones para16)

A chronology is an important part of the process of preparation. It permits you to see the events and incidents in their correct sequence. It enables you to identify conflicts between the versions of events given by different witnesses (for example the evidence of Jones and Adams in the example above) and also assists in identifying inconsistencies within the evidence of individual witnesses.

When you are in court a chronology is a ready source of information. Whilst you are on your feet you can quickly locate the source of any fact that you may wish to use for the purposes of cross-examination or in responding to questions from the bench.

Even though you have detailed and complete statements it is important that the advocate personally meet with each witness to be called prior to the witness entering the witness box. It may be that the meeting can only be by telephone. However it is important that you make some assessment of the witness and that you give the witness the opportunity to become familiar with you. What appears in a witness statement lacks colour and depth. It is only by communicating with the witness that a proper assessment of the strength or weakness of what is being said, how it is being said and the true flavour of that information can be ascertained.

Identifying the Issues

In theory at least the issues should be identified by the pleadings. In many cases this will not be so and it will be necessary for a reconsideration of the pleadings to take place at this time.

The factual issues will be identified by matters which become obvious during the course of considering the witness statements, the interrogatories, the exhibits, the pleadings and what you are able to glean of your opponent's case from all other available sources. In determining what will be in issue in proceedings (both factually and as a matter of law) it is vital that you consider the case from the point of view of your opponent. What is the case for the opponent? What matters are important to the presentation of his or her case? What are the strengths of that case and what are the weaknesses of that case? You will at some time have to deal with the strong points of your opponent's case; likewise you will wish to exploit the weaknesses of that case and it is during this early preparation that such matters need to be identified and addressed. Similarly, of course, you will need to consider the strengths and weaknesses of your own case.

Continued on page 17

Ethically speaking

by Barry Vogel Q.C

Do not do unto others as Rambo would do unto you

At the risk of being accused of being preoccupied with the subject, I wish to address, yet again, the subject of the deterioration of civility and professionalism between and among lawyers.

This sorry state of affairs is brought to my attention daily in the calls that come to me as Practice Advisor. Lawyers describe to me regularly, conduct that demonstrates rudeness, inflated rhetoric, hostility, and refusal to discuss or consider any position other than that being put forward. Frequently, the language used is antagonistic and unjustifiably aggressive.

At the risk of oversimplifying, I believe what is happening is that lawyers are becoming too quick to identify, at the personal level, with the issues raised by their own clients. And if they are identifying in this way, it is not much of a leap to characterize the lawyer opposite the same way, viz. he or she is personally identified with the client's position. That seems to be justification for lawyers treating one another in the same way that the clients treat one another.

I know that there are a lot of lawyers out there and that practice is becoming increasingly competitive. While that may be an explanation, it is not an excuse for lack of professionalism and courtesy. And it is a mistake to assume that this is taking place only in litigation, where one might argue that the adversary system is more prone to this kind of posturing. The fact is that it is found in all aspects of practice, including the common house deal.

It is axiomatic to restate that a hallmark, an essential of professionalism, is objectivity. The lawyer serves the client best by remaining detached and uninvolved with the animosities and recriminations that frequently exist between the clients. Remaining detached does not mean that a lawyer cannot be a zealous advocate for a client. Strong positions can be advanced without a personal spin directed at the opposite lawyer. In fact, objectively stated arguments are usually more persuasive and effective than personal attacks.

What are the effects of this unprofessional approach to practising law? The most important one, in my opinion, is that it unnecessarily hardens lines and encourages intransigence. I am aware that in the evolution of a dispute between people, hard lines and intransigence are often inevitable. But when the lawyers become personally involved in this dynamic, the reconsideration and modification of positions, which almost invariably are in the clients' best interests, are frequently delayed, and sometimes forgotten. This almost always causes increased expense and inconvenience to the clients.

Another effect: the experience of practising law is made less enjoyable when lawyers are sniping personally at one another.

I suspect that even the most ardent practitioner of the "Rambo" school does not really enjoy that kind of practice, but feels compelled to do it as a means of self defence or out of a misguided (in my opinion) notion of what this business is all about.

There is yet another negative effect. We all complain about lawyer-bashing on the part of the public. We are all unhappy when we see the evidence, which is everywhere, that a large part of the public has no respect for lawyers. ***Why should the public show respect for lawyers when so many lawyers don't show respect for lawyers?***

I urge you to deal with your colleagues in a professional and courteous manner. Most of you do, but the size of the minority that doesn't is much larger than it should be and, regrettably, it appears to be growing at an unfortunate rate.

Keep the personal references and your opinions of the other lawyer out of your dealings with that lawyer, and deal only with the issues and merits of the matters before you. And, just as important, when the other lawyer is coming on like Rambo, as difficult as it may be, try to rise above it; don't give the other lawyer the satisfaction; resist the temptation to respond in kind. Apart from the fact that the other lawyer will probably find such a response disarming, you are better serving your client as a professional.

You may also find that you are reducing the stress level of this business, and, who knows, may be helping to regain some respect for yourself and your colleagues. Rodney Dangerfield will be proud of you.

While the calls to me and the increase in news articles on the subject indicate that I am not the only person concerned with the state of civility among lawyers, I am unsure how pervasive the concern is. Is this a problem that must be dealt with? Is this the way it is going to be in the practice of law, and if you can't take it - get out? Is it somewhere in between? I would appreciate hearing from you. And if you agree it is a problem and have some suggestions as to how to deal with it, they would be most welcome.

Written by Barry Vogel, QC and reprinted with the permission of the Law Society of Alberta, Calgary.

Advocacy

Continued from page 16

The Brief

In the process of preparation you should organise your brief into an order with which you can become familiar, and which will enable you to quickly identify and locate material within your brief at any time. The physical organisation of the brief is a matter for personal preference but one method, which may appeal, is to have a series of folders or, alternatively, a series of divisions within one folder, for different categories of documents. The divisions or folders may include:

(a) pleadings, interrogatories and answers thereto, lists of discovery and other court documents;
(b) the witness statements in alphabetical order;
(c) expert reports, separated into areas of expertise, then placed in alphabetical order and, for each individual expert, arranged chronologically accompanied by the letter of request;
(d) important, or what are sometimes described as "critical", documents eg relevant contracts or correspondence and the like;
(e) discovered documents and other relevant but not vital documents.

In each division the separate items may be tagged for ease of identification and location. The chronology should be kept in a prominent and accessible location eg at the beginning of the division containing the witness statements or in front of the court documents.

When you are familiar with the facts and the law and have identified the issues to be resolved, then you are in a position to undertake what is referred to in the workshops conducted by the Institute of Advocacy as 'Case Analysis'. This will be discussed on another occasion.