

A dvocacy - the case strategy

by The Hon. Justice Riley

*"First settle what the case is,
before you argue it."*

Lord Chief Justice Howe
Trial of the Seven Bishops (1688)

On the last occasion I discussed the importance of the careful and complete preparation of each case by the advocate. I turn now to a vital part of the preparation process, the adoption of a case strategy.

When all the necessary information has been gathered, the relevant law identified and researched, and the issues ascertained, it is time for the advocate to embark upon a crucial step in the preparation for trial. I have called this the case strategy but it has been variously described by writers on the subject of advocacy as "the case analysis", "developing the case concept", "the case summary" and "identifying the case theory". However, it may be described as the process of developing a blueprint for the presentation of the case.

Glissan and Tilmouth in their work *"Advocacy in Practice"* succinctly describe the process as a "short concise summary of the theme lying behind the case, accommodating all the facts and evidence in a way which produces the winning conclusion".

The process involves identifying where you are at the moment having undertaken all of the preliminary information gathering processes available, then looking at where you realistically wish to be at the conclusion of the case and finally determining how you move from the first point to the second.

It may be likened to travelling from one side of a large city to another. You know your starting point and your destination and it is necessary to determine how best to get from one to the other. It may be that you will simply barrel along a freeway and get there quickly. However, if you are aware of a roadblock or some other impediment, you may wish to take a less direct route to achieve the same end. Whatever approach you take you will not wish to find yourself part way along your journey driving into dead end streets, or being confronted by one-way roads heading in the wrong direction. It is vital that you plan ahead to ensure the journey is completed in the most effective manner available.

In order to achieve a workable case strategy you will need to address each and every issue (both legal and factual) that you have

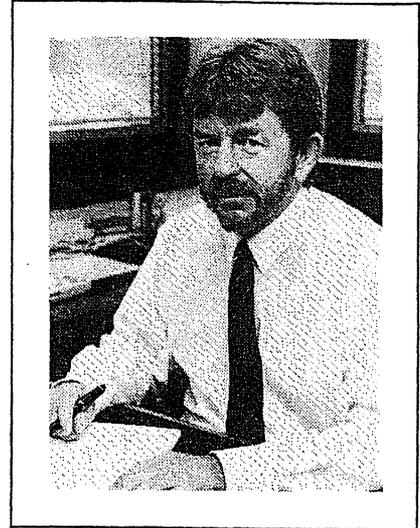
previously identified in the course of preparation. It is essential for you to have devised a plan as to how each is to be approached and resolved.

When developing your case strategy you will ask many questions of yourself. What are the strengths of the case? What are the weaknesses? How do I deal with the strengths and the weaknesses? What are the strengths of the case for the other side? What is the inter-relationship between the relevant facts and the relevant law? What is a consistent and intellectually satisfying presentation of the matter that encompasses my instructions, anticipates the evidence and argument of the other side, places emphasis on the strengths of the case and avoids or nullifies the weaknesses? When you have answered those questions you will have your case strategy.

In considering each issue, and prior to settling upon a strategy, it will be necessary for you to look at the matter through the eyes of your opponent. This will assist you to identify weaknesses in your own case and devise methods for dealing with them. It will also enable you to fully appreciate the strengths of your own case and to devise methods for the presentation of those strengths in a way which makes them secure from effective attack by your opponent.

Once you have developed the broad case strategy for your case you will follow that strategy unless confronted by the dramatically unexpected. The witnesses you call, the evidence you introduce and the areas in which you propose to attack the opposition case will be governed by the case strategy you have developed and should not detract from it. It is by reference to the case strategy that you will determine what is necessary and relevant for the proper presentation of your case.

In most cases the best case strategy will involve following the path of least resistance. Not taking on any unnecessary disputes or obligations. For example, if you are easily able to establish that a witness is mistaken in relation to a fact, why take on the added burden of endeavouring to show that the witness is untruthful. If a finding of dishonesty against a witness does not add to the strength of the case being presented on behalf of your client, leave it alone. It may be satisfying to your own ego to successfully confront the witness in that way but in doing so you take on an



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unnecessary additional burden. There is the risk that, notwithstanding your confidence in your own superb skills, you may not succeed. If you convert the issue from one of mistake on the part of the witness to whether the witness is a liar, you may find the tribunal of fact unwilling to take that extra step.

This also applies to issues. If you have determined that it is unnecessary for the proper presentation of your case to address a particular issue do not attempt to do so. You have already decided that attacking that issue is not a necessary part of your case. If you attack it and lose the argument the consequence is likely to be that you have harmed your case in some way. If you have a case strategy you will have predetermined what is necessary and what is not necessary and you will avoid adding to your burden and risk by addressing the unnecessary.

The effective advocate will develop a strategy designed to achieve the best result available for the client and will follow that strategy and not be distracted by irrelevancies.

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