

A dvocacy - presentation of the case

by The Hon. Justice Riley

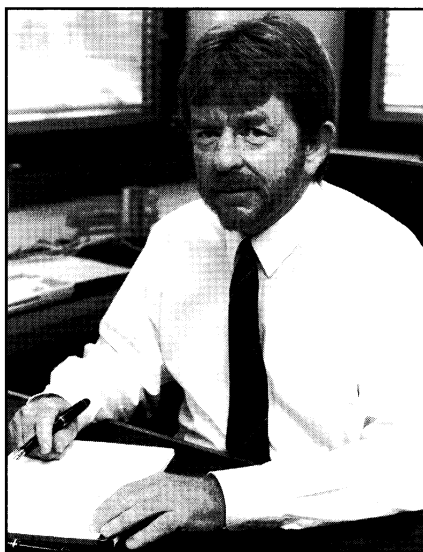
When you have completed your preparation and settled your case strategy it is necessary to determine how you will actually present the case. You know what evidence is available to you and you know what it is that you need to establish; you now have to determine how that is most effectively attended to.

Which witnesses do you wish to call? Which witnesses do you have to call? Which witnesses should you avoid calling? What evidence should you lead from each of the witnesses called? In what order will you call the witnesses?

To effectively present your case it is not simply a matter of looking at your list of available witnesses and saying: "Well, you can go first, followed by you, followed by you and we'll finish up with you". It is essential that you give careful thought to who is to be called and then to the order of presentation. The question you need to pose for yourself is "How can I achieve the most favourable impact in presenting the evidence in this case?".

In the ordinary course you would wish to commence your case and conclude your case with witnesses who you know will be impressive and leave a positive impact upon the court. You may wish to call the less impressive evidence and the less vital evidence at another time – perhaps deep within the case.

A vital and compelling witness called early in the hearing may set the scene for the whole of the case. This will be the witness first called upon to meet the brunt of the attack of the other side. If the witness is strong and confident in his or her evidence then some issues, which may have been a problem with a less confident witness, may disappear before that less confident witness gets into the witness box. For example, take a case where there is an issue as to the time an event occurred on a certain day. If witness A is firm and confident that events occurred in a certain order and the particular event occurred at a certain time, and witness X is of the same view but easily confused, then it would be prudent to call witness A before witness X. The evidence of witness A will (hopefully) ensure that the order of events and the time of the particular event is firmly established. The matter will no longer be an issue when counsel eventually rises to cross-examine witness X. Indeed opposing counsel may



never become aware of the difficulty you had. In this way the threat the issue posed may be defused and, equally importantly, an area which may have led to a discrediting of witness X may be avoided.

Unfortunately witnesses do not come from Central Casting. You cannot send them back and ask for another. Over time you will find that you are confronted by the whole spectrum of personalities and personal characteristics known to the world. Witnesses can be nervous, over-confident, over-helpful, biased, prejudiced, hostile, argumentative, suggestible, boorish, taciturn, garrulous or of any one or more of innumerable other dispositions.

In order to make an assessment of each witness and to determine firstly whether to call the witness, and then where the witness should appear in the batting order, and then how you should handle the witness, it is necessary for you to meet with the witness either directly or, at least, by telephone. What may appear as a clear, confident and firm statement of fact in print, may receive a wholly different assessment when you discuss the matter in person with the witness. The witness may be over confident, too ready to make assertions which assist the case or, simply, prepared to make statements without thinking the matter through. Such a person is a dangerous witness. On the other hand the witness may be totally lacking in confidence in the facts which appear in the statement and may be quick to resile from that position when tested. It is therefore essential that you have a "feel"

for your witnesses so that you may properly allow for and prepare for any failing which he or she may have.

Having identified the witnesses you intend to call and the order in which you intend to call them, it is necessary to consider the best way in which to lead their evidence. A witness will feel more comfortable with the process if he or she has some familiarity with it prior to first entering the witness box. It is helpful to take the witness to the court room and point out where he or she will sit; explain the processes to the witness; determine in advance whether an oath is to be taken or an affirmation; explain the order of events, ie evidence in chief, cross-examination and re-examination and inform them how they should address the various people who make up the court. In this way the witness will be able to focus on giving evidence rather than worrying as to matters of form and sequence. For most people giving evidence is a nerve racking experience, the more comfortable you can make the witness the more likely you are to be able to lead from the witness the evidence which you anticipate will be given.

If the witness is nervous then familiarity with the court and procedures will reduce one area that may be a cause of apprehension. It is important that you let the witness know that most (if not all) courts understand that giving evidence is a difficult experience and will make allowance for nervousness engendered by the process. You will assist such witnesses by yourself being (at least on the surface) cool and calm and confident.

There is no harm in giving witnesses some idea of how to handle themselves generally in the witness box. For example they should be told such things as: the importance of speaking clearly; to keep their answers as short as possible whilst providing a proper answer to a question; that if they do not hear or understand a question they should ask to have it repeated; that they should never guess at what a question means but rather seek clarification if they are unsure; that they should listen to the question and answer the question and so on.

Be sensitive to the strengths and weaknesses of your witnesses when determining how best to present your case.