

Questions from the Bench

Questions and observations from the Bench should not be regarded as an unwelcome distraction. As an advocate you should not regard interaction with the judge or magistrate as an interference with the smooth presentation of your address.

Rather, questions and observations from the Bench should be welcomed because they provide you with an insight into the matters that are of concern to the judge.

That person is about to deliver a reasoned decision either in favour of your client or against your client and therefore anything that concerns him or her should be of concern to you.

It follows that when a question or topic is raised by the judge it is generally prudent to deal with it then and there. In some limited circumstances you may wish to inform the court that you will be addressing the topic in greater detail in the course of your submissions and to suggest that it would be more practical to deal with it in the order that you had proposed rather than immediately. In most cases, it will be preferable to deal with the matter just as soon as it is raised.

The fact that difficult questions come from the Bench does not mean that the court is necessarily against your argument.

If the court presents you with obstacle after obstacle it does not follow that your case is doomed. On the contrary it may mean that the court is favourably disposed to the argument you present but is looking to you for assistance in dealing with the difficult issues that arise.

It would be wrong for you to conclude that the judge has reached a firm conclusion against your argument. It would be wrong for you not to pursue your argument with appropriate vigour. If you can assist the court to resolve the issues with which the court has difficulty success is likely to follow.

Not only should you welcome questions from the judge, but you should be concerned if the judge remains silent. Silence may mean a trouble free address for you but, in

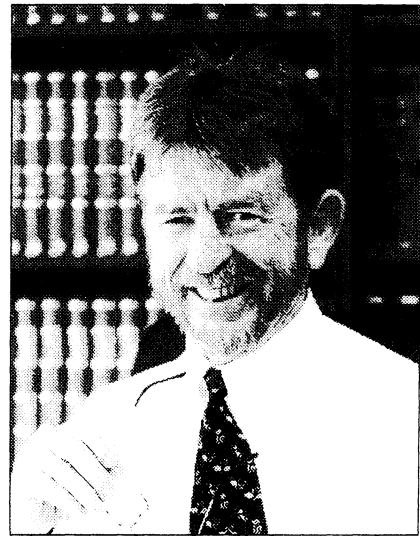
those circumstances, you will have no idea whether your argument is being silently accepted or silently rejected. You will have no idea whether there are issues that are of concern to the court. You will have no idea whether or not your treatment of various problems that have arisen in the course of the hearing is appealing to the court.

You will not be provided with the opportunity to deal with matters that may be seen by the court as an impediment to your client's case. A silent court leaves you in limbo and you will not know what (if anything) is a cause for concern or may be regarded as a flaw or deficiency in your argument.

When, in the course of discussion, a judge suggests a view of the case that is different from your own it does not necessarily reflect an attack upon your case. It does not, of itself, suggest that the court has settled on a different view from your own. You may find that the judge is merely suggesting an alternative way to deal with the issues that have arisen.

However, when the court suggests an answer to a problem that has been identified with your argument, or an alternative approach to the argument you have presented, you should not adopt the view of the court without proper consideration. It may be that the judge has not fully appreciated the situation or has overlooked some evidence or is simply wrong.

You should not adopt what falls from the Bench in an opportunistic way simply because it does fall from the Bench. You are there to present your own case and you must do so. If what falls from the court is, after proper review, of assistance to you then you may wish to adopt it. If it reflects a flawed response then you should ensure that you make that clear to the court.



Hon Justice Riley

In this regard you should bear in mind that it is likely that you will be more familiar with the issues and the law presented by the particular case than is the judge. You will have had time to reflect upon your argument. In most instances the judge will have only been called upon recently to consider the circumstances of your case and will not have the benefit of the substantial preparation which you have undertaken.

If you do not know the answer to a question posed by the court then you should acknowledge that to be so. In most cases your thorough preparation will mean that you are able to deal with difficult questions then and there.

However if you are caught by surprise you may wish to deal with the issue by indicating to the judge that you will take some instructions during the course of the next adjournment. At that time you will be able to properly consider the matter and formulate an appropriate response.

If you do not know the answer it is obviously dangerous to try to wing it. You may do more harm by proceeding in that way than frankly admitting that you need to consider the issue and taking time to consider your position. If you do decide to wing it, it will soon become obvious that you do not know the answer.

Discussion with the Bench is something to be welcomed and treated as a further opportunity to advance the interests of your client. ⁽¹⁾