

Presenting the appeal

Appellate Judges "are the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded."

Ruth Bader Ginsberg

In presenting the appeal it is important to commence and finish strongly. There is little point starting with a formal opening that recites the history of the litigation or informs the court that this is an appeal from such and such a court where judgment was delivered on such and such a date, and so on. The court already knows that information. Repeating it is a waste of time and a waste of the opportunity you have to make an immediate impact. Mason J, in an article published in (1984) 58 ALJ 537, said of the opening in cases before the High Court:

All too often counsel fail to take advantage of the unique opportunity presented by the opening - to make an impact on the minds of the judges before they begin to move forward on their inexorable journey to a conclusion. There is no need for a ritual incantation of the history of the litigation. The court is aware of it. Better to begin with a statement of the issues, unless the case lends itself to an exhilarating or humorous introduction.

It should be pointed out that opportunities for an exhilarating or humorous introduction will be rare indeed. Be careful. Such an opening has every prospect of falling flat, leaving you feeling embarrassed and groping for a way to get the argument back on track. The more senior you are and the more comfortable you are with the court and the court is with you, the greater will be the opportunity for such an opening. For the rest of us the opportunity is probably best left for another day. Although an interesting presentation

is part of effective advocacy the court is more interested in substance than style.

The opening, and particularly the early stages of the opening, provides an opportunity to dictate the course and content of the appeal. It is an opportunity not to be wasted. In your opening you should endeavour to get to your major point as soon as possible. In so doing you need to let the court know where you are going and how you propose to get there. You should avoid the need for the court to enquire of you: "where is this submissions taking us?" The direction of the argument should be clear to the court. If the members of the court are asking themselves what the submission is all about they will be experiencing difficulty in appreciating the impact of what you are intending to convey.

In presenting your appeal it is important not to read lengthy passages to the court. This prohibition includes passages from relevant case law, the transcript of the proceedings below and, most importantly, the judgment the subject of appeal. If a lengthy passage has to be read then identify it for the court and allow the court to read it for itself.

Throughout the presentation of your argument bear in mind that your familiarity with the case will necessarily be greater than that of the judges. This logically follows from your detailed preparation. You will need to ensure that the elements of the case essential to your argument are clearly stated and placed in a contextual framework for the court. It must be plain that each of the members of the court has an



Hon Justice Riley

appreciation of the crucial facts and issues.

Whilst presenting your argument take care before adopting arguments provided to you by the court. Often a judge will make suggestions as to how you put your argument. That will often be introduced with words to the effect of: "You put the argument this way ..." or "you would say ...". In many cases this can be seen as (and may be) reflecting a measure of support for what you have been endeavoring to say. You should carefully consider the suggestion made by the judge and only adopt it if it accurately reflects your argument. The danger of too readily accepting suggestions from the bench is that, when considered in subsequent debate with the judge or other members of the court, the argument falls flat. That may lead to a significant lessening of the impact of the balance of your argument. Alternatively the judge may simply be seeking to encapsulate your argument in order to ensure it is understood or to raise an obstacle. Of course the judge may also be looking to assist you by clarifying a particular matter.

If there is a weakness in your case or your argument it is best to acknowledge that to be so and to confront it. Avoiding it will not make the problem go away but rather will emphasise it when it emerges

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Thanks from DCLS

Last month, the Darwin Community Legal Service (DCLS) symbolically thanked the entire Territory legal profession by presenting a copy of the third edition of the Law Handbook to NT Attorney General, Dr Peter Toyne.

The presentation was made in acknowledgement of the important contribution solicitors and barristers make to the community by volunteering at DCLS.

"We have almost 60 volunteers on our books, from the private profession and the public sector, who give up their time for people who might not otherwise be able to access legal advice. For a small jurisdiction like the NT it is a great effort," Coordinator of DCLS, Caitlin Perry, said.

"Each week, volunteer lawyers provide free legal advice to up to 30 people at legal advice clinics around Darwin.



Ms Caitlin Perry from Darwin Community Legal Service presenting NT Attorney General Dr Peter Toyne with a copy of the Law Handbook.

"Volunteers were also the backbone behind the production of the Law Handbook. Over 100 local lawyers researched and wrote chapters for the invaluable

resource for the legal profession and public alike," she said.①

Presenting the Appeal cont...

through the submissions of other counsel or through the questions of the court. Kirby J, in an article written in 1995¹, and which will repay reading, said:

"Directness in an advocate is a great strength. Candid acknowledgement of a problem may even enlist the assistance of the court, if the merits suggest that course."

When the court is constituted by more than one judge you should endeavour to avoid doing so.

Whilst appellate advocacy is necessarily different from other advocacy the principles and practices you have applied elsewhere should underlay the presentation of your argument to the appellate body.①

Endnotes:

¹Ten Rules of Appellate Advocacy Kirby J (1995) 69 ALJ 964 at 971

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