

MAKING YOUR CASE

Practical Advocacy Skills for Young Practitioners Program

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Magistrates Courts are the courts of the first instance in the judicial structure throughout Australia. ¹The Queensland Magistrates Court is often referred to as “The Peoples Court”. This is because it is the court that the majority of people who come before Queensland Courts will have contact with. Approximately 96% of people who are charged with criminal offences come before it. Therefore it is the court where most of the community form their impression of the Queensland criminal justice system.

For these reasons many regard it as the most important court in the judicial structure. It is also likely to be the court of most importance to many of you as young practitioners. This is because it is here that you are likely to *cut your teeth* forensically, just as I did over a quarter of a century ago together with many others who are now judges or senior counsel. It is also a court in which you are likely to continue to appear.

Since my appointment I have presided over some cases involving complex litigation with senior counsel appearing. However to demonstrate the great variety of legal issues which arise in the Magistrates Court I should mention that at the other end of the spectrum I have presided in assault cases where the choice of weapons have included a watermelon, a dog, and a mullet not a mallet. There was also the case in which the police charged a man dressed as a leprechaun with driving under the influence of liquor. This is justice at the cutting edge of humanity.

It is the court in which you will have your early learning experiences. And it is a good court in which to learn and to hone your skills in court craft and etiquette, and other practical skills which are the subject of the program today. You will learn from your participation in the court proceedings, including by observing and listening to your opponents and the magistrates. You will often appear against senior practitioners and will have to address a wide range of legal issues. Magistrates are aware that young practitioners will be appearing before them and will be tolerant of those who do their honest best to apply the practical principles which I will outline to you.

These principals are based on personal experience gained in appearing for both the prosecution and defence at all levels of the judicial structure in Queensland, in working with investigative agencies such as the National Crime Authority and the Criminal Justice Commission, and more recently as a member of the judiciary. I remember my early experience in the Magistrates Court and what I learnt from members of the judiciary who were patient with me as I found my feet. One of the earliest lessons about not asking leading questions in examination-in-chief was

delivered by the former District Court Chief Judge Shanahan who said in his typical clear and forthright manner:

“Mr Irwin, if you give evidence from the Bar Table one more time, I’ll put you on oath.”

It is against this background and in consultation with my colleagues in the Queensland magistracy that I share with you the following practical tips about *making your case* in the Magistrates Court. These tips should also provide you with a foundation for making your case in the higher courts in the judicial structure.

To *make your case* you should apply the 3 *P*’s of being:

- Punctual;
- Prepared; and
- Precise.

These principles can be expressed in one further *P* word, of being *professional*.

Punctuality

The Magistrates Court is entitled to the same respect as that shown to the higher courts in the judicial structure. An important aspect of this is being ready to start on time.

The Magistrates Court generally commences earlier than the higher courts. In some parts of the state the court commences as early as 8:30am. The Arrest Courts at Roma Street in Brisbane commence at 9:00am. This is because of the large volume of matters which are dealt with daily by the court. There will often be in excess of one hundred matters listed before the arrest courts in Brisbane and Southport each day. The expeditious and orderly discharge of the jurisdictions of the Magistrates Court therefore requires that courts start early and on time. Both the Bench and legal practitioners will be less likely to make mistakes when fresh at the outset of the day than if matters are still being dealt with at 5:00pm.

If you require to take instructions from a client who is in custody at the court it is important to arrive to take instructions before the time appointed for court to commence so that you are able to appear before the court at that time.

Magistrates appreciate that there will be circumstances beyond your control which will make it difficult to start on time, eg your client or a witness who should be the subject of a conference arrives late. In these circumstances you should still appear before the court at the appointed time to mention the matter and explain the difficulty. It is important to afford the magistrate the courtesy of making his or her own decision as to whether to stand the matter down until later in the day. The magistrate is likely to be less frustrated and more receptive to your submissions if he or she is informed as to what is happening. Early notice of any difficulty will enable the work for the day to be restructured so that time is not lost in completing the court list.

If it becomes apparent to you before the day on which your matter is listed to proceed that there is a difficulty with the case which may require an adjournment it is

important to contact the court and arrange to mention the matter at the earliest available opportunity. In these circumstances do not wait until the morning that the matter is listed to ask for an adjournment on this basis. Providing this courtesy to the court will enable another matter to be listed in the place of your case. As a result court time and the time of your fellow practitioners will not be lost. Again the court is likely to be more receptive to an adjournment request made in advance of the hearing date.

However it would be wrong to assume that the court will always grant an adjournment, even where you have reached an agreement with your opponent. Magistrates do not appreciate being confronted with a unilateral statement by the parties that a case is to be adjourned. As part of regulating the proceedings of the court, magistrates like to make their own decision on these issues. Therefore it is important to place proper reasons before the court in support of an adjournment submission and be prepared to support it with evidence. For example if the reason for seeking the adjournment is that your client is incapacitated through illness a medical report or certificate should be provided. If this is not possible at least contact the medical practitioner so that you can satisfy the magistrate that you have verified your client's account.

The court may not necessarily consider it a proper reason for an adjournment that particular barrister who has been briefed is unavailable because it may consider that there are many other competent counsel who can be briefed, particularly in larger cities like Brisbane.

If it is necessary for you to apply for an adjournment on the morning that a matter is mentioned in the Brisbane arrest court (which is Court No 1 at Roma Street) or in the main criminal call over court (which is Court No 20 at 363 George Street) advise the court clerk when you arrive of this fact and of your identity, and every effort will be made to mention your matter early in the proceedings. Whenever possible the court will first deal with adjournments in which legal representatives appear. It will also give priority to sentences where the defendant is legally represented. However it can only do this if you are punctual and make yourself known to the clerk before the proceedings start. If you do so, the court appreciates that you will have other matters to attend to whether in another court or in your chambers or offices, and will do its best to meet your convenience by mentioning your matters as early as possible. Although I have made these remarks with particular reference to Brisbane, I have no doubt that they will be applicable in other centres.

Announcing your appearance

When you rise to announce your appearance in the Magistrates Court it is important to speak clearly and to spell your name. Counsel should also clearly advise the name of their instructing firm.

Appearance slips are not provided in the Magistrates Court as they would generally be impractical because of the volume of matters handled. It is important that your name be accurately recorded on the court file by the magistrate and in any transcript which is latter made of the proceedings. This is the case whether you are well known to the magistrate or not.

Addressing the court

Since 12 November 2004 Queensland magistrates have been addressed as “Your Honour”. This is in consequence of a Practice Direction No 9 of 2004 that was issued at this time.

This Practice Direction reflects that with the passing of the *Magistrates Act* 1991 Queensland magistrates emerged from the public sector to be independent judicial officers in the full sense of the word. This position was enhanced in mid 2000 when the title “stipendiary” was dropped and they became simply magistrates.

It also created uniformity in the mode of address of all Queensland judicial officers and thereby removing the confusion which resulted in judges of the higher courts being referred to as “Your Worship” and magistrates being referred to as “Your Honour”. No longer should magistrates find themselves being addressed as “Your Honour.....I’m sorry.....Your Worship”. Although I suspect that no magistrate will object to occasionally being referred to as “Your Majesty” as is sometimes the case by self represented litigants.

This mode of address is also in keeping with that used in the case of Federal Magistrates.

Preparation

Professionalism in the presentation of your case to the court requires that practitioners prepare carefully and are in a position to provide assistance to the court. In particular it is essential that you:

- Are familiar with the legislation relevant to the case;
- Bring an up to date copy of the legislation to court;
- Are able to answer any questions from the court about:
 - the maximum penalty for the relevant offence; and
 - the sentencing range applicable in the circumstances of the case
- are able to provide comparative sentences to the court;
- refer to the cases by their proper citation;
- are able to provide a photocopy of relevant cases to the court;
- are able to verify your client’s instructions if requested to do so by the court;
- ensure that references tendered in a criminal case expressly recognise that the author knows the purpose for which it is given.

The number of legal websites available, including that of the Queensland Parliamentary Counsel should make it a simple matter to have access to the most up to date reprint of the relevant legislation.

As both a practitioner and a magistrate I have found a valuable starting point for the preparation of a case or a judgement is to make a list of the elements of the offence and to note the maximum penalty. In the Magistrates Court it is also important in the case of an indictable offence to confirm that it is one that can be dealt with summarily, and where an election is involved, as to which party is entitled to make the election.

There have recently been cases before the Magistrates Court in which the magistrate has been referred to an incorrect penalty (from an outdated copy of legislation) or asked to deal summarily with matters which can only be dealt with on indictment. This is because practitioners had not checked the legislation first, and have left the issue entirely to the magistrate. These were cases where magistrates were not dealing with cases which regularly came before them. Although ignorance of the law (or the penalty) is no excuse, no magistrate can be expected to know every section or every penalty in each of the 160 or more pieces of diverse legislation which can potentially come before him or her, often in the course of busy call over lists where time is of the essence. In addition a magistrate may not be familiar with particular legislation because he or she is newly appointed.

While there may be no need to refer a magistrate to the maximum penalty or sentencing range (or to provide comparative sentences) for offences that regularly come before the court eg public nuisance offences, it is essential to be ready to assist the magistrate in those cases where the offences do not regularly come before the court, and to be ready to accurately answer the magistrate in any case in which assistance is requested on such issues. However if you don't know the answer don't pretend to know it by making a guess at it.

I have previously given an example of a situation in which it is necessary that you are able to verify your client's instructions in relation to incapacity to attend at court as required due to a medical condition.

Other examples of this, which may arise on a sentence or on a bail application in a criminal proceeding are submissions that the court should approach the matter on the basis that your client has a job to go to or has accommodation arranged. Every effort should be made to obtain written confirmation of this which can be tendered to the court, or at least to confirm this by direct telephone contact with the person reputed to be able to provide this support. Your submissions will possess greater weight in these circumstances.

Similarly, a reference relied upon to support your argument will be given greater weight if it is expressly stated by the author that he or she knows that it is given for the purpose of a court proceeding and also knows the nature of that proceeding.

Each of these examples of diligent preparation requires no less than would be expected by a judge in a higher court.

Further, in any case in which costs are sought it is important that at the conclusion of the proceeding you are in a position to:

- present a Schedule of Costs what are sought to the magistrate.

Precision

In presenting your case identify the issues in question and address them in a manner that is succinct and to the point.

Do not waste time asking repetitive questions or pursuing irrelevant issues. Similarly ensure that submissions at the conclusion of the evidence are precisely directed to the issues in dispute.

Remember in a Magistrates Court you are not addressing a jury. Therefore don't waste time in addressing issues about the onus or standard of proof which the magistrate can be expected to know other than in exceptional cases, eg where there is a reverse onus provision. You will achieve more if you go to the central issue and direct your submissions on fact and law to it. Be as concise as you properly can. Remember that a magistrate may have to hear a number of trials on a given day, and will not appreciate submissions which waste his or her time.

Presentation of your case

As I have observed it is also important not to ask leading questions during evidence-in-chief of a witness called by you, except on those matters which relate to formalities or are not in dispute. In those circumstances your opponent is likely to consent to this in order to save time, and this will be appreciated by the court.

It is important not to ask leading questions on vital issues which are in dispute, as Judge Shanahan so clearly pointed out to me twenty-five years ago. There is a good strategic reason not to ask such questions. An answer volunteered by a witness will always carry more weight than one that is put into the witness' mouth. This also holds true for cross-examination despite the fact that leading questions are permitted.

Never make an argument to the court on law or fact that does not carry weight in your own mind, or make a submission in a criminal case for a sentence which is not consistent with a clearly established sentencing range. And be prepared to make concessions where appropriate. This is important in establishing your credibility before magistrates as a young practitioner and maintaining it as you become more senior.

The court must feel confident in the submissions made to it. It is important to remember that you will often be appearing before the same magistrate, and even if you are not, that magistrates share their experiences. If you establish a reputation for making unwarranted or over the top submissions, your future submissions are likely to be given less weight by the judiciary. On the other hand you will find that magistrates are more likely to accept your submissions in other cases once your credibility has been established. Therefore you will find that you get a much better result if courts can trust you.

Prosecutorial presentation

While these principles hold true for criminal and civil matters and for defence counsel and prosecutors in criminal proceedings, they are particularly relevant to any young practitioner who undertakes the role of a prosecutor.

It is stated in a United States commentary on prosecutorial ethics:

“The first, best and most efficient shield against injustice must not be in the persons of defence counsel, trial judges or the appellate court, but in the integrity of the prosecutor.....this notion lies at the heart of the criminal justice system.”²

The prosecutor has a large responsibility which includes:

- determining what evidence to place before the court; and
- determining what witnesses to call.

The prosecutor must act in an honest and impartial manner to ensure that all relevant and admissible evidence is placed before the court. This is because the prosecutor represents society as a whole, and is not the representative of the officer who brings the charge or even of the victim.

The role of the prosecutor is to assist the court to get the truth and not to obtain a conviction at all costs. He or she must be prepared to make a submission in an appropriate case that there is insufficient evidence to warrant a conviction. And he or she must accept the court's ruling and not to be seen to disagree with them, either by body language or by tone of voice, no matter how disappointed in the result. This last piece of advice holds true for all practitioners whatever their role in the proceedings.

Conclusion

The Queensland Magistrates Court is the people's court and as such is a very important component in the judicial structure of the state. It is the court in which you are likely to spend much of your time as a young practitioner and in which you are likely to continue to appear as you become more senior.

It is the court where most members of the community will form their perceptions of the criminal justice system. It is the aim of the court to maintain standards, and to ensure that it acts effectively and efficiently so that the many people who have contact with it perceive the Queensland justice system as fair and equitable.

The practitioners who appear before the court are integral to achieving this. It is therefore essential that you are professional in your dealings with the court by observing the 3 P's of being punctual, prepared and precise. By being so you will in turn establish your credibility with the court.

I hope that these tips for making your case to the Magistrates Court will be of value to you now and throughout your careers. The magistracy of Queensland looks forward to your attending before us in the future.

¹ The Hon Justice J B Thomas, "Ethics of Magistrates " (1991) 65 ALJ 387, 389

² C.A Corrigan, "Commentary on Prosecutorial Ethics", Hastings Constitutional Law Quarterly 13(3) (Spring, 1986) 537