Sentencing Advocacy: all your questions answered

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In planning this session the conference organisers polled prospective attendees to ascertain the topics of particular interest in respect of sentencing advocacy. From the feedback received the organisers allocated the top 10 topics of interest for consideration in this session – they appear in the boxed headings discussed below.

1. Effective ways to make use of the evidence (i.e. both ends of the Bar table supplementing schedules of fact with the use of pictures and transcripts of interviews).

1.1 Preparation: This topic provides a useful platform to highlight at the outset the importance of preparation and purpose in the context of sentencing advocacy. As to preparation, whether your client is the Crown or the defendant, you cannot plan to effectively use evidence which you do not have. Your preparation should ensure that you have requisitioned evidence which you expect exists and is likely to assist your client on sentence, but which does not yet form part of your brief. In a similar vein you cannot make effective use of the evidence at your disposal if, as part of your preparation, you have not planned how to use it or indeed whether to use it at all. To remove doubt, by "evidence" in the context of sentence we mean any "information" which, pursuant to s 15 *Penalties and Sentences Act 1992* (Qld), the court is likely to consider "appropriate to enable it to impose the proper sentence".

1.2 Purpose: The mere fact that you have evidence at your disposal does not mean you should use it. You should only use it if it serves a purpose consistent with your role in the case. The risk with using evidence that serves no purpose is the same as advancing submissions or questions that serve no purpose – they may provoke a reaction which hurts your case. That reaction might be the ire of a sentencing judge, who senses that time is being wasted or, more concerningly, damaging contradiction by an opponent who would otherwise have left the issue alone.

1.3 <u>A common prosecutorial sin: under-use of hard evidence</u>: Perhaps the most common failing of the prosecution in respect of this topic is the under-use of evidence available to it. It has become common for the prosecution to tender a written summary or schedule of the facts alleged by it or as agreed by both sides. The advent of that practice seems to have been accompanied by a marked decline in the tendering of hard evidence, such as photographs of the victim, weapon or crime scene. Such physical evidence gives the sentencing judge a better understanding and "feel" for the case than any summary can. Similarly, transcripts of a defendant's admissions or of intercepted conversations, texts or emails likely contain content which, if highlighted to the sentencing judge, will better illuminate the case and the offender than a sterile factual summary. Consider tendering a tabbed and highlighted copy of such transcripts or alternatively including a selection of quoted extracts.

1.4 <u>A common defence sin: over-use of psych reports which serve no purpose</u>: Perhaps the most common over-use of evidence which serves no purpose is defence counsel tendering psychological reports which express no useful expert opinion. If a psychologist's report does no more than marshal the defendant's antecedents together in writing and provides no particular expert insight into the psychology of the defendant, particularly as it relates to the offending behaviour, then it is more likely to distract than assist the sentencing judge if it is tendered. The judge will better absorb the antecedents if told what they are, not left to find and read them buried in a purposeless report.

1.5 <u>Identify and explain the relevant content of exhibits</u>: Where you do intend to tender a substantial number of exhibits, make sure you plan how you will go about that process. As with the content and pace of oral submissions, exhibits should be dealt with in a way that breaks down the materials and does not rush or overwhelm the sentencing judge. The preferable method is to slow the tender process down, interspersing it with oral submissions, highlighting and explaining the relevant aspect(s) of each of the items gradually being tendered. A generally less preferable method, is to tender a single prosecution or defence bundle, indexed and paginated, but then proceeding in a staggered way through its individual segments, focussing oral submissions on each, one at a time. The latter method may be an administratively

convenient method, if there are to be a particularly large number exhibits, but it is less conducive to effective advocacy than the former. Putting every exhibit in the judge's hands at once forfeits a substantial degree of the advocate's influence over how the judge will receive and perceive the information in the exhibits. Whatever your tender method, you should make specific submissions about the significance of the more important content in the exhibits tendered. The sentencing judge might only read an exhibited document once and may miss the significance of its content unless it is specifically identified and explained by you.

2. The order of submissions (i.e. should one move from facts to history to comparatives to ultimate submission, or should they be combined/reordered?)

2.1 **<u>It depends</u>:** There is no "right" answer – it depends on the circumstances of the case, as well as what you know of the preference (if any) of the judge before you.

2.2 **<u>Prosecution – Begin with antecedents in brief</u>:** It will generally assist if the judge is told some brief basic information by the prosecutor about the defendant at the outset. For instance, "*The defendant was born on 1 July 1998. He is 19 years old and was 18 years and one month old at the time the offence. He is an apprentice electrician and has no previous convictions.*" This provides a convenient contextual snapshot of who the judge is dealing with.

2.3 **<u>Prosecution – When to deal with the criminal history</u>:** Starting with the "antecedents in brief" may not be such a brief start if the defendant does have a criminal history, particularly if it contains like offences. Tendering the criminal history near the outset may lead to some diverting delay in informing the court of the facts of any like matters in the criminal history. Weigh up the advantages or disadvantages of dealing with the criminal history, in whole or in part, before or after the facts. To do that, you will need to identify what purpose(s) it serves as an exhibit generally (e.g. minor or major criminal history) and specifically (e.g. like previous, on community-based order or parole at the time, has already served prison sentences, etc). On the one hand, it is useful to flag anything out of the ordinary at the start. On the other hand, the more

complicated or prolonged the process of explaining the relevant aspects of the criminal history, the more preferable it may be to deal with it once the judge knows more of the facts. Remember you can confide in the judge, indicating what you are doing, for instance, "*Your Honour, the defendant does have a relevant criminal history, including a previous conviction for rape, but I propose to deal firstly with the facts of the rape to which he has today pleaded guilty.*"

2.4 **Prosecution – Facts early:** It is preferable for the prosecutor to deal at an early stage with the facts of the offence to which the defendant has pleaded guilty. In doing so it is helpful to try and capture the basic essence of the facts in the first few sentences, just as you might in opening your case to a jury. For instance: "*Moving to the facts of the case, the defendant broke the complainant's jaw when he walked up and punched him in a local hotel. He did so without warning, out of anger and jealousy because the complainant was going out with the defendant's ex-girlfriend. Your Honour, let me say something of the past association of the players before describing the events in a little more detail.*"

2.5 **Prosecution – Finish with comparatives and sentence range:** Prosecutors should usually leave submissions on comparatives and the appropriate sentence range to the final phase of submissions. That is because reference to sentence range is likely to be largely meaningless until the court first understands the facts of the case and the criminal history of the person it is dealing with.

2.6 **Defence – Consider beginning with comparatives:** It will likely be of most assistance to the judge, assuming the prosecution finished with comparatives and sentence range, if the defence submissions begin with discussing the comparatives. That is because the topic will be fresh in the judge's memory and the prosecution's comparatives are probably still sitting on the bench in front of the judge. Whether referring to further comparatives or distinguishing aspects of the prosecution's comparatives, dealing with the comparatives at this early stage will tend to blunt the momentum built by the prosecution's submissions about sentencing range, making the judge more receptive to what follows.

2.7 **Defence – When to identify sentence range:** Whether you identify the sentence range for which you contend at this early stage is another matter. It will depend on the degree of leniency below par you are seeking. If you anticipate the judge will perceive the range you identify as being unremarkable, then it will likely assist the judge to flag the range you contend for early and will do no real harm to your chances It may even prompt a favourable intimation from the judge, giving you the confidence to be more succinct in your ensuing submissions than planned. On the other hand, if the sentencing range you are seeking will be perceived as unusually low, it would be wiser to postpone identification of that range until you have canvassed the circumstances of the case or the defendant's antecedents. This will build the credibility of your ensuing submission about the otherwise seemingly generous range you seek.

2.8 **Defence – Get some "runs on the board" before dwelling, if at all, on the facts or criminal history:** As a general rule it is unhelpful for defence counsel to dwell on the facts or criminal history – the less often they are repeated and wallowed in, the better. However, if there is an issue about the facts or criminal history which needs to be highlighted, disputed or explained, then, unless you are very confident the judge will receive your submission favourably, postpone dealing with it until you have dealt with your client's antecedents, including rehabilitation and references. This may make the judge more sympathetic to your client's cause and tend to reduce the relative significance of the issue as a material determinant of the final sentence.

3. The extent to which facts reduced to a schedule should be orally summarised for the record (by the prosecution), and best-practice for doing so.

3.1 **What is a "schedule"?:** We take this topic's reference to a "schedule" to be a long-form schedule of facts tendered by the prosecution, setting out in writing the entirety of the facts of the case which the prosecution seek to bring to the court's attention on sentence. We will adopt that meaning of "schedule" for the purposes of this discussion. However, before discussing the seemingly ubiquitous and unthinking use of such "schedules", we note in some cases there may be advantage in providing an "outline" style summary of the key facts. Such an outline, briefly stating the essential features of the offending conduct, spoon feeds the judge with a note of the type of

information to be mentioned during sentencing remarks and may provide a useful structure on which you can build your oral submissions summarising the facts .

3.2 **Why are the facts now so often in a "schedule"?:** It has long been the custom that the court is informed of the facts orally. Speaking generally, most judges do not require the entire facts of the case as alleged by the prosecution be always reduced to a schedule which is tendered as an exhibit. Judges are quite capable of taking notes of oral submissions, jotting down the key points as the hearing proceeds, and then using their notes as their main source for remarks when sentencing. In cases of low to medium factual complexity, our experience is that schedules of fact are a distraction from oral submissions and tend to slow the hearing down. They did not used to be tendered in such cases and we really do not know why they have been of late. It might be some judges like them in every case – if so just use them when before those judges. The settling of such schedules might be an internal aid to the prosecutorial preparation process or in settling issues between the parties before the sentence proceeds. However, those uses have nothing to do with advocacy on sentence. The benefit most judges derive from a schedule of facts will increase commensurately with the complexity of the case and the number of charges involved. The more complex the facts and, more significantly, the more numerous the associated charges, the more assistance the court will derive from a schedule of facts (and a working copy to mark during the hearing). Examples of such cases are the thief charged with ten break and enters, seven unlawful uses of motor vehicles and five stealings. Another is the methylamphetamine addict charged with multiple aggravated possessions on multiple indictments along with thirty transmitted summary offences. In cases of that kind a schedule of facts setting out the offending, referenced to each charge, in chronological sequence, will assist the sentencing judge and probably shorten the proceeding.

3.3 **The desirability of orally reciting facts:** As a general rule, regardless of whether there is a schedule of facts tendered, the facts should be recited orally. Courts are public forums and, of all of the court's work, it is sentences which are most likely to attract the presence of members of the public, particularly journalists, witnesses and supporters of the rival sides. If proceedings are being held in open court, such persons have a right to understand what is going on. Further, the defendant has a right to understand what is going on. It cannot always be assumed the defendant is literate or,

if literate, will have read and understood the schedule of facts tendered. Moreover, the opportunity to explain the facts orally to the sentencing judge is an opportunity for advocacy – the art of persuasion – which should be exercised.

3.4 **Summarise!:** The schedule should be a summary of the facts, identifying the relevant criminal conduct and its relevant context. It should not record every piece of factual minutiae, particularly facts which are of no significance to the assessment of the proper sentence.

3.5 **Summarising the summary:** Despite the primacy of oral submissions in explaining the facts, consideration should be given to orally summarising the facts in a schedule, if tendered in a case involving such a degree of complexity that a verbatim narration would consume an unwarranted amount of court time. Summarising the schedule orally in such cases is a sensible compromise between the interests of open justice and the interests of the efficient use of court time. You will appreciate our personal view – perhaps not the view of all judges - is that such cases are the only cases in which the tender of a schedule of facts is particularly advantageous.

3.6 **The oral summary should track the sequential content of the schedule:** Where the complexity of the case justifies an oral summary of, rather than recitation of the facts in the schedule, the oral summary should follow the same sequence as the schedule for two reasons. Firstly, the schedule of facts should already be sequenced in the way which best tells the factual story, so stick to that "best" sequence. The schedule is a potential tool of advocacy – if it is not in the best sequence then take proper professional control of your case and re-draft the schedule prior to sentence. Secondly, following the schedule's sequence allows the judge to be able to follow the oral submissions and the written schedule of facts simultaneously. The judge can read faster than you can talk. Typically, in cases where you are not reading out all of the content of the schedule of facts, the judge will still be scanning through what is written as you speak, perhaps even highlighting parts of the working draft. This simultaneous tracking cannot occur unless the sequence of the oral summary matches the sequential layout of the tendered schedule of facts. This method also allows a judge to invite the prosecutor to pause, to allow the judge time to read and absorb passages in the written schedule which are not dwelt on in in the oral summary.

4. Advocacy tips for distinguishing or justifying comparative decisions.

4.1 **Select decisions which are realistically comparable:** The best tip in this context is to use decisions which the judge will recognise as involving generally comparative circumstances to the circumstances in your case. Obviously matters of degree and judgment are involved, but, if the case is not realistically comparable, do not lose credibility with the court by using it.

4.2 **Identify the most persuasive elements of the decision:** Whether you are using a comparable justifying the range you seek or are seeking to distinguish a comparable relied upon, it is essential that you identify the elements of it which you intend to rely upon. Ask yourself: what is it about the comparative that makes it comparable? Alternatively, ask yourself: what is it about the comparative that makes it distinguishable? If this gives you a long list of points then cull your list, homing in on the most persuasive of the elements you have identified, whether in favour of or against the case being a comparable one. They are the elements to highlight to the sentencing judge. There is no exhaustive list of the elements to look for, but perhaps the five most common are:

1. facts;
2. plea of guilty or conviction after trial;
3. criminal history;
4. age;
5. exceptional personal circumstances.

4.3 **Plan:** Having identified the key elements you will highlight, plan how you will do so. Do not just highlight a few passages of the decision and wing it from there. Actually note down the points you plan to make and the sequence you intend to make them in. Make sure you include a note of the page and paragraph number.

4.4 **Focus and brevity:** Execute your plan. Remain focussed on the most persuasive elements you have identified and inform the judge of them. Consider paraphrasing them, citing where they are found. Be brief. Remember the judge can

read. Do not lapse into the security blanket of reading long slabs out aloud or doing a page-by-page running commentary of the judgment.

4.5 **Be candid:** Be candid with the court about the limits of the comparative sentence you are referring to. If there is an obvious difference to be acknowledged then acknowledge it, thus preserving the court's trust. Then go on to submit, despite that, why the comparative is still of assistance.

5. Making submissions on sentencing range where closely comparable Court of Appeal decisions cannot be identified.

5.1 **Less closely comparable Court of Appeal decisions may still help:** Court of Appeal comparatives with some general, if not close, comparability, may still assist in identifying a broad sentence range. Providing an example of a more serious or less serious case, acknowledging it is more or less serious, may still help the judge in identifying the probable upper and lower limits of the range.

5.2 **Do not overlook Court of Appeal decisions for different offences:** Bear in mind that like offending is sometimes charged differently without the underlying degree of culpability or wickedness being any different. Court of Appeal decisions involving different offences but like misconduct may provide some useful guidance. So, for example, a serious example of assault occasioning bodily harm may be of similar culpability to a minor to moderate case of grievous bodily harm. In a similar vein, five counts of supplying a dangerous drug to an undercover agent may be of similar underlying seriousness to a low to mid-range case of trafficking in a dangerous drug.

5.3 **Look to single judge decisions:** In the absence of useful Court of Appeal comparatives, single judge comparatives are well acknowledged as the next best source.

5.4 **Interstate court of appeal comparatives:** Do not overlook the potential use of comparatives from other states. For federal offences, which have no state borders, you should consider them as a matter of course.

6. Cases on sentencing principles (as distinct from comparative decisions) – when and how best to use them.

6.1 **Whether to use:** Authorities in which sentencing principles are enunciated are likely to be of assistance in cases where –

(a) the result you seek is a major deviation from average and you need to give the judge a principled basis, founded on authority, to justify such a departure;

(b) there are no particularly helpful comparatives, making it necessary to fall back to foundational principles to justify the range you seek;

(c) the sentencing judge is not used to sentencing in a case of the kind before the court (whether because the judge is inexperienced in the field or the case is unlike the "run of the mill" cases the judge often sentences in).

6.2 **When to use:** Such authorities are best used near the outset of your submissions on range, allowing you to justify the principle before moving to its application to your case.

6.3 **Which to use:** Only use the most seminal, highest authorities. If the statement of principle is contained in a High Court decision, then only use the High Court decision. Do not refer the court to an intermediate appellate court decision which refers to the same principle unless it adds material additional principle. Judges become frustrated when being referred to multiple cases which simply state the same principle over again.

6.4 **How to use:** If your authority states the principle clearly and authoratively, take the court directly to that statement. Preferably tab and highlight the relevant passage in the case which you are handing up so as to take the judge easily to it. It will seldom be necessary to take the judge to the broader detail of the case. Situations in which you may need risk trying the judge's patience by doing so include:

(a) where the principle cannot be clearly identified without first pulling together some of the relevant circumstances of the case; or

(b) where the statement of principle derives by way of factual example from the court's approach to the case; or

(c) where you seek to distinguish the circumstances to avoid the application of the principle.

7. Making submissions in favour of, or against, a finding of *exceptional circumstances* for an offence to which s 9(4) *Penalties and Sentences Act 1992* (Qld) applies.

7.1 **Know the relevant law:** Ensure you know the relevant statutory provision and the main cases on its interpretation. Do not presume the judge knows. Be prepared to explain what the relevant law is.

7.2 **Acknowledge the law:** Do not just drift into a discussion of the circumstances you want to use to argue against or rely upon as exceptional. Identify the fact that a finding of exceptional circumstances is in issue and headline the fact that you are now turning to a discussion of those circumstances so as to focus the judge upon the task at hand.

7.3 **In favour:** If your case involves a singular exceptional circumstance, go straight to it. If you are going to rely upon an accumulation of multiple circumstances, acknowledge and explain that fact first, before then going to the circumstances. This ensures the judge appreciates you are now turning to an accumulating list and is not irritated by you first proceeding to a seemingly minor circumstance.

7.4 **Against:** The three best counters to a submission of exceptional circumstance are, if apt to the case at hand:

(a) highlighting a lack of factual foundation for an exceptional circumstance relied upon;

(b) reference to comparable cases in which similarly supposedly exceptional circumstances have not been found to justify such a finding;

(c) concede circumstances which are genuinely exceptional (there is no point arguing the unarguable) but explain why the underlying seriousness of the case means the range you contend for is appropriate even allowing for the exceptional circumstance(s) (reference to comparable authority in so doing, will obviously assist).

8. Making submissions in favour of, or against, a finding of *reduced moral* culpability.

8.1 **<u>Is there a realistic foundation</u>?** Arguments of reduced moral culpability can be conjured up on a superficial consideration of just about any case. Consider how realistic the underlying foundation for the argument is. The success of the reduced moral culpability argument will turn upon whether there is a substantive foundation for the argument or whether it is a superficial argument relying upon matters which are, on analysis, common or unremarkable.

8.2 **<u>In favour: build a foundation</u>:** A successful submission in favour of a finding of reduced moral culpability builds the foundation first. Ensure you expose the factual foundation so that when you come to the submission the judge will understand it has substance and is not merely superficial.

8.3 **<u>In favour: set it apart</u>:** In planning your submissions focus upon the feature or quality which sets your case apart from the many other similar cases in which there is a superficial claim to reduce moral culpability. Your submissions should clearly articulate and emphasise that quality.

8.4 **<u>Against: undermine the foundation</u>:** If there is a lack of foundation for the submission, then highlight that fact and expose its superficiality.

8.5 **<u>Against: highlight counter considerations</u>:** Highlight the features of the case which tell against a finding of reduced moral culpability. For example, how repetitive, prolonged, premeditated, planned or persistent the offending was. In the case of a defendant with a criminal history, look to expose whether or not the same argument

about moral culpability has been repeatedly trotted out. If it has, then argue the point of diminishing return must be reached so that considerations of deterrence and protection of the public trump the reduced moral culpability of the offender.

9. Formulating arguments, and adducing evidence to meet (and defeat) allegations of commerciality for drug possession charges.

9.1 **The in between:** Bear in mind it may not be an all or nothing argument. Instead of "all personal use" your instructions may support the softer sell of a part personal/part commercial purpose finding. Similarly, your instructions may support the adverse concession of an intention to share the drug with others but without a more adverse accompanying profit motive**.**

9.2 **It depends:** Much depends on the force of the evidence supporting the inference of commerciality. The weaker it is, the more the focus should be on its inadequacy. The stronger it is, the more the focus should be on advancing contradicting information.

9.3 **Formulating arguments:** If the focus is on inadequacy then highlight the inadequacy. For instance, highlight the absence of tick sheets, scales and clip seal bags and highlight the fact the mobile phone download and the financial analysis provided no incriminating information. Keep the focus upon the short falls in the prosecution's position, emphasising the high degree of satisfaction required per s 132C *Evidence Act 1977* (Qld), because of the consequences of the adverse finding sought.

9.4 **Adducing evidence:** Be alive to the risks of adducing oral evidence from defendants or others involved in the murky world of drug offending. They begin from a point of low credibility and often go backwards quickly because they are reluctant to be candid or specific for fear of incriminating others or incriminating themselves in uncharged conduct. A generally more productive approach is to advance credible information which tends to contradict the inference of commerciality, for example:

(a) information in the depositions, such as photographs of the defendant's syringes, texts or intercepted calls, referring to a personal use context or the

contents of an interview in which the defendant positively explains it was personal use and denies commerciality;

(b) copies of the defendant's bank statements, other financial information or even photographs, showing how poor and lacking in income the defendant's lifestyle was at the time;

(c) information from medical practitioners or counsellors who dealt with the defendant during the offending era and can confirm he or she had a significant drug problem, so that the volume of drugs in question may conceivably all have been destined for his or her use;

(d) references/affidavits from persons who, during the offending era, witnessed the extent of the defendant's drug addiction and the number of fellow drug users the defendant kept company with.

10. Contested sentences generally (process, proof and submissions).

10.1 **<u>What is a "contested sentence"?:</u>** All sentences involve some degree of contest. A plea of guilty is only an admission of the elements of the offence. This means many aspects of the facts may legitimately remain in issue, but most will be minor and unlikely to materially affect what sentence should be imposed. However, some are so major that, depending on the court's conclusion on the issue, it may have materially adverse consequences for the defendant (in the sense identified in s 132C *Evidence Act 1977* (Qld)) and warrant the adducing of oral evidence at the sentence proceeding. A "contested sentence" means a sentence in which oral testimony is intended to be adduced in respect of a major issue in dispute. Bear in mind that it may not be necessary to adduce oral evidence to resolve some major factual disputes. Proof as per a trial is not necessarily required, for the sentencing judge can act on such information as the judge considers appropriate. Sometimes the gathering and exhibiting of compelling and relevant documentary evidence may suffice.

10.2 **<u>Is it really a contested sentence?:</u>** Of the matters listed for contested sentence few actually proceed as a contest involving oral testimony. Once the parties are properly prepared on the eve or morning of the supposedly contested sentence the issues tend to narrow and very often it is appreciated the issue thought to be in contest is,

relatively, a non-event which will not matter materially to the determination of sentence. Timely preparation and a realistic appraisal of the provable case will often avoid sentences becoming contested sentences.

10.3 **Forewarning the prosecution:** A sentence is sometimes listed to proceed in the usual way only for it to emerge for the first time during the sentence that a contested sentence and thus another hearing date is necessary. Such hearing date double-ups involve more cost and inconvenience for all concerned. They are readily avoided, by advance disclosure of the potential issue to the prosecution and ensuing pragmatic discussion between the parties of whether it is genuinely necessary to list the sentence as a contested sentence. The defence has no obligation to disclose in advance of sentence every minor factual issue on which it differs from the facts appearing in the disclosed materials of the prosecution. Where it is obvious the issue is so major that it will inevitably attract a contested sentence then it should be disclosed. Where the factual issue is borderline in its potential to attract a contested sentence, it is also wise to disclose it to the prosecution. Very often the first reaction of inexperienced prosecutors, surprised by a last-minute disclosure of a factual issue, is that an adjournment and listing of a contested sentence is necessary. However, given more time for consideration and perhaps to seek advice, such prosecutors may gradually arrive at the opposite conclusion. So, when in doubt, forewarn the prosecution.

10.4 **Proof – do the rest first:** A contested sentence will involve elements of examination and cross-examination of witnesses. This is not the occasion to deal with those major advocacy topics. However, despite the presence of those elements a contested sentence is quite unlike a trial. It is a significant consideration that both sides remain entitled to advance information and submissions as per a usual sentence. That information might include relevant statements from the depositions tendered as exhibits on sentence just as it may include transcripts or other documentary records of what the defendant has said. It might also include documents including defence reports and references. It is preferable to complete or nearly complete the process of advancing information and submissions on sentence in the usual way before embarking upon oral evidence relevant to the issue in contest. This will give the judge a sense of whether the contest is really likely to matter to sentence, for if it is not, the judge will likely intimate as much and the parties will likely abandon the need for the contest. If the

contest proceeds it will also have given the judge a sense of context; a framework of the facts not in contest to give the judge a better sense of the reliability, including the consistency and probability of, evidence to be adduced. Finally, it will expedite the contest. For example, exhibits will already be before the court and easily referred to, rather having to be proved and tendered through the witness, and the evidence in chief of witnesses may be shortened because their witness statements or interview transcripts will likely have been tendered already.

10.5 **Submissions should be prepared in advance:** Your oral submissions calculated at persuading the judge to resolve the contest in your favour should be prepared in advance in much the same way as your closing address should be prepared before you commence a trial. Indeed, it is easier to prepare your submissions in advance of a contested sentence than a trial because it is more of a set piece move with fewer variables in play than for an entire trial. Of course, the performance of the witnesses in the witness box matters and you ought to modify or add to your planned submissions to cater for what has actually transpired. However, most of what transpired will have been entirely predictable and you should already have planned and prepared your major arguments. Finally, preparing your submissions in advance will inevitably help you do a more effective job of examining or cross-examining the witnesses during the contest. That is because you will already have identified the critical evidence to elicit or undermine and identified how the broader facts, which are not in dispute, can be relied upon to your advantage.