# Advocacy in the District Court[1]

Judge P.E. Smith

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## Introduction

I have been asked to speak to you today about tips I have for advocacy in the District Court.

I know that on day two of this conference you will discuss these issues in more detail but I would like to I would like to briefly cover an overview with you- trials, applications and sentences in which prosecutors regularly appear.

At all times bear in mind what advocacy is- the art of persuasion.

I greatly enjoyed my time as a barrister both prosecuting and defending.

It is difficult work, but it is also very rewarding when done well.

It is a great feeling to finish a trial and think that you have done a good job- the result doesn't really matter.

In my view it is the way which you presented your case which is more important.

It is crucial that you not lose your temper, and at all times, act courteously and ethically in court towards the judge, jury, your opponent and the witnesses.

Some barristers develop "white line fever" as soon as they get into the court room. This leads to poor decision making and therefore poor advocacy.

If you keep your cool when your opponent is making a fool of himself or herself then you will have a far greater chance of achieving the result you are after.

Some barristers even develop this aggression before they get to court. Again, try and be courteous at all times. If it gets bad simply tell them, you are not prepared to talk to them and if they wish to raise the issue, they can raise it with the court. Many of these practitioners will back down once you tell them this.

## Preparation for trial

[1] Presentation to the ODPP Crown Prosecutors' Conference, 29 June 2021.

As you will all know preparation is the key to running a good trial.

The following matters should be done in preparation:

- Read the brief well in advance of the trial. This will alert you to any legal arguments or disclosure issues well in advance of the trial listing.
- I would read the brief once first, so you get an initial handle on what the case is about.
- Then I would read it more carefully a second time.
- Go the statute and establish the elements of the offence charged. A case always starts and ends with the Criminal Code.
- Put together a folder of the key cases ready to hand.
- Always do particulars, no matter how simple the case is- it focusses your attention on what the issues are in the case and what is relevant evidence.[2]
- Then I would anticipate any objections to the evidence which are likely to be raised by defence counsel and any defences likely to be raised and prepare those in advance (e.g. joinder issues and defences to be raised). Gather together the key cases on these issues.
- Confer with the key witnesses. Make sure there is always a witness present, so you don't end up in the witness box.
- Take the witnesses through their evidence. Be careful of course not to coach the witnesses.
- Make sure any special witness or AVL applications are sorted out well in advance of the trial.
- Arrange with the court before the trial to check that any videos and other electronic exhibits work. There are too many cases where they don't.
- Consider carefully whether you will play the accused's interview to the police.[3] Listen to it. Often it is the way they deny things which helps the crown case. Most interviews will contain at least one statement against interest.

**Experts**

It can be daunting dealing with complex expert evidence.

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[2] *Patel v* R (2012) 247 CLR 531; *Johnson v Miller* (1937) 59 CLR 467.
[3] *Nguyen v R* [2020] HCA 23; 94 ALJR 686.

You will need to master as best you can the area of expertise. Confer with your expert before the trial.

I can recall one night reading a text on Ohms Law before cross examining an electrical engineer the next day on the properties of electrical currents in a particular device.

Also sit down with your expert and go through the opposing expert's report so that you may be advised as to where the weaknesses in the opinion are.

**The trial**

At the trial it is essential that you be on time. There is nothing worse than getting off to a bad start because you are late, and the jury and the judge are angry.

When you are on your feet try not to move around too much or play with your pen or use your hands. It is very distracting, and the jury ends up paying attention to what you are doing rather than listening to the evidence.

Don't mumble or whisper but don't shout. Keep your voice to a medium level so you can be heard clearly. Use the lectern to place your notes on that and hold the sides of it to keep your hands still.

**The opening**

The opening is underrated.

In my view the opening is crucial. A good opening can win or lose a case.[4] In an open start with a one line statement which grabs the jury's attention from the start.

Don't simply read the witness statement. Give a brief but cogent summary of what the witness will say.

Try and do it chronologically so it tells a logical and simple story about the case.

Seek the court's leave to show exhibits to the jury during the opening. I can recall an arson trial once where if the video of the accused lighting the fire was played during the opening, the case may have been all over then rather than four days later, when the defendant finally pleaded.

[4] The American author WI Lindquist in 1982 thought a good opening statement affected the outcome of 50-85% of trials.

I also know of a case where the opening was so good during a defamation trial, the offers kept increasing each minute from the defendants during the opening and the case settled by the end of the opening.

Try and identify the issues for the jury which you expect will be raised.

Don't open too "high". If you do you will most likely fail to prove the case, you set out to prove.

**Evidence in chief**

Obviously non leading questions must be asked- start with what, when, where, how or why.

But it is not leading to flag topics. For example, "I now want to turn to the 25th of December 2020" and then ask non-leading questions. This keeps everyone on track but most importantly the witness. It is crucial the crown witness controls the witness and not the other way around.

You can also use "piggyback" questions such as "Witness you said that you went down the road in your car, where did you go after that?"

Use a check list of what points must be covered to get all of the story out.

Ask short one proposition questions.

Diagrams should be used. A diagram drawn by the witness is very useful as are photographs and maps.

Have the witness mark a plan of what they are taking about.

Always consider the use of a google map.

Also consider the tendering of calendars which identify the days and dates relevant.

Always have a folder ready to hand for how to apply to have a witness declared hostile- it happens on occasions. Indeed, it happened in the first civil trial I appeared in the District Court.

In fraud trials try and concentrate on the crucial exhibits. Make sure you have jury books paginated and indexed which everyone can follow.

Bear in mind the duty of a prosecutor to call relevant witnesses. It is rare you would not call a witness.[5] Think about just calling them for cross examination.

On experts make sure they explain technical terms to the jury.

**Objections**

If defence counsel objects, the etiquette is that the crown prosecutor sits down while opposing counsel makes the objection.

After this defence counsel should sit down while the prosecutor responds.

**Re-examination**

Again, non-leading questions must be asked. Don't feel as if there is a need to re-examine unless there is some confusion or uncertainty or unless you have to re-establish the credit of the witness for example- why they did not make earlier complaint.

**Cross-examination**

Some people are natural cross examiners- very few. Most people can learn to be effective cross examiners.

Judge Lynch will give a detailed paper on this, but I would ask you to bear in mind the rules of cross examination[6] which have been said to be:

1. Be brief. Often a long cross examination makes the witness more familiar with the witness box and he or she gets better.
2. Use plain words.
3. Ask only leading questions. That is the general rule but sometimes you may ask "Why?" when you know the answer is ridiculous.
4. Be prepared.
5. Listen carefully. I have been in many cases where the chink in the witness' armour appears, but counsel was not listening and moved onto a completely different topic.
6. Don't argue with the witness.

[5] *R v Apostilides* [1984] HCA 38; 154 CLR 563.
[6] Irving Younger's Ten Commandments.

7. Avoid repetition. I have seen many cases where the one question too many has been asked. Never try and improve on an already favourable answer.
8. Limit the explanations of the witness. Usually your questions will require a yes or no answer. Jeff Spender once told me of a rape case he did once where the cross examination of the complainant involved asking 20 questions only and every answer was "yes." There was a quick acquittal.
9. Limit the questioning
10. Save the main point for your address. You are best asking around the main point and establishing the facts which lead to the only inference available which is your address point. Don't ask the witness to comment on the inference because you may lose it.

Bear in mind of course the rule in *Browne v Dunn*[7] and you should put the substance of the allegations to the defendant during the cross examination.

**Address**

The address should be about 90% complete before the trial starts. The 10% can be filled in after you have heard the evidence.

Preparing the address in advance of the trial focusses your mind on what you need to prove and establish in the trial.

If you have an issue or fact against you "take the bull by the horns" and deal with it.

Again don't overstate the evidence.

I think that the crown is far better off acknowledging at the start of the address that each element must be proved beyond reasonable doubt by the crown which is a high standard and the evidence of the complainant needs to be considered carefully. But it is not an impossible standard and there is no need to prove every fact beyond reasonable doubt.

In the address also I would start with my best point first and finish with the second best one.

Make the address as story- have an introduction, a beginning and an end.

[7] (1894) 6R 67.

Also don't be repetitive. I have seen counsel lose the jury by continually repeating what they think is the best point.

Although you could repeat your points by way of summary at the end such as:

"Members of the jury in summary there are four reasons why the crown asks you to find the defendant guilty in this case and they are …"

Be brief. In a two-day trial you really should not have to address for long than 20- 30 minutes. You should be able to say all that you need in that time.

Be careful to understand the obligations of the crown.

1. Don't give an inflammatory address
2. Don't breach the rule in *Palmer v R*[8] unless it is by way of response to a defence case that there is a motive for false complaint.
3. Don't undermine the judge's directions but work with them. For example, if it is a "dangerous to convict case" work with the direction.

Other matters to consider:

1. Be careful to identify in advance of the addresses any lies relied on.[9]
2. How is particular evidence admissible e.g. discreditable conduct or similar fact evidence or evidence of uncharged acts of violence.
4. In a circumstantial case do up a list of the circumstances relied on by the crown as pointing towards guilt.

**Summing up**

Most judges will discuss the contents of the summing up with counsel prior to the summing up commencing.

Make sure you have gone through the relevant bench book directions and have a copy with you in court so that you can sensibly discuss these with the judge.

[8] [1998] HCA 2; 193 CLR 1.

[9] Give careful consideration as to whether they are credit lies (*Zoneff v R* [2000] HCA 28; 200 CLR 234) or lies going towards proof of guilt (*Edwards v R* [1993] HCA 63; 178 CLR 193.

With the more contentious ones make sure you have the up to date cases and provisions ready to hand. For example, those cases dealing with the *Robinson*[10] direction and the new section 132 BA of the *Evidence Act* 1977 (Qld).

Listen carefully to the summing up. This is crucial as you might pick up an error in the summing up which should be brought to the Judge's attention.

Don't fall asleep during the summing up in other words.

**Sentences**

The sentencing process involves persuasive advocacy as well.

Preparation is also a key.

- The statement of facts should not be overly long.
- Go to the Penalties and Sentences Act and have the relevant provisions with you and ready to hand.[11]
- Get out no more than three relevant comparable decisions and preferably ones with statement of principle.
- A brief outline- perhaps 2-3 pages of the crown submissions is useful.
- Be careful to ensure Victim Impact Statements contain relevant and admissible material.[12]
- If the defendant is not an Australian citizen have the relevant provisions of the Migration Act with you and the cases.[13] There seems to be an extraordinary number of these cases now before the courts.
- Ensure the judge receives the material the day before the sentence. I always read this material, so I have a good idea about the case before coming into court.

I know there are different views about the order in which documents should be tendered.

To my mind you should start with the age of the defendant and his/her antecedents. This will put into context the offences. For example, if it is a person with no criminal

[10] [1999] HCA 42; 197 CLR 162.
[11] For example, the provisions on whether it is an exceptional circumstances case- section 9(4).
[12] *R v Singh* [2006] QCA 71.
[13] *R v Norris* [2018] QCA 27; (2018) 3 QR 420.

history this puts the offending into an entirely different context than someone with an extensive history of similar offending.

There is no need to read verbatim the statement of facts. A good oral summary of the statement of facts and the crown's submissions suffices.

Be reasonable with your sentencing ranges- a judge is more likely to give you what you ask for if you are reasonable rather than shooting too high.

**Applications and Appeals**

Currently most, applications are dealt with in advance of the trial under section 590AA of the Criminal Code.

Preparation again is key. Know the brief thoroughly. Know where you can find the facts. Know the key statutory provisions and cases relevant to the issues.

Written advocacy is crucial in this area. The crown is almost invariably the respondent to these applications so there is no need to repeat relevant facts which are already in the applicant's outline. Having said this, it may be necessary for the crown to set out the substance of the crown case in the outline. Perhaps at the least annex the statement of facts.

Good submissions will be brief, clear, fair and accurate.

Make sure they do not overstate your case. In terms of accuracy there is nothing worse than in reply when your opponent tells the court that evidence was misquoted by you or you did not take the court to relevant evidence.

With the outlines do not exceed 10 pages. If you cannot make your points in 10 pages, then there is something wrong. Bear in mind in a full High Court appeal the outlines are a maximum of 20 pages and the Court of Appeal 10.

I would not put in huge quotes from the cases in the outline. Just set out the statement of principle with a footnote to the page references in the case.

Most judges do read the outlines in advance of the application so they have a fairly good idea of the issues involved and may even have an idea what the decision might be.

Be across the facts and the law. Have an indexed folder of the relevant provisions and the cases for the judge. Make sure you have this delivered or emailed the day before the argument occurs.

But oral advocacy is still crucial. Often a judge may have a preliminary view about which way they decide the matter, but the oral argument changes their mind.

High Court Justice Michael McHugh was a great believer in the power of oral argument.

In oral argument start with the relief you seek (or oppose). You don't need to read the outline verbatim but a good oral summary of it taking the judge through the main points and then replying to any issues which may have arisen in the defendant's oral argument.

**Conclusion**

In conclusion I will finish off where I started.

If you behave courteously and ethically and are well prepared, then while you have not yet won your case you are a good way along the road to winning it.

Suggested further reading:

Hampel and Others, Advocacy Handbook

http://www.advocacy.com.au/assets/aai-advocacy-manual--first-edition-.pdf

McHugh, M, Preparing and arguing an appeal
http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2010/20.pdf

Irving Younger, The Ten Commandments of Cross-Examination

https://www.youtube.com/watch?v=cFT5qEquiVE