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THE ART OF PERSUASION

INTRODUCTION

1. Advocacy is the art of persuasion by communication. Sir Owen Dixon described it as "tact in action":

   "*All of us engage in one form of advocacy technique or another every day. Young children persuade their parents to buy them sweets; teenager's present arguments as to why they should be allowed to borrow the family car; and parents themselves use sophisticated techniques on each other to influence the choice of holiday destinations; car salesmen are adept at convincing that the vehicle in their showroom is the one we should buy.....*"[1]

2. The adversary system is structured to require the parties to gather and present the evidence and the Court to decide whether the party which makes the claim has proved its case to the required standard. In the inquisitorial system the Court gathers the evidence, and therefore, the role of the advocate is to some extent reduced.

3. Fundamental to the role of the advocate in the persuasion process,is the ability of the advocate to communicate effectively both:

   3.1 Orally; and

   3.2 In writing.

4. In recent years written advocacy has assumed greater importance because of the pressure on Courts to resolve cases quickly and efficiently. It has resulted in a significant amount of both evidence and argument being reduced to writing.

[1] Reflections on Advocacy and the Art of Persuasion; Martin Hunter [1995] P275

5. Therefore a successful advocate has to be able to persuade both orally and in writing. The techniques are different, but each involves a form of communication which is important for the advocate to master. As part of the communication process, it is important for the advocate to build a rapport with the audience.

6. Rapportis one of the most important features or characteristics of subconscious communication. It is commonality of perspective of being "in sync" with or "on the same wavelength" as the person with whom we are talking.

There are a number of techniques which are beneficial in building a rapport, such as:

6.1 Matching your body language, such as posture, gesture and the like;

6.2 Maintaining eye contact;

6.3 Matching breathing rhythm.

Some of the techniques are explored in Neuro Linguistic Programming ('**NLP**') which is a model of interpersonal communication chiefly concerned with the relationship between successful patterns of behaviour and the subjective experiences, especially patterns of thought.

7. It is beyond the scope of this paper to delve into the process of psychotherapy based on NLP which seeks to educate people in selfawareness and effective communication and change their patterns of mental and emotional behaviour.

8. However, the co-founders, Richard Bandler and John Grindler believe that there is a connection between neurological processes; language and behavioural patterns that have been learned through experience and can be organised to achieve specific goals in life.

LEVELS OF COMMUNICATION

9. There are three levels at which we may communicate:

9.1 Object: talking about tangible material things;

9.2 Experience: common experience between the speaker and the listener;

9.3 Concept: speaking in terms of concept or broadly.

10. The higher the level of abstraction, the ideas increase and the reality received, such that the possibility that rapport or communication will be lost.

11. The audience of an advocate is usually looking to make findings of fact or to determine whether there is a reasonable doubt, rather than looking at notions of truth, or what really happened.

HOW DO WE PERSUADE

12. The more that your message resonates with the audience, the easier it is to persuade.

13. If your proposition strikes the listener as plain common sense, the more likely you are to persuade the audience.

> "*The indispensible requirement for a successful attempt to persuade somebody of something is sensitivity to the occasion and to the audience, an observance of the requirement of courtesy, and a tactful appreciation of the likely response of the audience to particular lines of argument.*"[2]

YOUR MESSAGE MUST BE MEMORABLE

14. If the audience cannot recall your message when it comes to a decision, you are unlikely to succeed in persuading your audience to your point of view.

15. Persuasion is "a process of inducing a person to adopt a particular set of values, beliefs or attitudes".[3]

16. A number of factors are used in the process, both rational and non-rational, including:

    16.1 Credibility of the argument and of the person delivering it; and

    16.2 Persuasive communication.

17. Persuasive communication consists of:

    17.1 The message itself;

    17.2 The arguments presented;

    17.3 The credibility of the source;

    17.4 The medium used (the external aspects);

    17.5 The person's original beliefs;

    17.6 The person's credulity (the internal aspects)[4]

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[2] The New South Wales Bar Practice Course – Advocacy – The Honourable A.M. Gleeson AC Chief Justice of the High Court of Australia

[3] The Penguin Dictionary of Psychology

[4] The Penguin Dictionary

18. The oral communication required includes the ability to:

    18.1 Speak clearly and fluently;

    18.2 Articulate at an appropriate pace;

    18.3 Speak at a suitable volume;

    18.4 Choose the right phrase or the right word for the situation.

19. What is best for the situation depends upon your audience and of necessity is a judgment call by the advocate.

UNDERSTANDING HUMAN NATURE

20. You need to consider:

    20.1 Is the audience likely to accept your argument?

    20.2 How is it being delivered? For example,Judges generally do not like to be lectured about the law.

21. A case may require argument on a point of law, but a Judge seeks assistance rather than a lecture. It must be of direct relevance to the dispute which the Judge is required to decide.

KNOW YOUR AUDIENCE

22. Because advocacy is an almost personal thing, it is important to know the tribunal before whom you are appearing. It is not necessary to know the person on a personal level, but it is important to know the person's background and what is likely to be acceptable and what is not.

23. Understanding the tribunal gives you a certain insight into the internal aspect of the persuasion process set out in paragraph 19.3 and 19.6 above.

CASE THEORY

24. The case theory is a short and simple statement which sums up how the issues in the case should be decided, based upon the evidence and how that results in a favourable verdict. It should cater for all of the exigencies of the facts.

25. Having read the material and the likely documentary exhibit and conferred with your client, you need to satisfy yourself that you are on top of the material.

26. The next step is to consider <u>your theory</u>of the case. You will have evolved it, subject of course to your ethical obligations.

27. A case theory must:

    27.1 Be supported by the evidence;

    27.2 Further the objectives of the client;

    27.3 Not mislead the Court and be flexible, that is be able to be adapted if the evidence does not come out the way you expect or, for instance, one witness becomes more credible than another and an anticipated strong point becomes a weakness.

    27.4 Be credible;

    27.5 Be available from logical steps in the evidence and easily acceptable to the tribunal.

THEMES

28. There is no crime of greed, jealousy, revenge or anger.

29. However, when a determination is made as to whether a particular act was done or a state of mind existed, there are clues which make an act or state of mind more or less likely.

30. Motive is a powerful indicator. Themes are often advanced to persuade the trier of fact to properly assess the witnesses they say and hear; the documents they read and the arguments of the advocates.

STRUCTURE, STRUCTURE, STRUCTURE

31. In order to make the case persuasive, it is imperative, as far as possible, that every aspect of the case should develop in a logical step by step process which makes the case easy to follow for the audience, so:

    31.1 The pleadings develop logically;

    31.2 The affidavit evidence tells a story in an ordered, logical way;

    31.3 The opening tells a story;

    31.4 The order, as far as possible, in which the witnesses are called, allows the story being put to the court to develop in a logical way.

32. From an overall perspective the case should appear structured and that is achieved by each aspect of the trial being structured.

33. There is nothing worse than an unplanned unstructured cross-examination, for instance. It detracts from the persuasion process and makes deciding the case for the audience difficult.

34. Similarly the tendering of documents should have a logical basis for when particular documents are introduced to enhance the case.

PLEADINGS

35. The start of the persuasion process is the originating document. A well pleaded claim, indictment, notice of appeal or other document, which effectively communicates the moving party's assertions, can be a powerful tool in the persuasion process.

36. A well pleaded defence or document in reply which articulates the defence can do the same.

37. The pleading assists to clearly define the issues.

38. Human nature being what it is we tend to dismiss a poorly drafted pleading particularly if it requires the reader to search for the message the pleader is attempting to convey.

STATEMENTS/AFFIDAVITS

39. Similarly, statements and affidavits need to be logical and well structured.

40. The easiest way to develop the story is to tell it in chronological order.

41. Drafting affidavits is a topic on its own, but a witness is more credible if his or her evidence is easily understood and developed in a logical step by step way.

42. Some tips on drafting affidavits:

    42.1 Introduce the witness;

    42.2 Develop the witness' account logically and chronologically;

    42.3 Avoid irrelevances;

    42.4 Make the affidavit a reflection of the person. There is no point making an unskilled labourer into a rocket scientist. It makes the evidence of the witness difficult to accept;

    42.5 Above all else, **the rules of evidence apply to affidavits and statements in the same way that they apply to oral evidence.**It becomes very difficult to read a coherent version of the facts if, having had large sections of an affidavit rejected as being inadmissible, attempting to then supplement the affidavit evidence using oral evidence, which requires the trier of fact to look at both the affidavit and the transcript in order to obtain a complete picture of the witnesses evidence in chief. Mistakes creep in. The trier of fact can lose the

thread of the case concept, the witness' evidence, and the persuasion process becomes much more difficult.

42.6 Be prepared to tell a story in the affidavit.

OPENING ADDRESS

43. The opening address is the first opportunity which advocates have to set out the case theory which, in the advocate's opinion, would persuade the Court to determine the issues in favour of his and her client.

44. It introduces the case and should set out the essential fact on which the case is founded. It should give a little background so the trier of fact begin to see the total picture, otherwise there will be a "disconnect" between the opening and the witnesses.

45. The opening compromises the following elements:

45.1 Introduce your role as advocate in the case and that of your opponent;

45.2 Give a clear summary of the facts;

45.3 A clear statement of the disputed issues;

45.4 Briefly outline the evidence of the witnesses so the admissibility of the evidence is not challenged;

45.5 The applicable law.

46. This involves speaking clearly, using appropriate language, without reading from a prepared script.

47. It identifies the issues, and the extent of the disputes between the parties.

48. Above all else, it should tell a story and weave into it, what each of the witnesses is going to tell the Court, and how the evidence of the witness establishes particular propositions for which you contend. It introduces the witnesses.

49. The persuasion process is detracted from if in the opening you:

49.1 Argue the case;

49.2 State your personal opinion;

49.3 Overstate your case;

49.4 Read from a prepared text.

50. The persuasion process is enhanced by:

50.1 An approach which enables the audience to empathise with your client;

50.2 Minimising any empathy the Court may have for the opposing party;

50.3 Making eye contact.

TELLING A STORY

51. Because the opening address is the first chance to acquaint the Court with the case, the themes which give depth, colour and movement to the allegations between the parties, first impressions are very important.

52. The persuasion process is assisted by recreating the moments leading up to the matters which gave rise to the litigation and allows the trier of fact to see what happened.

53. It is important to remember that most cases are decided on their fact not on questions of law and if the facts can be conveniently woven into a single coherent theory, at an early juncture, the more likely it is to be remembered later.

54. If the version first postulated makes sense as a story it is likely to be persuasive.

CLOSING ADDRESS

55. The purpose of the closing address is to persuade the tribunal to determine the facts in your favour. By the time of the closing address, the advocate has:

55.1 Put the case theory;

55.2 Told the story and explained the themes

and the closing is to weave together those aspects into a coherent whole.

56. Again structure is the key:

56.1 Keep to the point;

56.2 Set out the case theory showing how your evidence establishes that theory;

56.3 Deal with the **relevant** law.

57. **Your closing address should be prepared before your trial commences because it informs:**

57.1 The opening;

57.2 The evidence in chief;

57.3 The cross-examination; and

57.4 Any documents which are to be tendered.

58. The following matters are important for a persuasive closing address:

58.1 Use key words or phrases to encapsulate the important points;

58.2 Remind the Court of the burden and standard of proof on the contentious issues;

58.3 Make any concessions which seem appropriate in light of the evidence, using the key words and review the important points in an orderly and structured way.

58.4 Refer to the evidence which supports or the reasons which the evidence which underlines the case would not be accepted;

58.5 If there is evidence which damages the case, deal with it;

58.6 Watch the audience. Try to keep its attention.

58.7 Decide before you commence what your closing words will be;

58.8 Brevity is essential.

EXAMINATION IN CHIEF

59. The aims of examination in chief are:

59.1 To establish a case, or part of it, through evidence obtained from the witness;

59.2 Present the evidence so that it is clear, memorable and persuasive;

59.3 To insulate the evidence insofar as possible, from anticipated attack in cross-examination.

THE ORDER OF WITNESSES

60. Start and finish the case with a witness who makes a strong impression.

60.1 It is usual to start with the witness whose evidence is first in time. But it may preferable to call as the first witness the one who gives the greatest overview of the case. It is likely to be the main defendant, or its representative.

60.2 The main defendant or its representative should be called either first or last;

60.3 Corroborative witnesses should be called as close as possible togive evidence they are corroborating;

60.4 Less is better. Too many witnesses to establish the same fact can lead to inconsistencies and interfere with the persuasion process;

60.5 Expert witnesses call at the end of the case and allow the case to finish on a strong note and provide the advocate with an opportunity to recap or emphasis the evidence.

THE BASICS OF EXAMINATION IN CHIEF

61. Keep it simple:

    61.1 Simple language, one idea per question.

62. Set the scene.

    62.1 The context in which the events occurred needs to be established, and then the "action or event" needs to then be determined;

63. Know your objective:

    63.1 What are you seeking to establish?

    63.2 What part does the witness play? In what order do I want to cover things.

64. Know the answer before asking the question:

    64.1 Do not lead. Ask questions relating to how, what, when, where, why and who.

65. Structure, structure, structure. Progress logic, preferably chronologically.

66. Have the witness tell the story.

    66.1 The witness should tell the story in his or her own words;

    66.2 Watch and listen to the witness;

    66.3 Control the witness and keep the evidence relevant;

    66.4 Stopping and starting a witness. In order to keep the evidence relevant and in order to control the witness, it is often necessary to stop the witness if the evidence is going off the point.

TONING DOWN WEAK POINTS DURING EXAMINATION IN CHIEF

67. It is a good tactic to bring out any weak points rather than risk a damaging impact in cross-examination, for instance, when the evidence of an accused in a criminal trial is different from the account which he gave to the police.

THE DIFFERENCE BETWEEN EXAMINATION IN CHIEF AND CROSS-EXAMINATION

68. In examination in chief, the focus is on the witness. In cross-examination, the focus is on the cross-examiner.

CROSS-EXAMINATION

Is it necessary?

69. The first question to ask is "Is it necessary to cross-examine at all?"

70. Every question which does not advance your case injures it.

MAIN AIMS

71. To advance your own case.

72. To reduce the evidence in chief of the witness:

    72.1 By destroying the evidence;

    72.2 By weakening the evidence;

    72.3 By undermining the credibility of the witness;

73. **The basic rules**:

    73.1 Cross-examination must be relevant to some issue in the case;

    73.2 The ruling *Browne v Dunn* is a rule in fairness which requires a witness to be cross-examined on every material fact in dispute;

    73.3 The body language of the witness can be a telling sign.

74. **Leading questions**:

    In order to control the witness questions which allow an answer of "yes", "no" or "I don't know" are best.

75. **Form of Questions**:

    75.1 Do not ask a question you do not know the answer to or do not ask a question on a central issue where you cannot anticipate what the witness will say.

    75.2 Short questions, simple language.

METHOD AND STYLE IN CROSS-EXAMINATION

76. This includes:

    76.1 Confrontation;

    76.2 Drawing out every damaging detail;

    76.3 Undermining your witness;

    76.4 Undermining one witness for another;

CONFRONTATION

77. You can only confront a witness when you have real material to work with. E.g. statements or evidence of other people, or contradictory statements from the same witness.

DRAWING OUT EVERY DAMAGING DETAIL

78. Evidence may imply that the witness is in doubt from memory, observation or truth. The skill is to draw out every damaging detail, even if the witness admits to telling a lie, there is no need to leave it to just that.

79. However, you need to avoid going too far in undermining a witness.

UNDERMINING A WITNESS

80. Undermining one witness against another may lead to confrontation. You can only confront a witness when you have real material to work with. E.g. statements or evidence of other people, or contradictory statements from the same witness.

81. For example, an identification may be doubtful because the sighting was quick and done at a time when the witness was frightened, or a hearing witness may not have heard things correctly, because of background noise or other reasons.

UNDERMINING ONE WITNESS THROUGH ANOTHER

82. To do this is to play one witness against another.

RE-EXAMINATION

83. The main purpose is to remove or explain away or qualify the damage done to the evidence in cross-examination. If an inconsistency is not explained, prejudice will arise to the party's case or discredit the witness. Re-examine repairs any distortion or an incomplete account the cross-examination has produced.

84. The aim of the re-examination is to:

    84.1 Remove ambiguities and uncertainties;

    84.2 Install facts;

    84.3 Revive the credit of the witness.

IS RE-EXAMINATION NECESSARY

85. Again this decision needs to be taken on the basis of:

85.1 Has cross-examination damaged the case either on the facts or on the credit of the witness;

85.2 If the case is damaged can it be defused. If you do not know how, then re-examining can cause more damage.

86. Re-examination:

86.1 Must arise from cross-examination;

86.2 Like evidence in chief allows no leading questions;

86.3 Can explain the reason for the action of the witness;

86.4 Can rebut recent invention, where it has been suggested in cross-examination that the witness has recently invented.

NON-VERBAL COMMUNICATION

87. Non-verbal communication includes the way language and words; tone of voice, posture and movement are used.

88. Non-verbal communication has a number of components:

88.1 Eye contact. It is important to build a rapport with others. Avoiding eye contact may, to some people, indicate lack of confidence and untrustworthiness. But overuse of eye contact can be disconcerting or even threatening.

88.2 Posture. A person who slouches and looks down frequently and fidgets easily appears unconfident.

88.3 Head movement. Holding the head upright and facing straightforward appears strong and confident.

88.4 Arm movement. Folded arms tend to indicate a barrier, defensiveness, hostility or lack of confidence.

88.5 Hand gestures. Hands on the hips indicates aggression as may waving a pointed finger.

88.6 Open palms suggests honesty and openness.

88.7 Leg movement. Crossed legs can be a barrier.

89. Particularly in cross-examination, interpreting body language can give a clue to the state of mind of the witness being cross-examined.

WRITTEN ADVOCACY

90. Written advocacy has the obvious difficulty that the writer is unable to test whether the reader is receiving and understanding the message which the writer intends to convey. The rules for persuasive oral advocacy apply to written advocacy.

91. Accordingly, there is a number of simple rules to follow:

    91.1 Explain at the earliest stage what decision the party wants the Court to make and why;

    91.2 Formulate each proposition of fact and law followed by the supporting material;

    91.3 Use simple language. Everyone's comprehension rate is different. Their backgrounds are different and diverse. The more simple the language the more likely the correct message is to be conveyed.

    91.4 Simple ideas. Even the most complex concept can be reduced to the comparatively simple and therefore easily understandable ideas.

    91.5 Structure, structure, structure. The argumentshould develop logically.

    91.6 Head note. Introduce the idea or the conclusion and then demonstrate why it is correct by detailed analysis of the subject matter.

    91.7 In a complex writing an executive summary is often of assistance.

    91.8 Headings will often add to the structure and make the writing easier to understand.

    91.9 Use short sentences, numbered paragraphs.

    91.10 Ensure that the submissions are well set out, and have space for the decision maker to make notes. Cross Reference.

    91.11 Footnote. Notes in the body of the submission often detracts from the argument. Referencing at the foot of the page means that the argument flows.

92. The submission should flow and be congruent. It should be easy to read and to understand.

93. The submissions should be precise:

    93.1 Cite only the key passage from the best authority;

    93.2 Use past perfect tense.

94. Often time will not permit it, but when you have finished writing the submissions, ask:

    94.1 Is it realistic?

    94.2 Does it have a chance of success?

    94.3 Do I need to do more or less;

    94.4 Is it easy to follow:

    94.5 Does it read well?[5]

[5] The Australian Advocacy Institute Advocacy Manual Hampel Brimer & Cune P161-172

Some Additional Advocacy Books:

1. Ross on Advocacy: David Ross QC
2. Glissan &Tilmouth: Advocacy
3. The Inns of Court School of Law Advocacy - Appellate Practice Blank & Selby (Editors)
4. The Australian Advocacy Institute - Advocacy Manual Hampel Brimer & Cune

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