

“It’s the hope that kills you”

Advocacy in the Local Court



“IT’S THE HOPE THAT KILLS YOU”

- The volume
- The prosecutors
- The clients
- The bench
- The temptation - <https://www.youtube.com/watch?v=HJm8w3HVEIY>



OUR OBLIGATION

“Courage and determination are wonderful qualities in advocates. They must not wilt under fire”: The Hon Justice Michael Kirby, Ten Rules of Appellate Advocacy, Australian Advocacy Institute, Sydney



OUR OBLIGATION

“A barrister must promote and protect fearlessly and by all proper and lawful means the client’s best interests to the best of the barrister’s skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.”

Cl 35, Legal Profession Uniform Conduct (Barristers) Rules 2015



A GOOD ADVOCATE IS A PERSUASIVE ADVOCATE

“Advocacy is about persuasion. Professor George Hampel – himself formerly a leading barrister and judge in Australia – has explained:

Advocacy – or persuasion – involves creating or changing perceptions to influence the result ... Great advocates are not necessarily better lawyers than others – they are better communicators.”

The Hon Justice Kirby, *“Appellate Advocacy – New Challenges”*, The Dame Anne Ebsworth Memorial Lecture, London, Tuesday 21 February 2006



THE KEY QUESTIONS

- What is the outcome that I want?
- How will I persuade the Court to give me/the client that outcome?



WHAT DO I WANT?

Cannot persuade if you don't know what you want!

On a plea OR on appeal, if unsure of the penalty:

- Research (e.g. comparative cases and JIRS statistics)
- Use your brains trust



HOW DO I PERSUADE THE COURT TO GIVE ME THAT OUTCOME?

5 things:

- Empathy
- Structure
- “Because”
- Delivery
- Preparation



1. EMPATHY

Put yourself in the shoes of the Magistrate

- What will the Magistrate like about my case
- What will the Magistrate dislike about my case
- What questions might I be asked – be ready



1. EMPATHY

Know your bench

- Watch and listen
- Speak to others
- CLE's, seminars, and conferences



1. EMPATHY

Concessions

- Make appropriate concessions. Why?
 - Credibility
 - Limiting the issues
 - Making the Magistrate's job easier



1. EMPATHY

Make it easy

- Tender bundle: index, tabbed, and working copies (especially in District Court)
- Case law – the principle and (if you need to hand up a case) highlight and tab the relevant passage
- Brevity – busy court list
- And....Structure



2. STRUCTURE

Structure – think about

- What are the topics that I should address?
- What order should I address those topics?
- How do I move from one topic to a new topic?



2. STRUCTURE

The importance of a structured argument

- Think about it from the perspective of the listener...a structured argument is:
 - Clear, concise, and easy to follow
 - i.e. it is persuasive
- Think about it from your perspective....
 - Gives you confidence
 - Ensures you address the points that need to be addressed



2. STRUCTURE

How should you structure your argument?

- Three things:
 - What is going to be persuasive?
 - Think about structure from the perspective of the listener
 - Your personal style
- Some examples



2. STRUCTURE

Example One – Topic Areas

- Opening
- Objective Seriousness
- Criminal Record
- Subjective Features
- Statutory factors – aggravating and mitigating
- Sentence structure
 - Relevant sentencing principles
 - Commencement Date
 - Totality
 - Special Circumstances
- Closing



2. STRUCTURE

Example Two – Reasons

Conditional Release Order without conviction for 5 reasons:

One – offending at the lowest end of the spectrum

Two – person of good character

Three – powerful evidence of remorse

Four – excellent prospects of rehabilitation

Five – unlike the typical case, general deterrence has no role to play in the sentencing exercise



2. STRUCTURE

Example Three – Tell a story

Drugs are terrible things. Those addicted to them often act in a way which is atrocious and which causes significant harm to the community.

The offence before the Court today is a good illustration of that. Drug addicts lie, cheat, steal and rob with depressing regularity with little thought at all to the consequences of the victims. They do this precisely because they are addicted to drugs.

Of course that does not mean that in every case the moral culpability of an offender who commits an offence whilst addicted to drugs is reduced. The decision as to whether an adult person uses drugs is a matter of personal choice.



2. STRUCTURE

Example Three – Tell a story...continued

Everyone knows that those who commence to use drugs risk becoming addicted to them. Some people have a reduced moral culpability because they have a reduced ability to reason appropriately about whether they will take drugs or not. But when Ms Burgess, as she put it "lost the plot" after having lost her job and began using alcohol and drugs to excess and then simply to get money for more drugs and more alcohol committed the terrible offence I am about to describe, she made her own decision and she must be punished for what she did.

R v Burgess [2012] NSWDC 260 at [1]-[3] per Berman SC DCJ



2. STRUCTURE

The order

- What is going to be persuasive?
- Primacy and recency
- Start and end memorably



2. STRUCTURE

Moving between topics

Put yourself in listener's perspective – help the Court follow the argument

Some techniques

- Headline
- Pause
- Hand gestures



2. STRUCTURE

Deviating from structure

Answer questions from the bench

Returning to the structure



3. “BECAUSE”

Clarity of purpose – when thinking about your argument

- I am making this submission because...
- I am asking for this finding to be made because...
- I am tendering this document because...
- Some examples



3. “BECAUSE”

Logical argument – when presenting the argument

- The Court should accept my submission because...
- The Court should make this finding because...
- Some examples



4. DELIVERY

- Style
- Tone and pace
- Effective language
- Limit distractions
- Use of notes



4. DELIVERY

Style

- Watch others
- Experiment
- Find YOUR voice

Tone & Pace

- Conversational
- Be heard but don't shout
- Slow down!!!!



4. DELIVERY

Language

- Simple language
- Brevity
- Choose your words carefully
- Formality

Limit distractions

- Um's
- “In my submission”
- Hand movements

Use of notes

- An aide



5. PREPARATION

- No substitute and no short cuts
- Think about...
 - The first few words...
 - What am I going to say AND how am I going to say it?



5. PREPARATION

- Generally
 - You should always be preparing
 - i.e. be on top of the law and the procedure
- Use limited time in court
- The importance of the client conference



A FINAL OBSERVATION...YOU'VE GOT TO BE A BELIEVER!

