THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

TOONGABBIE LEGAL CENTRE SEMINAR

PERSUASIVE CRIMINAL ADVOCACY

31 JULY 2021[*]

1. Good morning. As we gather for this session physically dispersed, I would like to begin by recognising the various traditional lands on which we meet. Today I am speaking from the Supreme Court building, which is located on the land of the Gadigal people of the Eora Nation. I acknowledge these traditional custodians and pay my respects to their Elders, past, present and emerging. As I present today on persuasive criminal advocacy, it is also appropriate that we recognise the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples, and the injustices that Australia's First Nations continue to face.

2. I am very glad to be speaking to you this morning about compelling advocacy in criminal litigation, focusing on cross-examination and submissions. Personally, it has been more than a little while since I was on the practitioner side of these things. Some of you may even have the (correct) suspicion that my own criminal trial practice at the Bar was slim to none. These days, however, I am frequently on the receiving end of written and oral submissions, and am a habitual peruser of cross-examination transcript in criminal proceedings – not only for fun, but as I sit on the Court of Criminal Appeal.

3. As such, over the past decade I have learnt a thing or two about what is, or isn't, convincing to a judge. Some judges are pedantic about certain things, like split infinitives so much as daring to enter their courtroom. For my part, I loathe tautology, and questions so long that you forget them by the time you come to the answer. Frankly, you don't always know what to avoid with every judge.

[*] I express my thanks to my Research Director, Ms Rosie Davidson, for her assistance in the preparation of this address.

However, by and large, there are things you can be confident will be consistently persuasive, or consistently unconvincing, to a judge or jury.

4. My aim today is to give you some tips to become better criminal advocates. You may learn some brand-new things. Or you may have heard these things a thousand times. If you are in the latter category, may I urge you to not drift off. Have you become set in your ways? Are there things you know in theory which don't come across in practice? So, whether you are a seasoned criminal advocacy veteran or a complete rookie, I hope you can get something out of this seminar.

5. Our session today has two parts. The first is persuasive cross-examination in criminal litigation. For this, I will give some guidance under the "Three M's" – Manner, Matter and Method. The second part is drafting and making persuasive submissions in criminal litigation, and particularly, how to get your point across, and how to make your substantive case. For this submissions topic, I will draw on my criminal appellate experience, although these points will also have broader application.

6. I must put a caveat on as I begin, as any lawyer would. I cannot do comprehensive justice to either topic in the time we have together, and I am sure that none of you want to listen to me droning on all day. May I recommend that these are worthwhile topics to do some "homework" on, as it were. It is always a good idea to do some self-reflection and assessment as to practical steps you can take to improve your practise in these areas.

CROSS-EXAMINATION

7. Let us first turn to the art of cross-examination. I wonder how many people, including lawyers, get their first taste of this from TV shows? The archetypal lawyer is often belligerent and brash, while keeping the jury onside, and always asks the perfect question which leads to the witness confessing to everything. Obviously, such displays rarely reflect reality.

8. Not too long ago, I sat in a Court of Criminal Appeal matter which required me to wade through great swarths of cross-examination transcript from the trial. Some

of the things I read were quite enlightening. I would like to use a few examples from this case for illustration purposes. I will keep the case and the names of the lawyers anonymous – let us call our witnesses A, B and C, and our barristers X and Y.

Manner

9. Our first heading is Manner. What should a lawyer's manner be when cross-examining? I would suggest three types of lawyer *not* to be. These are the rude lawyer, the cerebral lawyer, and the confusing lawyer.

10. We all know the rude lawyer. The rude lawyer is aggressive towards the witness, or condescending, or unnecessarily sarcastic. Sometimes the rude lawyer is not inherently rude but is faced with such a frustrating witness that their patience lapses.

11. The case I mentioned before was a long one, with some colourful characters as key witnesses. The cross-examination of Witness A by Counsel X had been going for some days, and it is no exaggeration to say that A was not an easy witness. The witness gave an answer which mentioned the Muslim Brotherhood Movement, the Bandidos and the Rebels. The following exchange occurred:

> Counsel: What were you thinking there, you'd go and name every organisation you'd ever heard of, is that what you were doing?
> Witness: Do you want me to mention your name as well if you want?
>
> Counsel: Well I'm surprised you didn't.
> Witness: Well I should have.
>
> Counsel: You probably should have. You didn't put the mafia in there as well did you?
>
> HIS HONOUR: Next question Mr [X]. I reject that last one.

12. Obviously, counsel was frustrated. Rudeness, however, is wasted in cross-examination. It makes the lawyer look bad and can backfire by making the judge and jury more sympathetic to the witness.

13. Not just this, but the *Evidence Act*[1] compels a court to disallow a question put to a witness in cross-examination if the court thinks it is put in a manner or tone that is belittling, insulting or otherwise inappropriate. Such questioning also offends against professional conduct rules. Being carried away by your ego and arguing with a witness has a tendency to bring the legal profession into disrepute.[2] A barrister's duty to promote and protect fearlessly the client's best interests[3] does not extend to being fearless of common courtesy. Being confident or assertive is not the same thing as being unnecessarily hard on a witness.[4] As it has been said, "[c]ross-examination does not require you to examine crossly."[5]

14. Here's another example from that matter. The questioning related to the witness's self-interest in a particular situation:

> Counsel: Did you not regard that as somewhat cowardly?
>
> …
>
> Witness: Are you calling me a coward?
>
> Counsel: That's probably what I am doing?
>
> Witness: I'm not sitting here calling you a coward and accusing you of - insulting you, so—
>
> HIS HONOUR: How does this assist, Mr [X]?
>
> Counsel: I will move on.

15. These types of exchanges rarely help your client or your case. In fact, a witness is more likely to be on their guard if faced with aggression. By being polite but devastating in your technique, you have more opportunity to get past their defences. For example, a witness who does not feel intimidated may more

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[1] *Evidence Act 1995* (NSW) s 41.

[2] *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 8.

[3] Ibid r 35.

[4] Thomas A Mauet and Les A McCrimmon, *Fundamentals of Trial Technique* (Lawbook, 4th ed, 2018) 219.

[5] Ibid 219-220; see also James Glissan, *Glissan's Advocacy in Practice* (LexisNexis, 7th ed, 2020) 107.

readily concede the possibility of a vital fact needed to provide a "reasonable doubt".[6]

16. The next lawyer is the cerebral lawyer. This lawyer loves legalese, Latin, and long words. Unfortunately, this lawyer sometimes forgets their audience of the witness and the jury.

17. When cross-examining, you should use language which is appropriate in the circumstances. You may need to adapt your language as you go. If it is clear that the witness is having difficulty understanding you, continuing in the same way may provoke frustration.

Example 1

Counsel: So you were prepared to provide information … [i]rrespective of whether the information was true or otherwise; is that right?

Witness: What are you trying to say? You're just saying all these words I don't understand.

Example 2

Counsel: And then, see, what you've done, sir is you've, I'd suggest, told yet another elaborate story, but put it in the future?

Witness: How is that elaborate? How is that elaborate? I don't even know what it means, elaborate, so can you say it in a way that I understand?

18. If a witness, or a jury, genuinely doesn't understand what you are saying, you may come across as arrogant if you persist with the same language. Simplifying your words will make your meaning apparent to all involved. On the other hand, do not be condescending through oversimplification.

[6] Max Perry, *Hampel on Advocacy* (Leo Cussen Institute, 1996) 48.

19. Our last type of lawyer is the confusing lawyer. This can be easy to slip into during cross-examination, especially where the facts are complex.

20. There are various “rules of thumb” which can help you cross-examine clearly. These include:

    - One proposition per question;
    - Avoid confusing use of the negative;
    - Avoid ambiguity;
    - Use plain English where you can; and
    - Speak in short sentences.

21. You need to pay attention to the way you speak to avoid confusion. Otherwise, in the heat of the moment, your sentences can stretch out and your words jumble around. Here are some extracts from our case study.

Example 1

Counsel: What you were saying, were you, was that [Witness B], one of your boys, had smuggled a handbag, or a bag of some description, into the van from the [deceased’s] household and rather than surrendering it, had taken it back to [your address]; is that right?

HIS HONOUR: That's about six propositions, Mr [X].

Example 2

Counsel: All right. When the request came you didn't ask why?
Witness: Yes.

Counsel: You did ask why?
Witness: No I'm just agreeing with what you're saying.

Example 3

Counsel: So it's not the situation that as at the early hours at least of 3 July 2010 that you were somewhat distressed by what happened or what these people had been up to who were at your shop on the night of 1 July 2010, is it?

Witness: Sorry, I don't understand the question.

22. It's not hard to see why the witness didn't understand this last question. This example had confusing use of the negative, convoluted wording, and jumped around in time. Again, misleading or confusing questions put to a witness in cross-examination are not allowed under s 41 of the *Evidence Act*. It is not fair to the witness to be unclear.

23. Being clear in what you are saying avoids the appearance that you are trying sneakily to trip a witness up into making a damaging confession. Having unambiguous questions will expose a prevaricating witness, and clear questions and answers to refer back to will ultimately be more useful to you in summing up.

24. So, watch your manner in cross-examination. Avoid being the rude lawyer, the cerebral lawyer or the confusing lawyer, and you will find that the judge or jury will more sympathetic and able to follow your questioning.

Matter

25. Our next heading is Matter. What goes into or stays out of your cross-examination may determine whether you support or undermine your case. We must ask questions like: when should I cross-examine? Am I properly prepared, knowing the facts and law, including the rules of evidence? How do I make sure I have put my case to the witness properly?

26. The first, perhaps most fundamental question is: Do I even need to cross-examine? If a witness's evidence has not hurt your case, and you can't gain a clear advantage from cross-examining, you are more likely to damage your own case than your opponent's. Or, if your cross-examination is mostly a rehashing

of the evidence-in-chief, you risk consolidating your opponent's case. I have seen cross-examinations where 90% of the questions were, "Did you not say X in chief?" with no follow up. It is common to see this with inexperienced lawyers who feel they have to cross-examine without quite knowing why. It is also prevalent amongst a (thankfully) small group of practitioners who think it better to impress the client by the noise they make rather than the result they get. Remember, "in cross-examination, every question that does not advance your case injures it. If you do not have a definite object to obtain, dismiss the witness without a word. There are no harmless questions here, the most apparently unimportant may bring destruction or victory."[7]

27. My second point seems obvious, but overlook its importance at your own peril. You must be prepared. That is, you must have a detailed working knowledge of not just the law, including the rules of evidence, but of the intricacies of your own case. This includes the facts and the trial progression, including what has (and has not) been said previously by witnesses.

28. It is amazing what impact a good, in-depth knowledge of the case can have on your cross-examination. If the witness throws out something unexpected, the last thing you want to be doing is scrambling through trolley-loads of papers trying to find the basis for your next question. Instead, you want to be responsive and know where you are going.

29. In my case example, someone who we will call Witness C was being cross-examined about whether she had ever seen Witness A with a particular weapon. The exchange was as follows:

Counsel:	You have never seen him with a machete?
Witness:	No. I asked him about that yesterday when I finished here.
Counsel:	You asked him about that yesterday when you finished here?
Witness:	Yeah. You can check the phone records but I said to him "where was this machete" and he told me he kept it on him 24/7.

[7] David Ross, *Advocacy* (Cambridge University Press, 2nd ed, 2007) 48, quoting Edward W Cox, *The Advocate*, (London, 1852) 433.

…

Counsel: Who told you about the machete which gave rise to you asking [Witness A]?

Witness: I got asked yesterday questions by the Crown.

In fact, the transcript showed that the witness had *not* been asked questions about a machete by the Crown. Counsel could then discredit her by implying she had lied either about who she had discussed the case with or her own knowledge. This was only possible because of counsel's understanding of the details in a complicated case, including the content of the witness's evidence-in-chief.

30. You must also know the rules of evidence intimately. When I was a young barrister, I appeared in a case against an experienced police prosecutor. He objected to a point I had made and explained how it offended against some point of evidence law. I can say with absolute certainty that it is *very* hard to bring a persuasive retort to an evidentiary objection when you have no idea what the rule is. Avoid making the mistake I did by knowing and understanding the rules of evidence. Don't be scared of the *Evidence Act:* if you treat it as a friend, it will return the favour. Contents of documents, the hearsay rule and its many exceptions, opinion evidence, admissions, tendency and coincidence, credibility and character: these rules should be second nature to you.

31. My third "Matter" point is how to put your case to the witness properly. For this we turn to the oft feared, and frequently misunderstood, rule in *Browne v Dunn*. "I put it to you that you are a liar", thunders the barrister. "I put it to you that I am not", retorts the witness. Or again, from our case example:

Example 1

Counsel: I put to you that [the co-accused] was not a person who was present when any such conversation about … guns, and paying the price for those guns was ever held or said in the compound or anywhere else?

Witness: I put to you he was there.

Counsel: Yes, I know you are putting that to me.

Example 2

Counsel: And I suggest that he did not come back and he was not covered with blood because he was simply not there with the boys when they returned?

Witness: You can suggest that but what I saw was what I saw.

32. The rule in *Browne v Dunn* is, of course, a matter of fairness. You must cross examine on every material fact in dispute[8] relevant to that witness. If you intend later to contradict the witness's evidence, you must give that witness the chance to respond during cross-examination.

33. In fact, while the phrases "I put it to you" or "I suggest to you" may seem like a sure-fire way to make sure you have ticked off the *Browne v Dunn* requirements, they are rarely persuasive. There are at least four issues with these phrases. First, they are not in everyday speech.[9] Second, they are not actually questions, just an invitation to argument.[10] Third, they are a lazy formula not tailored to the witness and the evidence.[11] Fourth, using such a prefix highlights that the evidence is unfavourable.[12]

34. You should also avoid the temptation to put your case to the witness in a whole string of "I put it to you" questions at the end of the cross-examination. It's just a bad idea. Glissan says that this "looks, for all intents and purposes, as a strange exercise in legal formalism or ritual" and that "[t]he process always produces a string of successive denials which progressively cement the case against you."[13]

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[8] Ross (n 7) 50.

[9] Ibid 32, 52.

[10] Ibid.

[11] Ibid.

[12] Mauet and McCrimmon (n 4) 212.

[13] Glissan (n 5) 148.

The form of this question (if you can call it that) can also seem unfair to a jury. It is by far better to scatter the points you need to make throughout your cross-examination; and remember, you only need to put so much of your case as concerns that witness.[14]

35. You also want to be really careful in seeking to recall witnesses. It will always look as if you've forgotten something or as a last-ditch attempt to patch up a case. However, it *is* sometimes necessary, and s 46 of the *Evidence Act* (which deals with leave to recall witnesses in certain circumstances) can be helpful, but it is never the best option.

36. So, Matter in summary: Do I even need to cross-examine? Do I know all the facts and law, including the rules of evidence? Do I know how to use the rule in *Browne v Dunn* in the circumstances of my case?

Method

37. Turning now to Method. If cross-examination is an art form, it more closely resembles a beautiful piece of improvised music or dance than it does a near-photographic drawing of a bowl of fruit. Bear with me here. Effective cross-examination requires a lot of practice and carefully honed technique, but also flexibility and responsiveness. You cannot create a perfect series of pre-prepared questions which will fully anticipate what a witness will say. It just won't work. Witnesses can do the most unexpected things. You must listen to the witness and adjust your line of questioning to them and the answers they give.

38. That doesn't mean you shouldn't prepare. Preparation is key to understanding the issues and ensuring that your questions achieve their purpose. But preparation does not equate to writing every question down in advance. Such preparation "speaks volumes for industry… but takes no account of the witness".[15] Your questions may become an ineffective crutch if the witness

[14] Ibid.

[15] Ibid 107.

deviates off script. In the words of Hampel, "the prepared cross examination must be both planned and flexible."[16]

39. Should you take notes during the evidence-in-chief to use later in cross-examination? I would suggest only sparingly for vital points. A lawyer who scrawls down everything may lose more than they gain. Unless you're the world's best multitasker, chances are you will miss significant nuance, whether it be a word, a hesitation, a glance, a tone of voice or body language. Close listening and watching is crucial for tailoring your cross-examination to the circumstances. The other risk of over-zealous note taking is that you may disengage the judge or jury. The exception to this is if the witness's evidence extends over a number of days and there is no transcript, in which case it may be important to take notes.

40. To lead or not to lead? That is often the question. Despite what advocacy textbooks may say, the answer is situation dependent; there is no perfect mix of leading and non-leading questions that you can apply to every case. The good thing about non-leading questions is that if you get the answer you want, this will be more convincing than putting words into the witness's mouth. So, if you are confident about the answer, use a non-leading question. Sometimes, however, you need to put a proposition squarely to a witness to give them the opportunity to answer. It may also be dangerous to put things in a non-leading form if it gives the witness the opportunity to shoot your case down in flames. A classic example of this dangerousness I have seen is when counsel asks a witness, "How can you possibly justify that?" The witness can then, of course, list all their justifications.

41. The books on cross-examination will also often say things like, "Never ask 'How' or 'Why'",[17] or "Don't ask a question to which you don't know the answer". Unfortunately, you can't structure a cross-examination around blanket prohibitions. If you already knew every answer you wouldn't need to cross-

[16] George Hampel, *Aspects of Advocacy: Cross Examination and Pleamaking* (Leo Cussen Institute, 1982) 3.

[17] See for example Perry (n 6) 51.

examine! Ultimately, the way you go about cross-examination comes down to judgment calls you make in the moment, propped up by preparation and years of experience.

42. One technique used over the years is known as “closing the gate”. The point is to back the witness into a no-escape position, particularly if the witness would not accept your proposition directly. This method involves asking the witness a series of questions which will eliminate all possible routes of escape or alternative answers, so that when the final, most important question is asked, the witness can only agree. To get this technique right, you need a few things, including good knowledge of the case, an understanding of what sort of person the witness is, proper planning to anticipate their possible responses, and most importantly, practice.

43. One last thing to avoid is asking one question too many. You may be in a position during cross-examination where you have drawn out the exact answer you need. Well done. But don’t get caught up in your success and ruin your hard work by asking a question you don’t need to. Let me give a hypothetical example. Say you are cross-examining an accused who has been charged with being party to a joint criminal enterprise where the victim was murdered. You have already drawn out in your questioning that the accused was present when the murder took place. If you then go on to say, “And you shot him too, didn’t you?” the accused may credibly deny this or qualify their earlier answers, which looks bad for you. When you already have what you need, leave it at that – asking extra questions can be risky and unnecessary.

44. Asking one question too many can also occur when counsel tries to make a point but ends up giving the witness an opening for explanation. See this example:

Counsel:	[Witness A], is that a truthful answer?
Witness:	Yes.
Counsel:	Or are you just making that up--
Witness:	I wouldn't be sitting up here answering your questions if it was - if it was a lie.

Counsel: I am sorry?

Witness: I am putting myself at risk by if I was lying in court. So I am answering your question truthfully.

Here, counsel should have just left this at the first question. By asking more questions on the point, the witness had the opportunity to point out the danger to them in giving evidence for the Crown.

45. So in summary, you should adopt a cross-examination method that is flexible, and be prepared to adapt your questioning style to the circumstances of the case.

SUBMISSIONS

46. I now turn to our second topic in thinking about persuasive criminal advocacy: submissions. Written and oral submissions are made in many contexts, although I will be focusing on the criminal appellate context, and jury addresses for oral submissions. I want us to think about two sub-themes: getting your point across; and making your substantive case.

Making persuasive oral submissions: getting your point across

47. Turning first to oral submissions. How can you best get your point across, on your feet, in front of a judge or jury?

48. Here is a brief list of my top peeves and other advice when it comes to oral submissions:

- Don’t patronise or talk down to the judge or jury;
- Don’t be a comedian;
- Don’t harp on if you have a bad point;
- Remember that less is more;
- Remember that you are under observation; and
- Pay attention to your delivery.

49. First, don't patronise the judge or jury. This often comes down to the tone you use. You won't gain anything by lecturing; it is fundamentally arrogant and will put the decision-maker offside. You can use simple language without being patronising. It's also not a good idea to argue with the judge. Of course, you can push back if there is a point you can't concede, or if the judge has made a mistake. But there also comes a point at which it is wiser to move on than lock horns.

50. A court is a place where amusing things occasionally occur. However, it is not the place to be a comedian. The main reason is that it is wildly disrespectful to a defendant, whether or not you are appearing for them. Being in court is a highly stressful time for an accused person with much at stake. Cracking a joke will reflect badly on you as an advocate and may appear that you are being flippant about their situation and not taking their case seriously. This applies to cross-examination too – humour, even if seemingly inoffensive, can be very inappropriate.

51. Don't harp on if you have a bad point. If one of your points is weaker than others, don't spend equal time on it as your strong points. Sometimes, it is better to tell the judge that you will be relying on your written submissions for that ground and move on. If the last thing the judge hears is a long exposition on an argument which is frankly not that great, that may be the thing that sticks in their mind, to your detriment. Many talented practitioners would do well to heed this warning.

52. Remember that less is more. Many lawyers seem to like the sound of their own voice a little too much. It can be easy to ramble on to try to cover all your bases. Practically speaking though, it might be safer to assume that everyone in the courtroom has a seriously deficient attention span. So, know where you are going, and get to the point. This also applies when you are addressing a jury. That is not to say that jurors are disinterested or can't focus – they tend to take their civic responsibility seriously. But it is simply harder to concentrate when the speaker is dragging on unnecessarily. Hopefully that is not what you are thinking about me right now.

53. Remember that you are under observation. Your general behaviour and body language in court, even when you are not speaking, can impact upon how you

come across to a judge or jury. Exasperated sighs, muttering under your breath, incredulous glances, or unnecessary interruptions speak of unprofessionalism.

54. Your method of delivery is also one of the more memorable part of your oral submissions. If you speak too quickly or quietly, it may be hard to follow what you are saying. If you speak at a glacial pace, you may lose the focus of your audience. Good eye contact with the jury, at a good pace, with good tone, will help them to remain engaged. In your delivery, be mindful of what filler words you use, and how frequently you use them – that is, words like "um", "ah", "like", "you know", "sort of" and "kind of". You don't want to use filler words so much that the listener is distracted from your content. If this is a problem for you, it may require quite a bit of practice to break out of. I must also add, there is no need to quote Shakespeare. In our case example, Counsel Y in his jury address reminded the jurors of their oaths or affirmations and duties, and then added in, "To use the old quote from Polonius in 'Hamlet', 'To thine own self be true.'" What does this really add apart from making you look pretentious?

Making persuasive oral submissions: making your substantive case

55. Next, what do you need to do to make your substantive case persuasively in oral submissions? There is, of course, overlap here with cross-examination. I would suggest there are two key points: being flexible and having good knowledge of the facts and law.

56. First, particularly in criminal appellate advocacy, you should be prepared to be flexible with your delivery. It simply doesn't work to stick to a script. I have seen some advocates who seem to think that making oral submissions just means reading out your written submissions. Remember, the judge also knows how to read. Brief notes to jog your memory on what points you want to address on are a better idea. Your oral submissions should add something to your argument. If you are tempted to just read out your written submissions, perhaps think – is there something in particular I want to emphasise for the court? Or is there something I can expand on, or needs to be explained?

57. An important part of good oral advocacy is the ability to listen – to the judge, or to what is happening in court in general – and adjust your case accordingly as needed. In oral submissions, as opposed to written submissions, "[y]ou are no longer in complete control, your propositions will be challenged and you will have to respond immediately. Your carefully planned structure may be thrown to the wind."[18] It is not that you should throw away your case theory if challenged by a judge, but you should be flexible and responsive. And, if the judge asks you a question on a different topic to the dot point you are on, you should respond to that and change things around as you need to.

58. Second, just like in cross-examination, it is so fundamental that you have good knowledge of the facts of your case and the law. One of the reasons for this relates to answering questions from the bench. Judges like to ask all sorts of questions; occasionally, I regret to say, in overwhelmingly quick succession. Sometimes we ask questions to test the strength of your argument. Sometimes we need clarification of the facts. Sometimes we want a refresher on a point of law. What all these things have in common is that unless you have a good knowledge of your case and the law, you will not be able to answer our questions with confidence. The best advocates are those who answer the question put, which they can only do if they know what they are talking about. And don't dodge the question. It is ok to ask to come back to a question later if needs be – as long as you do come back. I can also say that from years of asking questions from the bench, it is easy to tell if the lawyer has not done their preparation. A well-prepared advocate who can respond coherently is far more persuasive than counsel who is not familiar enough with the facts or law in their case to give a comprehensive answer.

59. For a jury address in a criminal trial, knowing the facts of your case is by far the most fundamental thing you can do for persuasive advocacy. Knowing how everything fits together will allow you to present a coherent narrative in line with your case theory, all the while keeping good communication with the jury and not relying too heavily on your notes. The jury address in a criminal trial is the last

[18] Jeremy Curthoys and Christopher Kendall, *Advocacy: An Introduction* (LexisNexis Butterworth, 2006) 80.

chance you have to persuade the decision-maker, so make sure as well that you don't forget to make an important point – *brief* notes to prompt your memory will be vital.

Drafting persuasive written submissions: getting your point across

60. We now turn to drafting persuasive written submissions, and how to get your point across. It may well be that this is the first opportunity you have to persuade the court of your position, where *you* are controlling the argument – so don't squander it. Written submissions are important. They are not a mere exercise of getting something down on paper as a prelude to your oral submissions but are a fundamental step of clearly refining your argument into a structure that will assist the judge.

61. There tends to be a strange thing that happens too often when a lawyer sits down at a keyboard or picks up a pen to write submissions. Suddenly, they lose the ability to write plain English. Sometimes they also forget what headings are. As they write, they apparently also forget to read back over what they have written. May I urge you to pay attention to your own drafting habits. To quote Justice Hayne, "[s]aying anything to any group of lawyers about use of language or about questions of style is very dangerous. All lawyers know that these matters are important but almost all are equally certain of their own mastery of these subjects."[19]

62. From a judge's perspective, it is so much harder to understand the parties' legal arguments when you must first wade through a swamp of inexplicable Latin or needlessly fancy words, poor grammar, ambiguity or wordiness. It is also annoying. Instead, be simple and clear. Err on the side of shorter sentences and plain English. Use the active voice unless you must use the passive voice. Your meaning must be unambiguous. This makes your point easier to understand and evaluate quickly – which will be much appreciated by a time-poor judge.

[19] KM Hayne, 'Written Advocacy' (delivered as part of the Continuing Legal Education Program of the Victorian Bar, 5 and 26 March 2007) 2.

63. Remember to use headings and to give your submissions structure. This also makes following your argument easier. Also be mindful to steer clear of unusual formatting. When I see written submissions with strange fonts, odd spacings or margins stretched to their very limits, while this doesn't change the content, it lends an air of carelessness at best, and incompetence at worst, which is hard to ignore.

64. It is so important to edit your work. Too often I encounter submissions which read as if the first draft and the final version are one and the same. You can only improve your persuasiveness through revision. It will make a world of difference, particularly to fastidious judges. You want the reader to understand your meaning straight away, not to have to read and re-read several times until they get the gist.

65. This year, I have been telling each batch of newly admitted lawyers about the benefits of plain English, and that the best advocates can make their point simply and succinctly. It is not just them who need to reminder though – the worst culprits are usually among those who have been practicing for years.

66. So in summary, remember these key tips to get your point across better in written submissions:

    - Use unambiguous language;
    - Be concise;
    - Have structure in your submissions;
    - Don't neglect good formatting; and
    - Edit your work – do more than one draft.

Drafting persuasive written submissions: making your substantive case

67. However, persuasive written submissions require much more than simple clear communication. You also need to make your substantive case persuasively. To do this, you should start strong, include the relevant information, have a clear argument, and be accurate.

68. It is an important rule of procedural fairness that judges do not pre-judge cases and must always be open to persuasion. This does not mean, however, that we do not form preliminary opinions after having read the submissions. When a case requires some form of written submissions, remember that this is often the first impression we have. So, start with your strongest point and try to persuade the judge about your argument from the beginning. Your points should be in a logical order.

69. What should you include in your written submissions? A judge will want to know what the case is about, what information they will need, and what the best path is to follow in deciding it.[20] Overwhelmingly, the question which should guide you when you are drafting written submissions is, "Will this be useful to the court?" This framework will help you include what is important.

70. In seeking to help the court, your written submissions should identify the key, relevant issues. Don't get distracted by peripheral insignificancies, or overload with weak points. You can't write down everything you might want to; you have to be discerning. By narrowing your case to what is important you are likely to be more persuasive. And you should think twice if the submissions are becoming little more than a collection of caselaw extracts. If you are going to quote from a case at length, make sure you have a proper reason for doing so.

71. Be clear as to what you are arguing. A court can answer a question only when it knows what the question is.[21] In an appeal, did the sentencing or trial judge err? Make sure you particularise what the alleged error was. Vague submissions are bad submissions. Don't forget to link your arguments to the relevant facts – they make or break your case, particularly in criminal litigation. You can't expect the judge to make logic jumps you have neglected.

72. Your submissions must also, of course, be accurate. Presenting facts or law as true which later turn out to be wrong, misquoted or taken out of context diminishes your general credibility as an advocate. I have seen submissions

[20] Ibid 6.

[21] Ibid 16.

which argue that the primary judge overlooked a factor on sentence or similar, quoting from particular parts of the judgment and blatantly ignoring others.

CONCLUDING COMMENTS

73. I would like to leave you with some brief concluding remarks. Have you been cross-examining for years? Or have you been drafting and making submissions for years? If you have, are there areas in which you are set in your ways? Sometimes it is hard to see our own flaws. Nonetheless, don't allow yourself to become complacent. Are there ways in which you can become a more persuasive advocate? Think: how can I make this clearer, more concise, more fit for purpose?

74. Finally, no matter how hard you may try, you can't learn advocacy out of a textbook, nor, I regret to say, from a lecture. You need to get up on your feet and do it. And yes, you must make mistakes to learn, but you also must be alert to when you do make them, and try not to make the same mistake twice.