

# **CLOSING ADDRESS TO THE AUSTRALIAN BAR ASSOCIATION ADVANCED TRIAL ADVOCACY INTENSIVE COURSE**

**The Hon A S Bell,  
Chief Justice of New South Wales**

**27 January 2023**

1. May I begin by acknowledging the Gadigal of the Eora Nation, paying my sincere respects to elders past present and emerging and extending that respect to all First Nations people including any amongst this audience.
2. In that context I should mention that I returned yesterday from attending a Supreme and Federal Court Judges' conference in New Zealand where I had the pleasure of meeting Justice Lincoln Crowley who was the first indigenous judge appointed to a superior court in Australia. In his case it was the Supreme Court of Queensland. Lincoln had practised as a barrister in both New South Wales and Queensland before his appointment, and himself undertook this advocacy programme.
3. His is a very significant appointment, as is that of Justice Michael Lundberg to the Supreme Court of Western Australia.
4. I also acknowledge the participants in this advanced advocacy course conducted under the auspices of the Australian Bar Association. Those who have participated in this course not only demonstrate their commitment to continuous professional self-improvement but also demonstrate the abiding truth that the administration of justice in our common law system depends not only upon competent and impartial judges but skilled and ethical advocates. I will say something more about that shortly.

5. Thirdly, I acknowledge the instructors in this course who have given freely of their time in the traditional law vacation to participate in the program. It is a mark of their leadership and commitment to the profession which I so admire and applaud.
6. The Australian Bar Association should also be commended for its commitment to this residential course and I have no doubt that you will all have made deep friendships with your fellow participants across the course of the week, friendships which will continue and stand you in good stead for the rest of your professional lives.
7. Beyond advancing your clients' causes, skilled advocacy contributes significantly to the administration of justice.
8. Much has been written on the topic but skilled advocacy is ultimately a matter of trial and practice as well as observation of others, and the constant refining of experience.
9. Attributes of skilled advocacy include at least the following five skills:
  - clarity and coherence of presentation;
  - an ability to identify and focus on the real issues in dispute;
  - purposeful cross-examination;
  - agility; and
  - an ability to read the room
10. All of these attributes will invariably be underpinned by thorough preparation.
11. Thorough preparation involves a command of the facts and or documents involved in the case as well as a clear understanding of the legal framework in which those facts assume significance – whether that legal framework be supplied by legislation or contractual terms or the common law or equitable doctrine or, more commonly, a combination of all of the above.
12. To expand briefly on the five key attributes I have mentioned.

13. **First**, clarity and coherence of presentation.
14. Before a case commences in court and indeed before it is filed, plaintiff's counsel must have clearly in mind what his or her case actually is and how he or she intends to present it and establish it.
15. Too many cases meander with arguments over issues that are irrelevant or on the very margin of relevance. This is the antithesis of good advocacy. The real issues and often the best points and evidence can easily get lost in a litigation quagmire where counsel lack clarity and coherence.
16. **Secondly**, identifying and focusing on the real issues in dispute. This is really a by-product of clarity and coherence. It involves an important converse proposition, namely the need to strip away the irrelevant factual and legal issues which will not bear upon the ultimate result. Appreciation of what is irrelevant or unimportant will be a function of preparation and counsel's understanding of the matter.
17. Another important consequence of identification and focus on the real issues in dispute is that counsel should have the ability and willingness to make concessions where appropriate.
18. The **third** attribute I identified was purposeful cross-examination.
19. A cross examination should never commence without counsel knowing what he or she wants to achieve or establish from the particular witness and how he or she intends to do so.
20. If you have thought clearly about this in advance, you'll also know when to stop! This is a much-overlooked skill – not going back for your hat, as the saying goes.

21. The **fourth** attribute is agility. Litigation as we all know is dynamic and fluid. Witnesses, opponents and, dare I say it, sometimes even judges can be unpredictable. This can occur even with the best prepared case in the world but deep preparation will assist in pivoting as required.
22. **Fifthly**, I would emphasise the importance of "reading the room". This is tied up with the need for agility. Reading the room involves not only reading the judge but also a witness and often your opponent's camp.
23. A barrister who brings these five attributes to the court room will not only serve their client very well but also will greatly assist the judge or judges in the case of appeals.
24. Being a judge at first instance or on appeal is a very demanding role. It is not easy but it is of enormous assistance to judges who are duty-bound to provide clear reasons for their decisions to have cases presented by skilled advocates.
25. Whilst a clash of highly skilled advocates may result in a case which is difficult to determine because of the very skill of the respective advocates, 99% of judges would much prefer a case to be presented in a clear and skilful way as opposed to a rolling, incoherent occasion where counsel are not on top of the facts, have an imperfect understanding of the law and or take unnecessary or irrelevant points, often because they are not on top of their brief.
26. Advocacy of this kind adds greatly to the cost of litigation both in terms of cost to the parties, as poorly argued cases invariably take far longer than is necessary, and also because they add to the cost of the administration of justice more generally. A case which has been poorly presented and argued will be much more difficult for a judge to produce a clear, quick and satisfactory judgment.
27. The presence of highly skilled advocates in cases in the Commercial List of the Supreme Court of New South Wales is one of the reasons why that List has the national reputation it enjoys for speed of service and clarity of

outcome. High quality advocacy generally also engenders the trust of the Court in the advocates in question.

28. I wish you all well in your future endeavours.

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