ADVOCACY – WHAT SHOULD BE THE FOCUS?

1. WHAT IS ADVOCACY IN A CRIMINAL LAW CONTEXT?

The art of **fearless ethical persuasion** of the tribunal of fact:-

- In favour of your client;
- Particularly when the tribunal of fact is against you.

Fearless

- Don't be intimidated by the bench, police or anyone else. Stand your ground but always be respectful and never impertinent.
- Do not be put off by the fear of adverse publicity to you, to your client or your client's case.
- Do not allow yourself to be in a position of professional or personal conflict or to be caused embarrassment.
- Do not be put off in cross examination of a witness whom you fear may cause you physical or other harm – otherwise you should seek leave to withdraw.

Ethical

- Be careful not to allow yourself to be manipulated by your client or a witness.
- There is a big difference between suspecting your client may not be telling you the truth and knowing that to be so.
- Don't lead or be a party to the leading of evidence that you know to be false.
- Do not make a submission to the court or a suggestion to the jury that you **know or suspect** is not supported by the evidence or that may be contrary to law.

Persuasion (anyone can win the unlosable case)

- Persuasion is a process aimed at *changing* a person's (or a group's) attitude or behavior toward some event, idea, object, or other person(s), by using written or spoken words to convey information, feelings, or reasoning, or a combination thereof (Wikipedia). Relevantly – a magistrate/judge(s)/jury.

- People believe what they want to believe, often in defiance of fact and logic. Hence, with a jury particularly, a strong Crown factual case may be turned around. Although juries are always told not to allow emotion to affect their reasoning, the opposite is the reality.

- It is not all about pure reason and logic – an artful advocate uses emotion – sometimes subtle and sometimes not so subtle - to assist in persuasion – particularly with a jury – example - murder – battered spouse; **R v Wright** (Supreme Court NSW [2003]); **R v Waters** (Supreme Court NSW [1997]); **R v Said Morgan** (Supreme Court NSW [1997]).

2. PREPARATION PRESENTATION AND CREDIBILITY

- Before you can win the case for your client, you first have to prosecute it – identify the strengths and weaknesses of the Crown case and acknowledge the strengths and weaknesses of your client's case. If, in a rape case for example, you can't explain to the tribunal of fact why your client told the police he was not in the house (at the time of the rape) when there is indisputable evidence that he was in the house at that time, then you cannot win – you have to be able to explain the lie.

- Early preparation – early proof of evidence is desired and often, crucial.

- In an appropriate case you can take an early proof without asking whether your client "did it".

- Early proof – may be inconvenient and time consuming but it will:-

    A. Enable you to get your client's best memory of the events;

    B. Help you to focus on the factual strengths and weaknesses in the prosecution case and the defence case;

C. Help you to identify and focus on the issues.

- Conference all defence witnesses – and again – early proofs.

- It may be necessary to seek to speak with or conference a prosecution witness. If so, **always** seek to do it through the prosecution/OIC. If the witness refuses to participate, whether by influence of the prosecution/OIC or not, you may be able to usefully extract from the witness in cross examination, that he/she was unreasonable. There is no privy to a witness.

- Sell yourself: presentation; courtesy; respectful; humour (contrary to the view of some).

- Preparation of your client and defence witnesses to give evidence – as distinct from "coaching": **SEE** UK Witness Familiarisation Program **attached**.

- Credit – establish yourself as a credible advocate otherwise the judge/jury will not listen to you.

  For example it may mean:-

  A. Making a submission as to the law that does not favour your client on a particular aspect of your client's case;

  B. Conceding an inevitable factual scenario that does not favour your client's case;

  C. Conceding and apologising (including to a witness) when you are wrong.

- Temper your style/presentation/language to the circumstances.

- Respect your opponent, the complainant/victim and witnesses.

- Never, ever think you can't lose.

3. OPENNING ADDRESS

Local Court

- Where the magistrate is content to hear an opening – do it.

- If you intend to open, tell the prosecutor beforehand, so as to give him/her the opportunity to open before you and to commit them to open before you if they are going to open at all – to avoid the prosecutor being taken by surprise and to then being permitted to open after you.

- Why open in the local court?

    A. An opportunity very early in the hearing to counter balance the sometimes serious and shocking prosecution allegations contained within the CAN or Charge – an important psychological tool;

    B. Opportunity to establish a relationship with the magistrate (if you do not know the magistrate) and to demonstrate your competence and that you are “all over” the case;

    C. If done properly, the magistrate will appreciate an early identification of the issues and will note (to himself/herself) it is rarely done;

    D. Opportunity to (briefly) outline to the magistrate the strengths and issues of your client’s case – which may well assist in the admissibility of controversial evidence during the hearing;

    E. Opportunity to foreshadow why it will be necessary for you to “confront” a particular witness;

    F. The magistrate may engage you in a way that may assist you to determine how to present your case, perhaps in a manner slightly or even significantly different to that envisaged by you;

    G. It can provide the road map to where you are heading (the journey) and make it easier for the magistrate to follow you on the journey, provided that you do not overreach and exaggerate the anticipated evidence.

Jury Trials

An important provision:-

- Section 159 Criminal Procedure Act

> *(1) An accused person or his or her Australian legal practitioner may address the jury immediately after the opening address of the prosecutor.*
>
> *(2) Any such opening address is to be limited generally to an address on:-*
>
> *(a) the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and*
>
> *(b) the matters to be raised by the accused person.*
>
> *(3) If the accused person intends to give evidence or to call any witness in support of the defence, the accused person or his or her Australian legal practitioner is entitled to open the case for the defence before calling evidence, whether or not an address has been made to the jury.*

S 159 was considered by Howie J in **R v MM** [2004] NSWCCA 81 (31 March 2004): "……the defence counsel is not at liberty to open to the jury in any way he or she thinks fit…." and after some dissertation held [at]:-

> [139] *The purpose of the defence opening address under s 159(2), therefore, is to define, for the jury's benefit, the real issues in the trial and what the accused might say in answer to the Crown's allegation. It is not an opportunity for defence counsel to embark upon a dissertation on the onus and standard of proof, or the functions of judge and jury, or to anticipate the directions or warnings to be given by the trial judge, or to urge upon the jury the way that they should assess the evidence of a witness to be called in the Crown case. It behoves trial judges to ensure that the addresses of counsel are not open to abuse, particularly in a case where the contents of the address is circumscribed by a provision of an Act. To permit counsel to ignore such a limitation is not in the interests of justice, either generally or in the particular case. It may be appropriate for a trial judge to ensure, before the defence opens and in the absence of the jury, that defence counsel is aware of the limited basis of an opening under s 159 and that the address will comply with it.*
>
> *[140] The present is a good example of how defence counsel's address far exceeded the legitimate bounds of an opening under s 159 and almost caused the trial to miscarry. There was little of*

the address that complied with the section and a significant part of it was completely inappropriate, even if it had been contained in a closing address to the jury.

[141] Defence counsel seemed to believe that, because the Crown, in a moderate and appropriate opening to which no criticism could attach, referred to the extensive delay in the complaint and the fact that one offence was referred to as "buggery", he was justified in making an opening address which included that part which is set out in the judgment of Levine J.

[142] Even making allowance for apparent transcription errors, I have difficulty understanding the point that counsel was seeking to make in that passage of his address by referring to "stepping back in time....to the law that existed then" or to "the sort of morality that existed then even in relation to this offence". If he were concerned at the use of the term "buggery" to describe the offence, the proper way to approach the matter was to ask the trial judge to say something to the jury about the use of that term in the charge. But, in my opinion, it was completely inappropriate to introduce the topics of morality or a change in the law into the jury's considerations of the issue before them. The defence case was that the allegations were untrue. Questions of morality, of the nature of the offence, or of the differences between the current law and as it existed at some earlier time were completely irrelevant. In any event, it was not a legitimate matter to be canvassed in the defence opening. With respect, the trial judge should have taken the matter up with defence counsel to see what, if any, legitimate purpose there was in making comments which, so it seem to me, could only serve to distract the jury.

- **A Conservative View** as to Opening: Only open if you have to and keep it brief.

  A better view: Repeat – Reasons to open in Local Court A to G **AND** particularly, relevant with a jury:-

  A. Offences more serious – heinous Crown allegations – paedophilia and sexual assault of children for example. In my view, generally it would be a disservice to your client if you did take up the opportunity to say something positive about your client and his case at this early time in the trial process **UNLESS** there is just nothing positive to say – in which case, perhaps you should carefully review your client's plea;

B. A good opening can turn a case – and even overcome significant lies told by the accused during an ERISP;

C. Keep it simple, interesting, genuine and non argumentative – remind the jury that there are always two sides to a story and to be patient as your client's case unfolds;

D. Stick with the facts – as you anticipate they will unfold BUT always hold back, at least a little – always be careful not to overreach;

E. The objective is to persuade the jury to keep an open mind – for the jury not to have your client "convicted" because of the seriousness of the allegations. You have to tell the jurors something that will have their interest, wanting to hear more.

- Have a plan: what is the overriding message you want to leave with the jury? How will your proposed cross examination of witnesses tie in with and relate to your plan?

4. EVIDENCE IN CHIEF

- **A conservative view**: Don't call the accused to give evidence unless you absolutely must.

  A better view: There is no rule, never pre-judge. There are so many variables, including the ability of the accused to be a reliable historian and to stand up to cross examination. Generally, juries expect to hear the accused's side of the story – not just from you, but from the accused!

- By now, you will have thoroughly prepared the accused and all defence witnesses; lead the evidence confidently, not in fear and trepidation! And remember – never ever show surprise by any answer in chief.

- Don't get frustrated with your own witness – it may suggest that "the wheels are falling off".

5. CROSS EXAMINATION

The Big Picture

- You cannot properly prepare your proposed cross examination unless you have at least an anticipated outline of your closing address in mind. How do you propose to present your (anticipated) case?

- Then you can consider an outline of proposed cross examination for each witness – BUT before getting into the detail – what is it you want to achieve with the particular witness? How will that assist and tie in with your anticipated closing address to the court/jury?

- Before you can determine the big picture plan for each witness – you need to be able to know/visualise the big picture for your case. Is it a case where there must be direct confrontation with any Crown witness? You should have a pretty good idea what you propose to tell the jury/magistrate in your closing address when plotting your cross examination. Perhaps your case is not so much about the facts but rather, the application of the facts to the law? Is it a case which may simply turn on a witness' reasonable but mistaken perception?

- Examples of big picture plan for Crown witnesses:

    A. Crown witness BOB: Some of what he says assists your case but some other, hurts your case. Ideally, you want to create a doubt about his reliability as to his anticipated evidence that hurts your case but be able to say that he is nonetheless, a credible witness in so far as other parts of his evidence. So the challenge is to determine how you will achieve that - that is the big picture plan for Bob. Then get stuck into the detail

    B. Crown witness Sallie: Sallie is a complaint witness in a sexual assault case and all of what she has to say hurts your client's case, because it supports the credibility of the complainant. Knowing that you propose to tell the jury that the complainant had a particular vendetta against your client and that was her motive to make the complaint – you may actually have no, or very few questions for Sallie. You may accept that that is what she was told and that she is an accurate historian. That is because your focus will be on other Crown witnesses through whom you expect or hope to be able to establish the vendetta.

- Whilst denting the credit of an important Crown witness is an obvious desire, there are various ways to do it. It does not always involve an out and out assault on that witness. The attack may be quite subtle. Not every Crown witness who hurts your case has to be a liar! The witness may simply be mistaken and reasonably so.

- As to a credible and damaging Crown witness? You may decide that forceful cross examination will only reinforce the witness' credibility. In which case, allow the witness to get in and out of the witness box A.S.A.P.

- **Points to Remember:-**

  Juries (and sometimes magistrates and judges) sympathise and relate more to the witness than with the lawyers.

  If you have a "gotcha" moment with a particular witness, always slam the gate shut – no way out – Don't let the witness escape (metaphorically speaking) before putting your final proposition.

  Consider whether to cross examine a particular witness at all.

  Know when to quit – start and finish strong.

  Watch, take your time and listen to the witness. Don't be too scripted. Be prepared to go in a different direction.

  Be yourself – develop your own style - what works for you.

Asking Questions to Which you Don't Know the Answer?

- **Orthodox view**: Don't.

  Better view: Don't pre-judge, it depends on the given situation. Quality advocates get paid good money to make the forensic decision, to back their intuition as to whether to risk asking *that question.* The risk has to be worth taking.

  The rule, perhaps stems from the truth that the cross examiner should have control over and direct the witness with a view to getting answers that positively assist the cross examiners case. To ask a question to which you don't know the answer, is potentially, losing control of and the direction of the cross examination.

Regard the rule more as a general and sensible rule, rather than an unbreakable one. Unless you are confident in yourself as an advocate and in following your "gut feel" – don't ask *that question*.

If you decide to ask *that question* - have a back-up plan in case you don't get the answer you want.

Never ever looked surprised or put off if you get a bad answer. Take it in your stride and move straight into the next question.

EXAMPLE of A CROSS EXAMINATION WORKSHEET

Case name:

Witness name:

My theory of the case is:

This witness will advance the prosecution case by:

I am worried about this witness because:

The bias/motivation of this witness is:

I can advance my theory through this witness by:

This witness' credibility can be challenged by:

The documents, reports, transcripts or physical evidence I will need to effectively cross-examine this witness on are:

Some questions I may ask:

When I have finished cross-examining this witness this is what I want the court/jury to feel about him/her:

My cross-examination of this witness will allow me to say the following in my closing:

6. CLOSING ADDRESS TO JURY/CLOSING SUBMISSIONS TO MAGISTRATE/JUDGE ALONE

- You must have a plan – a good start and strong finish.

- A good closing can make the difference between a conviction and an acquittal.

- Every significant point on the facts should be referenced back to the evidence (by Transcript reference if there is one).

- To a jury: passionate presentation may be persuasive (less so to a magistrate or a judge).

- Ensure every point made is credible, otherwise, don't make it.

- Even if the case has not gone well – remember your fallback position is to avoid a conviction and to do that (in jury trial) you only have to *persuade* 1-2 or more of the jury that they cannot be satisfied beyond reasonable doubt as to the guilt of your client.

7. WHEN IS YOUR JOB DONE IN A JURY TRIAL?

- Even after the closing the job's not finished – the Summing Up and directions of law

Manny Conditsis
Trial Advocate
15 March 2014