

Advocacy

Melbourne University Law School

Guest Lecture Series 2011

24 March 2011

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The letter inviting me to speak suggested that I might speak on the topic of advocacy. I do so with some hesitation. I have not made a study of advocacy and have usually been impressed by how much better others seem both to practice the art and to talk about it. Advocacy can also mean so many different things that it is not an easy topic to confine. Quintilianus recognised in his first century AD study that actions as well as words may be employed to move a court to tears.¹ Hence the custom of taking care of the attire of an accused and having in court the accused's children and parents. Marshall Hall is recorded as having wept before a jury² and in a case in 1897 the Supreme Court of Tennessee concluded (in an appeal against judgment for the plaintiff in an action for seduction and breach of contract to marry) that counsel's shedding tears was not a ground of appeal and that it was a matter for counsel what weapons to use to advocate a case from logic down to noise and gesticulation.³ However, advocacy is what I have done as a lawyer and what I now see as a judge and it seemed high time to confront my hesitations.

Dr Gerber's Letter

Every day when I make my way to work, I pass a letter written to me in November

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¹ David Pannick, *Advocates* (1992) 27.

² *Ibid* 26.

³ *Ibid* 26 citing *Ferguson v Moore* (1897) 39 SW 341, 343.

1994 about my own advocacy. I signed the Bar Roll in 1985 and by November 1994 I had been at the Bar for 9 years. I had developed a sizeable practice with a particular, but not exclusive, emphasis on tax. I thought myself moderately successful in conducting tax cases both for taxpayers and for the Commissioner. Tax cases were heard then, as they are now, at first instance either in the Federal Court or in the Administrative Appeals Tribunal. In those days one of the members of the Administrative Appeals Tribunal before whom I frequently appeared was a Dr Paul Gerber. In the latter part of 1994 Dr Gerber announced his retirement and I wrote to wish him well in his retirement and said how much I had valued appearing before him. Dr Gerber wrote a very pleasant reply. I have framed that letter and have placed it on a wall which I must pass every day going to work. After dealing with a number of matters Dr Gerber's letter said:

I always enjoyed your appearances and, whilst I occasionally pondered whether all of your submissions were as sound as you put them, you were always so convincing that I had to guard myself against your plausibility. Your brilliance may therefore have actually **lost** you some cases you should have won.⁴

These words had, and continue to have, a very sobering effect upon me. It had never occurred to me that putting submissions plausibly, and convincingly, might be counterproductive. More disconcerting was Dr Gerber's suggestion, no doubt said teasingly rather than literally, that brilliant advocacy may have been the cause of losing cases that should have been won. I may not have improved much after the letter, but Dr Gerber's letter left a deep impression: advocacy is about persuading successfully.

In my role as a judge I now frequently see what Dr Gerber was telling me many years ago. I frequently see advocates who express themselves brilliantly. The words sometimes seem like the songs of the sirens whose sweet meadow sounds sang away the mind of Odysseus on his odyssey.⁵ He too had to guard himself against their sounds by plugging his oarsmen's ears with beeswax so that they could not hear the song and have himself lashed to the mast of his ship hand and foot. I frequently see advocates whose sheer force of intellect and personal command of a court room dominates thinking and leaves a powerful impact on the mind of the decision maker. F.E. Smith, later Lord Birkenhead, had a formidable reputation as a barrister. In one case F.E. had been briefed for a tramway company which had been sued for damages for injuries to a boy who had been run over. The plaintiff's case was that blindness had set in as a result of the accident.

The Judge was deeply moved. "Poor boy, poor boy", he said. "Blind. Put him on a chair so that the jury can see him."

F.E. said coldly: "Perhaps your Honour would like to have the boy passed round the jury box."

"That is a most improper remark", said Judge Willis angrily.

"It was provoked", said F.E., "by a most improper suggestion."

There was a heavy pause, and the Judge continued, "Mr Smith, have you ever heard of a saying by Bacon – the great Bacon – that youth and discretion are ill-wed companions?"

"Indeed I have, your Honour; and has your Honour ever heard of a saying by Bacon – the great Bacon – that a much talking Judge is like an ill-tuned cymbal?"

The Judge replied furiously, "You are extremely offensive, young man"; and F.E. added to his previous lapses by saying: "As a matter of fact we both are; the only difference between us is that I'm trying to be, and you can't help it".⁶

Sometimes formidable advocates are not matched against others with the same skill and power for persuasion. In each case the judge may sometimes need to guard

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Emphasis as per original letter from Dr Paul Gerber to GT Pagone, November 1994.

himself or herself against a plausible, but wrong, submission.

Dependence and Reliability

Embedded in what Dr Gerber was telling me was also a message about the dependence which judges have upon those who appear before them. Judges have to make decisions on facts and law. Judges generally do not know any of the facts relevant to a case except those facts which have been investigated by the advocates and which they have selected to put before the judge as decision maker. Sometimes a case will involve matters which are more widely known including to the judge, and occasionally a case may give rise to some particular fact (perhaps some geographical location) about which a judge will have some personal knowledge; but usually, and on the facts which matter, the judge will only know those facts which are presented by the parties through their advocates. This makes the judge dependent upon, and necessarily vulnerable to, the reliability of what the advocate has selected and put to the judge for decision making.

The same is broadly speaking true also about the law. The advocates will have spent considerable time researching the law before the hearing. They may have discussed the finer points of some statutory provision, or judicial observation, long before the case comes on for hearing. The case may be in an area of law which the judge may not have considered for some time or not considered at all. The judge is, again, necessarily dependent upon, and to some extent vulnerable to, the presentation of law, and the submissions upon the law, of the advocates.

⁵ Homer, *The Odyssey* (Everyman's Library, 1992), Book XII, lines 46-70.

A significant lesson of these considerations, and of Dr Gerber's observations to me, is that the chief attribute of good advocacy is reliability. The judge needs confidence that the facts and law as presented by an advocate may reliably be accepted as put. The judge needs confidence that an advocate's assertion of a fact is as the fact is asserted and not found in the stated form only as the advocate's "spin" or distortion. A judge needs to be confident that the relevant law has been found by the advocate and that it has been stated correctly and reliably. The advocate ceases to be effective if the judge feels the need to guard against the plausibility of what is stated. Where doubt exists, the judge will begin to look at the facts more closely and may reach conclusions that may be contrary to those submitted by the advocate. The advocate whose advocacy you must guard against engenders scepticism, causes greater scrutiny and may harm the advocated case.

Candour and Independence

Many of the ethical rules imposed upon lawyers, and of counsel appearing in court, are directed at making them effective as advocates. Sometimes that might not seem so to a client wanting the lawyer to do or say something which the lawyer cannot do or say because of duties to the court, to the law and to the proper administration of justice. The advocate's simultaneous duty to court and to client is especially important to the effective functioning of the law in court proceedings. The judge, and the integrity of the system, is peculiarly vulnerable to the advocates who appear on behalf of clients.

A judge cannot undertake independent enquiries into the facts and issues. Judges

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M. Gilbert (Ed), *The Oxford Book of Legal Anecdotes* (1986) 279-280.

do not have the staff, the financial resources, the knowledge or the skills to make or to order their own enquiries about the matters upon which they need to decide. It is neither efficient nor proper for judges to take on such tasks. It is efficient to leave the task of evidence gathering to the parties who are best placed to know what to investigate, what matters to pursue, where to find the facts, where to look for the evidence and any expert knowledge that needs to be pursued, and how best to present those matters to a judge when identified and obtained. For the judge to assume those tasks would expose the judge to the criticism of having ceased to be an impartial decision maker and to have become a partisan in the dispute. The losing party to any conflict, and the public as a whole, can have greatest confidence in the fairness of an outcome, and in the integrity of the system, where the process ensures that the decision maker is manifestly impartial. In *Giannarelli v Wraith* Mason CJ said:⁷

The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest. So, in *Swinfen v. Lord Chelmsford* Pollock C.B., after speaking of the discharge of counsel's duty as one in which the court and the public, as well as the client, had an interest said:

"The conduct and control of the cause are necessarily left to counsel ... A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, counsel would perform their duties under the peril of an action by every disappointed and angry client."

In the result the Court of Exchequer concluded "that no action will lie against counsel for any act honestly done in the conduct or management of the cause".

The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and

⁷ (1988) 165 CLR 543, 556-7.

authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.

It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel. The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court.

The duties owed by the advocate to the client and to the law are owed simultaneously and are directed to the same outcome. The advocate is the professional legal intermediary between client and decision maker simultaneously assisting both by sifting for each what is needed to achieve an outcome in the client's interests but consistent with the judge's duty to ascertain the rights of the parties upon evidence according to law. The client needs to know that the lawyer is putting reliably the best case that can be put. The court needs to know that the best case that can properly be put is being put. The client's legitimate interests would not be advanced by the advocate misleading the decision maker. The advocate has a duty to inform the court about the law whether in favour or against the interests for which

the lawyer appears.⁸ An advocate may have to draw attention to erroneous statements of the law in a judge's charge to a jury.⁹ These obligations may all seem inconvenient in advocating the client's interests but they are fundamental to ensuring that the system works well. The client's legitimate interests are best secured by the lawyer focusing upon that which the law permits the client to obtain on the evidence available.

At the heart of the simultaneous duty to court and client is the advocate's duty of independence in the conduct of a trial. The advocate has a duty of candour and honesty¹⁰ and a duty not to mislead the court.¹¹ The duty of independence has much practical content in the day to day conduct of proceedings in a court on behalf of a client. The advocate in court cannot be the "mere mouthpiece" of the client.¹² The advocate is required to exercise independent judgment and is personally responsible for the conduct and presentation of a case in court.¹³

A barrister who signs pleadings does so in part as a voucher that the case is not a mere fiction¹⁴ and thereby provides an assurance to the court that the pleading accords with the rules and that it contains a cause of action on the facts alleged. The preparation of the evidence for trial also requires lawyers to exercise independent legal judgment to assist the court in reaching the correct outcome. The guiding principle is that the evidence presented to the court should be that which is

⁸ *Glebe Sugar Refining Company Limited v Trustees of Port and Harbours of Greenock* (1921) 125 LT 578, 579-82 (Lord Birkenhead LC).

⁹ *R v Southgate* [1963] 1 WLR 809.

¹⁰ *New South Wales Bar Association v Livesey* [1982] 2 NSWLR 231.

¹¹ *New South Wales Bar Association v Thomas (No 2)* [1989] 18 NSWLR 193.

¹² *New South Wales Bar Association v Punch* [2008] NSWADT 78; The Victorian Bar, *Rules of Conduct and Continuing Legal Education Rules 2005*, r 16.

¹³ Butterworths, *Halsbury's Laws of England*, vol 3(1) (2005 reissue) 3 Professional Practice and Conduct, '5 Conduct of Cases' [550].

¹⁴ *Great Australian Gold Mining Co v Martin* (1877) 5 ChD 1, 10 (James LJ).

necessary, relevant, admissible and probative; in other words, that the lawyer tenders evidence which in the lawyer's independent judgment is considered to bear upon the question in dispute, is admissible in evidence and will assist in proving the case for the client.

A practical application of these considerations occurs every day when lawyers prepare affidavits and witness statements for court proceedings. The selection and presentation of evidence is an essential part of the advocate's role on behalf of a client. The selection and presentation of the evidence must be designed to persuade the decision maker of something. The facts selected and how they are presented can have a powerful effect upon a decision maker. Facts and their presentation are part of the raw materials used by advocates. However, the advocate must not create evidence which does not exist and must always exercise care to ensure that what is tendered in evidence does not inadvertently become the lawyer's "spin" rather than the witness' actual evidence.

In *Re Spedley Securities Ltd (in Liq); Reed v Harkness*¹⁵ Bryson J said;

It would be quite improper to school a witness in what evidence he should give but on the other hand it is not improper for his legal advisers to interview a witness before he gives evidence in litigation between parties and to ascertain what the witness will say in relation to relevant matters, relevance being ascertainable from the pleadings, particulars, any affidavits and from other sources including, during the conduct of the hearing, the oral evidence of other witnesses. The gap between schooling an examinee and the proper conduct of a conference is obvious enough and legal advisors who cross that gap would be liable to sanctions, including professional discipline and the exposure in the course of the examination and in public of what had taken place. Any idea that there is to be no conference between an examinee and the legal representatives whom he is entitled to have appears to me to be quite wrong and it is not to be expected or required by the court that before a person comes to be examined he

¹⁵ *Re Spedley Securities Ltd (in Liq); Reed v Harkness* (1990) 2 ACSR 117.

should not direct his attention to relevant matters, and that his legal representatives should not do so, in conference or otherwise. Legal representation would be ineffective unless legal representatives were to take the examinee's statement about such matters as could be seen to be relevant, point out papers which could be searched out and examined, and otherwise generally consider the examinee's position, in relation to whatever was known about his position, from whatever source it was known and whether or not that source included evidence which had been given at the public examination of another person. Schooling, drilling or colouring the evidence of an examinee would of course be quite wrong, as any legal representative must know.¹⁶

The line between impermissible schooling and permissible assistance may sometimes seem unclear, but existence of the distinction is not unclear and mostly what is permissible and what is impermissible is easy enough to determine. The lawyer must not distort the evidence of the witness. It is permissible, and useful, for the lawyer to interview a witness for the purpose of determining what evidence the witness is likely to give in court. It is also permissible for the lawyer to explore the evidence which the witness might give by showing the witness other evidence in the case to find out from the witness what his or her evidence about those matters is or would be. What is impermissible, however, is for the lawyer to instruct the witness about the content of the evidence which the witness would give in such a way as to change the evidence itself whether by fabrication, modification, concealment or "spin".

Unrepresented Litigant

The role of the advocate may become difficult when faced with an unrepresented litigant. The adversarial system works best when all litigants are represented by competent counsel and when all sides to a dispute have full access to all of the material that may reliably bear upon the task and issues for the judge to decide. An assumption upon which the adversarial system operates is that the judge can rely

¹⁶ Ibid 127 (Bryson J).

upon the parties to put forward everything relevant for the decision. That assumption includes that the parties will have tested before trial, and will test at trial, the evidence and submissions upon which the decision will depend. The assumption, however, is seriously challenged and potentially compromised when one or more of the parties is not legally represented or not legally qualified.

Where a party to a proceeding is unrepresented the court has a duty to be of some assistance to the unrepresented litigant. The court's role is not merely to pronounce a winner between participants to a contest as if it were a race. In *McWhinney v Melbourne Health*¹⁷ the Court of Appeal said:

The appellant referred to passages from the decision in *Tomasevic v Travaglini* where Bell J observed:

The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in circumstances - it must ensure a fair trial, not afford an advantage to the self-represented litigant.

These propositions are not controversial. It is well understood that a trial judge has certain obligations to assist a self-represented litigant, but those obligations are to be balanced against the requirement that the judge preserve his or her neutrality between the parties. The appellant's view that the judge ought to have adjourned the case on his own motion is inconsistent with that neutrality and the nature of the

¹⁷ [2011] VSCA 22.

adversarial system. The appellant's submission that the trial judge in effect step into the shoes of the litigant and do that which the litigant, after receiving the clearest advice, was unwilling to do, would cross the line between the permissible assistance that might be offered and the need to maintain impartiality and respect the position adopted by the litigants. Within our adversarial system of justice it cannot be said that the judge could (and indeed should), on his own motion have taken steps, against the wishes of the appellant, to adjourn the proceedings to enable the appellant to obtain medical evidence.¹⁸

The court may need to assist an unrepresented litigant in different ways depending upon the nature of the proceedings, the state in which the proceeding has reached, the nature of the unrepresented litigant and the particular aspect in which an unrepresented litigant may require assistance. In doing so the court must remain impartial¹⁹ and not confer upon an unrepresented litigant a positive advantage²⁰ or give the represented party something less than that party is entitled.²¹

At times the court's duty to assist an unrepresented litigant may impose an obligation upon the advocate for the other parties. The obligation upon the advocates for the represented litigant in such circumstances may be complicated. The duty of the court is and remains that of endeavouring to ascertain the rights of the parties. That obligation does not cease or lessen where a party is self represented. In *Neil v Nott*²² the High Court observed that a:

... frequent consequence of self representation is that the Court must assume the burden of *endeavouring to ascertain* the rights of parties which are obfuscated by their own advocacy.²³ (my emphasis)

The duty of the court to ascertain the rights of the parties where a party is unrepresented may require the lawyers representing the other party to assist the

¹⁸ Ibid [25]-[26] (Neave, Redlich and Mandie JJA) (citations omitted).

¹⁹ *Minogue v Human Rights Equal Opportunity Commission* (1999) 84 FCR 438, 446 [29] (Sackville, North and Kenny JJ).

²⁰ *Rajski v Scitec Corporation Pty Ltd* (Unreported, NSW Court of Appeal, Kirby P, Samuels and Mahoney JJA, 16 June 1986) 27 (Samuels JA).

²¹ Ibid 55 (Mahoney JA).

²² (1994) 121 ALR 148.

²³ Ibid 150 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

court in that burden.²⁴ A reason for that is that the court does not know all of the facts and inevitably will not be in a position to consider all of the issues and the law which may be relevant to a fair and adequate consideration of the rights from the point of view of the unrepresented litigant. The represented party, through his or her advocates, is the most likely source of assistance for the court in the burden of ascertaining the rights of the parties. It is the advocates of the represented party who are likely to have considered the possible relevance of facts and law which could bear upon a judge's determination adversely to the interests of the client even if they discounted them.

The extent of the obligation upon the lawyers for the represented party may also depend upon the nature of that party. In some cases a litigant may be expected to act as a model litigant especially where, for example, the litigant is the Crown, a government agency or an official exercising public functions or duties.²⁵ What the model litigant may be required to do as model litigant is likely to vary from case to case and from situation to situation. In some cases it may require the advocate for the model litigant to meet the case which an unrepresented litigant ought to have put

²⁴ *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1609, [19] (Flick J).
²⁵ Commonwealth Attorney-General, "Appendix B: The Commonwealth's obligation to act as a model litigant", Legal Services Direction 2005; Australian Tax Office, "Conduct of Tax Office Litigation" Practice Statement Law Administration 2009/9; Bruce Quigley, "The Role and Implications of Litigation in Tax Administration" (Speech delivered at the Australian Petroleum Production & Exploration Association Annual Conference, Hobart, 22 November 2007); Dale Boucher, "An Ethical Code ... Not a Code of Conduct" (1996) 79 Canberra Bulletin of Public Administration 3, 4; GE Dal Pont, *Lawyers' Professional Responsibility in Australia* (2006) 296-7; see also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ); *SCI Operations Pty Ltd v Commonwealth* (1996) 139 ALR 595, 613-4, 621 (Beaumont and Einfeld JJ); *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 695, 704 (Beaumont, Burchett and Goldberg JJ); *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, 40-1 (Finn J); *Scott v Handley* (1999) 58 ALD 373, 383-4 (Spender, Finn and Weinberg JJ); *White v Minister for Immigration Multicultural Affairs* [1999] FCA 1433, [81] (Ryan, North and Weinberg JJ); *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 171 ALR 227, 233 (Burchett J); *ACCC v Warner Music Australia Pty Ltd* [2000] FCA 647; *Challoner v Minister for Immigration Multicultural Affairs (No 2)* [2000] FCA 1601; *NAFK of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1374, [9] (Lindgren J); *NAOY v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 275, [8] (Driver FM); *Wodrow v Commonwealth of Australia* (2003) 129 FCR 182, [38]-[43] (Stone J); *ABB Power Transmission Pty Ltd v ACCC* [2003] FCAFC 261, [35] (Heerey, Stone and Bennett JJ).

but did not put because of an inability to do so. A court might not be ascertaining the rights between the parties if the model litigant takes advantage of the obfuscation created by the advocacy of the unrepresented litigant and deals only with the case put and not also with the case that ought to have been met. A court which has assumed the burden of ascertaining the rights between the parties may need to have the advocate for the model litigant address the critical questions that ought to be addressed even though the unrepresented litigant did not do so. That may be a difficult thing to explain to some clients but it may be no more than the necessary consequence of the advocate lawyer's duty to assist the court in the court's discharge of its own functions in the administration of justice. The outcome, however, will be greater confidence in the correctness of the decision and, of course, in the administration of justice as a whole.

Mechanical Helpfulness

Some aspects of the most effective advocacy can be surprisingly mundane and mechanical. Providing for the decision maker the mechanical resources needed for the decision maker's primary task is an often underrated, but powerful, tool of advocacy. In many cases, a judge will be left at the end of a trial with a mass of facts, evidence, law and argument found in many different places which will take time and effort to assemble, sift, digest and bring together in a final product of a decision with reasons. An effective advocate could usefully stop to consider how the judge's task, when undertaken in chambers, can be assisted in a way that is likely to favour the client's case. Written submissions frequently fail to provide an effective tool for continuing advocacy of a client's case after the hearing has concluded in court. A judge will typically have notes, pleadings, written evidence, transcript, exhibits,

submissions, counter submissions, books of authorities and sundry other materials located in disparate places over very many pages. The evidence and submissions on even a small point of a case can be located in so many places that some may be difficult to find and may easily be overlooked. The evidence on the one point may exist in many witness statements, many documents tendered in evidence (especially in the days of emails), and the transcript of numerous witnesses each with potential references in the transcript of the evidence in chief, the cross examination and any re-examination. How to find all this, on every point, usually relies upon a judge's memory and more or less helpful notes made by the judge during the hearing.

Written submissions frequently fail to provide an ongoing reference point from which the judge can begin, and resume, consideration of a case guided by specific references to establish particular facts or law. Frequently written submissions are little more than a high level discussion of the case for a client without providing real and meaningful assistance in the judge's task of deciding and producing a reasoned decision. The provision of a document which the judge "cannot do without" when writing a decision would be a powerful form of advocacy. It would provide a constant and ongoing influence upon how the judge will think when the hearing has completed and the difficult task has commenced of deciding and providing reasons for the decision.

An effective advocate could usefully look upon the judge, or other decision maker, as a consumer of the advocate's professional services. That might cause the advocate to ask a simple question, namely, what does the consumer of my services need for that consumer to produce the outcome that I want to secure? If the consumer were a home builder and the supplier were an architect, the latter would need to provide

detailed plans and materials to enable the home builder to contract. The fundamental position of a judge is that of a decision maker having to sift, find, order and evaluate evidence, law and submissions. The judge could use assistance in identifying as precisely as possible what needs to be decided (both facts and law) and where to find the matters (both evidence and law) upon which those decisions need to be made. A powerful and useful tool for an advocate to give a judge is a workable document identifying what needs to be decided with detailed references to where the judge may find the matters upon which those decisions will depend.

Written Advocacy

The modern practitioner now needs to spend more time being conscious of, and considering, the importance of advocacy in writing. Written advocacy has always been an important part of legal practice. Its increased importance in the modern world, and in to the future, comes from the ever greater reliance by decision makers on what is provided to them in writing. Applications for special leave to appeal to the High Court are particularly dependent upon the written application. The advocates get little time for oral submission and the judges will have considered and analysed the written document well before the oral hearing of an application. In that, and in increasingly more instances, it will be the written document which needs to have the desired effect rather than rely primarily on what may be said orally.

Written advocacy has always been a fundamental aspect of a lawyer's advocacy skills in the contexts of legal practice other than in court. A letter of demand sent on behalf of a client should, ideally, persuade the recipient to comply with the demand. A client instructing a lawyer to write a letter of demand is not doing so to further the lawyer's desire to write letters but, rather, to secure an outcome. The lawyer's letter

should focus upon achieving that object. Sometimes it does. When it does it may be because the letter has carefully explained the demand, has given the client's basis for the demand, and has persuaded the recipient of the letter that it is right, or at least better, to comply with the demand rather than to continue with an alternative course.

The importance of written advocacy can probably be found in every aspect of a lawyer's written professional practice. A statement of claim commencing a court proceeding may have more or less power depending upon how it is drafted. A pleading must comply with particular rules of court and a statement of claim must, of course, disclose a cause of action. However a focus upon the rules of pleadings can sometimes obscure their role as persuasive documents. A statement of claim can so clearly and well put a client's case that a defence to it becomes difficult if not impossible. It may enable a judge to see immediately a plaintiff's claim and the difficulties which the defendant must deal with to meet or answer the claim. The clarity with which the statement of claim identifies the issues will enable disputes to be resolved about discovery and other interlocutory disputes.

The way in which something is expressed²⁶ will have an impact on its reader: impact is unavoidable! It may be positive or it may be negative; it may be persuasive or it may be dissuasive; it may be effective to achieve an objective or it may be ineffective for that end; but the way in which content is conveyed will have some impact upon how the content is received by its reader. Shocking facts can be made bland by their expression, just as less striking events can assume a greater significance by

²⁶ Whether oral or written; whether in the body of the text or, as here, in a distracting footnote.

carefully crafted expression.²⁷ The task of written advocacy and effective writing is in part that of ensuring that the expression of something (facts, submissions, advice, letters of demand, etc) has the intended impact.

The use of facts can be an important technique in legal writing and can be used with compelling effect. An example of a persuasive legal submission given by an American writer weaves together powerful facts and legal issues to suggest the conclusion sought by the advocate:

Leonard Slocum Jr., a mentally retarded minor whose father has physically abused him, has become the state's ward and begun a habilitation program that has helped him demonstrably. His father, Slocum Sr., petitioned to become Leonard Jr.'s guardian, but the court found him unfit because of the abuse and because he has sired four illegitimate children by a 25 year old mentally retarded woman – formerly his ward. Did the court abuse its discretion?²⁸

The aim in the case was to uphold the exercise of a court's discretion not to award the guardianship of a child to his natural father. The question on appeal could have been posed in such, more general, and less persuasive, terms: "Did the court erroneously exercise its discretion by refusing to award guardianship to the biological father of a child in need of care?" The facts stated in that way would have lacked the power and persuasion of those selected and expressed by the author. The facts chosen, and the way they were expressed, carried the reader in the direction and to

²⁷ Some readers may recall the Monty Python sketch in which the words "nothing happened" assumed the power of mystery and drama when accompanied by strong dramatic music, mysterious looking figures and a prelude of suspense; see "The Day Nothing Happened" Monty Python at <http://www.website.de/The%20Day%20Nothing%20Happened.htm>; "The Adventures of Ralph Mellinsh" in Monty Python *Free Record Given Away with the Monty Python Matching Tie and Handkerchief* (Audio LP Record or CD), 1975.

the conclusion the writer wanted.

Facts can be powerful, but they need careful selection, fair treatment and careful expression. Overstating facts by exaggeration can defeat the purpose sought. Overstatement by inserting too many facts can distract from the essential points that matter. The misstatement of facts or the omission of material facts can also damage the intended outcome. Weaving the facts into the legal issues and submissions may sometimes occur as if by chance, but it is a skill that can be developed by practice, thought and dedication.

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²⁸ Bryan A Garner, *The Winning Brief* (2nd ed, 2004) 97.