

Advocacy

**Public Defenders Conference
2017**

Introduction

- The role and function of an advocate.
- The purpose of presentation and the art of persuasion.
- Cross examination.
- Closing addresses.

Good advocate = good day



Bad advocate = bad day



Role and Function of an advocate

- The time you have available to persuade is necessarily going to be short.
- You will need to get to the point.
- Being a passionate advocate can be persuasive but exercise good judgment.



DIVX
X264

Role and Function of an advocate

What are the basics.

1. Know the tribunal and its powers.
2. Know your factual material.
3. Apply the law to the facts.

Know the law that applies to the facts.

Sometimes “it’s the vibe” isn’t good enough.



Role and Function of an advocate

4. Know the vulnerabilities of your case.
5. Know the points that may help you.
6. Know what are the possibilities.
7. Know what you want and how to ask for it.

The purpose of presentation and art of persuasion

- As an advocate your job is to persuade.
- The ability to communicate is a prerequisite.
- It is a mistake to think of yourself simply as a presenter.
- Lawyers regularly stand up and present evidence and reports. Their submissions then describe the material – they then sit down. This is not advocacy.

The purpose of presentation and art of persuasion

- You need to be aware of barriers to persuasion.
- They may include inappropriate mannerisms or a style of advocacy.

The purpose of presentation and art of persuasion



"I've told you not to do that to the jury!"

The purpose of presentation and art of persuasion

- The most significant barrier to persuasion could be your reputation.
- It is *absolutely imperative* that you retain a good reputation.
- It is difficult to persuade a person who starts by not trusting anything you say.

The purpose of presentation and art of persuasion

- It will do you good to have a reputation as a person who fights hard for your clients.
- You can afford to have a reputation as a well meaning but average advocate.
- You cannot afford to have a reputation as a cheat or a fool.

The purpose of presentation and art of persuasion

- You have to have realistic expectations of what the tribunal can do. (Of course, that means being properly prepared).
- Asking a tribunal for a fantasy result will simply antagonise the tribunal.
- You have to communicate realistic expectations to the client. (Bring your toothbrush).
- The client has to be prepared for what may happen as well as what you hope will happen.

It's about the client, not you...

- I am what's on show here.
- I do like talking and I'll just keep doing it.
- I didn't realise you had 18 more cases.
- On day 3 – I accept my original estimate of 60 minutes may have been optimistic.



“It’s true that you lost and are destitute...but think how much richer you are for having heard my submissions.”

Narrative. Narrative. Narrative.

Cross examination

1. Preparation:

- a) General knowledge
- b) Specific knowledge

Cross examination

2. Consider no cross examination
3. Develop a trial plan or case theory
4. Factual analysis
5. Relate the cross-examination to your closing address

Cross examination

6. Panning for gold

7. Pinning the witness down

Cross examination

8. Identifying inconsistencies

9. DO NOT repeat evidence in chief

10. Do not fight losing battles

11. Do not question without knowing the answer

Cross examination

12. Do not ask the one question too many

Q. Yes, and it's the case is it not that Jason XXXX always denied that he'd shot anybody. Isn't that the case?

A. He denies he's ever done anything wrong. He never does anything wrong. It's never him: it's always someone else.

Q. Thank you.

A. Yes, clearly, your Honour. That's why we're still here. That's why he hasn't pleaded guilty. That's why I'm sitting here and he's dragging me under the bus. Yes, that's why I'm – yes, he's ... (not transcribable)... he could have thought about his kids; could have took a plea, you know, so you get a discounted sentence but not, sit there and say, yeah, you're not guilty. I drove you insane. I know that.

Cross examination

13. Do not argue with the witness

14. Control the witness

15. Sustain the momentum

16. End on a high note

Cross examination of Certain Witnesses

- Cross examination of child complainants.
- Pre-recorded cross examination.
- The witness intermediary's report.

Cross examination of Expert Witnesses



Cross examination of Expert Witnesses

- Validation; limitations and errors; verification; cognitive bias and contextual effects.
- Use of authoritative reports eg The US National Academy of Science Report; 2011 Report of the Fingerprint Inquiry in Scotland; Report of US President's Council of Advisors on Science and Technology (P-Cast)

Closing address

- People are more amenable to persuasion if they respect the person arguing the point.
- Be very familiar with the evidence because you can be assured the jury is on top of it.
- Clarity and precision – start with telling the jury the structure of your address.

Closing address

- Body language.
- Rhetorical devices and the use of communication aids to make the arguments memorable (charts/exhibits).
- Demonstrate how dangerous to objective decision making is the power of suggestion.
- Leave them with an alternative narrative.

List of resources and tools

- Legislation
 - Section 159 Criminal Procedure Act 1986
 - Section 160 Criminal Procedure Act 1986
 - Sections 41, 42, 43, 44, 45, 46 Evidence Act

List of resources and tools

- Cases

- *R v MM* [2004] 145 A Crim R 148
- *R v Rich* (1998) 102 A Crim R 165
- *R v Gilbert* (NSWCCA, 10 December 1998, unreported)
- *R v Dennis* [1999] NSWCCA 23
- *Picker v R* [2002] NSWCCA 78
- *Aslett v R* [2006] NSWCCA 49
- *R v Morgan* [2000] NSWCCA 7

List of resources and tools

- Articles/Videos
 - Irving Younger's 10 Commandments of Cross Examination
 - How to Cross-Examine Forensic Scientists: A Guide for Lawyers: 176 (2014) 39 Australian Bar Review