

Appeals to the District Court Children's Legal Service Conference

15 August 2015

**Craig Smith SC
Deputy Senior Public Defender**

Some Common Themes

- Time constraints on the Judge.
- A presumption the Judge has unlimited time to consider the issues.
- Please be concise.
- Short written submissions: One page? Dot Points? Page references?
- Tell the Judge what to look for in the material.
- Summarise long transcripts?

- Tell them the issue: opening?
- Focus on real issues.
- Call the client when you can.
- On a severity appeal: if there is good news since sentence call the client to tell it.
- Have the principles of sentence (generally and for children) ‘under your belt’.
- Remind the Judge of the legislative provisions concerning children.
- Where immaturity, present positive evidence of it. Don't just say it.

- Set the framework for the Judge.
- Fit the evidence into that framework.
- Present a positive case.
- Ensure all the exhibits are available and not missing.
- Ensure all transcript is ready and available for the hearing.
- Let people know in advance if an appeal is to be withdrawn or adjourned.
- Ensure notices of motion and affidavits are filed and served concerning fresh evidence. Informal applications to call fresh evidence are problematic and concerning.
- **A continuing theme: concise, structure and 'help me'.**

Remember one thing only:

Think about how the listener will receive your information.

My Structure

1. The Fundamental Question
2. Preparation
3. Structure (and more structure)
4. Primacy
5. Case Theory
6. If you are asked a question answer it
7. Relationship with the listener
 - a. Story telling
 - b. Argument/Submissions
 - c. Body language
 - d. Use of prompts (notes)
8. Opening/Framework
9. Preparation – preparation for performance

1. The Fundamental Question

- What do I want?
- You cannot present an effective appeal without knowing what it is you are actually asking for.
- And why you are asking for it.
- Precision as to both questions. Write out in one paragraph the answers to those questions.

2. Preparation and Preparation for Performance

- Preparation:
 - Knowing everything: law, procedure and tribunal.
- Preparation for performance:
 - What you finally say in your appeal should be seen to be the product of your preparation and not the preparation itself.
- When you stand up not having to refer to anything to present your appeal?

3. Structure

Have a structure for everything

- What will my structure be?
- Sometimes it is useful to tell the listener, or the witness you are questioning, what the structure is.

There are 5 points...

- Will my structure be the same for a severity appeal and an 'interests of justice' argument?

3. Structure

- A very simple structure for a plea which can be adapted to a severity appeal is as follows:
 - Penalty – what do I want?
 - Objective circumstances.
 - Technical matters.
 - Subjective/personal matters.
 - Conclusion – one sentence to wrap it up.

3. Structure

➤ O/W – opening words

➤ Objective circumstances

- Injuries to victim
- Provocation
- Mental health – contributing to offence
- Spontaneous – little planning

➤ Technical matters

- PG – early or late
- Section 21A
- Time in custody
- Mental Health – general deterrence
- Extra-curial punishment

➤ Personal matters

- 14
- Lives at home with parents – support?
- Not associating with same people
- Mental health – custody
- Future

➤ Final submission

- i.e. no full-time imprisonment

Question still remains – how am I going to present this?

3. Structure

Evidence in Chief – sentence appeals

- **Details**
- **Reports**
- **Background**
- **Chronology – leading up to offence**
- **Sorry**
- **Chronology – post-offence**
- **Future**

3. Structure

➤ **Details**

- Name, age, centre/address

➤ **Reports**

- JJR
- Psychological/psychiatric report
- Letter

➤ **Background**

- Might not need to add anything to the reports
- Something important to highlight – mental health?

➤ **Chronology – leading up to offence**

- Period leading up to offence
- Minutes, days and months leading up to offence
- Offence

3. Structure

➤ **Sorry**

- Victim
- Victim, family and community
- Yourself?

➤ **Chronology – post-offence**

- Arrest and charging
- Custody (e.g. protection, visits and incidents)

➤ **Future**

- Plans in and out of custody

3. Structure

A way you might think about legal arguments:

- What do you want? Tell the Magistrate/Judge clearly.
- Give the Bench the material to decide the point.
- That material may be a combination of statements, oral evidence and concessions.
- Make it easy or easier for the Judge.

4. Primacy

- Urgency or priority.
- Directing attention.
- Identification of the specific result contended
(when receiver is most receptive?)

Primacy

1.

2.

3.

4.

3.

2.

1.

4.

5. Ensure you have a case theory

- What is your case theory?
- Practical example: Identification or consent.
Reliability or falsity. Reduced gaol time or no gaol.
- It is best to have only one.
- What are the pieces of information or propositions that support that theory?

6. If you are asked a question answer it

- If at any stage you're asked a question answer it immediately.
- If you don't answer it you may as well sit down because the Judge will not listen to you.
- If you can't for a (very) good reason answer the question immediately (e.g. because you want to take the bench to something else) then politely tell the Judge that. This would be exceptional.

7. Relationship with the Listener

- a. Story telling**
- b. Argument/submissions**
- c. Body language**
- d. Use of prompts (notes)**

7. Relationship With the Listener

Body Language

- Engaging
- Look (head up)
- Listen
- It is okay to pause. It is okay to ask for sometime.

Use of prompts (notes)

- Use of notes – don't read as they should prompt memory
- Use of notes and relationship to eye contact
- Organisation at the Bar table
- Example – references and tabbing
- One page hopefully

7. Relationship With the Listener

Story telling

- Setting a framework
- Use of summaries
- Open on the issue
- Establish a positive framework early

Argument / Submissions

- Because
- Fact to be accepted and accepted “because”
- Succinct
- Dealing with the weak areas – concessions
- Structure: 5 points?

8. Openings/Framework

Open and admit matters:

- You define what the hearing will really concentrate on.
- One sentence is sometimes enough: “the issue in this case is identification”.
- Simple and clear.
- Admit matters, and accept material, that is not in dispute.

9. Prepare for your Performance

- Think about actually standing up in court.
- What that means is that when you stand up you don't just read out the pieces of paper you have written on as part of your preparation.
- How will I present it. Practise it!

9. Preparation and Performance

First and Last Sentence

- How many of us can actually say that when we were last in Court we knew the first sentence that we would use and the last sentence that we would use.
- Do we start by saying “I am instructed that”, “this is an appeal and I think its matter number” or do we try and be more creative and in a few words “grab” the attention of the bench?
- The same can be said for your final words.
- Write down the actual words.

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