Introductory lecture, Student Elective in Law Number 628 – Advocacy by the Honourable Justice Underwood AC, Governor of Tasmania, University of Tasmania, Monday 6th January 2014

It is my pleasure to welcome you all to, and to deliver the first lecture in 2013 Student Elective in Law Number 628 – Advocacy. It's some time now since I addressed a group of law students, but I have to say that to be talking to law students today puts me in mind of the time when I was Chief Justice and was asked to speak at a dinner for a newly formed group of law students. Actually, I thought my talk went down quite well. People laughed at the right places and nodded wisely at the serious message that I wanted to convey and clapped enthusiastically at the end. On the way out the President, who was escorting me to the door, asked me how much my fee was. I asked him what he meant and he said "the fee for the talk". I was taken aback and looked horrified. I drew myself up to my pompous best and lectured him that Judges don't ask for fees to deliver speeches, especially to law students, as it is part of a judicial officer's duty to do that sort of thing etc. etc. and he said "Oh that's good, because we don't have much money and we're saving up to get someone really good to speak next year."

According to the University Handbook, Student Elective in Law Number 628 – Advocacy "provides a theoretical framework to enable an understanding of the practical skills of advocacy." I am not quite sure that I understand that, for advocacy is the art of persuasion and that is, in essence, a practical operation. And everybody has their own style of being persuasive. Indeed, for many years it was thought that it was not possible to teach advocacy; you either had it or you didn't but "for some time now it has been accepted that formal training in advocacy, with appropriate emphasis on the practical nature

of the subject has an important role in legal education and continuing development."[1]

Our adversarial curial trial system relies on advocacy to function. Neither the judge nor the jury play any inquisitive role in the curial battle. The advocates or counsel are responsible for the conduct of the litigation – what evidence will be called and what evidence will be challenged, and how that evidence is called and is challenged. The jury's function is to decide the facts from the evidence that they hear and the judge's role is to preside over the conduct of the trial and to determine and apply the law. This system depends on each party presenting its best case in the best way. Its critics say that it is an unfair system because the wealthy can engage the top persuaders or counsel and therefore have an advantage and there is, of course, some truth in that, but I have to say that in my experience of some 25 years at the Bar and a like period on the Bench, I have only on one or two occasions felt uneasy about the outcome of a trial.

The practice of advocacy at the Bar must be carried out in accordance with the rules of procedure established by the Courts and in accordance with some fundamental ethical rules which are binding on counsel and even though, as I have said, everybody has their own style of being persuasive, there are some principles of persuasion that are common to everybody. Here is an example: How the question is asked will often determine the answer. For example, if you ask a witness how *dark* was it, the answer will likely be different from his or her answer to the question of how *light* was it? Similarly, the question may be put, "how far away from you was the man when you first saw him?" or it might be put "how close to you was the man when you first

[1] Former Chief Justice of the High Court of Australia Murray Gleeson AC, writing the foreword to the Advocacy Manual by Professor the Hon George Hampel AM, QC, IBSN: 9780646-494418 Australian Advocacy Institute 2008.

saw him?" No doubt, as the course develops and you break into groups and practice advocacy on scenarios, you will hear more of that sort of thing but I think my brief today is to talk about some fundamental ethical rules that are binding on counsel.

Before I embark on that, I would just like to observe that I gained immense satisfaction from my career as a barrister. It was a busy life and, unlike many jobs, every day involved a contest against an opponent. Practice at the Bar provided me with an almost non-stop adrenalin rush; the thrill of a win on one day and the down of a loss on the next, with the accompanying introspection as to what I could have done better. It involved skill and human drama, as well as an astonishing insight into the lives of others and, at the same time, it resulted in the development of strong friendships with, and support from, others who were in the same profession. The camaraderie of the Bar is a powerful thing.

Honesty is a fundamental ethical rule for those who practise at the Bar. Integrity is essential. The system depends on it. Barristers who are not totally frank and truthful with the Court will be harshly dealt with by the system and will be likely to be struck off the roll. "A dishonest advocate has no role in the administration of justice. Perfidy, deception, chicanery, mendacity, dishonesty, and corruption have no part in the administration of justice but are rather brought to account before the law. The court advocate's armour of integrity is at the very heart of the art. Truth in advocacy is essential. Frankness and candour are inherent in the coin of truth in advocacy. The advocate must adhere to this tenet of integrity and any straying from the path of integrity carries the full might of the wrath of the law. Those who

deliberately mislead will be struck off the role of practitioners – they are not fit to be officers of the court."[2]

Integrity of counsel leads to the next fundamental ethical rule, and that is that counsel's primary duty is to the Court. When you are admitted to practice, you are admitted as an officer of the Court. The duty of an officer of the Court was famously described this way by Lord Reid of the House of Lords in *Rondel v Worsley*[3]:

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not with-hold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him."[4]

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[2] The Art of Advocacy by Alexander Whistler SC V http://www.sevenwentworth.com.au/ws-content/uploads/The_Art_of_Advocacy.pdf accessed 7th December 2013.

[3] [1969] AC 227

[4] For some examples of this duty see "The Duty Owed to the Court – Sometimes Forgotten." A speech delivered by the Hon Marilyn Warren AC, at the Judicial Conference of Australia Colloquium Melbourne 9th October 2009. https://assets.justice.vic.gov.au/scv/resources/441d48cc-9b9b-46ac-b74c-6bccba6c2bab/jca+colloquium+keynote_final.pdf accessed 7th December 2013.

If there is a tension between the duty to the client and the duty to the Court, the duty to the court is always paramount. For example:

- If your client asks you to call some evidence that you know is false then you must refuse to do so and, if necessary, refuse to act for the client.
- If there is a case that is relevant to the legal issues in the trial then you must refer the Court to it, even if it is against your client's interests. You can only do your best to distinguish it from the case at hand – you cannot hide it from the Court.
- When addressing the jury or the judge, you must not misstate the evidence that is about to be, or that has been, given.
- You must not put forward an argument that you know has not a reasonable prospect of being accepted.
- If your client instructs you to give a witness a hard time, or tells you to embarrass the witness, you should not do so.
- You must always be courteous and polite.
- You must not object to the admission of evidence unless there are good grounds to do so.
- If opposing counsel stands up to make an objection to your question or submission, you must sit down.
- When you start out in practice, you are often asked 'how can you defend someone whom you know is guilty?' Well, of course, unless you were with your client when he or she committed the crime charged, or unless the client tells you

> that he or she is guilty, you can't *know* that the client is guilty.

If, at any stage in a criminal case, the accused admits that he or she is guilty, you can continue to represent your client to "put the prosecution to proof", but it would be serious misconduct if in the course of doing that, you put questions or made submissions to the effect, or on the basis that, your client did not commit the crime charged. For example, it would be permissible to test the reliability of the evidence given by a witness who claims to identify your client leaving the scene of the crime by asking how far away the witness was or what was the lighting in the area? You could even put that he/she could not see the person very clearly, but to put that the witness did not see, or was mistaken that he/she saw your client, is to step into impermissible territory because it is inconsistent with your instructions and misleading the Court.

The duty that counsel owes to the client is not to win the case. It is not to present to the Court whatever the clients wants counsel to present to the Court. The duty owed by counsel to the client is to present his or her case as best and as persuasively as counsel is able, consistent with the duty owed by counsel to the Court to do justice between the parties according to law.

There is another rule that is related to the duty to the Court rule, and that is the so-called 'cab rank rule'. It was developed during the time of Charles I in the mid-17th century and it is that counsel are obliged to accept a brief to represent a client in Court, provided the client can pay a reasonable fee, the brief is within that counsel's area of expertise and competence, and counsel has no conflict of interest. Counsel are like cab drivers, waiting on the rank ready to take anyone who comes along. This ethical rule was developed because it was recognised that people were entitled to legal representation in

Court no matter how unpopular the cause might be. [Describe the events surrounding my acceptance of a brief for the Commonwealth in the Tasmanian Dams Case]

Although, in the practice of their profession, counsel are engaged in battle with other counsel on a daily basis, there are a set of important ethical principles that are imposed on the counsel with respect to the way they act towards each other, in addition to those ethical rules that govern counsel's duty to the Court.

- Counsel must treat each other courteously and with respect.
- If counsel gives another counsel an undertaking, it must be adhered to.
- Senior counsel are obliged to assist junior counsel when asked to do so, and provided that giving that assistance does not conflict with counsel's duty to his or her client.
- Generally speaking, counsel are obliged to cooperate with each other, although not if that cooperation is in conflict with the duty to the client. A good example of the way in which counsel should treat each other in Court arises if, say, counsel is making submissions on the law and cannot find the passage in a cited authority to which he or she wants to refer the judge. If opposing counsel has the case, and can find the passage, he or she should hand the book over the table to opposing counsel so that the reference can be made.

So, that's the all-important background, or culture, in which curial advocates practise their noble profession, and during the course of 2013 Student Elective in Law Number 628 – Advocacy you will learn about the art of leading evidence, how to avoid a leading question, how to cross-examine off a

document and case concepts, but for now I want to say a word about the nuts and bolts of oral persuasion – advocacy.

The saying that 'advocacy is 90% perspiration and 10% inspiration' is absolutely right. Preparation before going into Court is so important. Television series that show off-the-cuff, brilliant court room performances are not how it is.

- You must get a detailed brief from your client and reduce it to writing in a useful, usually chronological, way.
- You must get a detailed brief from all the witnesses and also reduce it to writing in a useful, usually chronological, way.
- You must discover and inspect all relevant documents and, if you are going to adduce some in evidence, make a copy of them to go in your brief.
- In some cases you should visit the scene because it is not possible to really understand what the witnesses are saying about a murder scene or an accident scene etc. unless you have been there yourself.
- You must shape a very clear view of what order or orders of the Court your instructions require you to seek; viz: not guilty (or guilty, if you are prosecuting); an injunction restraining the defendant from trespassing, or a judgment of dismissal of the claim with costs if you are in the other side; or perhaps a judgment for $150,000 and costs etc. etc. - every case is different.
- You must then study and become familiar with the law relevant to the issues that may arise before you can obtain the orders that you seek.

- By now you should be in agreement with me that preparation is all important.
- You must know the law of evidence. I have often said that the barrister who goes into Court without knowing the law of evidence is like the carpenter who goes onto the building site without his tools. Both will be useless. To get the facts before the judge or the jury, you have to know the rules by which the Court permits proof of facts. I can't emphasise this aspect of preparation too much.
- Now that you are familiar with the facts and the law in the case, it is time to stop and think about your case and develop a case concept. That is, think about your case in conceptual terms. Does it all fit together? Is it all consistent with the client's instructions? Is it logical? Is it credible? - It is sometimes convenient to try a give your case a headline which will serve to keep you on the main track as the evidence in support of your client's case rolls out. It might be "this is a case of mistaken identity" or this is "a claim for money to right a grievous wrong suffered by the plaintiff at the hands of a negligent employer."
- You are not ready for Court yet. Before then, you have to go through your opposition's case in much the same way as you went through your client's case, so that you can identify its strengths and its weaknesses before you start. Identify the evidence that is in dispute. Identify the evidence that your client can explain away. What explanation can be offered to refute a part of the opposition case and so on.
- You are nearly, but not quite, ready for Court. Before you go, you have to do two things. The first is to write your closing

address! Now I know that many people say 'how can you do that when the evidence hasn't been heard?' The answer is that you write it to clearly identify the evidence that must be accepted before your client will obtain the orders that he or she seeks, and to clearly identify the law that must be found in order to succeed. If you do this, you have written not only the closing address, but also the road map that will get you to the right end. You may need to modify it after all the evidence and argument is finished, but it will give you that clear pathway to follow.

- Last, you must now organise your matter in files and in an order that will enable you to find anything you want - a letter, a case you want to cite, a witness statement – in a nano-second. You cannot concentrate on your client's pathway unless you have properly organised your material.
- Get to court early. Set up your materials at the Bar Table. [tell them about counsel rushing in and the 'vomiting file']. Show the witnesses the Court and where they will stand etc. It is important that you are in charge of your case and that everybody in the Court knows it.

Lastly from me, a few general words about advocacy.

- Keep it simple. For some strange reason, all too often, when counsel arrive in Court they adopt a convoluted style of language that involves complex sentences and long words. I don't know why this happens, but the answer is don't do it. Keep it simple. Whether you are asking a question or making a

submission, use short sentences and simple words. Let me give you an example:

The following are excerpts from a transcript of proceedings in the Court of Petty Sessions on a defended complaint for unlawful damage to property. In Tasmania wild ducks are protected birds except for a very limited period each year – the duck hunting season. There is a group of people who believe that wild ducks should be completely protected and as part of a campaign to achieve that state of affairs the objectors try and frighten the ducks off at favourite spots and stand in the water and be at risk of a duck shooters shot. The defendant in this case was the campaign director of the Coalition against Duck Shooting, Mr Levy and he was charge with damaging a duck shooter's hide. [explain]

The prosecutor (to complainant who built the hide): For what reason were you at Moulting Lagoon?.....I went there to shoot ducks.

And what do you use to aid yourself in shooting ducks?.....Could you repeat that please?

What things aid you when shooting ducks?.....Well, I use a firearm!!!!!

In the same case the cross examiner's questions of the complainant are hilarious. Here is a sample:

And also you only saw Mr Levy for a very brief period of time?.....No.

For a long period of time?.....Yep.

How long?.....Well I saw him for the total time that I was down there.

Well I'm talking about the time that you first saw him?.....I was with Mr Levy for approximately---------

No, I'm talking about the time you first saw him. How long did you see him for at the time you first saw him?.....How long did I see him for?

When you first spotted him? ..... Well I was seeing him the whole time. There wasn't a ----

So your evidence is that when you first spotted him you kept him under observation the whole time, is that correct? ..... By the time I was inside the hide ----

- Make eye contact with the person to whom you are talking, be it the judge or the jury or the witness. You will never be persuasive unless you make, and keep up, eye contact and also, if you don't make and keep eye contact, you will not be able to read the all-important body language. This will often give you a hint as to whether your submission to the judge is going over pretty well, or not well at all, Similarly, eye contact will give you a chance to see whether the witness is hiding something or being evasive, so although you may have notes to follow on your road map, don't look at those when you are speaking. Stand still. To walk about when asking questions or making a submission is distracting; distracting from the point of the question or submission. It's the same if you fiddle with a pen or constantly fiddle with your ear or, worse, frequently repeat a

pet phrase. Don't argue with a witness. Remember that you are the one asking questions and avoid arguing with a witness. This can happen so easily by you ceasing to ask complete questions. [eg, and then you walked out of the door? No I didn't. But you felt guilty didn't you? Why should I have? Because you knew you shouldn't walk out. Why shouldn't I have - she was the one that started it wasn't she? And before you know it, you are answering the witness's questions. Most effective is a pause and then repeat the question verbatim – After you put the knife down you walked out of the door didn't you? …….why would I do that? ….repeat.

- Listen. This is a most important rule. It especially applies to junior counsel who are afraid that ideas for questions, especially in cross examination, will dry up – although they shouldn't if you have the road map to the forefront of the mind. If you don't listen to the answers and monitor the body language, you will often miss pressing home a point that was open to you. [eg you then walked out of the door, didn't you? No. And when you got outside you saw her running away? What did you see? I didn't see nothing What do you mean you didn't see nothing (with heavy sarcasm) How could I - I didn't go outside. Egg on counsel's face. Loses the power of persuasion
- That example serves to emphasise two things the importance of preparation so that you know your case inside out and backwards and frontwards and secondly although you have your road map it is no good preparing a list of questions in XXN and just asking them regardless of what answers you receive.

- Every question should be directed to a step along your client's road map. Every question must be relevant. What is relevant? Evidence Act s55(1) relevant evidence is "evidence that, if it were accepted, could rationally affect, directly or indirectly, the assessment of the probability of the existence of ***a fact in issue*** in the proceedings" – explain what is a fact in issue – civil proceedings the parties decide by their pleadings what's in issue and criminal proceedings the plea to the charge defines the issues – tell Hodgman story about the weapon being found but had no finger prints on it and how he questioned what tests they did and where did they look and his famous book etc. because - return to the definition.
- It's the same old persuasion that you would use to convince your friend to go to the pub.

Having said all that to you, it is perhaps appropriate to return to the start of this lecture (don't look so worried!) and refer to a passage taken from a judgment of the Ontario Court of Appeal in a case called *R v White* in which the skills and competence of counsel in a criminal trial were under consideration and the issue was incompetence or tactical decision later judged unwise or imprudent. The Court said:

> "The art of advocacy yields few, if any, absolute rules. It is a highly individualised art. What proves effective for one counsel may be ineffective for another. Most cases, therefore, offer defence counsel a wide scope for the exercise of reasonable skill and judgment. Appellate judges, many of them advocates in their own practices, should not be too quick to conclude that a

trial lawyer's performance was deficient because they would have conducted the defence differently."[5]

Thank you for listening to me and good luck with 2013 Student Elective in Law Number 628 – Advocacy and a career practising at the Bar.

[5] Cited in Nudd v R (2006) 80 ALJR 614.