Advocacy inside and outside the courtroom

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We are on land once known as Meanjin, the traditional place of the Turrbal and Jagera people. For tens of thousands of years before European contact, clan members gathered to share knowledge and wisdom. I acknowledge their elders past and present as we continue that ancient tradition tonight.

And what a pleasure to be with so many clever, good-hearted public spirited young lawyers, keen to improve their skills in the interests of their clients, their profession and the community.

Lawyers tend to associate advocacy with the adversarial pleading and arguing of their clients' cases in courts or tribunals, through both written and oral submissions. Advocacy of this type is fundamental to the independent role of the legal profession. Together with an independent judiciary, the lawyer advocate of this kind, in Queensland often but not invariably a barrister, ensures the rule of law is upheld and that all litigants, no matter how unpopular or disadvantaged, can exercise their legal rights and have their freedoms protected. This advocacy ensures that the third arm of government, the courts, when necessary, can curtail abuses of power by the legislature and executive.

It was courtroom advocacy which Chief Justice Holmes and President Kingham addressed in earlier lectures in this series. This evening I will, of course, again discuss adversarial courtroom advocacy but I will also discuss legal advocacy outside the courtroom and put forward eleven matters which I consider will assist in providing effective legal advocacy, whether in or out of court.

The distinction between courtroom and other types of legal advocacy is of importance, as the High Court recognised in determining the extent and scope of advocates' immunity in *Giannarelli v Wraith* (1988) 165 CLR 543; *D'Orta-Elkenaike v Victorian Legal Aid* (2005) 223 CLR 1; and most recently *Attwells & Anor v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16. This was the topic of the Chief Justice's inaugural address in this lecture series.

Adversarial courtroom advocacy is of seminal importance to the legal profession and the community. It is central to the legal profession's institutional role in a democracy, ensuring access to the rule of law. I think you all know how passionate I am about that! But legal advocacy outside the courtroom is also an essential part of the modern Queensland lawyer's work.

Advocacy is defined in the Macquarie Dictionary not only as pleading for a cause in a court or tribunal but also as supporting or recommending a cause; positive espousal of a cause.

These days only a tiny percentage of Queensland legal disputes are finally determined in courts or tribunals. Lawyers settle most of their clients' disputes through negotiation, mediation, taking a collaborative, holistic, problem solving approach, whilst being flexible and responsive to developing discussions. The best interests of clients, financially and emotionally, mean that solicitors in giving advice are ethically obliged to inform their clients of suitable litigation alternatives.

When acting for clients in alternative dispute resolution, lawyers are no less of an advocate for their clients as when appearing for them in court, although the style of advocacy is usually less adversarial. The bottom line is that lawyers acting for clients in alternative dispute resolution will be helping them present their best case and will aim to persuade both their clients and the other side to accept an outcome advantageous to their clients.

Lawyers in undertaking their day to day work are almost invariably negotiators, whether writing a letter to their clients' neighbours over a dispute, preparing a submission to the Director of Public Prosecutions to have charges against their clients dropped or replaced with less serious ones, or phoning the other party to a contract to negotiate a later settlement date. In doing so they are also advocates for their clients.

This advocacy role outside the courtroom flows from the lawyer's fundamental duty to act in the client's best interests in all matters in which the lawyer represents the client. That duty is subject only to the lawyer's paramount duty to the court and the administration of justice. It is arguable that this duty extends to the alternative dispute resolution process: see *Legal Services Commissioner v Mullins* [2006] LPT 12 and *Legal Services Commissioner v Garrett* [2009] LPT 12. But there is no doubt that lawyers carrying out their professional duties outside the courtroom in any way whatsoever have a duty to be both honest and courteous.

Even when not acting for clients and working as third party neutrals as arbitrators, mediators or conciliators, lawyers use advocacy skills to persuade one or both parties why a suggested result should be accepted.

And nor are legal advocacy skills limited to court work and negotiations. Lawyers have a responsibility to involve themselves in their professional associations. As we saw in recent times in Queensland, the Bar Association, the Law Society, and senior practitioners are sometimes called on to undertake an important public advocacy role on behalf of the legal profession, explaining to the media and the community the critical importance of the separation of powers and the independence of the judiciary in a democracy. Leaders of the profession must use their finely-honed advocacy skills to defend fundamental legal institutions and principles when they are attacked.

Lawyers should endeavour to participate in Bar Association and Law Society committees within their field of expertise. Through these committees, lawyers often work for reforms to improve the administration of justice or attempt to dissuade the parliament from enacting legislation which would diminish the justice system. This systems advocacy is an important type of advocacy. It focuses on changing the justice system to effect law reform, often for the benefit of a disadvantaged group such as victims of domestic violence, or a community cause such as environmental protection. It is a form of advocacy often undertaken by community legal centres, law reformers, policy lawyers in government or even in-house corporate counsel.

Whilst there are differences between the skills needed for adversarial (inside the courtroom) advocacy and the various types of less or non-adversarial (outside the courtroom) advocacy, there are also many commonalities. It is these I will discuss with you this evening.

My view that legal advocacy is not limited to adversarial advocacy inside the courtroom receives some support from the words used for lawyers in European languages other than English: abagado (male) or abagada (female) in Spanish; avocat (male) or avocate (female) in French; advogado in Portuguese; avvocato in Italian; and advocaat in Dutch. If the Dutch word 'advocaat' sounds familiar, that may be because it is also the name of an egg brandy liqueur, originally the drink of Dutch lawyers. These words for lawyer in languages other than English clearly associate the everyday work of lawyers with advocacy without limiting it to advocacy in the courtroom.

I suggest the following eleven skill sets will make you a more effective modern lawyer advocate for your client or cause, both inside and outside the courtroom.

1. The first is thorough preparation. Great advocates, from the inaugural President of Queensland's Court of Appeal, Tony Fitzgerald QC AC, to the erstwhile Queenslander and renowned High Court barrister, David Jackson QC, in presentations on successful advocacy have emphasised that the first essential ingredient is thorough preparation. This is as true when working up a complex six-month trial in the Supreme Court, as when negotiating an ADR settlement for a client, presiding at a mediation, or preparing a submission for the Bar Association to send to the Attorney on why sections of a proposed Bill are unfair and unwise. Understand what you are seeking to achieve and plan your strategy. Familiarise yourself with all relevant facts, legislation and practice directions. If you are commencing proceedings, be sure the court or tribunal has jurisdiction. It was not unusual in my time in the Court of Appeal to find that a dispute which had started before a minor tribunal and then progressed, over years, through QCAT, its appeal tribunal and ultimately to the Court of Appeal was wrongly instituted in the first place and had to commence all over again. The great professional embarrassment to all concerned, the wasted costs and distress for the client, and the loss of confidence in the legal profession and the justice system could have been avoided by checking at the outset the legislation bestowing jurisdiction. Sound preparation will also

ensure the accuracy of correspondence and written submissions as to the facts and the law, in whatever context, and make them much more difficult to refute or ignore. Careful preparation will mean you will be able in oral submissions to articulately answer the testing questions of the judicial officer at the hearing, or of parties and their lawyers in alternative dispute resolution processes, without embarrassingly lengthy pauses as you ruffle through papers to find answers you should have known.

2. My second suggestion for successful advocacy is KISS and MISS. In arguing for your cause, whether it be a letter to the solicitor of your clients' nemesis, a submission to government about an ill-considered populist legislative change, or written and oral arguments in a complex trial or appeal, I have often urged the adoption of the KISS principle: Keep It Simple and Succinct. Concentrate on your best points and discard those of marginal weight. Justice Pat Keane, a highly successful, effective and brilliant advocate, in a presentation on advocacy whilst still on Queensland's Court of Appeal emphasised that the very best advocates don't just KISS; they MISS. They Make It Simple and Succinct! The measure of great advocates like Keane, Jackson, Fitzgerald, Brett Walker QC and, prior to his appointment as the current Queensland Court of Appeal President, Walter Sofronoff QC, is that they communicate even complex factual scenarios and difficult points of law simply and clearly. Aim as an advocate to give the probably overworked decision maker with a perplexing problem to solve, such a clear, structured and cogent answer that she or he will largely accept and adopt the reasoned solution you have provided.

3. My third essential for successful advocacy is to build and maintain a reputation for unwavering honesty. As a lawyer, you are required to be honest in all your professional dealings. You must never put forward facts or legal arguments you know to be wrong. You should disclose facts or points of law unfavourable to your case or cause. You must be fair and not falsely embellish your case, factually or legally. Lawyers who develop a reputation for being sharp, slippery, or disingenuous lose the trust of their opponents and decision makers. They not only breach their professional obligations but they are ineffective and unsuccessful advocates.

4. My fourth point for successful advocacy is to remember you are an advocate. You are required to be honest and fair but you are not required to be neutral. You are entitled, indeed obliged, to use all methods of persuasion legitimately open to you to assist your client or your cause.

5. My fifth suggestion is to strategically tailor your submissions to the recipient. Flattery, extravagant flourishes and feigned indignation may be appropriate for a media release or a short grab in a press interview but will be unlikely to pass muster with experienced, even cynical judges who were once advocates themselves and know most of the spin-doctor techniques. Judicial officers, lawyers and lay persons alike will be more responsive to arguments which they apprehend as well prepared, reasoned and authentic rather than pompous, rehearsed or feigned.

6. My sixth suggestion for the successful advocate is courtesy, another professional requirement. In persuasively advocating for your client or cause, do not be discourteous to your opponent, even the difficult self-represented one. Do not be discourteous to the judicial officer or mediator, even if he or she does not seem impressed with your case. And, on appeal, do not be discourteous to the judicial officer whose decision is under appeal. Try to avoid becoming argumentative; rather put forward your well prepared submissions in a calm and rational manner.

7. But sometimes advocacy, particularly oral advocacy, requires courage, my seventh point. In hearings before difficult presiding officers it will sometimes take persistence and courage to ensure that you put forward your client's case and your best arguments. In my early days as a young barrister In the Public Defender's Office I appeared for an especially unlikeable man charged with viciously bashing his unfortunate wife in public. There were three eye witness neighbours who all gave evidence of the assault on the defenceless complainant but my client nevertheless insisted on pleading not guilty. The trial was before a notoriously cantankerous judge who, perhaps understandably, had formed a strong view as to where the

merits of the case lay. And they were not with my client! The judge wanted the trial to finish quickly so that he could attend the court's annual conference which had just commenced. On my client's instructions, it was necessary to cross examine the complainant and the witnesses at some length to try and demonstrate their unreliability. It is always a problem when a lawyer must show that four witnesses telling similar stories are all unreliable. The judge impatiently directed me, in the presence of the jury, to stop asking questions of the various witnesses and to 'put my case'. I politely but firmly continued my cross examination of each witness, doing the best I could for my client and his unpromising instructions. And the judge's anger continued to rise. More than once he threatened to 'deal with me' if I did not stop cross examining and 'put my case'. He relentlessly attempted to force me to breach my duty to my client by threatening me with contempt. Fortunately, I made it to the lunchtime adjournment without being 'dealt with'. Over lunch I discussed these events with the then Public Defender, Tony Healy QC. In the afternoon, the Public Defender (now also my defender) returned with me and sat prominently in the well of the court. The cantankerous judge was also a cowardly judge. Thanks to the presence of Tony Healy, the judge said not a word and meekly allowed me to cross-examine appropriately. The prosecution case was a strong one and the client was duly convicted but, thanks to my persistence and the Public Defender's assistance, only after a fair trial. And with the judge's improper behaviour recorded for appeal purposes – whether the client's or mine! Adapting Gilbert and Sullivan's observation about policemen in 'Pirates of Penzance', the advocate's lot is not always a happy one! With experience you will learn when it is prudent to concede points and abandon weak arguments and when it is necessary to persist and courageously, but always politely, maintain them.

8. My eighth piece of advice concerns the development of your argument and dealing with the contrary contentions. Most experienced advocates advise that it is generally better to develop your position in argument before dealing with your opponent's contentions. Whilst doing so, accept frankly and directly the facts and law unfavourable to your case and then explain, if you fairly can, why your position is nevertheless correct. In doing so, I again emphasis that you are an advocate and fairness does not equate with neutrality. Your obligation is to put forward the best arguments legitimately open to you. And try and provide the decision maker with a reasoned answer to the problem she or he must solve.

9. My ninth suggestion relates to written advocacy. If your advocacy is written, revise, refine and edit. Beware the gremlins! You don't want to lose the impact of your carefully researched and prepared work through a crazy 'spell correct' or inadvertent typo.

10. My tenth piece of advice is to stay mentally and physically fit. Being an advocate is hard work and stressful. It can involve terrific mood swings from the ecstatic highs of victory to the depressing episodes of self-doubt when you have the silver medal yet again. Remember, your client can ask no more and is entitled to no less than your professional competent best. You will not be able to give this if you are unwell. Exercise regularly. Take holidays. Mini breaks after a long and demanding matter are a good way of unwinding. Care for your loved ones. Learn to relax and control your anxiety with breathing, yoga or mindfulness techniques. Watch for warning signs of excessive stress or substance abuse and get professional assistance early. Regularly unwind by doing something in which you find joy. You must be physically and mentally well to give your best as an advocate to your client or your cause.

11. Finally, and not because it is of least importance but because it is so critical it deserves to be the last point I emphasis, remember your professional responsibilities and duties. Live by them. Avoid conflicts of interest and if any arise, disclose them immediately. Your duty to your client, critical as it is, is subject to your paramount duty to the court and to the administration of justice. Your fundamental duty of honesty in your professional work extends beyond your work in court to negotiations, submissions and alternative dispute resolution, indeed, to all your professional work. If as advocates, whether inside or outside the courtroom, you have inadvertently misstated the law or facts, you must immediately correct the misstatement. You must be not only honest but also courteous in all dealings in your legal practice, in or out of court, not only with clients and legal practitioners but also with opponents, represented or not. It is these professional responsibilities that distinguish you from those who merely run businesses for profit and make you part of the ancient and honourable legal profession. And if in doubt as to whether you may be in breach of your professional duties, seek assistance.

> There are many lawyers willing to provide confidential answers to your queries: for barristers, members of the ethics committee, your senior or junior master or any silk; and for solicitors, a senior practitioner or the Law Society's senior counsellors.

In conclusion, whether conducting lengthy or complex litigation in the nation's highest courts, acting in or presiding over a mediation, writing a letter on behalf of a client, or drafting submissions for your professional association about concerning proposed legislation, you are a modern lawyer advocate. All these kinds of advocacy require many common skills. Everything you do, write or say must be informed by your professional responsibilities. You must keep physically and mentally fit. Be thoroughly prepared. MISS (Make it simple and succinct) and KISS (Keep it simple and succinct). Put forward your strongest submissions legitimately open in support of your client or cause, frankly dealing with the facts and law against you. Carefully revise and edit all written advocacy. Aim to make you arguments reasoned rather than pompous or emotive, giving the decision maker the clear answer to the problem she or he is to solve. Do your best to avoid being argumentative but when necessary be courageous in pursuing your cause in the best interests of your client and the administration of justice.

Lawyer advocates who follow these principles, whether inside or outside the courtroom, will have fulfilled their duty to their clients, their profession and the community they serve.

I wish each of you personal and professional satisfaction and success in your journey.