Maximising your impact as an advocate: A view from the Bench

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Good evening and thank you to the QLS for the invitation to speak tonight. I was pleased and honoured to be invited to address the first seminar in the 2017 Modern Advocate Lecture Series. It is important to foster our professional relationships and to reinforce the ethics of the profession through initiatives such as this one. It is my privilege, daily, to play audience to all sorts of advocates; professional and otherwise. On some days, like today, it is not just a privilege but also a pleasure. I enjoyed reading well thought out written submissions in advance of the hearing about a novel issue of statutory interpretation. The oral presentations amplified the critical arguments and the practitioners were responsive to my questions. A good day in Court indeed. Of course, they are not always like that. So I have a strong self-interest in promoting quality advocacy.

It was with that personal interest in mind that I came up with the title for my talk. Later, sadly when it was too late to change the title, I thought "Maximising your impact as an advocate" sounded dangerously like a toastmaster's lecture.

You may be relieved to know, I certainly am, that I will not try to demonstrate a winning presentation style. My modest aims are: that you can hear me well; that this talk is interesting enough to hold your attention at the end of a day's work and that my few presentation aids will reinforce my message, not distract you.

If I achieve all of those aims I will be well pleased. I intend to follow the advice Sir Owen Dixon is credited with giving to barristers – remember the Greek precept "nothing too much". While speaking of ancient Greek wisdom, I am sure you are familiar with Aristotle's *Rhetorical Triangle*; but in case you are not, here is my first visual aid.

Aristotle identified three pillars of persuasion by rhetoric: logos, pathos and ethos.

Logos targets the brain; it is the logical, rational aspect of argument. Pathos is about the heart; moving the listener to *want* to accept your proposition. Ethos appeals to the gut – the instinctual response to a person – that sense of whether we can trust what we are being told.

Tonight my main focus will be on ethos but, before I turn to that topic I do want to say something first about logos.

Logos, logic is the irreducible minimum of legal argument. Whether you are advocating orally or by way of written submissions, the logic of your argument is your most powerful tool for persuading a legal audience. But your logic will not be evident without clarity of expression. Your argument must take your audience step by step along a smooth path that leads inexorably to your conclusion.

Easily said and an elegant pleasure to observe, it demands mastery of your material, rigorous analysis, time to reflect, revise and, where necessary, to delete.

I think most lawyers will tell you they are reluctant to delete something they have written; especially if they have spent some time on it and are attached to the particular way they have

structured or expressed the point; even if it is not strictly relevant or necessary. My advice is cut and paste it into a document of random passages. Store it under miscellany and comfort yourself that you still have that passage if you ever do need it. Confidence to pare down your argument to its essential comes with practice and experience. Remember that Greek precept "nothing too much" and practice using those helpful functions on your keyboard: *select* and *cut*.

My Executive Assistant found this next image for me to use in a presentation I gave recently about judgment writing. I asked her to find an image which illustrated the search for clarity. Obviously she has had to endure my judgment writing process because the image she found is uncomfortably familiar. So let me acknowledge now that what I am saying about clarity of reasoning is as important for Judges as it is for advocates.

The law reports are littered with bad writing; judgments which are prolix; rambling; and obtuse. This is not a question of experience; it is an acquired habit. We do what is modelled for us. But it need not be this way. It hasn't always been this way. Just open an early volume of the CLRs and read for yourself. Yes, the law has become more complex. That does not mean, though, that every point that might be raised, however trivial or marginal, needs to be.

And an argument is not made by stringing together screeds of legislation and quotations. You know how your eye scans over the reproduced section or the case extract when you read your opponent's written submissions. I will do the same with yours. Lay out your argument bare-boned. Provide the detail when, where, and if it is required.

So a plea from the Bench – eliminate the irrelevant and the superfluous. That will be a very good start to maximising your impact as an advocate.

I am indebted to my Associate who found this little nutshell, ironically buried in a great deal of verbiage about writing concisely and clearly. I offer it to you as a mantra that I will commit to and I hope you will too:

Context before details. Clearly partition the issues. Make your arguments succinct.

If you do this, you will reveal the logic of your argument. It will help you find the flaws and address them. And, importantly, it will help you advise your client about their options and prospects in the litigation. You are not only an advocate *for* your client; you are an advocate *to* your client - when you advise the better course of action. You will be best placed to fulfil that advocacy function when you truly understand and can assess your argument.

I want to turn now to talk about ethos. Let me go back to Aristotle's Triangle of Rhetoric. Focus for a moment on the object of each pillar. Logos relates to the argument; pathos to the audience; ethos to the speaker - to you, the advocate.

Aristotle argued an audience will more likely accept propositions put forward by a credible speaker. To appear credible, he said a speaker must display (i) practical intelligence, (ii) a virtuous character, and (iii) good will.

I want to address virtuous character or, as I perceive that aspect of Aristotle's theory, reputation. What does reputation mean?

The primary definition from the Miriam Webster dictionary contains two parts, both of which are relevant to my purpose:

a **:** overall quality or character as seen or judged by people in general.

b **:** recognition by other people of some characteristic or ability <has the *reputation* of being clever>.

If you have graduated with a law degree it is assumed you are intelligent. But if, as a practitioner your focus is solely or even primarily on the intellectual endeavour, without regard to how you conduct yourself, you risk developing a professional reputation which will hinder, rather than enhance your success and the success of your clients.

As far as Judges are concerned, your reputation is formed by your performance in Court. What reputation do you want to earn by that performance?

Well obviously you want a reputation for frankness and honesty. In a legal discipline case, his Honour Justice of Appeal Thomas could be accused of saying the bleeding obvious when he observed: "a barrister does not lie to a Judge who relies on him for information". Sadly, it wasn't bleedingly obvious to the practitioner concerned.

Few practitioners earn the unenviable reputation of being dishonest but there is another reputation you should avoid developing. It sits at the borderline. It is often based on a suspicion held by a Judge, rather than certainty, and it can be just as devastating.

I mean a reputation for being "tricky"; willing to do something dishonourable for a short term advantage. These are the advocates who misrepresent the evidence or the case law. They *forget* to tell the Bench about adverse authorities. They don't observe professional courtesies in their dealings with their opponents in the hope of pressing an advantage through surprise.

A good example is provided by the case of *Legal Services Commissioner v Puryer* [2012] QCAT 48. In that case a solicitor's conduct in personal litigation against a co-tenant under a lease led to disciplinary proceedings. He obtained an order against the co-tenant in her absence. The co-tenant successfully appealed to the Court of Appeal, which concluded there was evidence that the solicitor had misled a Supreme Court Judge about the extent to which his co-tenant had met her obligations under the lease and how much notice he had given her of the particular application. One argument raised by Mr Puryer was that the correct information was contained in documents placed before the Judge. The Court of Appeal said *"to say the least, Mr Puryer did not seem to understand that a lawyer's obligations of candour to the Court, whose officer he is, are not discharged by leaving it to the Court to plough through a bundle of papers in order to discover relevant material adverse to this case"*.[1] It referred his conduct to the Legal Services Commission.

The Queensland Civil and Administrative Tribunal found he deliberately misled the Court. But the case also illustrates that the duty to the Court requires a lawyer to provide active assistance to the Court. The fact that the litigation was personal did not affect his responsibilities as an officer of the Court.

I will stay with the question of assistance to the Court for a moment.

[1] *Puryer v Webb & Ors* [2008] QCA 246 at [31].

Firstly I want to raise communications with your opponent before Court. I cannot overstress how well it reflects on both advocates when they have conferred before the hearing. I greatly appreciate Counsel who eliminate trivial points or those where the outcome is near certain so the Court's time is focussed on the central disputed issues. I urge you to develop a professional and collegiate approach to procedural or minor disputes that could be pragmatically resolved without wasting the Court's time. The sooner you all get into the issues themselves, the better.

Secondly I want to address the assistance you give to a Judge when you are responsive to their questions; even if they come from left field and may be slightly off your track. Before her appointment to the Federal Court, Melissa Perry QC presented a very helpful paper, "Practical Speaking Skills"[2], which I commend to you. She made the following observations, which I endorse:

- Judges are ultimately looking to Counsel to assist them with the task of reaching a decision. When they ask questions, they are looking for that assistance. They want to know how you might answer particular problems or issues which occur to the Judge. They reveal how the Judge is thinking in a provisional way, and provide an invaluable opportunity to address the issues that are worrying the Judge.

- Listen closely to questions from the bench. If you don't understand a question, politely indicate that you are not sure that you have understood the question and ask if the Judge would mind expanding upon the question, or words to similar effect.

- Wherever possible, answer questions at the time that they are asked. If you can't think of an answer immediately, indicate to the Judge that you would like to return to that point shortly, and remember to do so.

I could not give better advice than that. Most Judges are happy to give you time to respond. It is up to you to propose a reasonable method for considering a point or getting instructions about it.

What you don't realise until you are on the Bench is just how much a Judge sees and hears. You have to assume that the Judge sees everything you do and hears everything you say in Court. If she doesn't, her associate will, and they will talk about it when Court adjourns.

How you behave towards your colleagues in Court reveals much about your ethics and your professionalism. So too does the tone of your correspondence. The self-serving letter is rarely tactful and the motivation usually apparent. If your tone is discourteous and inflammatory, that will tend to reflect on you, not the person to whom it is addressed.

The case of *Legal Services Commissioner v Winning* [2008] LPT 13, offers an extreme example of this point. A lawyer used grossly offensive and obscene language in Court, and in conversations with other legal practitioners and officials, when referring to fellow practitioners and high public officials. There was no question of his honesty and it was accepted he made a valuable contribution to the community through his practice. It was also accepted that he had some cause for suspicion and anger about his dealings with some of the agencies. However, he did not deal appropriately with his complaints. The Tribunal found it was unsatisfactory professional conduct to express himself in the crude, vulgar, and undisciplined way that he did. I'm not going to repeat the language he used – it is on the public record – I am not really

[2] Paper for LexisNexis Practical Advocacy Skills For Young Practitioners Seminar, Sydney, 12 December 2006.

delicate about such matters, but it was highly offensive and would not be out of place in an Elmore Leonard novel.

Of course rudeness is not confined to advocates. Every advocate will have a story about a cranky Judge. Unfortunately some Judges have a reputation for bullying. You are on a losing game if you meet like with like. The best you can hope for is to contrast that rudeness with your professionalism and ride out the storm with your dignity intact.

You will have many disagreements with Judges. Deciding how to disagree, even with a perfectly pleasant Judge, might seem daunting. But I think the answer lies in detached professionalism. This is a difference about an argument. It is not personal. Do not take it personally. If you have no cause to retract or qualify your argument, don't. If you can say more, do so. If you can't, simply say you have put your argument and can't take the matter any further. It is a matter for the Judge. I do warn against liberal use of the phrase "with respect"…it can imply the opposite. If you are conducting yourself with respect to the office of the Judge and to the Court, you add nothing by saying so and risk creating a contrary impression.

And a salutary tale about a poor response to an adverse ruling. I was sitting on a medical disciplinary case and, exercising QCAT's clear powers to do so, I directed the parties to attend an ADR process over the objection of Counsel for the practitioner. When I so ruled, without a moment's reflection, and no shame, he declared loud enough for me to hear that this was his "first appeal point". I exercised my judicial deafness and let it slide. Fast forward one month, the parties are back before me on review. Discussions are going well. It is left to Counsel who opposed the process to seek the indulgence of more time. I was happy to oblige, but could not stop myself from observing that my ruling now seemed an unlikely appeal point. I must admit enjoying Counsel's discomfort. If the ruling is against you, you have two options – appeal or get on with it.

These scenarios do not raise mere questions of etiquette. The purpose of the legal system is to provide a formal, fair and controlled forum for resolving conflicts. Your role in that system involves ethical obligations to the Court, as the forum, to your client, and to the members of your profession. It is easy to be swept away if you become entangled in the dispute.

Our legal system is littered with symbols reinforcing a fair process, unaffected by prejudice or bias. Themis wears a blindfold, Barristers gowns have a money pouch at the back; on one view, intended to ensure the quality of a barrister's advocacy is not affected by the level of payment.

There are other symbols, but they all reinforce that the Court is a place where disputes will be resolved in a professional, rational and fair manner.

The dispute is between your clients, not between their representatives. In my role I expect advocates to be able to co-operate with the Court and with each other in expediting a fair hearing. I will think less of them if they cannot, or will not. My experience of an advocate in one case, will travel with them, and I will remember my prior experience when I see them next.

You might ask why I am spending so much time on reputation. It is because one pillar of your rhetoric is inextricably linked with your professional reputation. Your credibility, as the speaker, contributes to the power of your rhetoric. So a good reputation is vital to maximising your impact as an advocate.

Of course Shakespeare had something to say about this. In Richard II, Thomas Mowbray, the Duke of Norfolk, is in high passion having been accused of treason. He explains his distress to King Richard:

"The purest treasure mortal times afford is spotless reputation; that away men are but gilded loam or painted clay."

You should treasure your reputation.

As a young lawyer, I thought I understood the importance of reputation. After 17 years on Courts and Tribunals I look back and know now that I did not truly appreciate the tremendous value of a good reputation. Nor did I understand how reputation can be made or broken without a practitioner knowing it has happened.

Reputation evolves and accumulates with others' experience of you and what they say to others about you. Your reputation among Judges develops collectively. We talk about advocates every day.

Happily, I can say that often Judges share good impressions. Frequently, the first time I hear the name of a young lawyer is when a colleague mentions in passing that they were impressed by the way the lawyer conducted themselves in Court that day. When the lawyer appears before me for the first time, I am likely to recall my colleague's good report.

Sadly, though, not all impressions are good ones. I wonder whether poor impressions are more likely to be shared. An exasperated Judge may check out their experience with a colleague. I am regularly asked whether a particular lawyer has appeared before me and, if so, my view of them.

When that question is asked, Judges know the question is not directed to the advocate's intellect. What they are doing is a quick referee check. The advocate will never know it has taken place. Without articulating it in these terms, Judges are sounding out each other about the advocate's ethos.

I sometimes seek out another Judge's opinion of an advocate if I have had a bad experience with them; or if I think I may be reacting unfairly or might have misread their motivations. The view of a respected colleague will be a powerful influence. If my colleague reports a favourable impression I will examine my own response more closely. A good report from another Judge can save me from forming a negative view too hastily.

But if my colleague reports their own negative experience with the advocate, this will strike a significant blow to the advocate's reputation. Now, not one, but two Judges will have had and shared a bad experience and had their negative perception reinforced…and so it goes on when the next Judge makes the enquiry of one of the first two Judges.

While I have dealt with the virtual character or reputation aspect of ethos, Aristotle also identified two other qualities: practical intelligence and good will. In my view, all three aspects of ethos resonate in the advocate's duty to the Court.

Practical intelligence is displayed when an advocate chooses only credible arguments to run, makes sensible and reasonable concessions and identifies pragmatic solutions that will progress resolution.

Virtuous character relates to honesty and integrity. It involves observing professional codes of conduct intended to ensure confidence between the profession and the judiciary.

The final quality of good will speaks to motivations. Is the lawyer advocating in the client's best interests? Is the lawyer unnecessarily extending proceedings with unmeritorious applications and if so, why? Is this lawyer abusing the Court process?

Your reputation rests on your everyday practice. How you behave as a professional, both in and out of Court reveals your respect for the forum, your opponent, your client and the Judge or jury you are trying to persuade.

If you want the formula for a good report on you as an advocate this is it:

- arrive at Court well prepared.
- focus on the essentials of the argument, not on extraneous issues.
- do not mislead the Court.
- be courteous to the Court and your opponent.
- do not ambush your opponent.
- do not waste the Court's time.

If you present that way, you will maximise your impact as a credible advocate whose arguments are worthy of careful consideration.

Thank you for your attention. I hope I have met at least some of the aims I set myself in this talk.