



GREENWAY CHAMBERS

**ADVOCACY 101:  
COURT ROOM CRAFT AND THE ART OF PERSUASION**

**J. P. Knackstredt & M. J. Connor**

**Seminar Notes**<sup>1</sup>

**Introduction**

- 1 In a legal context, advocacy is often considered the work of lawyers while on their feet in Court.
- 2 The nature of advocacy for lawyers in New South Wales dramatically changed in 2020 due to COVID-19. The trend towards online appearances in some jurisdictions and lists may continue.
- 3 In that context, this paper discusses the nature of advocacy, its many forms and some practical suggestions for the persuasive presentation of ideas and arguments.

**What is advocacy**

- 4 In summary: the art of persuasion or influence - anywhere, and in any context. This goes well beyond the courtroom, although that is our main focus.

**Forms of advocacy**

- 5 **Oral** - in person, AV and telephone appearances. What you say and how you say it, including your tone of voice, is important.
- 6 **Written** - pleadings, affidavits, submissions, (in the online Court context) emails and messages, aides-memoir, chronologies, diagrams, Court Books etc. Simple things

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like properly indexed and paginated Court Books and clear and logical corporate structure diagrams can ensure that you are the point of reference for the Court.

- 7 **Non-verbal** - body language, eye contact, facial expressions, standing and sitting when appropriate (including when your opponent is addressing the Court), use of mobile phones and other devices in Court. This can be just as important as what you say.

### **Objective and methodology**

- 8 What are you trying to achieve? How are you going to achieve it? These questions should always be at the forefront of your mind.
- 9 Preparation is one of the most important parts of advocacy as it allows the advocate to be flexible and creative when making submissions and, particularly, when answering questions from the Bench on difficult issues.
- 10 Be careful. As an advocate, our instinct is to win. But we have competing duties, including an overriding duty to the Court. This overriding duty is not only important from an ethical point of view, but it is an important pillar of your reputation (which we discuss below). In addition, it pays to always remember that the judge is the ultimate decision maker and it does not assist your client to get the judge off-side or press an unpopular point too far.

### **Delivery**

- 11 Know your audience and jurisdiction/ procedure. If you haven't appeared before a judge or in a particular jurisdiction, do your research, including reading the practice notes or directions. There may be particular practice directions for COVID-19. Many judges have practice notes and procedures particular to them. If you are in doubt, ask a colleague or sit in the list on a day or time before you have to appear and watch how the list operates. If you understand the procedure and nuances of the jurisdiction, your submissions are much more likely to be well received.
- 12 It is important to consider how the judge is likely to react to your submissions in the context of the case, who you act for and the respective merits. Merits drive cases. Be confident and use conviction when you speak. Make your submissions more interesting by using voice modulation. However, nuance is key, and restraint is important.

- 13 Eye contact is vital. It shows respect, it shows that you are listening and engaged, and is crucial to gauge the judge's reaction to submissions and evidence. That non-verbal feedback can assist in tailoring your approach and submissions more effectively.
- 14 Intensifiers should be saved for the issues and points that you most want the judge to follow and remember, and should be used with care. Understatement is often better. It can be a way of bringing the judge around to an idea, rather than hitting them over the head with it.
- 15 Judges are well educated, experienced and probably have more knowledge of the relevant area of law than the advocate, so submissions regarding widely understood principles may be considered unhelpful or a waste of time. Don't preach, and never patronise.
- 16 Keep it simple. Judges have very limited time and, like all of us, their attention span (whilst probably longer than most humans) is limited. Work out your key points in advance and make them clearly and succinctly.

### **Courtroom etiquette**

- 17 The best time to manage your diary is as soon as orders are made or you are informed of particular dates. Have a system, stick to it and ensure consistency across devices. Don't read out the contents of your diary to the Court. No one is interested in what else you have on.
- 18 Using language like "May It Please the Court" is important. It is easy to get this right.
- 19 Knowing where the line is between unwelcome argumentation and doing your duty to press your client's case is important. It is sometimes better to abandon a particular point (or say little about it) and instead focus on those points that are more likely to win favour.
- 20 Casual language should be avoided unless there is some evidentiary or other reason.
- 21 You will not always have an answer to a legal, procedural or factual question and may require instructions. It is much better to ask for the time to obtain instructions. Judges will almost always give you that opportunity. Whatever you do, don't guess.
- 22 It sounds basic (and it is) but judges have very limited time and do not want to be made to wait. Don't be late. Lateness is a sign of disrespect. Be early for mentions, the start of hearings and adjournments. You may also be able to deal with your matter early if the judge has time.

- 23 What you wear is a form of non-verbal advocacy. It demonstrates preparation, thought, particularity and confidence. It can also telegraph that you are disorganised and have questionable judgment.
- 24 Every advocate makes mistakes and the best way to deal with them is to bring them to the Court's attention in a frank and timely manner. You will maintain the trust and confidence of the Court if you do so; a vital matter for your future clients.
- 25 You may be the subject of hostility from the Bench for many reasons, including delay on procedural issues by clients or legal representatives, the format of Court Books or other documents. Hostility may also seem (to you) to be capricious. However, your role as advocate is to have a thick skin. The case is not about you. In addition, you are likely to appear before the same judges again in your career so you should always be respectful and measured.

### **Content**

- 26 The judge will ultimately have to write a judgment and will rely on the written and oral submissions presented to them. The ultimate goal of an advocate is to present a logical, cogent argument that the judge can easily rely on as the basis for a judgment.
- 27 The Court relies on barristers and solicitors to assist the Court on legal and factual issues. This involves a great deal of trust, which means that you need to ensure to build credibility with judges and to cultivate your reputation more broadly as an ethical, trustworthy advocate.
- 28 Questions from the Bench should always be answered directly and, if possible, at the time they are asked. Questions are a good indication of what a judge is thinking or his or her approach to a particular issue. It is also a good opportunity to think creatively and make persuasive submissions on a topic of interest to the judge. Never ignore questions and try to avoid telling the judge you will deal with them later. However, do not let them completely side-track you.
- 29 In order to maintain credibility and the trust/respect of a judge, it can be effective advocacy to concede difficult/adverse points, or deal with them upfront, instead of ignoring them. You can then be free to focus on your client's stronger arguments.

### **In-person v online**

- 30 Almost all of what is set out above applies equally to in-person and online appearances. Even though you are appearing online, you are still 'in Court'. Dress and act accordingly.

- 31 The importance of written advocacy and document preparation and access is amplified in AV or telephone appearances where you cannot simply hand the judge or witnesses documents. Before any appearance, consider the format and method of access for all parties, witnesses and the Court.
- 32 Technology issues can be frustrating and distract from your ability to persuade. Login or dial-in before your appearance to ensure the links are working and all settings are property adjusted (including filters). Know how the technology works in advance.
- 33 Online appearances may be much more focused on facial expressions by virtue of the technology and legal representatives should be conscious of what can and ought to be seen by the Court. On the other hand, there is less opportunity for the use of other body language.
- 34 Avoid speaking over someone else. This is true during in-person appearances, but creates real problems in the online setting.
- 35 And - when you get back into a physical courtroom, remember that you have to stand up when you speak!

**J. P. Knackstredt**

Greenway Chambers

[knackstredt@greenway.com.au](mailto:knackstredt@greenway.com.au)

02 9151 2937

**M. J. Connor**

Greenway Chambers

[michael.connor@greenway.com.au](mailto:michael.connor@greenway.com.au)

02 9151 2973

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