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THE POWER OF PERSUASION –
SOME PRACTICAL LESSONS FOR THE SOLICITOR ADVOCATE

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INTRODUCTION

The only legal professional advocacy I practise these days is in the occasional appearance in the High Court. Long ago I gave up trying to persuade any High Court Justice of anything – they must simply be assisted to persuade themselves. In each case I can only hope that enough of them eventually agree with my point of view. (I do not intend to focus today on High Court advocacy – the subject is too painful for a Saturday morning.)

As a junior barrister I was told that advocacy is the art of "suasion". That word means the act of exhorting or urging; but a synonym is "persuasion" and I think it is the more appropriate word in the context of legal advocacy because it means bringing, or helping to bring, another to a particular point of view.

The topic given to me today is "The Power of Persuasion". I do not set out to exercise that power – indeed, I may not be persuasive at all. I am not performing any tricks, trying to mess with your minds in any subtle way or even telling you what you should do. All I am setting out to do is to give you some of what has stuck in my mind (and that may not be much) after an education that included debating and acting and a career of legal advocacy of nearly 40 years, on and off. I shall also serve up a selection of tips and traps from others as well and leave you to make your choices. Nothing I have to say is new.

ADVOCACY

Much has been spoken and written on advocacy and persuasion since at least the time of the ancient Greeks. Last year the NSW Bar Association ran an interesting series of lectures on Rhetoric, in which many distinguished and well qualified speakers addressed various aspects of that general topic, including its role in advocacy and the art of persuasion. (A very long reading list is available from the Association.) Aristotle, for instance, included as a means of persuasion *ethos*, meaning the moral character of the speaker (reflected positively in practical wisdom, virtue and goodwill). He also included *pathos*, the emotions of the audience; and *logos*, logical proofs (by both deductive and inductive reasoning). No doubt they all continue to play a part because Aristotle was certainly a bright spark and the process of human evolution since his time has not been so rapid.

Advocacy includes both the art and the technique of persuasion. This paper is not a treatise on advocacy – that is a subject that embraces very much more than just persuasion (although the ultimate objective remains to persuade) and there are volumes of material and practical courses galore on how to do it. (I acknowledge that I have borrowed heavily from them.)

My Office library includes (as a selection only): *"Hampel on Advocacy"* by Max Perry (Leo Cussen Institute, 1996); *"Winning in Court"* by Hugh Selby (Oxford University Press, 2000); *"Advocacy"* by David Ross QC (Cambridge University Press, 2005); and *"The Gentle Art of Persuasion"* by Chester Porter QC (Random House Australia, 2005). The first three deal with the nuts and bolts of advocacy, with detailed practical advice on all the steps involved in bringing and resisting cases in court. The fourth is the latest in Porter QC's books of reminiscences (which are interesting in themselves); but it does contain useful observations on persuasion in many contexts, not just in legal advocacy.

I could also refer you to: *"The Golden Rules of Advocacy"* by K Evans (Blackstone Press Limited, 1993); *"The Seven Lamps of Advocacy"* by E A Parry (Fisher Unwin, 1923); *"Advocacy with Honour"* by John Phillips (Law Book Company Limited, 1985); *"Advocacy in Practice"* by James Glissan QC (4th edition, LexisNexis, 2005); and many, many more. There are also numerous articles, conference papers, training materials and the like addressing the subject.

But reading about ways of persuading people is just the beginning. As Porter QC says, the only way to learn it is the fool's way – by doing it and failing and succeeding. I will move to some things to consider when you do it. And when you do it, do it your way – it is usually disastrous to try to copy the style of another, even very successful, advocate (probably because, as with all experts, they make it look easy because the foundations are not displayed and therefore you cannot see what to build upon). There is no "best" or "right" way to practise advocacy and there is no "best" or "right" method to adopt to try to persuade someone to a point of view.

In 1961 the late, great J W Smyth QC gave a lecture in the NSW Bar Association common room on cross-examination. (If you are interested, it is well worth reading – *Bar News*, Autumn 1988.) Smyth QC described six essential attributes for a good cross-examiner, but they apply equally to a good advocate or persuader in court and they apply as much today as they did 47 years ago.

1. A capacity for hard, solid, conscientious work, for which there is no substitute in this profession.
2. Being reasonably well endowed with plain commonsense.
3. Having a vivid imagination and a good memory.
4. Being a psychologist and not without some worldly experience, because it is useful to understand human nature, particularly its frailties and imperfections.
5. Having a keen appreciation of the probabilities. (Whoever can succeed in making his or her side's version in evidence appear more probable is likely to win.)

6 Being observant and keeping your wits about you in court, otherwise you cannot hope to follow the ever-changing pattern of a case or turn an unexpected development to advantage.

When he came to address the manner of dealing with any particular case, Smyth QC added to those attributes five more essentials.

1 A clear appreciation of the issues in the case.
2 A complete knowledge of your own facts and an appreciation of where the weaknesses of your case are likely to lie.
3 An anticipation of your opponent's case and what its weaknesses are likely to be.
4 Knowledge of the relevant law.
5 A sound knowledge of the laws of evidence, "because, after all, they are your tools of trade".

In a paper for The CLE Centre in 1999 Brian Donovan QC (as he then was), put forward seven pillars of advocacy:

- declaration (where you say or write something);
- communication (when that is heard or received);
- persuasion (when it is acted upon);
- narration (the opening address);
- explanation (the evidence in chief);
- interrogation (the evidence in chief, cross-examination and re-examination); and
- argumentation (the final address).

The content of the declaration is the starting point (assuming always knowledge of the process and procedures to be followed) and it needs to be got right. Communication of the declaration leading to persuasion is probably the area for discussion for today; but each of those seven areas alone could be the subject of a day's examination.

In a paper to a medico-legal conference in 2001 Chief Justice de Jersey of Queensland identified three key elements to persuasive court presentation:

- a firm grasp of the law (including procedure and evidence) and the facts;
- efficient court presentation (both orally and in writing); and
- elegance in presentation.

In 2004 Justice Hayne of the High Court gave a Continuing Legal Education lecture to the Victorian Bar on advocacy in special leave applications to the High Court, especially. He provided what he described as six *"glimpses of the blindingly obvious"* as being what should be the standard stock in trade of any advocate:

1 know the facts of the case;
2 know the law that applies to the case;
3 know what order the advocate wants the court to make;
4 know how the advocate wants to achieve that result;
5 convey that to the court; and
6 avoid distracting the court from the path that he or she wants it to follow [and given my earlier comment about the High Court, I would add: prevent

the court from distracting the advocate from the path he or she wants it to follow].

Later (and there is still a fascination with numbers), Porter QC distilled to four the essential principles of the art of persuasion for John Phillips AC QC in (2005) 79 ALJ 607. In essence, they are de Jersey's three plus one, expressed in a different form:

1 thorough knowledge of the subject of discussion (including the facts and possible arguments about those facts) – taking for granted a knowledge of how it may be pursued (rules of procedure and evidence, etc);
2 knowledge and sympathetic understanding of the audience to be persuaded;
3 selection of the best arguments (not presentation of all the available arguments); and
4 putting the selected arguments in a form most likely to appeal to that audience.

They provide a good basis upon which to proceed and, since this is a day of criminal law, I shall attempt to mould what I say to that jurisdiction. I hope that what I say is relevant to both sides of the criminal contest.

[In (2006) 80 ALJ 339 Justice Young referred to two new styles of advocacy (neither desirable) that are becoming more noticeable, at least in the Equity Division of the Supreme Court: the advocate who is so confident (or arrogant) that s/he gives the impression that the judge is thought to be an ignoramus (cf Porter QC's second principle); and the advocate who has worked long and hard right up to the last minute, but neglected to provide the court with required documents, or omitting to perform some other mechanical but helpful task, so that the judge is at a disadvantage during argument (cf Porter QC's fourth principle). Perhaps they are not such noticeable types in the rough and tumble of the criminal jurisdiction.[i]]

MY BRIEF

The College of Law thought that I might be able to give you a few tips today, addressing the need in advocacy for persuasion to be based not only on good communication and presentation, but also on special disciplines, skills and techniques. It is assumed (not always completely accurately) that legal practitioners have a thorough knowledge of the law and the various rules of procedure and evidence that must be applied. Whether they do or not, they should have – they are the basic tools of the trade as Smyth QC said all those years ago – so I say nothing more about that. Assuming your familiarity with the relevant law and procedure, the College thought that some attention might be given to techniques of case analysis and trial preparation and presentation.

Well, here goes…

PURPOSE

An advocate in a contested hearing of substance must have a purpose – a clearly defined goal. It is usually, by positive or negative means, to create at the trial in the mind of another (or others) a reality, factual and/or legal, from events in another time and place and to achieve a particular conclusion based on that creation. This is done by the conduct of the advocate (words, voice, movement), by witnesses, by real evidence and by evidentiary aids (photographs, recordings, charts, re-enactments, etc).

It is clear, therefore, that the advocate needs to know at least three things:

- the message that needs to be conveyed (at all points along the way) to build that reality;
- the way in which that message will be conveyed; and, just as importantly
- what the particular audience will do with the message.

It is not enough to do well with the first and second – thought needs to be given to and care taken with addressing the third. An advocate is attempting to create in the mind(s) of the audience, the person or persons to be persuaded, in addition to the reality to which I have referred, a sympathetic approach to the message being conveyed. To do that effectively, you need to know as much as can be discovered about your audience.

PREPARATION

When I was in private practice at the Bar many years ago I considered it a reasonable general rule of thumb (for anything other than production-line matters) that for every hour in court it was necessary (or at least advisable) to spend at least two hours (often more) on the matter in preparation before and during the hearing. An advocate must know his or her brief, to begin with. An actor goes on stage to follow a script that has been learned and rehearsed – an advocate must go into court armed with the knowledge and materials to develop an effective script as s/he goes. A limited amount of rehearsal might be done, alone – but it must be remembered that the script will probably change during the hearing so it is a good idea to remain mentally flexible.

That all means that you need to know the evidence that is available on both sides, how it is to be introduced, what facts it proves, what attacks might be made upon the evidence and with what result for the proof of facts, and what arguments might be made about the facts on both sides.

That means knowing also the law that applies to the facts that may be proved, the legal outcomes that flow from those applications and the legal arguments that may be available on both sides.

The greater the knowledge of the subject of any argument, generally the better equipped an advocate is to argue it. Of course, one can know too much – more than is comfortably necessary to sustain the argument – but so long as that does not confuse the issue (prevent you seeing the wood for the trees), it is a matter of personal choice. It is generally better to know too much than too little.

An essential first step in preparation is to develop your case theory (sometimes described as case concept). This is the story of your case and what lies behind it. Following a case theory will assist you to avoid leading inconsistent evidence or obtaining in cross-examination evidence that is inconsistent with your case. I have sometimes seen defences mounted to a charge of sexual intercourse without consent of: "I did not have intercourse with her" and "if I did, it was with her consent". Such beasts have no legs.

Marcus Stone (*"Cross-Examination in Criminal Trials"*, Butterworths, London, 1988) writes:

> *"A party's theory of the case is his consistent and integrated view of the undisputed facts, his version of the disputed facts, and what he must prove in the law for the verdict which is his objective. It represents a party's position, fully thought-out, rather than an assessment of the evidence"*.

Insight into your opponent's theory of his or her case will help you to anticipate and perhaps to frustrate lines of cross-examination. It will set out the features and points that you will want to make – the reality you will want to create and the reality on the other side that you will want to injure – to win your case.

The authors referred to above support the notion of preparing your final address first, once the case theory has been formulated. It then becomes a plan for the whole of the running of your case (subject to contingencies, of course). You then go on to prepare your evidence. The opening address is prepared last.

<u>Some Practical Lessons:</u>

1. Read or listen to and understand the material you are given. This takes time.
2. The provider may assume that you know something that you do not – so don't be reluctant to ask for clarification or for additional information. If you are satisfied that there are gaps in the material, send out for more.
3. Research whatever factual or legal issues you will need to address. This also takes time, probably time that will not be financially remunerated but time that will serve your reputation well. Remember that you mean to build a personal track record and you will develop a good record only by preparation, by being honest and by building upon your successes.
4. Ensure that you have the current procedural and substantive laws and rules to hand and are sufficiently familiar with them to be able to find what you need when you need it.
5. Constantly test the components of your message – if appropriate, by discussion with others.
6. Examine those components from the point of view of the opposition.
7. Examine the likely message from the opposition and test that.
8. Not only learn, but also spend time thinking.
9. Prepare notes for your assistance at the hearing – notes for examination in chief of witnesses, for cross-examination, for legal argument and for address. The extent of your notes will depend on your own style – but even if they are not needed during the hearing, the exercise of preparing them will have been a

good discipline and may enable you to retain a mental image of at least a checklist of points to be covered.

10. If you are working with another or in a team, make sure everybody knows what s/he will do, so as to allow the hearing to flow.

EXAMINATION OF WITNESSES

In your preparation you will have identified the evidence that witnesses are able to give and the facts that evidence can prove. You will also have identified possible lines of attack or support, on either the substance of the testimony or the reliability (credit) of the witness.

When you question a witness, in chief or in cross-examination, don't forget to listen to the answers. It is surprising how often an advocate just ploughs on with a pre-determined line of questioning without deviating in response to the answers actually given by witnesses (which sometimes open up very useful sidetracks for you to explore). The questions are not evidence – it is the answers that make the substance of the exchange probative material that the fact finder can use, so you need to be alert to where the answers may take you.

Look at the witness and appear interested in the answer being given – if you do not, nobody else will take any interest. You may get an unexpected answer, no matter how many times you have heard the witness in conference. The witness will be encouraged by your attention and it may be appropriate to reinforce the performance. Witnesses do not choose that role and they are often insecure.

Evidence in chief is most persuasive when the witness is enabled to tell a story in an orderly fashion. Often that can be done with minimal and non-intrusive questioning. This passage from John Munkman's *"The Technique of Advocacy"*, 2nd ed. 1991, p 47 demonstrates the advocate's need for preparation, including conferences with witnesses:

> *"The aim of examination in chief is to elicit from the witness a complete orderly story told by the witness in his own natural way with the minimum of prompting. The story should be in the right order. Usually the order of time. If there are several distinct topics they should be introduced one by one, according to their importance. Each topic has to be exhausted before turning to the next. The story should be complete in detail, so far as is necessary for the proof of the case or to carry conviction. This does not mean that it is necessary to go into minute details which have no substantial relevance. Selection may be necessary."*

<u>Some Practical Lessons:</u>

Donovan QC in his paper in 1999 formulated the following rules for both the examination of witnesses and the making of submissions. Of course, they may need to be modified in particular circumstances.

1. Know what you want to say.
2. Say it.
3. Say it so the tribunal will understand it. Simple words, short sentences. Avoid legalese.
4. One sentence, one idea, one message (or one question, one idea, one answer.)
5. Be brief.
6. Be tactful. Do not say the witness is a liar. Let the tribunal think that itself.
7. Respect the intelligence of the tribunal. Some things are more powerful if left unstated.
8. Watch to see the tribunal has heard and received your message.
9. If it has not heard it, say it again and make sure it is heard.
10. Watch and listen to how the tribunal receives the message – favourable or not, persuasive or not.
11. Use active voice in sentence structures (and avoid multiple negatives).
12. Use concrete ideas and images wherever possible – paint a picture – create a reality.
13. Order and structure. Keep to your planned order (to the extent possible and appropriate). Generally the most important points are said first, followed by detail and expansion on each one.
14. Give the tribunal time to digest what you say. Allow pauses. Aural comprehension is generally poorer than visual comprehension, so make allowances for that.
15. Focus your advocacy on the tribunal. You will not be as effective and persuasive if you are thinking about yourself, your anxieties, your mistakes, faults or failures – or even your successes. Be "other focused" – on the audience you are trying to persuade.
16. Preparation will assist in achieving that focus – preparation of the case (the "what") and preparation for performance (the "how").

ORAL SUBMISSIONS

Unlike written submissions, the audience is going to be exposed to oral submissions only once, so if you slip up early (for example, by skipping a step in your argument or being overridden by some distraction in the courtroom) there will probably not be an opportunity to bring the audience back to what you want to say. The impact of your submission may be lost for all time. If what you have to say is worth listening to, then you must hold your audience.

1 THE AUDIENCE

Solicitor advocates are most likely to appear before magistrates and judges, but much of what I am saying applies also to audiences comprised of juries, tribunals, those presiding in ADR, appellate benches and so on. To date, we are still appearing before human beings and not machines and their sensitivities need to be appreciated.

It may be helpful to remember that a magistrate or single judge is still a jury – a jury of one and a jury with qualities that are different from the lay jury – but still a human who needs to be persuaded and can be subject to some of the same influences that

affect lay juries. However, there are some advantages for the advocate before a single judicial officer, because it will usually be possible to find out something about him or her in advance. If there is anything you can find out that might legitimately assist you to persuade, to bring the *judex* to a particular point of view, then you should use it.

Such a person is also unlikely to remain silent throughout the process (as a jury usually does, more or less). You should listen carefully to any comment from the bench, try to analyse its meaning and intention and try to use it to advance your argument or weaken your opponent's. You need to be patient with such interruptions. If they require responses, those should be given as promptly as possible. Judicial comments should not be ignored, especially where the judge (or magistrate) is the audience you are attempting to persuade.

If the bench (or your opponent) is particularly loquacious, just let them go on. Again, be patient (it is a great virtue in the persuasion game). The more that is said, the better may be the chance of that person providing more ammunition for your argument or, indeed, talking him or herself around to it. If distractions are thrown your way, deal with them as economically as possible, but don't lose your way – remain focused on the path that you need to tread. Above all, resist any provocation (of a personal or professional nature) that may be held out.

With juries it is important to deal with them as what they are – a cross-section (more or less) of the community. Their life experiences will be diverse. Their education standards and worldliness will vary. Whatever your assessment of a jury's abilities, it is vitally important not to talk down to them, not to patronise or condescend. Be aware that there may be some things you need to explain as you go, but be judicious about that and always explain in clear but not simplistic language.

2 STRUCTURE

The way in which oral submissions are constructed (whether of a legal nature such as on the admission of evidence or of the nature of an opening or closing address) will affect their ability to persuade. Judicial officers and lay people naturally think logically, usually deductively – it is easier than mentally sifting and sorting a jumble of words. They also like to receive assistance, especially from someone plausible. If you can readily give meaning to the reality you are trying to create, without too much work on the part of the audience, you will be halfway there.

Some of the authors mentioned above suggest that the way to construct a final address (for example – although this can be adapted to other oral submissions) is as follows:

- Opening – setting the scene and engaging the audience in some way.

- Describing the message you wish to convey. If you have a trump card to play, this may be the best time to play it.

- Developing the themes of your argument. You may find it helpful to incorporate stories or illustrations at steps along the way, to give colour and force to what you say and to assist in the audience's comprehension.

- Conclusion – combining the themes or drawing together the threads of your argument in a way that makes it seem persuasive, at least – if not irrefutable.

3 CONTENT

The first words can make a strong impression on the audience's mind, so some thought should be given to the way in which you should start. Porter QC gives several examples of what NOT to do and I adapt a few of them as follows:

- "As I listened to the evidence, I wondered how I would be able to respond to it" (and the speaker still does not know);
- "The Crown must prove that my client acted maliciously. The Shorter Oxford English Dictionary definition of 'malice' is…" (and it all becomes very dry and technical);
- "I propose to address you very briefly" (but he doesn't).

An opening should make the audience sit up immediately and take an interest. First impressions (and last impressions) are important.

The message to be conveyed should be shortly, comprehensively, clearly and forcefully stated. If your client is relying on self-defence, for example, the message is that he came under severe attack from which there was no retreat and he was obliged to defend himself and did so with reasonable force in the circumstances. You do not waste time describing at the opening stage the lead-up to the attack and the details of the way in which it was made. Your message is self-defence and you want the audience to focus on that. It is the main issue for your client and you will return to it at the end.

The themes that might be developed in such a case should then be drawn out from the evidence and by reference to it. Referring to and/or quoting evidence requires care in itself, especially if different versions of the same thing are to be gathered in from different parts of the trial. It is easy to lose an audience – any audience – in the dense recitation of transcripts of evidence. It is important also in this process not to omit any necessary step in your argument – because if you do, your opponent or the audience (or both) will pick up on it and seek to use that omission. It is even more important to include only your best points – not to make an argument by several different routes where one (or two) will suffice and not to load up your submissions with arguments that don't carry much weight or are really peripheral. This often requires self-discipline and sound judgment.

There is value in simplicity; but it can come only from thorough understanding, analysis and synthesis of what you are putting. The most complex financial transactions, for example, can be fully and properly explained to a jury of lay people and in a way that maintains their interest – but only by someone who has done the preparation for it. (Indeed, in any case of complex facts or law, an advocate should not appear unless s/he is prepared to do that work.) Simplifying the explanation of a matter must be done without distorting the reality – and if you do it successfully, the proverbial lights will go on in the audience's heads, they will suddenly become more attentive and you will find it much easier to persuade them to your argument.

There is also value in repetition, but it must be used wisely. (There is little that is more annoying for an audience than to be told over and over something that they already fully comprehend.)

Statistics may be useful – but remembering Disraeli's (or maybe it was someone else's) three types of lies: "lies, damn lies and statistics". If statistics are used, be sure to explain exactly what conclusions they may support and why (or conversely, why they do not support your opponent's contention).

If technical terms or acronyms are used (in evidence or in submissions), translate and explain them as you go – when first mentioned and, if necessary, by way of subsequent refresher.

If you wish to use illustrations to support your arguments, give the practical illustration first, then move to the theory that it supports (if necessary, also dipping back into the illustration to show how it works.

There can be great power in contrast. It can be used in the manner of advocacy – loud v quiet; fast v slow – and it can also be used in the substance of both questioning and submission.

Just as the opening needs to make a good first impression, the conclusion needs to leave a strong and favourable last impression in the audience's minds. It should be punchy and attention-grabbing, but not overly dramatic or corny. Above all, an advocate should not drift to a confused and impotent collapse.

4 DELIVERY

Advocates must be prepared to respond to the audience and tailor the delivery as indicated by the responses that feed back. Justice Windeyer of the High Court was an outstanding lawyer and an unfailingly polite judge. On one occasion counsel was waxing at great length about some point that was not finding favour with the bench, but could not be moved on. Justice Windeyer attempted to move him along by saying: "That's all understood, Mr X – but what about…" (referring to another ground of appeal). Mr X responded: "I'll deal with that shortly, your Honour". Windeyer J sighed, leaned back in his chair and said: "Oh dear, I suppose you mean 'soon'."

Sometimes the bench may hold out some assistance to an advocate, but you have to be careful and critical. Many years ago I was prosecuting some drug dealers before a very senior judge in the District Court. A piece of evidence had been allowed in at the committal hearing, but I formed the view that it was really inadmissible. I made no reference to it at the trial, but in the absence of the jury at a point still in the Crown case the judge asked me if I proposed to tender it. I said not and my opponent (who was a very eminent Senior Counsel, later a Supreme Court Judge) said he would object to it. The judge said that if it was tendered he would admit it. I tendered it over objection and it was admitted. In ordering a retrial the Court of Criminal Appeal was very critical of the judge. Convictions followed the retrial, without the inadmissible evidence. (I suppose the only good news in that story – completely fortuitous, of course – was that I appeared at the appeal and retrial and earned more fees.)

There is usually not a great deal of useful reaction by juries during addresses. Occasionally there might be some facial expressions, some movements or other body language that gives a clue, or there might be intermittent note-taking (but of what, is anybody's guess). The best one can hope for with juries is continuing engagement in your argument and for that to happen the jury must be able to understand it and follow it to its conclusion.

Judges and magistrates are different from juries (but still – for the most part – human). It may be possible to know something of a particular judge's or magistrate's views and proclivities and to play upon those. They often react by expressing views or giving direction to the course of argument. Sometimes they give hints that can be built upon by advocates. Nods and winks from the bench can be very useful.

If you are appearing in sentence proceedings, be humble. Above all, be realistic – if a severe penalty seems to be indicated by objective standards, then acknowledge it and move forward. If you are seeking leniency on behalf of your client, do not presume that it will be given – attempt to persuade the sentencer to grant the favour that you are seeking. A plea of guilty with a plea in mitigation is a constructive exercise and can require hard work. It is not an abandonment of care or surrender to the court, come what may.

WRITTEN SUBMISSIONS

Increasingly in our supposed oral tradition, written submissions are being required in many situations. It should be remembered that the written word persists, unlike oral presentations that are heard and gone (unless recorded in an enduring form). Consequently, while the general structure may well be very similar to oral submissions, the content may differ in some respects. I mention two.

First, repetition should be avoided. If the audience wants to be reminded of what was said, the submission can be re-read.

Secondly, flourishes such as stories, illustrations, humour and dramatic touches should be used very sparingly. The written word is not so amenable to persuasion by those devices.

ETIQUETTE AND ETHICS

An advocate – at least, an effective advocate – has power: the power of persuasion. It must not be misused or abused.

The rules of etiquette for advocates might be distilled to the one word "courtesy", always important in court and a large component in persuading people. Audiences usually do not identify with the arguments of those they find offensive. In his speech at the Opening of Law Term Dinner at the Law Society of NSW in 2006 Chief Justice Spigelman lamented the increasing lack of courtesy in the profession and in modern life generally. Soon after, the Legal Services Commissioner published a paper reporting 523 complaints against practitioner rudeness made by clients, practitioners

and, increasingly, judges. It cited 13 decisions of various disciplinary bodies, tribunal and courts throughout Australia in which allegations of unprofessional conduct or professional misconduct were made out on the basis of discourteous behaviour alone.

The decisions of *New South Wales Bar Association v di Suvero* [2000] NSWADT 194, *Constantine Karageorge No. 12 of 1986* and *New South Wales Bar Association v Jobson* [2002] NSWADT 171 provide some guidance.

NSW Solicitors Rule 25 provides:

> *"A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct."*

In *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 667 Kirby ACJ said:

> *"Those members of the legal profession who seek to win a momentary advantage for their clients without observing the proper courtesies invite correction by the court and disapproval of their colleagues… To the extent that solicitors act in this way, they run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession from other dealings in the community."*

Finally, from Justice Mathew B Durant of Utah, USA:

> *"A lawyer can be firm and tough-minded while being unfailingly courteous. Indeed, there is a real power that comes from maintaining one's dignity in the face of a tantrum, from returning courtesy for rudeness, from treating people respectfully who do not deserve respect, and from refusing to respond in kind to personal insult."*

That power can be the power of persuasion.

PERSUADING THE PROSECUTOR

I conclude with a few observations from the prosecutor's point of view. Defence representatives may wish to persuade the prosecutor to take a certain course in proceedings. That may have benefits for both sides.

The principles are the same and knowing your audience is one – so it is an advantage to know with whom you are dealing. It is best to start early with the police involved in a matter and with the prosecutor.

You may wish to persuade the prosecution to drop a charge or to negotiate to a less serious offence. So far as the ODPP is concerned, that must be recorded ultimately in writing (although it usually begins with oral discussion). Consider first the Prosecution Guidelines on the subject (at www.odpp.nsw.gov.au) because they will

guide the prosecutor's decision-making (know your audience…). Apply to your discussion, your letter or submission the observations made above in relation to submissions generally because the prosecutor is your audience. Don't try to "snow" the prosecutor – remember that s/he has the brief of evidence and maybe more. Correctly state the applicable legal principles. Make sure you refer to all relevant matters. Correctly identify the elements of the offence(s) you are addressing. Identify also relevant discretionary factors that may operate pursuant to Guideline 4. Allow time for your arguments to be considered and applied.

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[i] Googling "power of persuasion" produces an extraordinary batch of materials, mostly American. Most of the stuff seems to be directed at more effective ways of selling things. Social psychologist Robert Cialdini offers six principles of persuasion: authority (people defer to experts); consistency (people uphold their stated commitments); liking (people like those who like them – as at Tupperware parties); reciprocity (people repay in kind); scarcity (people want things that are rare); and social proof (people follow the lead of their peers).

Somebody called Dianna Booher tells us to appeal to the emotions. A litigation lawyer called Paul M Sandler says: "One of the most significant factors in any argument – which Aristotle called the most potent – is ethos – the character of the advocate as perceived by the listener". You need to create the impression that you are a person of honesty and integrity.

A Dr Tony Alessandra tells us to build a rapport by identifying what we really want, focusing on the listener, being quick to compliment, training ourselves to remember other people's names, empowering others, arousing in them positive emotions, taking clues from the audience, honing our senses of humour, practising better questioning and keeping our perspective.

I offer all that to you for what it is worth (and it is not entirely worthless, in fact – some of that we can drag along with us as background).