FUNDAMENTALS OF TRIAL TECHNIQUE

THOMAS A MAUET ∞ LES A McCRIMMON

THIRD AUSTRALIAN EDITION

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To George Hampel and Felicity Hampel

FOREWORD

Her Honour Justice Ann Ainslie-Wallace
Appeals Division of the Family Court of Australia

If you wish to persuade me, you must think my thoughts, feel my feelings, and speak my words. Marcus Tullius Cicero

Often has it been said that advocacy is the "art of persuasion" but until relatively recently little has been written that guided the willing learner about how to persuade in court.

What is it and how does one acquire the skill of being a persuasive advocate?

The law student, the newly admitted advocate, the seasoned advocate often strive without success to be persuasive, not for want of enthusiasm for the task, but for want of practical information about what to do.

It used to be thought that by watching seasoned advocates perform in court, the inexperienced could acquire the necessary skills to persuade, but no longer. It is now well accepted that persuasive advocacy is a skill that, like any other skill, can be learned and honed (perhaps perfected) through knowledge, practise and critical self-analysis. However, before that journey can begin, one must know and understand the fundamental theory and concepts that underpin good, persuasive advocacy.

This is the third edition of this important trial advocacy book in which the authors provide that fundamental knowledge through perceptive analysis accompanied by helpful illustrative examples. From proper organisation of documents, the development of the case theory to preparation and performance of the trial components, the authors give clear and insightful guidance. Ethics and etiquette, critical to an advocate's success, are comprehensively discussed in a chapter that considers and analyses many of the dilemmas and questions often encountered by an advocate.

I commend this book to all who are committed to learning or improving their advocacy skills.

May 2011

FOREWORD TO THE FIRST AUSTRALIAN EDITION

The Hon Mr Justice George Hampel
Chairman
Australian Advocacy Institute

Advocacy is the art of persuasion in court. To what extent talent contributes to performance by good advocates, and whether great advocates are born or made are interesting questions, the answers to which may not be helpful to those seeking to develop their advocacy skills. The fact remains that at the foundation of every advocacy performance, whether merely competent or brilliant, there are well-developed skills of analysis, preparation and performance which are essential. As Thomas Mauet rightly asserts, artistry becomes possible only after the basic skills have been mastered.

The development of those basic skills requires commitment and experience. I mention commitment first because I do not think that without it it is possible to sustain the input of time and energy which is required of a competent professional advocate. Experience is essential in the learning of skills. However, experience can be a poor teacher unless the learner has the facility to learn from it. There are, unfortunately, many experienced but bad advocates who have perpetuated errors usually because they have not taken the time to analyse what they do and to learn how to make their performance more effective.

After twenty-five years as a barrister, ten years as a judge and "consumer" of advocacy, and twenty years as a committed teacher of advocacy in Australia, the United States and New Zealand at every level from undergraduate to advanced, I have come to accept a number of truths about advocacy and its teaching, three of which I think should be referred to in a foreword to this excellent work.

The first, and I think the most important, is that in addition to acquiring preparation and technical performance skills, a good advocate must be a good communicator. After all, to be persuasive, the advocate must be able to affect and influence the tribunal's perceptions, and to do that he or she must be able to "get through" to the tribunal. The ability to communicate also consists of a number of developed skills performed with such degree of natural ability as the individual possesses.

The second truth is that, at last, the myth that advocacy cannot be taught has been finally put to rest. The last fifteen years have seen great developments in the United States, Canada, Australia and New Zealand in the attempts to analyse what makes good persuasive advocacy and how it can be taught. The emphasis has been on the development of skills by a teaching method which involves performance under instruction.

Once the basic skills are acquired and the advocate has the facility to understand and analyse his or her own performance, further development of skills, enhanced by the individual's talent, can take place.

Finally, there is the realisation that the teaching of advocacy involves the teaching of skills. It involves learning by doing with coaching rather than learning principles or simple acquiring information about such skills. This is best achieved by the workshop method where instructors who are competent advocates can teach by imparting their own skills of analysis and performance and by demonstrating those skills.

Thomas Mauet recognised these features of advocacy and advocacy teaching when he produced his American Edition in the early eighties. It is a practical and clear work which for a long time now has been an important adjunct to the workshop method of learning advocacy skills. Its approach of making the point then illustrating that point by examples in a practical way helps those learning at workshops or performing in court to understand what their aims should be and how they may achieve those aims.

The Australian Edition is timely. The adaptation will make this book more relevant and provide greater assistance to Australian lawyers than other editions. It will particularly help those lawyers in Australia who realise that the acquisition of basic skills is essential, and that the pursuit of excellence in advocacy is an important professional goal.

1993

FOREWORD TO THE SECOND AUSTRALIAN EDITION

The Hon Professor George Hampel QC
Professor of Advocacy, Trial Practice and Forensic Studies
Former Justice of the Supreme Court of Victoria
Chairman Australian Advocacy Institution

I wrote the foreword to the first Australian edition published in 1993. That was an excellent adaptation for the Australian setting by Les McCrimmon of Thomas Mauet's work. Since then we have all continued teaching and learning.

I stressed then and do now that advocacy, as the art of persuasion, involves good preparation and analytical skills as well as performance skills in argument, examination and cross-examination. In addition an advocate must be a good communicator.

As skills these must be taught by the workshop method which involves coaching. Knowing what to do is essential but the advocate must also learn how to do it. The practical nature of this book with its explanations and illustrations makes it a more useful adjunct than any I have seen to workshop learning.

The new edition rightfully places more emphasis on persuasion and therefore communication. It emphasises the need to look at communication from the listener's perspective.

It has some additional useful check lists for example in the chapter on preparation.

In all it is a more complete and developed work by the authors who gain their knowledge and skills in a practical way by continuing their teaching and research.

No advocate interested in developing advocacy skills should be without this book. The book is on the list of books recommended by the Australian Advocacy Institute.

2001

BIBLIOGRAPHY

"An English Judge's Dress" (1904) 3 Can L Rev 321

Aronson M and Hunter J, *Litigation: Evidence and Procedure* (6th ed, 2000, Butterworths)

Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC 102, NSWLRC 112, VLRC FR 2005)

Blake M, Ashworth A, "Ethics and the Criminal Defence Lawyer" (2004) 7 Legal Ethics 167

Brown R A, *Documentary Evidence: The Laws of Australia* (2009, Thomson Reuters)

Bungay M, "Jury Selection", in *Mauet's Fundamentals of Trial Techniques* (T Eichelbaum ed, 1989, Oxford University Press)

Dal Pont G E, *Lawyers' Professional Responsibility* (4th ed, 2010, Thomson Reuters Lawbook Co)

Frieberg A, "Jury Selection in Trials in Commonwealth Offences", in *The Jury Under Attack* (M Findlay and P Duff, eds, 1988, Butterworths)

Glissan J, *Advocacy in Practice* (4th ed, 2005, LexisNexis Butterworths)

Heydon J D, *Cross on Evidence* (8th Australian ed, 2010, Butterworths)

Jablon A, "'God Mail': Authentication and Admissibility of Electronic Mail in Federal Courts" (1997) 34 American Crim Law Rev 1387

"Lawyers Wigs and Gowns" (1946-1948) 7 N Ir Legal Q 225

Ligertwood A, Edmond G, *Australian Evidence* (5th ed, 2010, LexisNexis)

Lord Macmillan, *Law and Other Things* (1937, London)

Lord Templeton, "The Advocate and the Judge" (1999) Legal Ethics 11

Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002, Butterworths)

McCrimmon L, "Challenging a Potential Juror for Cause: Resuscitation or Requiem?" (2000) 23 UNSWLJ 127

McCrimmon L, Maxwell I, "Teaching Trial Advocacy: Inviting the Thespian into Blackstone's Tower" (1999) 33 *Law Teacher* 31

McEldowney J "Stand By For the Crown: An Historical Analysis" [1979] Crim L Rev 272

McNamara B, "Forensic Photography", in *Expert Evidence* (I Freckelton and H Selby eds, Thomson Reuters Subscription Service) (looseleaf)

McQueen R "Of Wigs and Gowns: A Short history of Legal Dress in Australia" in *Misplaced Traditions: British Lawyers, Colonial Peoples* (R

McQueen, W Wesley Pue, The Federation Press, 1999), 32

Odgers S, *Uniform Evidence Law* (9th ed, 2010, Thomson Reuters)

Reed C, "Authenticating Electronic Mail Messages – Some Evidential Problems" (1989) 52 MLR 649

Ross Y, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th ed, 2010, LexisNexis Butterworths)

Tanford A, "The Law and Psychology of Jury Instructions" (1990) 69 Nebraska Law Rev 71

Ten Commandments of Cross-examination (National Institute for Trial Advocacy, Notre Dame Law School, Notre Dame, Indiana, USA)

The Concise Oxford Dictionary of Current English (9th ed, D Thompson ed, 1995, Clarendon Press)

The Jury in a Criminal Trial: Empirical Studies (1986, New South Wales Law Reform Commission Report, RR 1)

Young P, "Practical Evidence: Re-examination" (1991) 65 ALJ 282

TABLE OF CONTENTS

CHAPTER 1

Preparation for trial

1.1 INTRODUCTION

Trials are the principal adjudicatory method used to settle legal disputes. Alternative methods such as mediation are becoming increasingly important in the resolution of civil disputes; however, trials remain the paramount dispute resolving method employed in Australia. In the trial of the most serious criminal cases, the jury continues to be of particular importance.

Our adversary system is premised on the belief that pitting two adversaries against each other, with each presenting his or her version of the truth, is the best way for the trier of fact to ascertain the probable truth. The facts must be shaped by the advocates' four "tools": substantive law, procedural law, evidence law, and persuasion "law". The first three, principally legal, can be learned in a few years. The last, the art of persuasion, is what fascinates true trial lawyers. Trial lawyers spend a lifetime learning about, and learning how to apply, the art of persuasion in the courtroom.

In the context of the trial, what you do, how you do it, and why you do it, is what this book is all about. Chapter 1 provides a comprehensive approach to trial preparation and strategy. Chapters 2 through 8 address the specific stages of a trial, including jury selection and persuasion, opening address, examination-in-chief and cross-examination of witnesses,

closing argument, entry of exhibits and making objections. Chapter 9 discusses trial ethics and courtroom etiquette.

The examples used in the book focus primarily, but not exclusively, on the presentation of a case before a jury. Advocates who can properly present a case to a jury also will be competent in the presentation of a case before a judge alone. The converse does not necessarily hold true. Those instances where a particular technique needs to be modified when employed before a judge alone are noted in the text.

1.2 LOCAL PRACTICES AND PROCEDURES

The conduct of trials differs from jurisdiction to jurisdiction, and from court to court. Procedural rules may differ depending on whether you are in a federal court or a state or territory court. The rules governing the presentation of a case in a Supreme Court will not be identical to the rules governing the presentation of a case in a District Court or a Magistrates Court. Evidentiary rules may also differ. For example, in the federal courts, the Australian Capital Territory, New South Wales, Victoria, Tasmania and Norfolk Island, the uniform Evidence Act applies.[1] In the remaining jurisdictions, specific, non-uniform, evidence statutes govern.[2] It is not surprising, therefore, that the advocate's first task is to ascertain and master all the "rules" that apply to the upcoming trial.

1.3 ORGANISATION OF LITIGATION FILES

This is the age of records; in particular, electronic records. Everything is routinely recorded, archived and duplicated. Even a simple case can, and invariably will by the time it approaches trial, generate an extensive amount of paperwork and electronic communications. Consequently, all files must be effectively and efficiently organised. How this is done will depend on the resources available to you. The object of the exercise, however, is to provide immediate and accurate access to the contents of your file – whether organised electronically or in hard copy – at any time during the trial. Counsel who are organised will appear prepared, confident, and professional to both the court and the jury.

When organising a litigation file the important point to remember is that the system must be logical and clearly indexed. The system should be in place when litigation starts, not simply when a trial appears likely.

Litigation files are usually divided into several categories. For example, the following file organisation and categories may be used.

1 *Evidence Act 1995* (Cth) (applies in federal courts and Australian Capital Territory courts); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

2 *Evidence Act* (NT); *Evidence Act 1977* (Qld); *Evidence Act 1929* (SA); *Evidence Act 1906* (WA).

1 Folder categories

Files should usually include the following indexed folder categories.

a Court documents

Generally, these should be indexed in the order filed or entered:

1 pleadings;
2 particulars and reply to particulars;
3 interrogatories and answers to interrogatories;
4 discovery and inspection;
5 motions;
6 orders; and
7 subpoenas and affidavits of service.

b Evidence

Exhibits and potential exhibits should be placed, if they are documents, in clear plastic document protectors, inserted in your exhibit binder, and indexed. This index will constitute your exhibits register, which will set out:

1 the proposed exhibit reference ("1" or "A for identification", etc);
2 who is to produce the exhibit;
3 a brief description of the exhibit; and
4 a reference back to the pleadings.

The exhibits register should be placed in your trial notebook, which is discussed below.

c Counsel's records

These include:

1 solicitor's brief to counsel;
2 retainer contract, bills and costs;
3 relevant correspondence;
4 legal research;
5 the case history, including a log of counsel's activities in the case; and
6 notepaper to record other miscellaneous items.

1.4 TRIAL NOTEBOOK

Trial material should be organised in the most useful and efficient way. This is different from the organisation of litigation files discussed above. The organisation of litigation files is designed to be all-inclusive. By contrast, trial materials include only those materials which actually will

be used during the trial, and the organisation parallels the use that will be made of the material at trial. All parts of a trial – jury selection, opening address, examinations-in-chief and cross-examinations, closing argument – require separate organisation and preparation. Accordingly, the documents necessarily generated during each phase of the trial should be organised in a logical, easily retrievable way.

The compilation of a trial notebook is a recommended way of organising trial materials. Under the manual method, all of the necessary materials for each part of the trial are placed in a two-ring binder (preferably with an inside pocket on the front and back cover for "to do" lists) in appropriately tabbed and indexed sections. The advantage of this method is that, once placed in the notebook, the material is less likely to be lost or misplaced, and can be located immediately by turning to the appropriate section.

Increasingly, advocates are using portable laptop computers and electronic notebooks for the storage of information required during the trial. Further, litigation software continues to improve, and substantial parts of a trial notebook can be computerised. Whether the material is stored electronically or manually, the following sections should be considered for inclusion. It is important to keep in mind, however, that the organisation of the trial notebook should reflect the needs of the advocate trying the case. In other words, organise *your* trial notebook to be useful to *you*.

The following is a commonly used system of organisation:

1 facts
2 pleadings
3 discovery
4 motions and advance rulings
5 jury chart
6 witness chart
7 trial chart
8 exhibit chart
9 opening address
10 examinations-in-chief
11 cross-examinations
12 closing argument
13 instructions and warnings
14 legal research

1 Facts

This section should contain the brief to counsel, all reports, witness statements, diagrams, and other factual material. It should also contain a