

Advocacy



DAVID ROSS QC

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CAMBRIDGE
UNIVERSITY PRESS

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Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521611176

© David Ross 2005

First published 2005

Reprinted 2005

Printed in Australia by Ligare Pty Ltd

A catalogue record for this book is available from the British Library

National Library of Australia Cataloguing in Publication data

Ross, David, QC.

Advocacy.

Includes index.

ISBN 0 521 61117 2.

ISBN-13 978-0-521-61117-6 paperback

ISBN-10 0-521-61117-2 paperback

1. Trial practice – Australia. 2. Examination of witnesses – Australia.

3. Legal etiquette – Australia. I. Title.

347.94052

ISBN-13 978-0-521-61117-6 paperback

ISBN-10 0-521-61117-2 paperback

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Advocacy

‘Painstaking preparation means that luck will run your way.’

Advocacy explains how to win cases in court. Focusing on the techniques and methods of successful advocates, David Ross QC shows how to prepare a case for court.

Writing in simple, clear language he gives the benefit of his many years of local and international experience as he describes

- how to hold a court’s attention
- how to start and stop a witness
- how to cross-examine all types of people, from liars to experts
- the methods of taking objections to questions
- how to address a jury
- how to follow etiquette and behave ethically
- how to win impossible cases.

All the principles of advocacy are explained, from the striking start to knowledge of human affairs, and *Advocacy* is rich with examples taken from real cases.

Advocacy is essential for both beginning and experienced barristers, and anyone who is interested in knowing how the best lawyers operate and how they win their cases.

David Ross QC is an eminent advocate with extensive experience in trials and appeals throughout Australia. He has taught advocacy in many countries.

Foreword

The best advocates are great artists. In this short book I refer to what some of these advocates have done in the past. My aim is to pass on their lessons. The best advocates have an exhaustive knowledge of all the technical rules. That is their starting point. There can be no shortcuts. They commit the rules to memory so they can be put to use at a moment's notice.

How advocates exercise their skills depends on their preparation and their judgment as a case runs. I have recorded here what some of the best have done in some notable cases. But it is not dogma. In every generation there are classy advocates who find some new way of cross-examining, or addressing, or doing any of those small but important things that are called for in a trial.

Advocacy is a little like the language that serves it. It is in a constant state of change. The excellent advocates of the past found new techniques. Immerse yourself in their lessons but treat it as a study of history. It is now your task to find your own new ways. We all depend on you to keep the flame of justice burning bright.

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Chapter 1

The nature of advocacy

The essence of advocacy

[1000] Advocacy is winning cases. Nothing more and nothing less. It consists in persuading a court to do what you want. The court may have serious misgivings, but the good advocate gives it no choice.

[1005] Court work involves the advocate in all sorts of duties. You must do everything legal to win your client's case. You must keep up to date with the law in your field of practice.¹ You must not mislead the court.² You must not cross-examine falsely or lead evidence that you know to be untrue. In your private life you are not required to be totally abstemious, but of course you must never commit a crime.

The qualities of advocacy

[1010] Advocacy is a craft. Like every craft it can be learned. The techniques have to be acquired, practised and constantly honed. The competent advocate can employ these techniques, but the good advocate is a master of them, and moves beyond the craftsmanship of simply appearing in court. The advocate practising at a higher level is an artist.

[1015] Advocacy is played out in a setting that makes it quite different from any other specialty. First, it is done in public. People watch and they judge. Second, every case is different. Not even the newcomer will find the same issues and aspects in every case. Each

case has to be custom built. The good advocate will treat every case as the most important ever. It will be prepared and conducted as if it is the last and the one on which the advocate's reputation hangs — as it does. There will be a different approach to each witness. The strategy is prepared to the finest degree but the good advocate will watch the witness constantly, be ready to adapt the plan and be alert for the opportunity to improvise. It will look effortless.

The qualities of an advocate

[1020] The basic quality an advocate needs is the wish to be an advocate. You must love and need the court work. How many disciplines are there where you can write a script and play a leading part? But you must be able to survive its demands.

And first, has he a healthy frame, capable of enduring long-continued exertion of mind and body, the confinement of the study, the excitement of practice, the crowded court by day, the vigil of thought by night? Can he subsist with a sleep of five hours? Can he, without dyspepsia, endure irregular meals — hasty eatings and long fastings? If he is not blessed by Nature with the vigorous constitution that will bear *all* this, and more, let him not dream of entering into the arena of Advocacy.³

And you must do more than just survive. You must embrace it, love it, live for it. Every old advocate will tell you that the best and worst times of life have been inside a courtroom, from euphoria to misery. The most you can hope for is to do the best professional job. The result is not within your power.

[1025] Good physique is not a necessity. Advocates are tall, short, fat, thin, good-looking, plain. No doubt the good-looking advocate has some attraction, but being well-favoured is probably the least of the qualities an advocate needs. An unhappy physique or unusual looks are never a handicap to one who has the necessary attributes.

[1030] To be a good advocate in court you need the following qualities:

1. **Voice** You will sound good. Your voice will be well modulated and you will talk slowly. Quality is more important than volume.
2. **Words** You will have a good command of words. When questioning a witness you will use simple language that everyone can understand. Your submissions to the judge will be of the same cast. You will express complex propositions simply without being superficial or simplistic. Your talk will have clarity at least, and often eloquence.
3. **Order** Your submissions and dealings with witnesses will be well ordered and logical. The detailed preparation will be apparent.
4. **Courage** Court work is civilised warfare, and as an advocate you are the champion of your client. Tenacity will be evident. You will not relinquish a central position without a fight. You will be polite but firm, and never belligerent. You want to win. You are not afraid to be silent.
5. **Presence** Every good advocate seems to have a presence. It probably derives from confidence. Many advocates battle nerves before court. You would never know it because the fear falls away when the case starts for the day.
6. **Observation** You will be watching the witness and the judge intently. You will rarely make a note – all the noting should have been done long before.
7. **Wit** You must be quick-witted. If you have a sense of humour you will never use it for its own sake. An advocate with this quality will use humour sparingly and to help win the case. Never crack jokes.
8. **Emotions** You have a good knowledge of human affairs and of human nature. You will not be afraid to use emotions to advance your client's cause.
9. **Law and evidence** You will know the statute law that applies to the case and the earlier relevant decisions of the courts. The rules of evidence seem second nature.
10. **Honesty** Your word is your bond. You never take permanent offence at anything said by your opponent in court or out of it, except for perfidy.

[1035] A good advocate will also possess the qualities of wisdom and judgment. These qualities are often employed in ways that could never be discerned by an observer in court. It is impossible for an onlooker to know what argument the good counsel has decided not to put, what evidence not to call, what issues to omit from cross-examination. In the running of the case the good counsel will have the intuition to touch on a subject and then perhaps leave it alone. Some of those hard judgments are made in preparation and some are made in the instant. Clarence Darrow, the revered American advocate, said:

The trying of cases in courts calls for an acute intelligence, the capacity for instantaneous thought and for deciding what to do in the twinkling of an eye.⁴

Cases won on admissible evidence

[1040] In an adversary system the judge's role is to hold the balance between the contending parties without taking part in their disputations.⁵ A trial or hearing is not a pursuit of truth, not even in a criminal case.⁶

[1045] Cases are won on evidence accepted by the court. There is a difference between facts and evidence. Evidence on an issue may never be put before a court and thus can never be proved. It is your role to use your best endeavours to have the evidence in your own case admitted, and the evidence in your opponent's case excluded.

[1050] A few examples illustrate the point. Documents may be available to prove a defence but they cannot be obtained. A witness may refuse to give evidence on the ground of self-incrimination. In a bigamy case the prosecution may not be able to provide the strict proof of the earlier marriage.⁷ A confession may be excluded because of improprieties by the police,⁸ or because it was not recorded by an audio machine.⁹ An accused may say that the confession is true, and it can still properly be excluded.¹⁰

[1055] Thus there may be facts which can never be proved because they can never be put in a legally admissible form. It is your duty to object to your opponent's evidence which should not or cannot be admitted and which does not advance your own case.

[1060] Evidence may be given on which the fact-finder places no reliance. It may come from a witness who has been effectively cross-examined. The witness could be quite disreputable, but in this case may be telling the truth.

[1065] Many cases win or lose themselves because the evidence and the law that is applied are all one way. In these cases advocacy is rather like an exercise in damage control, for damage control is part of the art of advocacy.¹¹ But a good advocate will win a difficult case. A poor advocate will lose a case that should be won.

How and what to learn

[1070] There is no quick way to learn the skills of advocacy. There is probably no true starting point. One approach is to watch the advocates in the superior courts, particularly in cases where there are witnesses. You will learn how to start and stop a witness, and how to direct a witness from one topic to another. This handling of the witnesses never seems to appear in the reports of cases or in the books on advocacy. There are special reasons for learning how to guide a witness. The witness is not a lawyer. The witness will not know what evidence is relevant and what evidence is admissible.

[1075] Watch how the good advocate does this so easily.

Can I just stop you there for a moment . . .

Thank you for that. May I now ask you about . . .

And to avoid inadmissible hearsay:

I don't want you to tell us what was said, but did you then speak to Mr Black?

See how the experts do it. Then try it on your friends in ordinary conversation and find out what works for you.

[1080] Watch the examination and the cross-examination of a witness. You may never be able to discern why a witness was asked about a particular subject, or why not. That is because you have not seen the brief of either advocate, and you have not done the preparation and made the necessary fine judgments. You will, however, learn some techniques on how to handle witnesses of different sorts. Then go away and recall how it was done, and how you could do it. You will be surprised at the profit of this reflection.

[1085] There is a limit to what a new advocate can learn from watching senior advocates in the appellate courts: style in addressing the bench, yes; detail of the case or handling witnesses, no. In these courts all the evidence and the submissions are in writing and filed with the court well before the hearing. The facts are a given. Spoken submissions are designed to advance the advocate's position and reduce the opponent's. Since so much is already known to the court and the parties, even the argument can be hard to follow.

[1090] Be cautious about the advocacy you see in your lowest courts. There is a huge range in quality. Some of the old timers are magnificent. A few have been in practice for 30 years but with the experience of one year repeated 30 times. There are newcomers still learning the skills. Check to make sure that what you see and hear in those courts are not the errors that seem to be passed on from one generation of lawyers to the next.

[1095] Read the advocacy books. Keep your eye out for the reports of cases where the questions and answers are quoted with or without approval. Few of the biographies of prominent advocates quote the questioning of a witness except for some stunning remark or brief exchange.

[1100] When I was a young advocate I was often told that it was necessary to develop my own style. I distinctly recall not being able to understand what the advice meant. Should I ask questions in a way nobody else did? Should I try to be different in court from

anyone I had seen and admired? I started to put this advice to the test. In the lower courts where I first appeared I tried different styles at different times. Slowly I must have found a style that suited me. You will too.

Good habits

[1105] No knowledge is wasted in an advocate, although some knowledge is of more immediate importance. It is worth developing a habit of acquiring particular forms of knowledge. Every good advocate will tell you that learning never stops.

[1110] The following are some of the more important habits:

1. **Law** Keep up to date with decided cases, the authorities. Often enough a superior court will make a decision that will strike you as important. Make a note of it. Soon after I began as an advocate I started taking note of cases under their most obvious subjects, and keeping the notes in a loose-leaf folder. It became an alphabetical index of topics. Others have different ways of noting, but all advocates do it. We have to. We would find it too hard to absorb a case and to find the law on the subject from scratch, even with internet resources.
2. **Evidence** You must be thoroughly familiar with the rules of evidence. Evidence consists of the rules and principles that govern admissibility. The rules of evidence are often exclusionary by preventing the proof of some issues. Obvious examples are hearsay, improperly gained confessions, and all manner of documentary evidence.
3. **Rules of procedure** For the young advocate the rules and formalities can be quite intimidating. Has the case come to the right court in the right way? And in court, when do you stand and sit? How do you announce your appearance? What is the procedure for examining witnesses? In what situations can you lose the right of last address?
4. **Court propriety** Stand when spoken to by the judge, be respectful in word and demeanour, and be silent when the oath is taken. There is a list of do's and don'ts in the last chapter.