Appellate advocacy

By Gerard Mullins

The term 'appellate advocacy' ordinarily conjures up images of experienced senior counsel at the prime of their careers arguing esoteric points of law before the Court of Appeal or the High Court. But the reality is that there are many appeals to lower courts and tribunals in which the attributes and skills of the appellate advocate are important.

The Hon Justice Michael Kirby delivered the Dame Ann Ebsworth Memorial Lecture in 2006 on the topic of appellate advocacy. During the course of his lecture, Justice Kirby noted that it is possible to identify a number of common characteristics shared by effective advocates. He 'listed 'ten rules' that indicated how an advocate might enhance performance before an appellate court.[1] Justice Kirby considered the list a useful starting point for advocates wishing to refine their skills before the appellate courts.

The list is as follows:

1. Know the court or tribunal that you are appearing in.
2. Know the law, including both the substantive law relating to your case and the basic procedural laws that govern the body you are appearing before.
3. Use the opening of your oral submissions to make an immediate impression on the minds of the decision-makers and to define the issues.
4. Conceptualise the case, and focus the attention of the court directly on the heart of the matter viewed from the interest you are propounding.
5. Watch the bench and respond to them.
6. Give priority to substance over attempted elegance.
7. Cite authorities with discernment.
8. Be honest with the court at all times.
9. Demonstrate courage and persistence under fire. You will generally be respected for it. In any case, it is your duty.
10. Address any legal policy and legal principles involved in the case and show how they relate to the case.

Justice Kirby notes that, even in cases where an oral hearing occurs, the increasing importance of written submissions affects the way that an appellate advocate typically approaches the task at hand. Oral argument is not designed solely as an opportunity to present submissions already stated in writing. Reading written submissions aloud to the bench would do nothing to advance the argument – certainly if it went beyond reading a particular passage. Attempts to do so will frustrate judges who, for the most part, will already be familiar with the material before them. If the judges are not, they will usually reveal this fact, requiring the advocate to adapt his or her submissions accordingly.

His Honour continues:

> 'A good advocate ordinarily uses oral argument to complement and strengthen written submissions, and not just to state them again in a slightly different way. More discerning advocates will keep in mind that some judges may not have had time to read the submissions carefully. In the particular case, some will be out of familiar legal territory. Even in the age of written arguments, the advocate must tread a careful path between keeping the interests of those judges who are "hot" and those who are not and are not really focusing on what the case is about. It is quite a tall order. The challenge is increased by the trend towards written argument.'

Oral argument presents the contemporary advocate with an opportunity to focus the attention of the court on the most important aspects of the case. It also provides an opportunity to engage in discussion[2] with decision-makers about the central issues in the case. ■

Notes: **1** Note also M D Kirby, 'Ten Rules of Appellate Advocacy', (1995) 69 ALJ 964.

Gerry Mullins *is a barrister at Ronan Chambers, Brisbane.*
PHONE *(07) 3236 1882* **EMAIL** *gerrymullins@ozemail.com.au*