

DON'T JUST SIT THERE

Gillian Coumbe, Barrister

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Introduction

1. Advocacy covers the conduct of a civil case from start to finish.¹ But it is the oral presentation of the case in the courtroom -- evidence and argument -- that ultimately defines the advocate. Mastery of the exciting art of oral advocacy requires constant practice and effort. "Years of toil, nights of stress and days of danger".² On the job training should therefore begin early in your career. Otherwise you will not have time to make all the necessary mistakes.
2. In Australia research shows that women advocates are under-represented in speaking and lead roles in the Courts, especially in commercial and appellate cases.³ Observation and impression suggest the same is true here in New Zealand.⁴ In addition, the role of the silent junior seems to be increasing in popularity.⁵ However, oral advocacy cannot be learned, let alone mastered, in silence. This paper addresses the following:
 - (a) Why it is important, where possible, for junior counsel to have a speaking part in Court, and how to get it;
 - (b) How to manage fear and gain the confidence to speak; and
 - (c) How to make the transition from junior counsel to a leading role as an advocate.

Don't be a silent junior

3. For novice advocates, the opportunity to do minor Court appearances on your own (with the right overall supervision) provides essential experience. These solo appearances should begin on day one, with the complexity of these cases increasing over time.

¹ This includes the written documents – the pleadings, witness briefs and written submissions – as well as the oral argument: The Hon Justice Doyle, "Sinful Oral Advocacy", speech delivered at the Bar Association of Queensland's annual conference, February 2008.

² The Hon Justice Michael Kirby, "Rhetoric in Law – A Case for Optimism", 2008, p 41, quoting from J Curthoys and C Kendall, *Advocacy—An Introduction*, 2006, vii.

³ Speech given by the Hon Justice Marilyn Warren on the occasion of the Tenth Anniversary of the Victorian Women Lawyers, 24 August 2006; Francesca Bartlett, "Model Advocates or a Model For Change? The Model Equal Opportunity Briefing Policy as Affirmative Action" (2008) 32 *Melbourne University Law Review* 351;

⁴ The Right Honourable Chief Justice Dame Sian Elias advises that her impression is that the rate of female appearances in the Supreme Court (especially as leaders) has, if anything, declined in recent years.

⁵ Former Federal Court Judge Ray Finkelstein QC, speaking at the recent New Zealand Bar Association Conference in Melbourne on 25 August 2012, observed that in Australia junior counsel, both male and female, are increasingly silent. He appeared to attribute this largely to senior counsel being unwilling to share the oral presentation, contrary to tradition.

4. However, the best way for young lawyers to learn good advocacy skills is to supplement these solo appearances with a role as junior to a leading counsel. The opportunity to watch how things should be done, and ask questions, is invaluable. Much can be learned from closely observing and copying (or occasionally from cringing and avoiding).⁶
5. For the first year or two, that junior role in Court may largely be a silent one. Even for more experienced juniors it is not always possible to have a speaking part in every case. Sometimes the nature of the case or the argument does not accommodate it. Not all senior counsel (or commercial clients) may be receptive to the idea. Instructing solicitors may fear damaging their relationship with their client. But a silent role should certainly be the exception rather than the rule. There are very good reasons for speaking up, and for senior counsel to encourage their juniors to do so:

- (a) Without a speaking part the best opportunity to learn and improve is lost. Justice Michael Kirby once described the differing abilities of advocates as follows:

"Some advocates...are sprinters. Others are better at running marathons. Some, alas, are down to a walk. A few are walking in the wrong direction."⁷

But whilst skills of communication and persuasion may, for a fortunate few, be natural talents, advocacy is also a skill that can be honed and improved. Inheriting a "top barrister" gene is not essential. Good advocacy can be learned. Observation of senior counsel, attending training courses, and studying the many papers listing handy hints on oral advocacy, can assist.⁸ But there is no substitute for direct experience. This requires getting to your feet and speaking.

- (b) Only by speaking up will you really learn how to handle difficult situations such as unexpected developments or vigorous (and occasionally hostile) questioning by the Judge. Only by leading evidence will you learn how to manage and control witnesses. Only by presenting oral submissions will you gain the confidence and skill to present a clear, concise argument that is distilled down to its bare essentials. The forensic skills of your senior counsel will not transmit to you by some process of osmosis. You need to experience for yourself, and be tested in, the hard and public school of advocacy. Searing embarrassment is a teacher we never forget.⁹
- (c) Doing part of the oral presentation with a more experienced counsel provides an invaluable opportunity to receive feedback about your performance. The senior may offer constructive criticism and suggestions for improvement. You also have the chance to seek his or her guidance and advice before you stand up.

⁶ M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964.

⁷ The Hon Justice Michael Kirby, "Appellate Advocacy – New Challenges", the Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006, pp17-18.

⁸ Gillian Coumbe "Oral Argument in Civil Cases – Don't Write it Off", a paper on oral advocacy presented to the New Zealand Bar Association "Tricks of the Trade Seminar" on 22 May 2012: <http://www.gilliancoumbe.co.nz/wp-content/uploads/2012/07/Effective-oral-advocacy.pdf>

⁹ Chief Justice Robert French AC, "Trials of Advocacy", Australian Bar Association Bar Readers' Trial Advocacy Course, Closing Dinner, 8 July 2011, Perth, p 3.

- (d) Although challenging, oral advocacy can be the most satisfying and exciting part of the case. You may even be rewarded with an occasional Alan Shore moment when the Court is won over by your brilliance. The oral hearing is pivotal -- your only opportunity to engage with the Judge, and the culmination of all the work that has been done. By not speaking you deny yourself much job satisfaction.
- (e) If you are a habitually silent junior, eventually that is the reputation you will acquire. You will be seen as the able assistant but not a leader. You may write brilliant submissions. You may have handled the preparation of the case superbly. But the reality is that most of the credit will go to the advocates who present the case. Even juniors who regularly have a significant speaking part can find it difficult to emerge from the shadow of senior counsel and establish themselves as a 'go-to' advocate in their own right. If you do not speak up at all you may be permanently consigned to a supporting role – the second violin. That will hold you back if you are planning a career as an advocate, whether at the independent Bar or as a solicitor-advocate.
- (f) Taking a wider view, if more women do not speak up, it will take longer to close the gender gap at the Bar table. It will be harder to change the traditional briefing patterns (especially in commercial and appellate litigation) that are based on a misconception that good advocacy, especially the lead role, requires 'male traits'. Good advocacy requires excellent communication skills combined with intellectual rigour, confidence, and a certain fearlessness. Gender is, and should be, irrelevant.¹⁰
6. How, as a novice advocate, do you secure a speaking part? Primarily by asking for it. Senior counsel also need to be encouraging of this. My early experience at Russell McVeagh in the 1980s was that the partners were very receptive to sharing the oral presentation, and that in turn reassured the clients. It might involve, initially, leading a few minor witnesses, or presenting the secondary arguments. Once you have senior counsel's confidence it will be taken for granted that you will speak. But in the early days you may need to be insistent. Sometimes my allocated speaking part was in danger of being squeezed to vanishing point. Once in the Court of Appeal my senior counsel, who was in full flight addressing the Bench, turned and asked "Shall I just keep going?" I replied "No, I want my go."
7. In addition to your pre-allocated speaking part, additional opportunities often arise in the course of a hearing. For example, new, unexpected issues may emerge and you may be asked by your already overloaded senior counsel to address them. Even if you have to work all night, even if it is a difficult argument and you anticipate a rigorous time from the Bench, say yes. If senior counsel offers you an out -- "I'll do it if you don't feel able to" -- don't take it. Grab the opportunity, however daunting.
8. It is more difficult today for counsel in civil litigation to get the regular experience of the courtroom that they had in the past. The rise of alternative dispute resolution has contributed to that. A large proportion of commercial cases tend to settle. Cases that do go to trial do not have as much oral content as formerly. The advent of written

¹⁰ As Justice Mary Gaudron famously said when a member of the High Court of Australia, "although there may be genetic factors at work in skills of communication, there is no evidence that the relevant genes reside on the Y chromosome": The Hon Justice Michael Kirby, "Appellate Advocacy – New Challenges", *ibid*, n 5, at p 43.

witness briefs and written submissions has shortened the time for leading evidence and for oral argument. All the more reason, therefore, to seize all opportunities.

How to manage fear and increase confidence

9. The ‘terrors of oral advocacy’ are very real in the beginning. My first appearance in Court, a few days after admission to the Bar, was anticipated with dread. All I had to do was to seek an uncontested order in the High Court bankruptcy list. I carefully wrote down my four lines of script, including my full name, and rehearsed endlessly. Fortunately the presiding Judge was the kindly Justice Speight who helpfully suggested a slight variation to the order I was seeking. He explained, when I proffered my consent to the change: “Actually Ms Coumbe, I don’t need your consent...”

10. Anxiety before a hearing is perfectly normal – and indeed necessary. These feelings of apprehension do, however, become much more manageable with experience. Here are some suggestions for overcoming fear and increasing confidence:
 - (a) Be thoroughly prepared. “The three rules of oral advocacy are preparation, preparation and preparation”.¹¹ Thorough preparation means you will be less nervous in Court. The reassurance of knowing the material cold will necessarily increase your confidence in your handling of witnesses and your presentation of oral argument. Rigorous preparation is an essential part of extemporaneous speaking.¹² Being on top of the material and answering questions well will also enhance your credibility with the Judge.

 - (b) Consider investing in some professional voice training. You do not need to be as vocally-challenged as King George VI to benefit from this. A barrister’s voice is a tool of trade. It makes enormous sense to work on improving it. Surprisingly few people do so. Voice training will have numerous advantages, including:
 - enhancing the clarity, tone, enunciation and projection of your voice. An improvement in the quality and sound of your voice will inevitably boost your performance and therefore your confidence;

 - helping you to become more adept at thinking on your feet. You will feel more confident about pausing and taking time to process your thoughts and think about what to say next. This may save you from blurting out ill-considered answers to questions, agreeing too readily to unhelpful propositions put to you by the Judge, or making improvident concessions. You will be less likely to become overwhelmed and unable to listen properly or think clearly. In short, you will be less likely to panic when the going gets tough;

 - encouraging you to speak at a lower pitch. This will give you greater authority and presence in Court. It will also help to conceal nerves. A high pitched voice strangled with nervousness will not aid your presentation;

¹¹ Justice Rothstein “Winning Appellate Advocacy: Persuasive Presentations” (2007) 32(1) *Manitoba Law Journal* 163, 166

¹² Randall Churchill reputedly said that his father Winston Churchill had “spent half his life preparing extemporaneous speeches.”

- add colour and liveliness through variation in intonation, pitch, speed and volume of delivery. If your voice sounds tired or bored, that is the effect you will have on the Judge.

I was not blessed with natural public speaking ability, but was fortunate to be tutored, after becoming a lawyer, by the late Lois Alberta Paynter, of the former John Thomson Studio. A formidable doyenne of New Zealand speech and drama, she once, when forewarned by an adjudicator to stay within her allocated presentation time, replied: “Young man, Lois Paynter *invented* time.” Lois once described my presentation as “soporific”. I had to consult the dictionary to see whether she had insulted me. I suspect she despaired that she would ever instill any oratory skill in me, but in fact she helped me greatly.¹³

- (c) The most common fear is getting it wrong in public – in front of the Judge, senior counsel, opposing counsel, instructing solicitor and client. This must be kept in perspective. Difficult moments in Court can happen to all advocates, at all levels of experience. A few judicial “uppercuts”¹⁴ do not spell the end of the world. There will always be good and better days. Your team may occasionally compliment you on a fine performance. At other times you may sit down to a chilly silence. Once my senior counsel slumped onto the bar table with his head in his hands. But practice and preparation will help to maximise the good experiences and minimise the not so good.

Judges today tend to be very courteous. They do not seem to find it necessary to subject young counsel to a hazing ritual. Justice Kirby, commenting on a welcome (albeit belated) shift towards courtesy in the NSW Court of Appeal, for which he largely claimed credit, said “Everyone loved me”.¹⁵

- (d) Remember that it is not all about you. You are not there to impress the instructing solicitor and others present. The hearing is not an audition for “New Zealand’s Got Talent”. Your job is to persuade the Judge that your client should win. Keep your focus on that end goal. From first to last, your duty is to advance the lawful interests of your client, consistent with your duties to the Court. What the Judge really wants is your help. The Judge wants as much assistance from you as you can give. Be attentive and responsive to the Judge, particularly during questions, rather than absorbed in your own performance.
- (e) Anxiety may stem from a misconception about what oral advocacy requires of you, and whether you can deliver. Aggression is not, for example, an essential ingredient of effective advocacy. Indeed, too much assertiveness is counter-productive. Nor is a flashy performance required. Judges may not appreciate flamboyance and theatrics. A respectful, conversational tone is best, preferably with a touch of flair.

¹³ Speech New Zealand can recommend speech teachers, for example, Meredith Caisley of Caisley Communication Consultancy: <http://caisleyspeech.co.nz/director.html>

¹⁴ A F Mason, “The Role of Counsel and Appellate Advocacy”, (1984) 58 ALJ 537, 539.

¹⁵ The Hon Michael Kirby AC CMG, “Inside the High Court”, Guest Lecture at UniSA, 27 September 2011.

A certain robustness is, however, required. You do need to convey confidence and resilience. “Attitude is everything in advocacy”.¹⁶ Courage in the client’s cause is vital. You may not feel confident initially, but you must appear confident, even if that means faking it until you do. If you appear not to have confidence in yourself neither will the Judge. The secret is to agonize in private.

- (f) Comfort can be taken from the fact that feelings of anxiety usually diminish once you begin speaking. Counsel tend to be at their most nervous just before standing up. This can be alleviated by being organised, having all your materials ready and marked up, arriving in Court early -- and keeping the instructing solicitor and client at bay during those final moments before you begin.
- (g) The presence of senior counsel during your presentation should also be reassuring. A silk safety net. If you do get into difficulty you can always confer with your leader. The senior can if necessary conduct some damage-control during re-examination of the witness, or during the reply argument. A constructive critique of your performance by your senior counsel will also let you know what you are doing right, and what to avoid doing next time.
- (h) Find your own advocacy style. As Oscar Wilde said “Be yourself, everyone else is already taken”. There are techniques and skills you should learn from senior counsel, and there are basic rules of advocacy that must be observed. But ultimately you need to discover what style of presentation works best for you. Trying to imitate others does not work. If you feel comfortable in yourself, and your style reflects your own personality, you will present more confidently and effectively. Be your own advocate.

Transitioning into a leading role

11. The transition to a leading role in presenting a case does not happen at a single defining moment. It takes time, and should be a natural progression. Below are some suggestions for laying the groundwork:
 - (a) It is, for the reasons given above, important to make the most of the junior role by having an increasingly significant speaking part. You will gradually emerge as an advocate in your own right. It is perhaps best not to outshine your senior counsel too soon.
 - (b) However, it is unwise to be appearing only in a junior role. From the time of your admission to the Bar you also need to have cases (at a level appropriate to your experience) that you are appearing in by yourself. In my early Russell McVeagh days I began with the bankruptcy list and duty solicitor work, then smaller defended District Court cases and commercial arbitrations. I also appeared in defended interlocutory hearings in the High Court. Gradually the complexity of these solo cases increased.

¹⁶ Mr Justice Ian Binnie, “A Survivor’s Guide to Advocacy in the Supreme Court of Canada”, John Sopinka Advocacy Lecture presented to the Criminal Lawyers’ Association at Toronto, November 27 1998, p 24.

- (c) Not all defended advocacy has to be in a courtroom. Appearing before administrative tribunals also provides excellent advocacy experience. When I first went to the Independent Bar I was fortunate to be briefed in numerous cases before the former Casino Control Authority. For a number of years there were frequent significant defended hearings, some lasting for weeks or months. The presence of a few pugnacious former politicians on the Authority -- Trevor De Cleene and later Michael Cox -- added to the challenge.
- (d) Create opportunities. Pro bono cases may provide an invaluable advocacy opportunity. Occasionally, reducing your hourly rate may also encourage a client to proceed to trial where the strengths of the case would otherwise be outweighed by the economics.
- (e) Be ready to step up. Chance events can present opportunities. On one occasion I was to present part of the oral argument in a competition law case in the Court of Appeal. On the Saturday afternoon prior to the Monday hearing the senior silk I was to appear with, an avid jogger, rang to say he had been in a hit and run and was incapacitated. Later he said "You could look a little less pleased about it".
- (f) Above all, be willing to accept responsibility for what happens in Court, to make the tough decisions yourself, and to assume a leadership role.

Conclusion

12. Oral advocacy can only be mastered in the school of hard knocks. You will be handed some opportunities; others you must find. It is important that you do not put limitations on yourself. So don't just sit there, say something. You will be rewarded with a satisfying and exciting career as an advocate.