ALL I EVER LEARNED ABOUT BEING A GOOD BARRISTER I LEARNED FROM BEING A JUDGE: GOOD ORAL ADVOCACY

TALK TO THE NSW BAR PRACTICE COURSE

The Golden Rules

1. Your first duty is to the court, not to your client. Accordingly, you must never ever mislead the court. If you have done so inadvertently, then remedy the situation at the first available opportunity. Once an advocate gets a reputation for being unreliable or worse, dishonest, it is very hard to lose.

2. While you hope to persuade the court, the court is actually looking to you for assistance. A helpful barrister is on the path to being a good barrister. Thus if the court asks you a question, answer it. Usually the court wants help when it asks counsel questions, it is not trying to be tricky.

3. Seek wherever possible to refine and narrow the scope of what is in contest before the court ie seek agreement wherever possible on matters or fact and/or law with your opponent. This is an efficient use of everyone's time and will save your client money.

At Directions Hearings

4. The court is busy, your matter is not the only matter to be dealt with in the list so therefore:

    - make sure you announce your name (spell it if unusual) and who you are appearing for clearly;

- know the history of the matter and what relief is ultimately being sought;

- come prepared with written short minutes of order (which you have discussed with the other side beforehand);

- try to reach agreement on as much as you can before the court;

- state what is and what is not contentious;

- have whatever documents you need to hand up already prepared, with copies for your opponent;

- bring a copy of the rules of court;

- be sure to know what power the court has to grant the orders you seek.

5. If you are in default, first, say so; and second, explain why; then third, provide a remedy.

Notices of Motion

6. You should do the following:

    - if not contained in the motion, state the power for the relief sought;

    - give a brief summary of what the proceedings are about, where the motion fits into the proceedings and why you seek the relief stated in the motion;

    - state what evidence you are relying on and why it is relevant;

- have copies of all authorities you seek to rely upon if you are appearing in a motions list or, if possible and the motion has been specially fixed, have sent through the day before a list of authorities to the judge (but still hand up copies of unreported judgments).

Hearings

7. In addition to the dos and don'ts listed below, the following suggestions are offered.

openings

8. Do an opening, even if only brief (if in doubt, ask the court if it would be assisted by one).

9. The functioning of an opening is to give an outline of your case to the court. This will include a brief recitation of: the facts that you hope to prove if not agreed; the evidence you will be relying on; and of the law. The idea is to provide a 'roadmap' to the court of your case.

10. Tell the court what has been agreed to factually and/or legally and what has not ie what the main areas of contest will be.

11. Be structured.

evidence

12. Ask yourself, is this evidence relevant? To what issue does it go? Do I really need to read this affidavit or cross examine this witness?

13. Remember to read the affidavits you rely on and to tender all exhibits.

14. When objecting to affidavits don't just object for the sake of it. The evidence may be of assistance. Nothing irritates a judge more than pages of objections to material that is not really contentious.

15. Have a copy of the *Evidence Act* on hand at all times.

16. If leading evidence in chief, be structured (which usually means chronological).

17. Cross examination should be targeted ie what evidence do you need to get from this witness? It should not be 'cross' in the sense of raising your voice, or be sarcastic or belittling. Be polite at all times.

18. Have clean copies of any document you want to put to a witness or to tender. In this regard, confer with the other side to ensure that a clean tender bundle is available to put to witnesses.

19. Always make sure that you have a clean copy of your witness' affidavit present if the witness is required for cross examination.

closing submissions

20. Don't simply read out your written submissions. If they have been provided to the court beforehand generally they will have been read in advance. Talk to your written submissions and remember that if the court asks you a question, answer it as directly as you can.

21. A useful tip is to have speaking notes that will provide a structure to your oral address and will ensure that if you are diverted by questions from the bench you will know where to return to in your submissions.

22. Don't make submissions that are no longer maintainable on the evidence.

23. Make sure you actually refer to the evidence you have tendered, read and elicited in questioning. Nothing is more frustrating than a tender bundle to which only a handful of documents have been referred to. Increasingly the general rule is that if the court has not been specifically taken to a document in the tender bundle, then it is excluded from it.

24. Likewise in relation to legal authorities. While bundles of authorities are useful to the court, do not hand up authorities only to then not refer to them. Generally, only hand up unreported or difficult to access authorities. If you have filed a list of authorities then it is not necessary to hand up reported decisions of the well known and commonly used law reports. And avoid long lists of authorities to which only a handful of decisions are referred to.

25. In this regard, be sure to be familiar with the relevant jurisdictional practice note and rules governing lists of authorities. Extracts of long decisions are permissible provided you also photocopy the front page and headnote of the decision and provide a reference to it.

26. Your oral submissions should be structured in such a way so as to tell the court where you are going ie what the issue is, what the law is and what evidence you are relying on to ensure that the court will find in your favour on any given issue.

27. A reply should not be a restatement of your submissions, it should be responsive to points raised by your opponent that were either not dealt with, or not dealt with fully, by you in your submissions.

Do

28. Be mindful to do the following:

- speak clearly and not too fast. For shorter matters there is often is no transcript;

- be polite, reasonable and courteous to the court;

- be polite, reasonable and courteous to your opposition. In doing so you are providing assistance to the court and what goes around comes around; and

- if there is a problem, raise it early with your opponent and, if necessary, the court. Problems arise in litigation, it is how they are dealt with that counts.

Don’t

29. Do not:

- be late to court;

- fill the void with a preponderance of pontificating prolix purple prose. For example, if you don’t know the answer to a question, don’t blather, say so and, if possible, take it on notice;

- sledge or make comments from the bar table. If you want to say something, wait your turn and then say it;

- discuss anything you don’t want the judge to hear in court while the judge is present. The acoustics of some courts are such that the judge hears more than you thought possible;

- discuss anything you don’t want the judge to hear in front of the tipstaff or court officer. Just because the judge is not in the court

room you cannot assume that information will not travel back to the judge in chambers; or

- engage in *ex parte* communications with the court. If you need to contact the court or the chambers of a judge then make sure you have your opponent's consent first.

14 September 2009

Justice Rachel Pepper

Land and Environment Court of New South Wales