ADR Bulletin
ADR Bulletin

Volume 10
Number 1 *Persuasion Part II*

Article 5

10-1-2007

Appellate advocacy

Bret Walker

ADR Bulletin

Persuasion in appellate advocacy

Appellate advocacy

Bret Walker

Appellate advocacy in Australia has a striking characteristic, the more so because ours is a federal country. Lawyers who dominated the constitutional convention, who still dominate parliaments, and who have a very large role in the drafting of all legislation, including legislation about courts, have clearly decided that you can't have too much of a good thing, if that good thing is litigation.

We offer, for many legal decisions, the possibility of three goes, even more if we add administrative decisions. For example, once a pension or superannuation dispute reaches the High Court (which is possible because the numbers involved means the precedent may be significant), there may have been three court levels and one or two previous administrative decision levels. We're not alone, but we do seem to be the world champions for giving losers 'another go'.

It's tempting, because we have a 'top-down' view in the legal profession, that we look first at the High Court instead of at administrative decision-makers, to think of all of appellate advocacy as being before a bench of more than one judge. That's not correct as most appeals in this country are heard by single judicial officers. They are appeals, sensibly called *appeals from administrative decisions*, which go to single judges or magistrates, and then there is a large number of appeals from magistrates' decisions in criminal cases which go to a district or county court judge sitting alone.

I'm not going to talk about those numerous and important appeals very much because: (a) I don't do them very much; (b) I did them a long time ago; and, (c) they aren't as interesting in terms of persuasive techniques as are multi-member benches.

One word, 'hierarchy', is the key to an understanding of appellate advocacy as an attitudinal stance. It is about going to a higher place in the hierarchy to complain, if you are the appellant, about what happened or, if you're a respondent, to say 'no, no, no, you (the higher court) should tick the lower court's work (with all the condescension that undoubtedly does involve) as having been correct or, if not correct, adequate'.

'Hierarchy', is a concept from which a number of different facets of appellate advocacy can and should be approached by those who are interested in reflecting on how to be an appellate law advocate. Here I comment upon: the importance of 'in-group' in appellate work; the power and scope of written persuasion; the enjoyment of spoken advocacy; and, some distinctive features of criminal appeals and appeals in the High Court.

One word, 'hierarchy', is the key to an understanding of appellate advocacy as an attitudinal stance. It is about going to a higher place in the hierarchy to complain, if you are the appellant, about what happened or, if you're a respondent, to say 'no, no, no, you (the higher court) should tick the lower court's work (with all the condescension that undoubtedly does involve) as having been correct or, if not correct, adequate'.

Appellate courts and 'in-groups'

Is the appeal court there to correct an error or is it there to get the right result? That is, there's the 'error' approach and there's the 'second, third and fourth go' approach. The key question is, 'Why should most of the judges that you are addressing *feel* that the result ought to have been different?' The appeal, to them, as appeal judges, is that it ought to be *right*. A standard manoeuvre by the bench, who in many ways are the real opponent to an appellant, is to say, 'What was the error below?'

The advocate must have done an in-group analysis. One in-group is judges. It's not true that all judges identify as some kind of craft guild with each other. Hierarchy is a key word. Court of appeal judges do not identify with district court judges in New South Wales. But then, district court judges don't identify with court of appeal judges either, and some have even wondered whether they are speaking the same language. But, facetiousness aside …

From an appellant's viewpoint the in-group that really matters is that group of lawyers involved in appeals. We're talking about a very small minority of cases: only a small fraction of disputes become cases, and a very small minority of them become contested results, so we're talking about a rapidly narrowing funnel to produce appellate jurisprudence. And so, there's an in-group already and if you can, as an appellate advocate, establish an in-group feeling between you and/or your client — the distinction is elusive but important — on one hand, and on the other at least two of the three judges, or three of the five if you've got five, as to what the result should have been — you'll notice

that I've leapt over the idea of 'error' at the moment — then you have already established a very large bridgehead to success.

The power and scope of written persuasion

The most important part of an appeal is deciding whether to appeal, and what are your grounds. The second most important part of the appeal is how you engage with the judges when you're on your feet.

The enjoyment of spoken advocacy

The written advocacy means that appellate spoken addresses have returned to what is probably a mythical golden age of opportunity for advocates, where the spoken persuasion catches, holds and excites the judges, or at least most of them. The advocate must seize the opportunities for emotional attachment to an outcome. Cases don't go to appeal unless you've been beaten.

The most important part of an appeal is deciding whether to appeal, and what are your grounds. The second most important part of the appeal is how you engage with the judges when you're on your feet.

Now, as to the first, it is a common whinge of judges that there are too many grounds of appeal. Usually, there's only one or two grounds of appeal that matter. If there are about 27 grounds of appeal, the appellant is likely to lose. Or, good counsel (who has received the case after the grounds have been lodged) will say, 'Well, there are 27 grounds, but they may be grouped [this is a euphemism] into the following two classes …'

The importance of written material extends from the grounds and into the appeal hearing. Unlike trials, the so-called facts are in books; they're printed. You don't have flesh and blood before the court; you don't have starving widows to gesture towards. You can tell stories, but the story can be checked by your opponent and the bench, from the book in front of you and them.

Appellate advocacy is now very largely written. This has been an entirely beneficial change. We now write about those aspects of the appeal, which always lent themselves to writing because they most closely resemble the way the judgments are produced; for example, the analysis of the jurisprudence, the detailed references to the detail of the evidence, and chronologies. This information never needs to be read or even spoken about during the appeal hearing.

You've lost and hence you are an appellant. There's always something pretty powerful to say against you, and so the enlisting of the emotions is a necessity.

How do you deal with matters on your feet before the appeal judges? You must confront how the judge below actually dealt with the matter, and here one should read to the bench not from a work of authority to instruct them but from the work under scrutiny to destroy it. The way to do that enlists some basic tools that are necessary for civilised advocacy.

The first is courtesy. Sarcasm or unkind comment about the judge below *must* be initiated by the appellate judges, not by the appellate advocate, and must never be too readily acquiesced in by the appellate advocate. One must only reluctantly be forced to accept the appropriateness of the stricture that some very senior judge has passed on a judge below.

Next, weak reasoning is best exposed by the repeated reading of it, with sympathetic understanding and an attempt to explain to the judge what is being referred to. You read two or three sentences, and then interpolate your argument, or your reference, or you say 'and your Honours will find a useful cross-reference to —' something

which is contradictory in the same set of reasons.

Usefully we have paragraph numbers in judgments. Very often in appellant arguments, after only about 10 minutes of going through the reasons you are attacking, you are already able to say 'and yes, it's the paragraph 36 error that is the main one. Your Honours will recall paragraph 36.' It (paragraph 36) begins to get this fateful aura; people return to it. They have, literally, their red pens out; they're all marked, they're heavily underlined and those are the very simple ways in which one can turn the reasons for judgment, which were once a coherent whole, into something which has been dissected — almost literally so in the way in which it has been separated out, the focus put on particular parts, the turning point in reasoning identified — where you say a wrong point was made, or a step taken too far, or a jump made without any justification.

Criminal appeals

What about when you don't have reasons for judgment as when you have a jury verdict? When it comes to appellate advocacy in relation to a trial judge's summing up to the jury, alas at the moment we are bound by the impossible command that on one hand we must be alive to the difficult dynamics of a jury trial (and what Chief Justice Gleeson in the High Court refers to as the 'impossibility of understanding why tactical decisions are made by advocates'), and on the other hand that there are any number of precedents against which one can measure the words of a judge, particularly concerning the way in which the jury is obliged to approach various matters of exculpation, or various matters of the weight of evidence.

And in the High Court

Finally, what differentiates High Court appellate advocacy from what we have already discussed is that you are not seeking merely to persuade that in the administration of justice there ought to have been a different result. They will tell you at the special leave application that the High Court is not here to correct errors. At that point, laymen in the audience are usually carried out on stretchers 'cause that's what they think (from *The Castle*) that the High Court is there for. There are exceptional cases where the error appears so egregious, or even so sentimentally affecting, as to attract special leave. That happens once in a blue moon.

In the High Court the in-group analysis is different. How is it that the theory of the case which would produce, almost synergistically, your win — how do you make that theory fit with, gel with, a feeling of judicial intellectual satisfaction? Depending upon your politics about judicial conduct you can pick any number of words such as creativity, stewardship, fidelity to the law, attachment to justice. All of these describe that feeling of intellectual satisfaction which lawyers all get in appropriate cases — where one feels that the principles that follow from the way in which the case has been decided, or ought to be decided, fit within a scheme usually appealing to a combination of different factors, which appeal in different degrees of cogency to different members of the bench.

There is what I'll call the *antiquarian* appeal (that is, the traditional appeal) which is very powerful for all judges including those most vulgarly called 'activist'. I say vulgarly because common parlance will call a judge activist because the speaker disapproves of the outcome for which the judge decided. To refer in particular to Justice Michael Kirby, his attachment to precedent is, in my view, the strongest of the present bench. At least in his interventions during argument, his questions most bluntly address, 'Why should we change what has been established? Why should we depart from the words of Parliament?'

So, the antiquarian or traditionalist approach is one which you can enlist as an in-group member, namely, 'We've all read these cases. We can synthesise them in this particular way so as to make a system, so as to provide that humanly attractive quality of *coherence*'. Artificial no doubt, but it satisfies, in the same way that in music a proper cadence satisfies and a dissonance may not.

Next there are the judges who find the importance of what I'll call *connections* between different areas of doctrine absolutely essential to a feeling that they are contributing at the apex of the judicial system to the development of the common law. Now, that sounds as if it's the opposite from the antiquarian approach, and very often it is expressed in terms, which have, as it were, fewer footnotes, literally and figuratively, but they are in fact converging on a common point.

The word at the moment — I don't know how long this will last — is *coherence*. This postulates that there ought to be a proper, recognisable and explicable link between the law of defamation, the law of negligence and the law of contract, that they decide different kinds of disputes in ways that have more than a passing family resemblance.

I would say in-group analysis in the High Court is very important for appellate advocacy there. If you wish to persuade that a result ought to be different in the High Court as opposed to a court of appeal, you will be seeking to persuade that your outcome, your desired result, is the incidental by-product, the thing that just follows at the end of your argument, from that which is far more important to the High Court. You must engender among them a feeling of satisfaction that by publishing this result for the reasons you urge they will have contributed to a working out of, or an exposition of, or perhaps a repetition of legal doctrine, in a way which will provide guidance to the hierarchy. It all comes back, as I said in the beginning, that in appellate advocacy you are talking in, to and for a hierarchy. ●

Bret Walker SC is a barrister, with a practice mainly in general appellate advocacy, equity/commercial, administrative and constitutional law. He has been a Senior Counsel since 1993. His more prominent appointments include: President of Law Council of Australia; President of NSW Bar Association; Chairman of Australian Bar Association Model Code of Conduct Committee 1995; Member of NSW Health Clinical Ethics Advisory Panel. He has been the Commissioner of Inquiry (or similar) for five public inquiries.