Standing your Ground: How to prepare well for court and how to handle "push back" from the bench

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How to prepare well for court

The following are brief, note form suggestions. This advice refers to a civil case in which there has been a direction that evidence in chief be by way of affidavits. However, much of it has more general application.

1. Know your brief. You need to be thoroughly familiar with the facts (ie the evidence on both sides), the issues and the law. (This will involve reviewing the pleadings to identify the live issues and considering whether the pleadings need to be amended to accurately reflect the real issues in the case.)

2. The standard advice is – after you have thoroughly read and researched the facts and the law and identified the issues – write your closing submissions first – ie what you want the court to do and why the court should do it.

3. Then work backwards - reviewing the evidence to see if it needs supplementing (or pruning); identifying the issues on which you need to cross-examine; preparing your cross-examination; then your opening. These will all be shaped by the closing submissions.

4. Ideally the parties should co-operate in preparing a book of documents (whether in paper or electronic form). This should contain only the

documents which are necessary for the determination of the issues. (If you cannot gain the cooperation of the other side, prepare your own.)

5. Counsel's notes for the opening and closing addresses, and for the cross-examination of the witnesses, should contain the page numbers / paragraph numbers of all of the evidence (affidavit and documentary) which it is intended to refer to, so that she can quickly and seamlessly refer the court and the witnesses to the relevant material.

6. Your material needs to be physically organised in a way that makes it easy for you to find what you want as soon as you need it.

7. Practice each aspect of the trial until it is smooth. (Use a mirror if you can bear it.)

How to deal with "push back" from the bench

If you are confronted with "push back" from the bench, you first need to determine what kind of "push back" you are getting. Is it really rudeness/ bullying / refusal to listen, or is it robust questioning aimed at trying to achieve understanding of your case, or refinement of the issues, or testing of your arguments. This kind of "push back" is an opportunity. It should be embraced.

Constructive questioning

As C P Shanahan SC wrote in his article, *'Instructions on how to use a life-jacket': Persuading a hostile court to shift its position*:[1]

[1] (2013) 38 Australian Bar Review 76 at 78

> There is a significant and important difference between a hostile court's interrogation of propositions advanced by counsel in argument on one hand, and judicial bullying on the other.[2]

In *Watson: Ex parte Armstrong* the majority in the High Court observed:

> During the course of argument a judge will often follow the common, and sometimes necessary, course of formulating propositions for the purpose of enabling their correctness to be tested, and as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory.[3]

In appeals, in trials and in interlocutory applications, the use of written submissions is routine. This means that the judge (or judges on an appeal) will normally have read both side's submissions before the hearing; will have formed tentative views about what the real issues in the case are (and often about how they should be resolved); and, importantly, will have formulated questions to assist them in the resolution of the issues.

It is important to address such questions. If you side step them, you will be missing a valuable opportunity to persuade the court to decide in your client's favour.

There are a number of ways to address such questions. The most obvious one is to provide answers to the questions which provide a reason or reasons to decide the issue in your favour.

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2 The author refers in the article to a "hostile" court, in the sense of "a court that expresses a pronounced negative, albeit 'tentative or exploratory', view of the case advanced by counsel during the course of argument." [p 77] He goes on to identify the risks posed by such exchanges on both sides of the bar table including (for judges) "perceptions of pre-judgment and the rule against judicial bias, and the risk that a case may be decided on a basis upon which the parties have not been properly heard" and (for counsel) the risk that "advocates can lose sight of their client's case, become 'de-stabilised' and ineffective or fail to render the respect to which a court is entitled."[78]

3 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 264 per Barwick CJ and Gibbs, Stephen and Mason JJ; 9 ALR 551

However, sometimes any answer to a particular question or questions would be fatal to your case. Your task then, is to explain why those particular questions do not reflect the real issues in the case and – preferably using those questions as a starting point – explain what questions you submit the court should be addressing instead and why.

It can be confronting (even terrifying) for young inexperienced counsel to get to her feet prepared to deliver well prepared submissions and, instead, to have questions fired at her from the bench. However, this should be expected.

It must be acknowledged that, on occasion, this process can go wrong. "Judges and advocates are both essential parts of the same system for the administration of justice, and neither can function without the other, and both are subject to increasing pressure in their work places."[4] Counsel, especially inexperienced counsel - and even more especially ill-prepared counsel - can sometimes misconstrue rigorous or insistent testing of their arguments as a personal attack; and judges can become frustrated and annoyed at having their time wasted by ill-prepared, poorly organised submissions or counsel who refuse to engage in the dialectic process designed to assist in the refining and determination of the issues.

The key to minimising the chance of the process going wrong is preparation.

(a) Counsel should be thoroughly familiar with her own submissions and those of her opponent.

[4] (2013) 38 Australian Bar Review 76 at 78

(b) She should, of course, be prepared with logical arguments as to why her position is correct and her opponent's is incorrect.

(c) This preparation should enable her to identify the issues and to prepare a number of different logical reasons why her client's case should be preferred on each identified issue.

(d) Ideally this will enable counsel to anticipate the kinds of questions likely to be raised by the court, and to be ready with answers and alternative pathways to a successful outcome should the first answer prove fruitless.

If you are not successful at persuading the court of the correctness of your position on a particular issue after proffering, say, three different explanations (more or less depending on the issue) then you should also have an exit strategy. "I don't think I can take that issue any further Your Honour," is a tried and true method of bringing the discussion to an end so you can focus on your next point.

If, despite thorough preparation, you are caught off guard by an unanticipated question the best strategy is to acknowledge the importance of the question; state frankly that you need some time to think about it; and ask if you can get back to the question – eg after the break. Make sure you have a note of the question – and make sure you <u>do</u> get back to it.

<u>Genuine bullying / bad behaviour on the bench</u>

The ideal for both judges and counsel is to maintain courteous behaviour at all times. This does not always occur. When there is a failure of courtesy and respect from the bench, it can be as a result of two different phenomena. The first is a (hopefully) uncharacteristic loss of temper either as a result of some shortcoming

by counsel or from an unrelated cause. Such lapses should be rare and will often be followed by an apology. As there will inevitably be occasional lapses (and apologies) from both sides of the bar table, this kind of "bad behaviour" will generally be forgiven by both bar and bench – provided it does not occur too frequently.

The other source of bad behaviour comes from the genuine serial bully – ie the psychopathic personality type who lacks empathy and craves power. Thankfully, these are very rare.

The following remarks may be taken as generally applicable advice on how to deal with bad behaviour on the bench – but are of particular relevance to the serial bully, should you be so unfortunate as ever to have to deal with one.

1. The first rule is never become emotional. Always respond calmly, courteously and, above all, emotionlessly.

2. This means you do not react to any display of emotion from the bench.

3. Do not return fire with fire, impatience with impatience, displays of anger or frustration with equivalent displays – or with tears if you can help it. (Take a pill if necessary!)

4. The reason for this is self-preservation. If a serial bully gets a reaction, he will only be encouraged. The most effective form of self-preservation when dealing with a bully is, usually, not to react to emotion and not to show any yourself, but to remain business-like and focused on your case.

5. Even if you are not dealing with a serial bully, but (for example) with an exchange about the case in which a judge's temper has become frayed, responding in kind can cause the situation to escalate. (The same advice applies to a judge dealing with a bad tempered reaction from counsel.)

6. You need to distinguish between personal bullying and the kind of "push back" that may affect your case / your client's interest.

(a) Personal bullying

7. Probably the best way to deal with personal bullying or inappropriate comments is not to respond: to maintain, if possible, a dignified silence in the face of provocation and to keep your focus on the business at hand – making your case. If this kind of bullying goes too far, the remedy is outside the courtroom – ie a complaint to the head of jurisdiction, preferably through the Law Society or Bar Association.

(b) Behaviour that may affect your client's interests

8. The same is not true of the kind of bullying / bad behaviour that may affect your client's interests. When that happens, you have to stand your ground (emotionlessly). If you believe you have a submission you must make and you believe you are not being listened to, you need to politely request the judge to listen – without making it personal. Stick to the business at hand. Some useful phrases might be:

- Your Honour, I am obliged to make this submission.
- Your Honour, may I be permitted to finish this submission?
- May I be heard on that point, YH?

- (In extremis) Is your Honour refusing to hear me on this issue? OR
- I want to put on the record that I have requested your Honour to allow me to address the court on this point.

9. If remarks by a judge indicate the possibility of bias, you are obliged to raise the matter, no matter how uncomfortable that may be, again, politely and emotionlessly and without making it personal.

   An example might be:

   > "Your Honour has said X. I am obliged to submit to your Honour that that might be construed, by a fair minded observer, as an indication that your Honour has pre-judged the issue (or bears some animus towards my client)."

10. Note that you must be prepared to back this up with an appropriate recusal application depending on the reaction from the bench.

11. This may bring the judge to his or her senses and you may get a fair hearing. (Most judges are horrified at the thought that they might be denying someone a fair hearing.) If not, you have set up the necessary appeal points to preserve your client's rights.

Justice Judith Kelly
Supreme Court of the Northern Territory

Further reading:

C P Shanahan SC, *'Instructions on how to use a life-jacket': Persuading a hostile court to shift its position*, (2013) 38 Australian Bar Review 76

Hon Justice G Martin AM, *'Bullying In The Courtroom'* (2013) 4 *WR* 16 at 16 (WR = Workplace Review)

David Gillespie, *Taming Toxic People: The science of identifying and dealing with psychopaths at work and home*, Pan MacMillan Australia, 2017

P Young, *'Judicial Bullying'* (2013) 87 *ALJ* 371

C Merritt, *"Judicial Bullying? Not in my courts." The Australian*, Legal Affairs pages, Friday 7 June 2013.