

Chapter 2

Advocacy*

The function of advocacy

The adversary system is based upon the assumption that justice is most likely to be achieved as the outcome of a contest in which the case of each opposing party is presented by a professional advocate, learned in the law, and operating within the constraints and disciplines of an organised profession whose members owe a duty not only to their clients but also to the court. The essential role of the advocate in an adversarial system is to present the client's case to its best advantage, to cut down the opponent's case, and to endeavour by all legitimate means to persuade the tribunal to a view of the facts and the law most likely to result in a decision in favour of the client.

It follows from the last proposition that the elementary condition of the successful discharge of the obligations of an advocate is that the advocate understands what view of the facts and the law is in a given case, most likely to result in a decision in favour of the client.

To be a good advocate it is necessary to be a good lawyer. Not all good lawyers are good advocates, but an advocate who has not taken the trouble to master the principles of law relevant to the contest is like an athlete who can develop a dazzling turn of speed in the course of a race but has not taken the trouble to find out where the finishing line is located.

Sir Owen Dixon once pointed out that it is the fundamental ethical obligation of every barrister to have a sound working knowledge of the law. This is both a professional duty and an essential prerequisite of success as an advocate. Everything that follows is predicated upon the assumption of close adherence to that primary obligation.

The importance of preparation

It is only in a small minority of cases that success or failure turns exclusively or even mainly upon what is said or done during the course of a trial. What goes on before the commencement of the hearing is always extremely important, and frequently decisive, in determining the outcome of the litigation.

Nowadays, increasing emphasis is being placed upon pre-trial procedures. Questions of pleading, discovery, interrogatories, preparation of formal statements of issues to be tried, and exchange of witnesses' statements and reports prior to the hearing will continue to play an increasingly important role in the conduct of litigation.

* A paper originally prepared in 1998 for the New South Wales Bar Association's Bar Readers Course while Murray Gleeson was at the Bar and subsequently updated in 2001 when he was Chief Justice of Australia.

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