The Inns of Court College of Advocacy

The Council of the Inns of Court

EXCELLENCE IN ADVOCACY

Training Videos – Appellate Advocacy

Part 1: Introduction by The Honourable Mr Justice Green and Lord Hughes of Ombersley

(transcript of video)

HHJ Green QC: As chairman of the Advocacy Training Council, I am delighted to introduce this film on Appeal Advocacy. The ATC is committed to the promotion of effective training in all aspects of advocacy. The appeal process is a central feature of practice at the bar, and now forms an integral component of the training provided by the Inns of Court and new practitioners. This film has been specifically designed to assist with this training; the judges, and advocates who deliver the talks, and conduct the mock appeals all have immense expertise in the craft of appellate proceedings.

The film is divided into five segments; the first is a talk by Lord Hughes explaining what judges expect to see in written or oral argument before the appellate courts. There will then follow two talks by Sarah Whitehouse QC; Senior Treasury Council at the Central Criminal Court, on how to conduct a criminal appeal, and Dinah Rose QC; one of the foremost appellate advocates, on how to conduct a civil appeal. The advice given by both - whilst specifically geared to the particular discipline - is complimentary, we would recommend that you watch both. The final two segments are a mock appeal in a criminal case and a mock appeal in a civil case.

RH Lord Hughes of Ombersley: Unless you have an unusual kind of practice - for example unless you do a lot of work in the administrative court - the first thing to remember about appeals is that they call for a technique different from trials. There's no need to be deterred by this; just as a half-decent tennis player can play on clay as well as grass, so you can do as well on the different surface of the Court of Appeal.

The basic rules of advocacy are the same, just as the laws of tennis don't alter. Know your tribunal, work on giving it what it wants, try to make it want to find for you, if at all possible try to persuade it that it thought of your killer point all by itself, those rules apply everywhere. But you do need to adjust for the different

A playing surface; the big difference is that the trial advocate starts with a more or less a clean canvas to paint upon - you can tell the story making your points as you go along, broadly you are in control, and the court will - generally - go at your pace. Now, the Court of Appeal will not - appeals are not a re-run of the trial, an appeal is not a general whinge about the outcome. It is framed by the grounds, and the grounds have to be specific. So appeals are more like putting the magnifying glass up against one small corner of the canvas; the one which is identified by the grounds. The majority of the picture will quite often not be mentioned at all, but simply taken as read.

So, know your tribunal; look at it from their point of view, have a look at a day's list - there will be a lot in it, two or three cases perhaps in the civil division, and in the criminal division as many as one or two conviction appeals and perhaps six or so sentence appeals.

Two things follow from that; first - the judges are in all the cases, and they are sitting normally four days a week. They can't do them all without a lot of pre-reading. Secondly the hearings are concentrated, cases will be given provisional timings - say an hour for a conviction appeal, half an hour for a sentence appeal - and remember these times include judgement, you've only got the rest. Of course some cases will run over - but they can't all, or the day will never end.

All this means that you don't get up and start telling the story from scratch. Please, no launching yourself with "This is an appeal from Barsetshire Crown Court, the indictment contained four counts. Count one my lords charged arson with intent and the particulars were..." and so on. All that does is to waste valuable time, and more to the point your listeners will switch off - because they know that from what they've already read. What you need to do is to go straight to the point, and that means to the specific grounds that you have identified. In

A a nutshell; say at the outset what it is you say went wrong at the trial. This principle applies from the earlier stage when you're framing grounds.

B There are few things more irritating to the judge - who's trying to get into the case with very little time - than to open up the document labelled "grounds", and find that it tells the story in narrative fashion, and it's only when you get to page seven that the author tells you what the point is. You need to start with the point, then your judges can read everything that you have written with an eye to the issue. So, please avoid narrative in your grounds, or at the very least impose upon yourself the discipline of putting on page one - right at the top - after no more than "this was arson" or "tenant's dilapidations", put right at the top a numbered list of grounds which ought to be no more than a sentence each. Then, your hard-pressed Lord Justice, when opening up the document, can see for example "one - the judge admitted the evidence of Obadiah Slope; it was inadmissible because there is no reliable science of gate analysis", or "the judge should have held the equipment controls regulations only apply to injury occasioned by contact between a workman and machinery, they don't apply to muscle injury caused by stretching" - that kind of thing.

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G Your object ought to be to present your case to the judges in a single, short document. You will have drafted grounds right at the outset when you were seeking leave, it is possible that you may want to amend them slightly after leave is granted, for example once you have the transcript of the summing-up or of a relevant piece of evidence, and can identify the bits you complain about by page numbers. That incidentally is a very good move and will earn you brownie points.

H You may be invited to submit a skeleton argument, however - half the time (and virtually always in a sentence appeal) it is likely that you will have nothing to add to your grounds, so say "grounds should stand as skeleton". And if for any reason you do have something which needs adding then I really cannot tell you how

A welcome it is to receive a document which is headed *Grounds and Skeleton Argument* - and this is the important bit - *this document supersedes the ground previously lodged*.

B Conversely, there are few things more infuriating than having to read two documents which say more or less the same thing but not quite in the same order, and not quite in the same word. That way you waste an inordinate amount C of time checking whether there are any differences, and if there are whether they matter - and all the time your blood pressure is rising.

Make your grounds short and you will win friends and influence people. It's a D generalisation, but nearly every set of grounds and nearly every skeleton argument is about twice as long as either needs to be. So - I agree - are many judgements that there's not very much you can do about those, and two wrongs E do not make a right. Besides, if you want to succeed do as I say - not as I do.

Get your grounds and documents in in plenty of time; this all follows from the fact that they have to read ahead. If they've read ahead and made a few notes F their hearts will sink if a day before the hearing your additional clip of papers arrives, because it means they have to go back to the file. In the criminal division the office now has a special label which arrives with these clips which is meant to G say "it's not our fault", it says "late papers" - and I can assure you that their arrival is universally dreaded. Get everything in at least ten days before the hearing - make it easy for them and you have a much better chance of a sympathetic hearing.

H Authorities - despairing with citation of authorities; of course it is theoretically possible that one day you will have the definitive case in which the court needs to re-examine the entire law of relief against forfeiture, or the meaning of dishonesty, but normally you won't. So concentrate on the cases which are not

A only relevant, but which actually lay down a principal. Cases which are just examples of applying a well-known principal to particular facts are only rarely much help. The clearest example is the sentence appeal, in which the court is

B referred to a case for the proposition that four years is the right sentence, then when they read it they find that the trial judge passed a sentence of four years and the Court of Appeal dismissed an appeal against it. What, please, is that

C supposed to tell anyone? All it tells you is that four years is not too long, it tells you nothing about whether it might be too short, or whether it is in the centre, or at one edge or the other of the available bracket. Avoid citing that kind of case altogether, and generally avoid long lists of authorities - it may look macho, but it

D has a counterproductive effect.

Be prepared for them to argue; some you will find are more interventionist - or if you like, chatty - than others, but they will almost certainly intervene. Be prepared

E to answer, even if - and it usually will - it takes you out of your prepared order of argument. You will score well if you can cope with the intervention, you can then work your way back to what you need to say without making it sound as if you've

F been rudely interrupted, then you will score even better.

Don't try too hard to read into what they say whether they're with you or against

G you, the trick is to treat interventions as aides - not as discouraging disagreement. Of course it may be that they are against you, but it is also quite likely that they are just testing out your argument.

For the same reason keeping it short does not mean assuming that they've made

H up their minds and there's no point in saying anything much at all. Although they've read the case and will necessarily have formed some kind of provisional view, it may only be a provisional view on what the question is, even if it's a provisional view not only on the question but also on the answer I cannot tell you what a pleasure it is to hear oral argument which changes your mind. There is

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plenty of room for persuasion, it's simply that it has to be short and tailored to the point at issue. There may even be the occasional case where you can justify getting into the narrative, you might for example need to do this to explain why

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the evidence was inadmissible, or why it was crucial and yet unfair, and so ought to have been excluded under section 78. And just sometimes there maybe scope for a carefully neutral statement of the case which demonstrates that your lay

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client had the merits of the dispute.

Even if you can't expect an appeal to be allowed because you were unlucky to lose, it may just occasionally do no harm to let that come out, but please be very sparing with this - it has to be incidental - almost imperceptible - if it's going to

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be effective. Subtlety is the name of the game, or as they used to say, "the arguments come decorated for the jury, but desiccated for your judges".

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