The Inns of Court College of Advocacy

The Council of the Inns of Court

EXCELLENCE IN ADVOCACY

Training Videos – Appellate Advocacy

Part 2: Criminal Appeals - Sarah Whitehouse QC, (Senior Treasury Counsel at the Central Criminal Court)

(transcript of video)

© 2018 – The Council of the Inns of Court

Sarah Whitehouse QC: "Appellate judges are bigger than you and they hunt in packs"; so said Jonathan Sumption - now Lord Sumption - in a lecture organised by the South Eastern circuit in 2009.

With the greatest possible respect and with deference to a Justice of the Supreme Court, it will improve your advocacy immeasurably if you don't approach the Court of Appeal Criminal Division with a sense that you are about to be set upon and torn to pieces. Approach it with confidence and enthusiasm, remember that the Judges are human; that they want to give the right answer and they want your help.

In this talk I'm going to give you some practical advice to follow. It should enable you at least to feel a sense of pride at the end of the hearing, and to know that - successful or not - you have represented your client to the very highest standard. You may even derive a measure of enjoyment from your appearances in the appellate courts.

The talk is in two parts: before the hearing and at the hearing. It will come as no surprise to anybody to know that the section on preparation before the hearing is as long, if not longer, than as the section on the hearing itself. You all know that no performance – whether the lead role in Hamlet, or an orchestral symphony or a parachute jump – no performance can be enjoyable or successful without advance planning.

Before the hearing:

If you're really well-prepared, you'll have the same confidence that you may have at being properly kitted out for a tennis or football match, or a wedding. Your mind will be free to concentrate on the match, rather than worrying about whether your socks are about to fall down.

© 2018 – The Council of the Inns of Court

A So, number one:

Check at an early stage whether the Court wants a skeleton argument in addition to your advice and grounds of appeal or your respondent's notice. Sometimes they do and sometimes they don't.

B

Two:

C Always refresh your memory on the relevant practice directions. This applies as much to the experienced barrister as to the newcomer.

Three:

D Do check what documents the court has: you will get a Criminal Appeal Office summary but – depending on what type of appeal it is – you or other parties will have sent transcripts and other material to the court. The judges don't want duplication so you do need to know in advance what they've already got, so that you can send any other essential material. This of course applies particularly in the court of appeal; in the supreme court you'll have followed their directions and you'll have sent your bundles in advance already.

E

F

Four:

G At least ten days before the hearing, send to the court of appeal three copies of the authorities and other documents that you want to rely on. It just won't do if you send them the night before. Believe it or not, the staff at the court of appeal don't drop everything just because your new skeleton has arrived. Your confidence will be severely dented if your first exchange with the lord or lady justice of appeal involves a dressing down because your papers didn't arrive in time.

H

© 2018 – The Council of the Inns of Court

A

Your authorities should be paginated, with an index, and with the relevant passages marked, either with a highlighter pen or with lines at the side. Your skeleton or grounds of appeal should also be amended to show the tab, and page

B

and paragraph number of the relevant documents so that the judges don't waste their own reading time.

Five:

C

Prepare your own bundle: this is personal to you, but you must be able to find your way around the papers with speed. Put your papers into files. Use post-it notes, different sizes and colours – whatever works. Cross reference all

D

documents, so for example in your skeleton you might make a note of the page number where the authority is to be found that's relevant to that point. The same in the note that you'll be writing to remind yourself of what to say in court.

E

Put a brief summary on the front page of each authority with a note of the paragraphs where the essential principles are to be found. Highlight those principles, make notes as to where else they are to be found in your other

F

documents. Think about making some documents just for you to use. For example a chronology might help; then when you're suddenly asked about when the defendant was first arrested or convicted you'll be able to answer

G

straightaway.

I find it useful to have several copies of indices to the bundles placed both in the bundles and loose on the desk. That way, an index will always be somewhere close at hand to help you when a judge suddenly asks you to look at a document

H

- you won't have to scrabble around looking for it.

Talk to colleagues about the appeal, if you can, both those senior and junior. That way you'll become accustomed to crystallising your thoughts and finding ways of expressing orally what you want to say so that it becomes natural to you.

© 2018 – The Council of the Inns of Court

A

You'll also get good feedback which will provide the oxygen that you need to consider responses to the court when awkward questions are asked.

B

Write a note of what you want to say: this is the central and most important piece of advice. Write out every word that you might say; you can't go to the court clutching your skeleton argument and drone through it. The skeleton and your note of what you want to say – I'll call it a speaking note for these purposes – those two documents serve very different purposes. The skeleton is like a map or itinerary for the court: it sets out the terrain, it shows where you're going before you set out and where you want to end up. But your oral submissions will be written in your own personal preparation note – it's not to be given to the court, it's not a formal document, but it's a note for you. Now those oral submissions written into your own speaking note, are the journey itself – where you take flight, hit turbulence, maybe alter course if you really have to, and if all goes well, have a smooth landing.

C

D

E

F

You're not going to read your speaking note out slavishly and you might not even glance at it. Some people find it helps to have a separate note of headlines or trigger points, which you can put on the left-hand side of your papers with your full note on the right. Other people find that they prefer to use a full note but with the trigger points highlighted within the note. These are matters for you to consider, and to work out what works best for you. So you're not writing this out in order to read it to the court – far from it – but writing it out will force you to order your thoughts in advance. To say to yourself "what is the essence of my argument? Why should my argument succeed? Why am I right? Can I cut anything out? Is there an argument that ought to be abandoned?"

G

H

So if you're writing it out in full, it will start literally with the words "I appear on the behalf of", if of course you are acting for the appellant. You must then get straight to the point. In an appeal against conviction for example, identify in a

© 2018 – The Council of the Inns of Court

A

single line what the appeal is about: For example you might write down "we submit that this conviction was unsafe because the judge erred in allowing the Crown to adduce hearsay evidence…."

B

You might then go on to write in your note: "There are three reasons why the Judge was wrong to have allowed the evidence to be adduced. They are as follows: One…" – and so on.

C

Preparing in this way will also enable you to think and speak in numbered points because that is how you will lay out your own note of what you want to say. That will provide structure and clarity to your oral submissions in the court.

D

I find it helpful to put the submissions on each point on separate sheets of paper – so that if the court indicate that they don't need to hear from you on one ground you can turn easily to the next and of course each submission will have its own post-it note so that you know where to find it.

E

Now we come to the hearing. Here you are, in your metaphorical shiny sports kit with the right equipment – and don't forget that the right equipment must always include your own up-to-date-copy of *Archbold* – what happens now?

F

When the session starts, it sometimes happens that the court will tell you that your case won't be heard before a certain time later in the morning, the invitation will be to you to leave and to return at whatever time you're given. Smile gratefully but stay where you are; it's a wonderful opportunity to get a sense of the mood of the court. You can also learn by watching other advocates, noting what's effective and what grates. It's calming to the nerves to watch others because you can see that they get through it and emerge – normally, relatively – unscathed.

G

H

© 2018 – The Council of the Inns of Court

A Remember, while you are waiting, that the judges do want to hear from you. They are not pussy cats but they're not ravening wolves either. Remember also that they are lawyers and like you they probably enjoy the law. Keith Evans in his

B excellent book *Advocacy at the Bar* suggests that Appellate Court judges might be approached in the same spirit as your law tutor at university. If she asked a question in a tutorial you wouldn't, Keith Evans says, harangue her with long

C oratorical answers stitched up with repetitions and nervousness. You would have done your best to answer, simply and accurately.

In essence, approach appellate advocacy as if it were a conversation, while of course maintaining the formality. That way you will avoid the temptation to

D gibber nervously and you will also avoid the peroration; the final flourishing flowery speech which does your case no good at all.

E Follow the cues of the court; if they say "you don't need to address us on ground x or y" then don't - skip to the next section in the speaking note. If they ask questions that show that they are interested in, or troubled by, a point, then

F address it. Beware though; sometimes they court might ask questions in a rather leading form, "that's your best point isn't it Mr Snookes?", it's very tempting when it's put that way to agree readily – beware of agreeing too readily.

G Be economical with time; in the language that you choose – do not use filler words or phrases, and don't waffle. Don't waste time finding documents, make sure you know exactly where they are – even fifteen seconds' delay to a busy judge can be infuriating.

H Don't repeat yourself: If you absolutely feel that you must, then acknowledge to the court that you are doing it.

Don't ever use clichés: They're dead words, used so often that they will barely merit a lift of the judicial head. At worst they are an infuriating distraction; they

© 2018 – The Council of the Inns of Court

A

show a lack of rigour. For example “guidelines are guidelines not tramlines”, or “at the end of the day, the bottom line is…..”, or “in a nutshell……”, or “when all is said and done….”

B

Avoid using slang: the “half-time submission” is a submission that there’s no case to answer. Don’t speak of bad character evidence “going in”, it didn’t “go in” at the trial, it was “adduced” or “admitted in evidence”. This isn’t a social occasion,

C

and your words should be carefully chosen rather than looking as if you had suddenly thought of them, or as if you were down at the pub with your friends.

At the end of the hearing, after judgement’s given, you need to know what more,

D

if anything, needs to be said. Is there to be a retrial? What are the court’s powers to order one? What directions should be sought? You should have the correct passages tabbed in Archbald so that you can go straight to them without wasting

E

time.

Above all, try to enjoy the experience. If you approach your appellate court appearances in the right spirit - with diligence and serious preparation; with a

F

helpful and positive attitude; and with humility as well as pride; then it will be an enriching experience and one that you may even look forward to repeating.

- - - - - - - - - - - - - - -

G

H

© 2018 – The Council of the Inns of Court

Copyright notice

- The Council of the Inns of Court (COIC) is the owner or the licensee of all copyright in this training document. All rights reserved.
- You may read, print one copy or download this training document for your own personal use.
- You **may not** make commercial use of this training document, adapt or copy it without our permission.
- Every effort has been made to acknowledge and obtain permission to use any content that may be the material of third parties. COIC will be glad to rectify any omissions at the earliest opportunity.
- Use of this training document is subject to our terms of use.