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EXCELLENCE IN ADVOCACY

Training Videos – Appellate Advocacy

Part 3: Civil Appeals – Dinah Rose QC

(transcript of video)

Dinah Rose QC: The key to the effective conduct of an appeal is simple: preparation.

If your appeal is properly prepared, presenting it in court ought to be relatively straightforward. In everything I am about to say, take it as read that you must be familiar with every page of the evidence, and every page of case law that's relevant to the issues. All this takes time, but it is the hours of careful preparation which make the difference between the mediocre barrister and the excellent one.

If you are representing the appellant, the first critical stage in the conduct of the appeal is the identification of your grounds of appeal, to be included in the notice of appeal.

A notice of appeal is not a skeleton argument; your task in this document is to identify the errors made by the judge, and say what he should have found. It is not to cite copious case law, or seek to argue a case. Your grounds of appeal should be a short document, which clearly identifies the issues and sets the parameters for everything which follows.

It is relatively unlikely that the judge will have made 15 errors. If you pursue every point, your good points will be buried, and may pass the court by: you may not even get permission to appeal. As a general rule of thumb, though of course there are exceptions, you should think very carefully before maintaining more than three or (maybe) four grounds of appeal.

If you can, take your strongest point first. However it must be recognised that this may not always be possible: sometimes the logic of a case requires that points should be argued in a particular order. For example, one point may not arise unless the first issue is resolved in your favour. Be careful in that situation, taking the issues out of order may simply telegraph to the court know that you have no faith in the point which should have been arguing first.

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Selecting your grounds of appeal may not be straightforward: it is one of the areas in which the experience and judgment of a barrister is most important. You have to seek a balance between avoiding taking too many points, and not

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running a point which might actually have merit. Just to make this task more difficult, your own view of the merits of a case may not be the same as that of a court: most barristers will have had experiences of cases where the point they

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considered to be virtually unarguable was adopted with enthusiasm by a court.

When in doubt as to whether to take a point on appeal – and you will be, often – it may be useful to ask yourself these two questions:

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First: Can I foresee any situation in which I lose on everything else but win on this point?

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And secondly: Do I gain any benefit from taking this point that I can't get from taking any other points in this appeal?

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If the answer to these questions is no, you should probably be considering dropping it.

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The next important phase in presenting your appeal is the written advocacy: your skeleton argument. This is a critical document. It is often the first document a judge will read; and it's usually your first chance to persuade the court to find in your favour.

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The most common errors in skeleton arguments are excessive length and poor structure. The court of appeal now generally expects a skeleton argument to be no more than 25 pages in length: that ought to be enough to develop your case, no matter how complex you think it is.

A clear structure is essential: virtually all my skeleton arguments have the same simple format:

A First: A summary of the appeal, this identifies the issues and states – in outline - what your position is on each. This should be no more than one or two pages in length, right at the start. It's your opportunity to put your case in a persuasive

B nutshell. Ideally, you should be explaining to the court in these few short paragraphs why you should win.

C Second: An outline of the legal framework. For example if the case is based on the performance of a statutory duty, set out the relevant statutory provisions, and explain briefly any particular points of interpretation that arise, by reference to the relevant case law.

D Third: A short outline of the relevant facts.

E And fourth: Your submissions on each ground of appeal in turn. When you are citing a case in your skeleton argument, there is no need to set out large chunks of it. Just identify the relevant paragraphs, and the legal proposition for which you are citing the case.

F Finally: In a skeleton argument for an appellate court, keep your language clear and clinical. I strongly recommend that you avoid the emotive language which infests some of these documents: there is no need to say that your opponent's

G argument is "wholly misconceived" or "entirely without merit". The words, "this argument is incorrect, for the following reasons:" are actually more persuasive. Judges do not want to be bludgeoned into agreeing with you. They would rather see a clear analysis of the force of your point, and work out for themselves

H whether they agree with it. As a general rule, treat all adverbs with suspicion, especially words like "clearly", "plainly", or, worse, "self-evidently", in my experience words like these are often a giveaway that an advocate does not have an argument to support a proposition.

A So by the time you get to the hearing, the court will have the benefit of your grounds of appeal, and your skeleton argument, which will be of course well-structured, and set out in a concise and a persuasive way, your case on each

B issue.

So what is your aim at the hearing? Why is it necessary? What is it actually for?

C The oral hearing of an appeal is a chance for the court to test the arguments of both sides to breaking point. It's also an opportunity for you to bring your case to life, to construct a persuasive narrative, and also of course to answer the points that have been made by your opponent.

D Do give the court a clear structure of what you are going to say at the outset, so that they have a route map to your submissions, and can follow where you are in them. But please do keep this simple; I would generally simply say something like

E this:

"The issues in this appeal are X and Y; I propose briefly to outline the legal

F *framework; then to take your Lordships to the facts; and then to develop my submissions on the grounds in the following order".*

G I would generally not recommend that you begin your submissions - as so many advocates do, - with "My lords, I have twelve points …" Numbering your points like this immediately makes the case feel dull, like a plod through an endless list. Everyone's heart will sink when they hear you say "and seventhly …" And twelve

H submissions sounds like far too many. Worse, people often get confused halfway through, and the court and the advocate spend time debating whether the advocate is on point eight or point nine. There may be twelve points that you want to make, but there is no need to say so; they are much better grouped under the broader heads of your grounds of appeal.

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Assume that the court has read your skeleton argument, and certainly don't read it out, but this does not mean that you shouldn't cover the ground in your skeleton argument. The oral submissions flesh out the skeleton. Courts often find

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it useful if you anchor your submissions in the structure of the skeleton argument, so something like "I now turn issue X, which is dealt with at paragraphs 20-30 of my skeleton argument". Use your oral submissions to develop the strong or

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controversial points in your appeal, where you need to spend some time discussing the case law with the judges or looking at the flaws in the analysis of the court below, or showing the court the detail of the facts of the case. Other points can be taken swiftly, by reference to the relevant paragraphs of the

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skeleton argument.

Since the testing of the argument is one of the principal purposes of the appeal,

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the interventions and questions from the judges and your response to them are of essential importance. As part of your preparation, you should always seek to anticipate the likely questions which you expect to be asked. Where are the weak points in your case? Where could it be misinterpreted? What policy or merits

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points might be raised against you? Has your opponent advanced a response to it which the court is likely to want to probe?

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You should usually aim to deal with a question from a judge immediately, rather than saying "I'll come back to that". There are some - but very few - exceptions to this general rule. If the question raises an issue which you have not yet come to, but will be dealing with in detail at a later part of your submissions, you might

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want to explain to the court that this is so, and deal with it in its proper place. But even in that situation, it is preferable at least to give the judge a summary of your position on the point. Otherwise there is a risk that he won't listen to anything else you say until his concern has been addressed.

A Secondly, if you are asked a question which requires a factual or legal response which you don't have at your fingertips but can supply over lunch or perhaps overnight – say so, and return to the point when you have the information. Do

B not shoot from the hip unless you are sure of your ground.

Try not to feel defensive or anxious about the court's questions. Judges are usually not trying to expose you or trip you up, but are seeking your assistance on

C points which they have not yet worked out in their own minds. A question is an opportunity to persuade and engage the court. If you have prepared your appeal, you should already know the answer.

D Do be careful though of the question which is a trap. There are some judges who will seek to force you into a position where you don't want to be – perhaps by putting to you a formulation of your case which may not be the one you are

E actually advancing, or even by seeking to make you make a concession which you don't want to make. This requires a courteous but firm response. Don't ever let a judge browbeat you into a false position.

F If you are the respondent to an appeal, you face a particular challenge; you won the case below, so you may feel on relatively strong ground. But in fact, nearly half of the appeals which get permission are successful. It can be a disadvantage

G to be the respondent, because your opponent has the opportunity to go first, to set the scene, to establish the landscape of fact and law within which the court is considering the problem. Your task as respondent is to disrupt that landscape. You might want to start with a short explanation at the outset of why your

H opponent's characterisation of the issue is wrong. Then show the court the particular factual or legal points which change the perspective of the case in your favour.

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Surprisingly often in my experience, the appellant fails to show the court the materials which potentially undermine his case - in which case you as the respondent have an open goal. You can undermine the court's confidence in your

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opponent as a reliable source for the facts or the law, and seek to recast the appeal in your favour.

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If you are an appellant – take care not to fall into this trap. Make sure that you have dealt at least in outline with the documents or cases which your opponent is relying on most strongly, and that you have sought at least to neutralise them, and - if you can - to turn them to your advantage and use them to support your case, before he can show them to the court.

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Another potential challenge which you must be prepared to face as the respondent is the rare case in which the court asks to hear from you first. It goes

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without saying that this is a very bad sign for your client – the court thinks that the appeal is so strong that they may be able to dispose of it in the appellant's favour without hearing from him. Never go into court without being ready to

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make your submissions, even if you think it is impossible that you might have to do so until the following day. Always expect the unexpected, and be ready to deal with it.

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Finally if you are representing the appellant, you will need to be ready to reply to the respondent's submissions. If you are lucky, you might have a lunch hour or even overnight to prepare what you are going to say, but in many cases you will

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have to reply immediately after your opponent has finished, without a break to gather your thoughts or your notes. You will have probably somewhere between 30 minutes and an hour for your reply.

Most replies are not very effective: the parameters of the case are often clear by this point, the court may think it knows the answer, and be impatient at hearing

A more. It certainly won't want to hear you repeat points that were made in your opening argument.

B So what should you aim to achieve in a reply?

C Of course, you need to respond to the cases cited by the respondent where necessary; and to address arguments that you didn't deal with in your opening. Identify any concessions that the respondent may now have made, and explain their significance for your case.

D But more generally, by this stage you will have a much clearer idea from listening to the interaction between the court and your opponent of the way in which the court sees the case, and which points attract it, or better yet, any points in your favour which the court itself has taken and thought up. The reply is your opportunity to summarise your case in the way that is most attractive to the court, as matters have developed: to focus on your best points, the essence of your case, and quietly leave aside issues which now look unlikely to be successful.

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F One final word for respondents: there can be a temptation to switch off during the appellant's reply. - don't do that. The appellant may make an incorrect assertion of fact, or even cite a new authority that hasn't previously been referred to. If they do that you have a right to respond. Any final response you make will have to be quick, though – you'll be lucky to get five minutes before you try the court's patience.

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H So, in summary: be prepared, identify your issues, structure your skeleton argument and your oral case carefully. Be receptive to the court, and open to intervention, listen to your opponent, and be ready to fill the holes they have left for you; listen to the court's interaction with your opponent, and take your cue from the points that concern the judges. But above all - be prepared. Good luck!

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