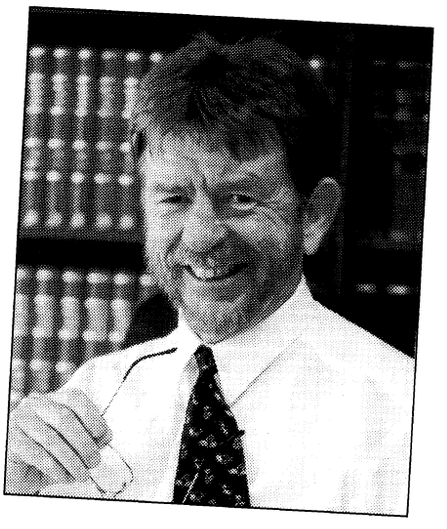
ADVOCACY
Follow the path of least resistance



Hon Justice Riley

"The cautious seldom err"
Confucius

In addressing a jury you should not place unnecessary obstacles in the path of your case. If it is unnecessary to establish a particular matter for the purposes of your argument then do not seek to do so. By doing so you divert attention from the directly relevant issues and you undertake an obligation that does not rest upon you.

An illustration of this proposition is that in the usual case defence counsel should not assume the burden of seeking to establish the innocence of his or her client, the accused person. As is well known the onus of proof in criminal cases rests upon the Crown. All that defence counsel need do is identify the basis for a reasonable doubt as to the guilt of the client.

Whilst counsel may wish to suggest to the jury that the innocence of the client is clearly established, he or she should do so in a way that makes it clear that this is not a hurdle that has to be overcome.

The issue for the jury is whether or not the Crown has proved the case against the client beyond reasonable doubt. To move the focus away from that question by assuming an additional burden will often be a dangerous way to proceed.

When making points to the jury it is desirable that you do so in a way that is easy for them to accept. Unless it cannot be avoided you should not require the jury to reach a conclusion that is likely to be an unpalatable conclusion for them.

You should adopt, and permit the jury to travel along, the path of least resistance. For example there is a natural reluctance on the part of people to conclude that another is lying or being deliberately deceitful.

Human nature is such that, generally speaking, people prefer to accept the honesty of others until the contrary is demonstrated. Unless there is some identified advantage to be obtained from so doing, you should not call upon a jury to find that a particular witness has lied.

If your goal is to have the evidence of a witness rejected, or at least doubted, you will bear in mind that it is easier for a jury to reject evidence on the basis that the witness has been confused or mistaken or under some form of misapprehension rather than that he or she has lied under oath.

It may be clear to you that the witness has lied but that is unlikely to be the only conclusion open. The members of the jury may not share your view of the witness. They may feel sympathy for the witness. If they are left with a blunt proposition from you that the witness lied, you may find that some members of the jury will not adopt that view.

Leaving alternatives to the jury enables them to agree with your submission that the evidence ought not be accepted or relied upon without the necessity to reach the unpalatable conclusion that the witness has been deliberately untruthful.

You may wish to suggest to the jury, possibly in very strong terms, that the likelihood is that the witness lied and to point to the evidence that logically leads to or supports that conclusion.

This may involve comparisons with the evidence of others, a consideration of the surrounding circumstances, an evaluation of the internal inconsistencies within the evidence or an analysis of the motives, prejudices or lack of objectivity displayed by the witness. However, depending upon the circumstances, the jury may be more inclined to accept that the evidence is unreliable for reasons that do not reflect upon the honesty of the witness.

It is preferable to allow for that prospect by leaving to them the alternative propositions that the evidence of the witness was unreliable as the result of mistake, confusion, faulty recollection due to the passage of time or whatever other cause presents itself. In the absence of some compelling reason for so doing do not saddle your client's case with the burden of showing the witness to be a liar. In most cases to do so is to assume an unnecessary responsibility.

In preparing your address you will be aware that the version of events that appeals to you might not be the only version that is reasonably open. Of course there will be the competing version presented by your opponent, but there may be others.

You should not assume that the jury has limited itself to one of the two options presented by counsel. If there are alternatives available and they are not inconsistent with your case theory then you will tell the jury why that is the case. If an alternative is inconsistent with your client's case then you will wish to explain to the jury why it is that it should not be accepted. It is important that none of the available alternatives is allowed to accompany the jury into their deliberations unaddressed.

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In presenting your address it is vital that you do so with apparent confidence in the force of your argument. If you are hesitant because you have not yet thought through what you are about to say, or because your preparation has otherwise been poor or because you don't find the propositions you make convincing, then it is likely that the jury will not warm to the argument.

Your confidence in the argument you present should be reflected in the language you adopt. The language chosen should convey a sense of certainty.

Propositions that you invite the jury to accept as fact should be expressed in a positive way. Generally speaking the use of expressions such as "it is submitted" or "it may be" or " I ask you to accept" and the like suggest hesitancy and are to be avoided. No matter what your innermost thoughts may be a positive and confident presentation is called for. ①

Profession backing this year's NT Law Handbook

Forty-three practitioners have already agreed to help produce the third edition of the NT Law Handbook in what promises to be a significant pro bono contribution by the Territory profession to a valuable community resource.

"Every other state and Territory produces a Law Handbook," NT Legal Aid project coordinator Samantha Willcox said.

"Each handbook is written by volunteer lawyers who give their time to a publication designed to help the general public understand the law.

support

"The support of people in the profession has been outstanding to date, however there is still a lot of work to be done. I will be contacting many more people during the ensuing weeks to ask for their assistance."

The Handbook is more than 700 pages in length and contains 26 chapters.

The last edition was published in 1997 and is no longer a current and beneficial resource due to the significant changes in the law during the past five years.

"So many people, both within the profession and outside it, refer to the Law Handbook to answer their legal questions," Ms Willcox said.

high quality

"I am confident that the effort put into it by our production team and contributors will result in a high quality and widely used publication.

"Anyone in the legal arena who would like to contribute to the Handbook should contact me at Legal Aid on 8999 3048. All offers delightfully received!"

The NT Law Handbook is a joint project of the NT Legal Aid Commission and Darwin Community Legal Service.

A launch of the publication will be announced later in the year.①