

The decline of advocacy

By John Nader QC

In this article the word advocacy is restricted to forensic advocacy: advocacy in court or quasi court proceedings. I wish to explain why I believe the quality of advocacy as such has declined over many years. It is a decline which has in my opinion accelerated since the abolition of civil juries.

You are entitled to ask, 'Who are you to advise your fellows how to improve their ability as advocates?' I do so on the basis of more than 50 years as a barrister and as a judge, and before then as associate to Justice J H McClellens of the NSW Supreme Court. In that time I have seen innumerable barristers in courts and quasi courts, ranging through inspiringly good, middling, to embarrassing to behold.

Yet many in all categories, from the most to the least impressive, were excellent lawyers. Bad advocacy does not of itself bespeak an incompetent lawyer. Some judges who were highly regarded as lawyers were known to have been indifferent advocates.

I am convinced by my observations over time that the quality of advocacy, as an art, has been deteriorating.

Therefore a decline in the art of advocacy does not imply a decline in the quality of barristers as lawyers. I recall a very eminent silk, Kearney, who was, with everyone's approval, appointed because of his chamber practice. He did not go to court in ordinary circumstances, except perhaps to seek an adjournment or take a judgment. He was an equity barrister, known personally to me, who later became a Supreme Court judge. I am not to be thought to be making the mistake of assuming that every barrister is also an oral advocate; some are not.

However, I am convinced by my observations over time that the quality of advocacy, as an art, has been deteriorating.

Advocacy is the art of persuasion and it includes many subordinate components such as argument, questioning of witnesses, speeches to judges and juries. It is clear therefore that no single style or method of speaking by a barrister in forensic proceedings would satisfy all the components of advocacy.

No single *a priori* technique of elocution could possibly cover the multifarious components of advocacy even in a single case.

The method of the particular components that I have referred to is in the judgement of the barrister. He or she will always have in mind that their purpose is to make their words intelligible to the judge or jury: they will be guided by instinct.

One or two common faults may be mentioned. Some barristers do not project their voices clearly from the bar table. Some barristers run syllables and words together so that their meaning and therefore their force may be lost. In some cases aggressive language may destroy the clarity of submissions.

Advocacy is one of the great arts of civilised humanity. As an illustration that everyone will recognise, I mention Marcus Tullius Cicero, the great Roman advocate who prospered towards the end of the Roman Republic and the beginning of the Roman Empire. His prosecution and defence speeches are worth reading. Cicero is remembered 2000 years later chiefly because of his skill as an advocate.

The Bar Association, itself, has taken and continues to take active steps to assist barristers to improve the quality of their art as advocates. However, I think that more than a lecture or two from an expert is required to create the best standards of advocacy. Barristers having received such advice from the Bar Association should themselves continue to work to improve their advocacy skills.

The function of advocacy can be illustrated by a simple metaphor. If one has a valuable article to deliver to a person at a distance it may be placed in a parcel and physically delivered to the recipient. The parcel may be damaged because of poor packaging or rough delivery, and by the poor packaging the valuable article may itself be damaged and its usefulness reduced. The barrister's valuable article is their oral message to the court. The journey is the distance from their mouth to the judge or jury. If it is packed in clear, well articulated language it will arrive safely without annoyance to or misunderstanding.

I continue to describe advocacy as an art. I do so because, like all art, it is something made or created. It might be a barristers objective to convey a concept to the court. The forming of the concept in one's mind is not an art. The art is created in order to transmit the concept to the bench. It is the transmission of the concept which is the art of the advocate.

Given some useful introduction to the art of advocacy, which the NSW Bar Association provides, self-improvement remains best way to stay on the path. Every barrister should then be the chief critic of their own performance and ability as an advocate: if a barrister thinks that their performance falls short of the best they can do, he or she should take active steps to improve their delivery of submissions, arguments and other communications in court. Confidential advice by friendly, trusted colleagues can be useful.

Facility with the attractive and intelligible use of the English language is very useful. When I first came to the bar a very senior barrister of considerable age advised me always to read good

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literature so that I might improve my use of the English language. I have taken his advice, and as bad as my use of English may now be, it is better than it would have been if I had not done so. It is a very personal thing but I found that the late 19th and early 20th century novelists were the most useful. Being somewhat old-fashioned about what is good English literature, I expect that

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most barristers would now choose something more modern. The extent to which the reading of good English can assist one's verbal fluency is quite amazing.

Reading into a recorder and playing it back can make us realise how much worse our spoken English is than it should be.

It is not to be thought that my comments suggest that the quality of the bar in all of its respects has fallen. In fact, in most respects the quality of barristers has improved remarkably.

Barristers as a class are more dedicated to the interests of society than they once were. Consider the large number of barristers who work *pro bono* for those who cannot afford to pay for legal representation.

The legal knowledge of barristers as a class has become much greater as matters governed by law become more numerous.

It seems to me that the dedication of barristers is far greater today than it once was.

This article is concerned only with court and quasi court advocacy: with the qualities that affect the efficiency of the communication from a barrister to the tribunals being addressed: in some cases a judge or arbitrator, and in other cases a judge and jury.

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