MOOTING TIPS SEMINAR 1993
TRANSCRIPT

Hon Judge Antoinette Kennedy
District Court of Western Australia

I'd like to be able to tell you that there's some magic rule that will make mooting easy, but while there is a magic rule, it's not necessarily easy. The rule is hard work.

It is said that there are three rules for any court case:

- the first rule is preparation;
- the second rule is preparation; and
- the third rule is preparation.

Preparation banishes fear. It makes it easy to think on your feet and present your arguments properly, because you know what you're talking about.

I read recently that a well-known sportsman said, "The harder I work the luckier I get". That applies to everything, including mooting. With mooting, of course, you can still win, even if your side loses the argument. To a degree that is also true in a court case. If justice is not with your client, you can still gain a reputation for being a counsel who presents a case well.

The first part of preparation is to master the facts. You are fortunate that the facts are usually reduced to a single page and they are fixed and not likely to change. But you must make sure that you are thoroughly familiar with the facts. You must read the problem at least a dozen times before you start work. If, when you read it, you decide you have drawn the losing side, that should make no difference to you. You can still win the moot.

You must never try to fudge or blur the facts because you simply will not get away with it and you will look dishonest. If moot judges have done nothing else they have read the problem; they know what the facts are. If you try to blur the acts you must lose points. You simply have to work with the facts you have been given.

As you work with the facts you must identify the principal issue or issues in the case.

Then you must research the law. I don't know what students do these days, but in my day we did our best to get away with simply reading the head notes of cases. To be properly prepared you really can't do that. Certainly in a court case it would be positively dangerous to simply rely on a head note. You should read at least one of the judgments of each case on which you rely. The head note only tells you the conclusion and that may not always be reliable, but even if it is reliable, it is only the conclusion. It does not tell you why or how the conclusion has been reached. Often in the body of a judgment you will gin the history of a rule and much other information that makes it easier to understand and easier to explain to others. There is a good chance that if you have read the judgments in the main cases you will be the only one in the room who has, and that immediately gives you an advantage; in particular, it makes it very easy to think on your feet.

You must check all up to date supplements to make sure your law is up to date. If you can find articles on the topic, so much the better. You don't have to quote the article and even if it not quite on point, if it's on the topic, it will give you a deep background and increase your familiarity with the topic.

Whatever preparation you do, you should try not to do it at the eleventh hour. You need time to think about a problem. You need to leave it in the back of your mind and let it develop over time, and it will become clearer to you simply by quiet reflection rather than by panicked reading.

The same applies to the preparation of your arguments. Something that seems like a brilliant idea at first will often be abandoned after a few days of quiet reflection.

Delay in preparation is usually caused by fear rather than laziness. We fear we will fail so we delay facing that, but the beauty of the law is you cannot fail if you prepare. Justice may not be with your client but you can still prepare to the best of your ability and then you simply have not failed. If Lord Olivier acted in a terrible play, it's still a terrible play, but he would give a shining performance.

Once you have prepared the law and the facts and thought about the matter for a few days, you must reduce your arguments to writing. This is a great discipline. It's easy to go over something in your mind and convince yourself that when you get to your feet you will be able to talk to some total stranger with the same brilliance you have seen in your own mind. You will not; no-one can. Just get a piece of paper and start writing about the topic and don't stop until you have filled at least a foolscap page. You may eventually alter that page out of all recognition – it matters not. It's getting started that counts.

Try your arguments out. [Give the example of Leo Wood – the work he used to do and the way he tried his argument out on practitioners around town.]

While you should prepare exactly what you are going to say and reduce it to writing, advocacy is not about making long boring speeches, unless of course you are the late Dr Hebert Evatt, a former High Court Judge and Leader of the Labor Opposition sin the 1950s, who in the *Communist Party Case* (or it might have been the *Bank Nationalisation Case*) talked to the High Court Judges for 14 days and they couldn't shut him up. You have to be in his position to get away with that.

You should reduce what you want to say to writing for your own sake to martial your thoughts and as a mental discipline, but you should expect to have to abandon the speech and answer questions before very long.

Most kind-hearted judges will at least let you get started before they ask questions, but then they will expect you to talk to them, to engage in conversation with them, while you seek to persuade them to your point of view. An outsider should see it as a conversation between you and another lawyer, but it is a structured conversation in which you must use language which is courteous and correct but not servile.

It's a long time since I've read Dale Carnegie's book *How to Win Friends and Influence People* but my recollection is that the basic message of the book is that in dealing with another human being, particularly where you are trying to sell that human being something,

you must decide what you want. For example, you must decide whether you want to score points off that other human being or whether you want to sell them something. There can be no doubt that when you are dealing with the bench you don't want to score points off that human being, talk down to them or show them that you are smarter than they are. You want to sell them something, and you should never forget that.

You should never underestimate the intelligence of the court and you should never talk down to the court. It is not only rude, it is counter-productive. It is a very bad habit that some young practitioners have when appearing before Magistrates and District Court Judges, speaking down to us. This of course overlooks the fact that eventually we make the decision.

There is much helpful advice in the book *Advocacy at the Bar* by Keith Evans. At one point he related this delightful story:

> "I remember once appearing in Quarter Sessions in the little town of Devizes. It had taken one scheduled and one unscheduled train journey followed by a horribly expensive taxi ride to get there, and for all the good it did my client I might as well have stayed in bed. Ahead of me in the list was a splendid young barrister who delivered to the Chairman of the bench a beautiful and condescending lecture on the elementary principles of sentencing. He sat there is his rusty tweeds, did the Chairman, looking something between bemused and bored. He said nothing as our hero went blithely on, but when the time came he didn't accede to his eloquent plea for leniency either. The your man departed the Court without ever having discovered that he had just appeared before Lord Devlin, then retired as a Lord of Appeal in Ordinary, and filling in a spare day as 'Qualified Chairman' of the bench.
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> Do be careful (especially after the frightening newness of everything has worn off). No matter who he may be , the man on the bench had quite a bit of experience before he became a judge and it is a grave mistake to underestimate him."

Never speak for longer than is necessary. All lawyers do this and it is said that along with the two great lies of "The cheque is in the mail" and "I'll still respect you in the morning", the third is "Your Honour, this won't take very long". It requires real knowledge of your subject to be brief.

When the bench asks you a question, answer it. There is no point looking flustered and saying or implying that the answer to that question is on page 56 of your speech and you will deal with it in your own good time. Never forget that you are having a structured conversation with this person and seeking to persuade the person to your point of view. There are of course occasions when it is difficult to answer without at first explaining some other matter. It is perfectly permissible to say that, just as you would in any polite conversation.

Do not speak so quietly that you cannot be heard, that is both rude and irritating. The courtroom is your workshop – you are at work and so is the judge.

Try not to look timid. It may make the bench feel sorry for you and patronise you but you get no points for behaving as though you think the bench is about to yell at you.

Neat dress – wig.

Rude judges. It is unlikely that in a mooting situation you will encounter judges who are rude. However, you may encounter judges who are curt because some people simply because they have a curt manner, or they are people who have no charm. You should never take this personally and you should never consider that it is directed at you personally. It is very likely that if the judge behaves in that way, the judge is a person who always behaves in that way. You should not allow it to affect you and you should maintain your composure and continue to answer the questions as though the person has spoken to you in a perfectly polite and sensible manner.

Once you get into practice, you will discover that most courts have a judicial officer who has a reputation in the professions for being rude. It's very rare that that person has chosen you in particular to be rude to, such people usually don't discriminate. They treat everyone in the same way and everyone has to put up with it. It is most unpleasant and undesirable but it is pointless to get yourself involved in an argument with that person and it is pointless to allow that person to prevent you from putting your arguments in a quiet and courteous way. Remember Dale Carnegie, and remember that you are there not to tell the judge what you think of him or her or to let them know what you think of them but to put your client's case to the best of your ability.

I might also say that when you are talking to practitioners they can always tell you stories about rude judges, but I can assure you most polite judges have stories about rude practitioners as well and you never hear the stories about rude practitioners when you are sitting around with practitioners having a beer, they're not telling you stories about how rude they were.

Whatever the situation you face in court, it is to some extent like a well-disciplined game of football. You keep your eyes on the ball and move on with the game.

Finally, I want to say something about losing. The fact is that losing is the best thing that can happen to you. It's from losing that you learn most. Winning is good, but you don't learn anything from it. You simply must keep working at this business and experience is extremely important. You are not going to get experience if you give up the first time you make a mistake, if you give up the first time you lose, or if you are too frightened to start in the first place. When you lose you must, as I think the song says, "Pick yourself up, dust yourself off, and start all over again."