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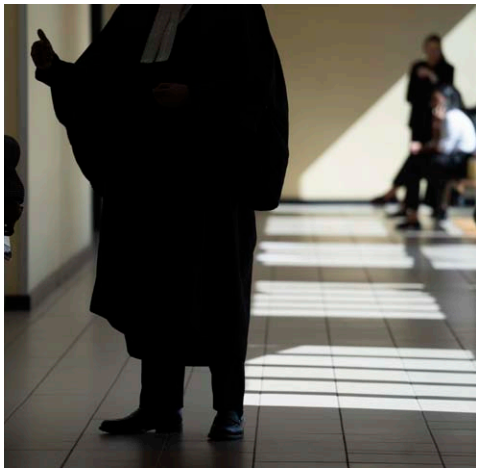

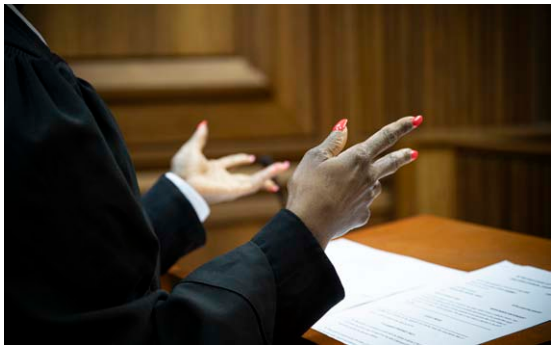

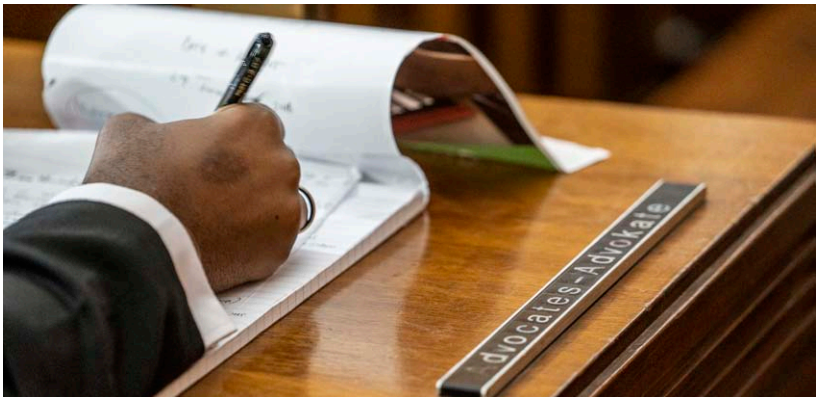

SUCCESSFUL ADVOCACY

by **STUART WILSON***

When I was an advocate, I had a definite idea of what good advocacy was. After three years on the bench, that idea has changed. Even when I acted as a judge, I needed only to face the work in relatively short bursts. I could recover in practice, where I had much more control over my time. To be a full-time judge is to know that there is no escape from the volume of work – at least not until retirement. Good advocates help me come to grips with the work and to move through it quickly. Good advocacy is a toolbox of methods that tend to achieve that goal.

Not all advocates warm to the idea that their principal task is to help the judge. But that is really all there is to it. Just about the only thing counsel has to do in court is to settle in the judge's mind the facts and the law that the judge needs to rule in their favour. Now that I have a reasonably good grasp of how that is done, and of how counsel are regularly missing the mark, I have set out the eight principal features of good advocacy, from a judge's perspective. Here they are.

* ***Stuart Wilson*** *is a judge of the High Court, Gauteng Division.*

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1. THE PRACTICE NOTE

Pay attention to the practice note. Craft it with care. Make it easy to find on CaseLines. It is the first thing any judge reads.

Judges must deal with very large volumes of litigation. An opposed motion judge will decide up to 10 matters a week. In the unopposed court, that number rises to 140. In the trial interlocutory court, judges regularly process over 200 matters every week – both opposed and unopposed. Every week, every judge is presented with thousands of pages of documents.

Case files often contain more than one application under a single case number. This means that a judge does not necessarily know, on opening the file, which application they must decide.

Senior judges sometimes allocate work to more junior judges. In opposed motion court, that means that the senior judge must wade through the papers in 50 opposed motions. The senior judge must work out what each case is about, and how long it is likely to take to argue, before apportioning cases to each of the more junior judges, such that each judge has a fair spread of work, and the workload is distributed reasonably evenly.

Getting through that work means finding the application that is actually before the judge out of the two or more sets of papers on the CaseLines file. Once that is achieved, the judge must identify the issues they have to decide, the facts relevant to those issues, and the range of possible outcomes, in light of the applicable law.

Each of these tasks is made possible by a well-drawn practice note, which draws the judge's attention to the relevant application, sets out the principal issues in that application, and identifies the documents the judge will have to absorb before deciding that application.

Many if not most judges will refuse to hear a matter where a practice note has not been filed. That is not mere formalism, as some counsel appear to believe. It is an indication of just how reliant the judge is on the practice note as a roadmap into the other papers.

A good practice note allows the judge to cut the papers down to readable proportions and to come to grips with the main issues as quickly as possible. Even a bad practice note at least tells the judge which application they must hear on the particular day they are presiding. The failure to file a practice note makes it impossible for the judge to absorb the papers at the pace required.

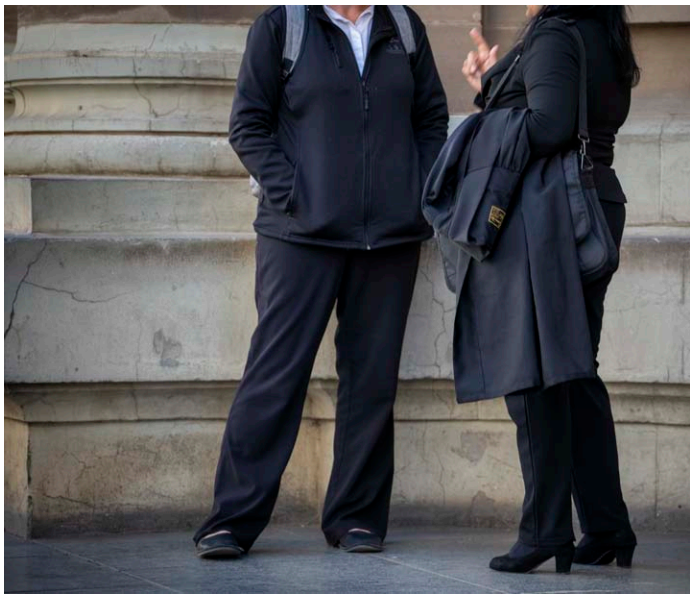
2. THE COURT ROLL

Judges organise our work by publishing a roll with directions which are designed to allow us to move through the work as quickly and as efficiently as possible. The directions issued with the roll, the order in which the matters appear and the day of the week to which the matter is allocated for argument all reflect the way in which the judge who issued the roll has decided to tackle the work.

The way the roll is organised is essentially a complicated Jenga tower. If you demand an accommodation after the roll is published, you risk bringing the whole system down. What may seem like a small accommodation to you ("please hear me remotely"; "please hear me on this day and not that"; "I have double- or triple- briefed myself, please accommodate this by standing the matter down until after lunch") can present major problems for the management of the roll and the efficient disposal of our other work.

For all these reasons, the roll should be treated as a final instruction on how the matter will be heard, not as an invitation to write to the clerk and ask for (or demand) a special arrangement. Almost always, the answer is, and should be, "no".

There are occasions – in my experience vanishingly rare – in which an accommodation can and should be asked for after the roll is published. For example, counsel undergoing serious medical treatment have, in the past, asked to have their argument date changed, or to be heard remotely. I have been happy to oblige. But it must be something that serious.



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3. THE PAPERS

I am regularly and genuinely surprised by how much better acquainted I am with the papers than the counsel who argue off them. Realistically, I have no more than a few days to read the papers in the matters I hear. Sometimes – in urgent court – I have a matter of minutes. I should have no more than a superficial grasp of the documents, at least compared to the counsel arguing before me, who have – presumably – mined the papers forensically while preparing their case.

And yet, when I get into court, it does not take long before counsel relies on a fact that I am fairly certain is not on the papers. Still, I tend to humour counsel by asking them to point me to it.

In a small number of cases, the document emerges miraculously from the bundle – either because I have genuinely overlooked it, or, more frequently, because the document has been uploaded between the time I read the papers and the time I ask counsel to point me to it.

In all other instances, my inquiry is met by an incoherent mumble and a long, awkward silence while counsel fumbles through CaseLines looking with rising panic for a document they will never find.

All this is avoided when counsel reads the papers in advance and advises their attorney or client of any deficiencies. When counsel is compelled to appear notwithstanding a material deficiency, they can avoid embarrassment simply by owning up to the fact that the document is not there. Either its absence is fatal, or it isn't. But there is nothing to be gained by attempting to convince the judge that the document really is there by means of some sort of Jedi mind-trick, or even worse, by ignoring the judge's inquiry completely.

Whatever the situation, thumbing through CaseLines for longer than is polite on your mobile phone while complaining about the quality of the internet connection at court is a bad look. Invest in a compact laptop and download the bundle.

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4. ORAL ARGUMENT

Once you get into court, virtually everything about your demeanour and oral presentation matters. It may not change the outcome of the case, but it will affect how the judge responds to you, and how quickly and easily the main issues in the case are identified.

The worst possible approach is a loud declamation of the abstract justice of your client's case. You will never be called upon to speak to a South African judge as a death penalty advocate would address a jury in an American soap opera.

Even though the press of work on the High Court frequently verges on the inhumane, a judge has generally read enough to know something about the case. Your first job is to find out how much we know and then work from there to acquaint us with the material facts and propositions of law we will need to accept if we are to rule for your client.

Doing this requires a courteous, calm, workmanlike demeanour. Start out by identifying the type of case and what you think the main issue to be decided is. Then break that issue down into its subsidiary issues, making careful reference to the papers where you need to.

Stand as still as you can. Speak at a steady pace. Avoid metaphor or hyperbole. Avoid humour. The judge probably doesn't share your sense of it. Setting out the facts and the law cleanly and clearly is the most persuasive rhetoric.

Sometimes, perhaps quite often, the judge has read enough to have advanced views about the case. If these are in your favour, don't insist on retreading ground the judge has clearly already covered, unless there's something about it that you really need to emphasise.

If the judge's advanced *prima facie* views are against you, take the time, politely but firmly, to explain why the particular views the judge has expressed are incorrect. Judges often want, and need, to be told that we are wrong. It helps us test our initial views. Maybe we will abandon them. Maybe we won't. But one of the jobs of the losing advocate is to sharpen the judge's grasp of the case, so that the losing side will at least be able to appreciate why they lost and, exceptionally, how they should approach an appeal.

If the judge has not, on reading the papers, immediately taken your side, the worst thing you can do is observe out loud that they have already made up their minds, and offer little to no further argument. This is about as unhelpful as it is possible to be. A *prima facie* view is just that – an initial take. It is how most judges test our knowledge of a case in court. Give it time and space. Address it. Use it to open up a dialogue with us.

5. QUESTIONS

Some judges like to sit back and let the argument wash over them. They filter the argument, often subconsciously, before the right result and the main reasons for it emerge after hours or days of thought. Other judges ask lots of questions. They like to define the issues they need to decide through a conversation with counsel. Through the same sort of exchange, they identify the range of possible outcomes in relation to each issue. They do that because they like to give judgment *ex tempore* at the end of argument where they can. Where they must reserve judgment, they like to walk out of court with a working draft of the judgment in their head, which is then refined (and the outcome often changed) during the judgment-writing process.

Either judicial technique gets the job done, but you must be prepared for both. Even the most sanguine judges will ask some questions. Your preparation for court must cover the possibility either that you will do all the talking or that you will do almost none, other than responding to judicial questioning.

The worst possible approach is to write a speech, and then read it out to court, looking faintly irritated at any interruption. Welcome questions. They signal that your argument has captured the judge's attention. The opportunity to respond to a judge's question is a chance to persuade – to turn the case in your client's favour. Don't squander it. Prepare for it.

Sometimes a judge asks a question and then answers it for you. Feel free to insist, politely but firmly, on the space to give your own answer. In almost all cases, you will get it. But don't respond aggressively – or forlornly – to the fact that the judge has decided to ask a question in the first place.

6. TRUST

Judges quickly develop opinions about the advocates who appear in front of us. We rarely come across counsel who are actively misleading. But when we do, we are able quickly to identify who they are. Once they are identified, nothing such an advocate says will be taken at face value. Everything will be double-checked. An advocate who has lost the trust of the court might not know when this has happened, might never regain it, and might as well not be there.

Though few counsel actively mislead, many counsel are sloppy with the papers. They make factual submissions that do not appear from the evidence. They rely on cases that cannot reasonably be read to favour their argument. We know who they are, and we weigh everything they say in light of that impression.

There are many counsel who have earned the court's trust, but some counsel have earned it only partially. I can trust some counsel never to make a misleading submission, but that does not mean I can trust them to have prepared their case properly, to have checked an authority, or to have taken a proper instruction. My approach will be calibrated accordingly.

Be an advocate the court can trust. You will reap substantial rewards.

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7. YOUR OPPONENT

In my early days as an advocate, I was deeply irritated by my opponents. I thought they were pompous, overbearing, dishonest or downright idiotic. I revised my opinion when I realised that the adversarial nature of litigation might be getting the better of me, that they had a job to do, much like me, and that I did not have to like them personally for us to have a sound and productive working relationship. Still, there were times – early on in my practice – when I visibly rolled my eyes or looked seriously annoyed in court at some ridiculous submission made by my opponent that no-one with more than a passing acquaintance with the case could seriously entertain.

Now that I sit on the bench, I see the same sorts of looks on counsel's faces, and I am utterly mortified that I could ever have pulled faces to the extent that some counsel still do. It leaves a horrible impression on the judge. At best it is a distraction. At worst it leads the judge to question your objectivity and independence.

To be able to trust you, a judge must believe that you have analysed the issues in a case with a degree of detachment. Pulling faces, rolling your eyes, or sighing out loud, and the various other things that counsel do to indicate their lack of enthusiasm while their opponent makes submissions, all serve to undermine that trust. Yes – your opponent may be silly, annoying and wrong. But remember that you are likely the only person in the room (other than perhaps your attorney and your client) who thinks that.

Still, even the most seasoned of counsel give in to the temptation to show their irritation with their opponent from time to time. In a contentious case, at 15h30 on a Thursday afternoon, in a stuffy court where the air conditioning has been on the blink all day, you will be forgiven for letting your mask crack. We have all been there.

But some counsel – even very senior counsel – make querulous self-importance part of their persona. They make a mistake. They risk losing the court's trust and respect.

> "TO BE ABLE TO TRUST YOU, A JUDGE MUST BELIEVE THAT YOU HAVE ANALYSED THE ISSUES IN A CASE WITH A DEGREE OF DETACHMENT."

8. WITNESSES

Judges can generally cut through lengthy and repetitive oral argument by asking questions, or by indicating that they have already grasped the point that counsel is now making for the third time.

During oral evidence, things are different. The advocate is in control of the use of court time (although, much too frequently, the advocate will themselves fall under the control of a hapless or loquacious witness). Evidence-in-chief and cross-examination generally take as long as they take. A judge will only intervene to resolve opposing counsel's objections, to prevent unfair or repetitive questioning, or to warn counsel about leading questions and the solicitation of inadmissible evidence.

Judges tend to give counsel latitude to lead or cross-examine as they see fit, even if that means putting up with fair amounts of irrelevant or inadmissible testimony. Judges know that we cannot always tell what evidence will turn out to be relevant and admissible until the end of the trial. We know that we will be able to sift through the evidence and disregard unnecessary material while preparing our judgment. We are also sensitive to the fact that appellate courts regularly chastise trial courts for interfering with the way the evidence is generated and shaped in a trial. While appellate courts, like all courts, are neither infallibly fair nor invariably correct, nobody wants to have their conduct of a trial criticised on appeal.

None of this means that counsel have free rein to take as long as they like while questioning a witness. In my experience, too many trials involve lengthy passages of questioning on common cause facts. Many counsel like to lecture the witness on common cause facts, which I find particularly frustrating.

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Evidence-in-chief is led in a haphazard manner, extracting facts from the witness in any order except the chronological. And cross-examination is blunted by confusing compound questions, which are often presented breathlessly in several parts to a witness who loses the thread very quickly.

The time this wastes is inexcusable, because it is caused by poor preparation. Counsel ought to know the common cause facts in advance. These barely need mentioning at all except in an opening statement and in closing argument. Counsel also ought to know the facts that need to be proved to sustain the pleaded case. That requires a careful evaluation of the pleadings together with the witness's statement.

In leading a witness in chief, counsel ought to elicit those facts in chronological order with clear, non-leading questions. In cross-examination, those facts must be put to a witness for comment. This is just about the only thing that really has to be done in cross-examination – although good counsel will do much more than that.

It is a great pity that the bulk of cross-examination I see consists of thirty minutes of argument with the witness, none of which is particularly helpful, after which counsel may or may not remember to set out the facts underpinning their own case, and upon which the witness has the right to comment.

During all of this, the prudent judge sits back, intervening only where necessary to ensure fairness, often thinking about the rapidly diminishing proportion of the working day they will have after adjourning to make a dent in their reserved judgments. Counsel who place a judge in this position will find it harder to prevail and, in any event, are rarely thanked for their trouble.

SUCCESSFUL ADVOCACY

If you follow this advice, my life will become easier. But that is not the only reason you should do it. You should follow my advice because it will contribute to your success. Success is not the same as winning all the time. Good advocacy can turn a marginal case into a winning one. Bad advocacy can turn a winning case into a losing one. But you can generally only be sure of winning an objectively strong and well-presented case – which will never be anything like all or even most of the cases you are briefed on.

Truly successful advocates are advocates who have the ear of the court. Judges listen to advocates who come across as if they want to help and who have mastered the tools of advocacy necessary to provide that help. In the long run, attorneys learn how to identify referral advocates who can hold the attention and respect of the court. Lay clients will choose trust account advocates and attorneys with higher appearance rights who they can see the judge listens to and respects. In other words, advocates who help judges get the work. For those who don't, the work eventually dries up. A

> "GOOD ADVOCACY CAN TURN A MARGINAL CASE INTO A WINNING ONE. BAD ADVOCACY CAN TURN A WINNING CASE INTO A LOSING ONE."