

Episode 1: Summary

Episode name: The View from the Bench - Tips for Aspiring Advocates

Guest(s): The Honourable Justice Lucy McCallum

What area(s) of law does this episode consider?

McCallum JA shares her advocacy tips, gained from her own broad and deep experience at both Bar and Bench – from preparing a case, to appearing at first instance and on appeal, to handling the disappointment of losing a case you expected to win.

Why is this topic relevant?

Advocacy is the core skill of every barrister, and an essential skill for most solicitors who are litigators. But no one is born a brilliant advocate, and the best advocates prepare for their appearances meticulously, rather than ‘winging it’ on some innate natural talent. In this episode, you will learn specific techniques and systems to prepare for an appearance and have a more complete understanding of your case before you rise to your feet.

What are the main points?

- *“If advocacy is the art of persuasion, then preparation is the tool of the artist”*. You need to know your case, the law that applies to it, and the context of your case, back to front. If you know your case well, then you can reduce it to its essence, and present it succinctly and persuasively, and consistently with your duties to conduct litigation justly, quickly and cheaply. Brevity is a virtue, but it’s not a shortcut – brevity can usually only be achieved by devoting lots of time to preparation.
- On the subject of brevity, understanding your case well not only enables you to reduce your argument to its essence, but also lets you reduce the material on which you rely to its essence too. Judges aren’t machines, and throwing all of the material you can at the Bench can overwhelm – the important material may be lost in a sea of irrelevant filler.
- If you are on the receiving end of an unexpected loss in a case, particularly on a point of law, remember that the common law is always evolving. A case going against you doesn’t necessarily mean you got the answer wrong; it might be a new development in the law. Of course, that doesn’t explain every loss – in an adversarial system, someone usually has to lose. If you are a less experienced advocate, it can be hard to tell whether a decision that went against you on a point of law was incorrect or whether you just got it wrong. An informal survey of more senior colleagues is a good way to test whether the decision is appellable or whether it’s time to let it go.
- Approach your appearances in court as Socratic dialogues, rather than speeches – it’s a good idea to have a plan for how your submissions will unfold but be ready to answer questions when they’re asked by the bench, rather than stick to your script. These questions can be valuable hints about what issues the judge is most interested in and how they are approaching the determination of the case. Perhaps most importantly, you need to be able to explain what orders you want the Court to make!
- When it comes to urgent interlocutory applications, knowing when to make or resist the application is just as important as knowing how you will make the application. Don’t be bullied into making an application until you have all of the evidence you need. The same applies if you’re on the receiving end of an urgent application – if

you need more time to prepare, seek instructions to give an undertaking to maintain the status quo until you are ready for a substantive hearing.

- The most important thing for advocates who are new to appellate advocacy to understand is the nature of the appeal you are seeking. Is it a rehearing, an appeal on a point of law, or judicial review? The nature of the appeal will inform how you prepare your written and oral submissions.

What are the practical takeaways?

- A good blueprint for preparing a case at first instance is a technique used by the late, great Peter Hely. Once you've read all of the material, start with a list of all the legal propositions that are likely to come up in the case. For all the propositions that support your case, choose a single authority to establish those propositions. For all the propositions that don't support your case, choose one authority that explains the limits of that proposition. Then, write down a list of the facts that need to be proven to make good each proposition in your case. That simple matrix will tell you what you need to prove, and why you need to prove it.
- Every decision maker brings their own background and perspective to the cases they consider. Understanding a judge's background in practice can help you tailor your submissions to your audience. If you know who you are going to be appearing before but don't know much about their background, read their swearing-in speech to learn more.
- Don't be afraid to admit what you don't know. No one can be expected to have read every case and memorised every section of every piece of legislation! That frankness will be appreciated by the Court more than trying to muddle through, and few judges won't give you the time to prepare to deal with an issue that has come up without notice.

Show notes

[Judge Carlton Reeve's sentencing of the three men who killed James Craig Anderson](#)

[Perry Herzfeld and Thomas Prince. *Interpretation* \(Thomson Reuters, 2020\).](#)

[Tim Game SC and Julia Roy SC. 'Unifying Principles in Administrative and Criminal Law' \[2018\] ELECD 1670.](#)