

CHILDREN’S LEGAL SERVICE CONFERENCE

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PLEA MAKING AND ADVOCACY

Introduction

The aim of this paper is to provide practical information which will hopefully assist in presenting a plea. There are 5 Points.

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1. The Fundamental Question

What do I want? You cannot present an effective plea without knowing what it is you are actually asking for. If you don't know don't stand up.

2. Structure (and more structure)

You know what you want. A structure means knowing where you are going and how you are going to get there. A very simple structure for a plea and one that I use all the time is as follows:

- (i) Penalty – what do I want?
- (ii) Circumstances.
- (iii) Technical matters.
- (iv) Subjective matters.
- (v) Conclusion – one sentence to wrap it up.

Taking each of those five points in turn:

(i) *Penalty - what do I want?*

Often it is useful to tell the Magistrate or the Judge what you want. This is a call that has to be made by the advocate but I think it is often better to tell the Magistrate or Judge straight away where you are going in diplomatic language. What I mean by that is don't just say, don't send him to gaol, couch your submission in more comfortable and less threatening language.

(ii) *Objective circumstances*

It will be a rare case when you do not say something about what actually happened. Even if it is the worse case, it is probably useful to try and distinguish the facts of the offence from other more serious offences.

A good way of thinking about the objective circumstances of the offences is how the Chief Justice referred to them **Regina v Way** (2004) 60 NSWLR 168 at paragraph 85 and 86, namely:

- The physical acts of the offender and their effects;
- Factors that relate to the mens rea of the offender. For example, some circumstances will be personal to the offender, such as those where there is a cause or connection with the commission of the offence, such as:
 - motivation (e.g. duress, provocation and robbery to feed a drug addiction);
 - mental state (intention is more serious than recklessness); and
 - mental illness or intellectual disability (where that is causally related to the commission of the offence).

(iii) *Technical Matters*

I won't list all of the potential matters that can fit in under this category, but I consider these to be matters of law. (e.g. plea of guilty; remorse; time in custody; and criminal record etc...).

(iv) *Subjective Matters*

Often the best part of your plea is something personal about your client. That may be something in relation to their background or the effect this offence has had upon them. Again I won't list everything that could be grouped under this category. I often leave the personal matters to the end of my plea on the basis that it provides a good platform to lead in to your conclusion.

(v) *Conclusion*

Always put a full stop, so to speak, on your plea. That doesn't mean three or four paragraphs repeating everything you have said, it means one or at most two sentences that cut at the heart of your plea.

Once you have said that - sit down.

3. If you are asked a question answer it

If at any stage of your plea you're asked a question then answer it then. If you don't answer it you may as well sit down because the Magistrate or Judge will not listen to you.

If you can't for a (very) good reason answer the question immediately (e.g. because you want to take the bench to something else) then politely tell the Magistrate or Judge that. This would be exceptional.

If you cannot answer the question at all, for whatever reason, then is there any harm in saying "I can't answer that"?. Sometimes that can be a very effective technique in establishing a relationship between yourself and the bench, because the bench will understand that some parts of your case are very hard to explain and will appreciate your candour.

4. Preparation

a) Generally

I cannot emphasize how important it is that before you stand up in court your matter is thoroughly prepared. That means knowing everything.

That means when you stand up not having to refer to the piece of paper that you have in front of you to present your plea.

What you finally say in your plea should be seen to be the product of your preparation and not the preparation itself.

What I mean by that is when you stand up don't just read out the piece of paper you have written on. If anything, the only piece of paper you refer to should have a series of dot points about the essential matters in your case. That piece of paper should be the final product of your preparation, and it should be dot points, it should not be paragraph upon paragraph or page upon page of material.

Organise your materials so that when you stand up you only have one piece of paper in front of you with dot points. Even better if you have nothing.

b) Interviewing the Client

In relation to interviewing a client about what is a plea, or what will become a plea, conduct the interview using the same structure you use in presenting the plea.

I actually write down on a piece of paper before speaking to the client: objective circumstances, technical matters and subjective matters.

I will then ask questions to obtain information, which goes into 1 of those categories. This is time effective because you are not going over the same information again and again, and you can take the piece of paper you have written down information on into the court and present your plea from it (subject to something later in this paper).

I think this technique is particularly useful for those of you, probably all of you, who work in a high volume practice. It saves time. The time saved can be used on preparation.

c) Written Submissions

As to the use of written submissions:

- i.* Use them when you think that they could assist in the presentation of your plea. That means, not deciding to use them in every matter but deciding when it is appropriate to use them;
- ii.* I use them when I want to cover more technical areas of the law which are relatively dry (e.g. s.21A matters);
- iii.* Keep your written submissions short, 3 pages is too long. Do not quote slabs of case law but state the relevant principle and apply it to the facts of your case. This should be able to be done in one or two sentences;

- iv. When referring to written submissions in your oral plea do not read them out word for word or regurgitate them. Structure your oral plea to include the written submissions.

5. First and Last Sentence

How many of us can actually say that in the last plea that we did we knew the first sentence that we would use, and the last sentence that we would use.

Do we start a plea by saying “I am instructed that”, “there is a plea of guilty and I think its matter number” or do we try and be more creative and in a few words “grab” the attention of the bench?

The same can be said for your final words in a plea.

Try writing down the actual words that you are going to say when you first stand up and the actual words you are going to say when you sit down.

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