Do's and don'ts of tribunal advocacy

Introduction

1. Experience has been called an expensive school. In this practical talk, Graeme McPherson QC and Diarmuid Laffan will share their thoughts on disciplinary tribunal advocacy and hopefully, in doing so, may save listeners some part of that expense.

2. Diarmuid will focus on case preparation and presentation from the advocate's perspective, before Graeme gives a valuable 'view from the bench' in light of his experiences sitting as a tribunal Chair across a variety of professions and sporting bodies.

3. The following paper provides a broad outline of the topics Graeme and Diarmuid will address.

Initial instruction

4. When initially instructed by a professional, it may still be possible for you to pre-empt the charging decision and convince the regulator that its allegations are baseless. It is therefore worth immediately investigating with the client whether there are any means of addressing the regulator's concerns and avoiding the charge entirely.

5. Experience shows that charges are often drawn when regulators are still relatively lacking in information. The means they can be vague, over-broad or simply unsustainable. It is in your client's interests to clarify the regulator's charges (the rules it claims to have been broken and why it says this) as early as possible. This will give you clarity as to the case you have to answer and leaves you in a strong position when it comes, later on, to confining the regulator to the case it has defined.

6. Whether acting for a professional or prosecuting the charges, you may have to meet imminent deadlines soon after you are instructed. In terms of getting quickly up to speed with the case you have to present and accelerating any further investigations that are required, there is no substitute for an early conference with the client, preferably in person. You will often have a long list of questions after reading the initial papers, and a conference is the most efficient way to get those answered and to start getting to the heart of the case.

7. Early on in your instruction, you will have to make tricky judgement-calls about whether to adopt a relatively open approach as regards providing information to your opponent or giving them the bare minimum, often more in hope than expectation they will simply go away. When acting for a professional, this correspondence can be critical as it will often be used to challenge your client's credibility at the hearing –

with allegations for example that she was less than candid initially and is now making it up as she goes along.

8. If a charge and contested hearing seem very likely, and some of the information your opponent has requested (and the underlying issues) will inevitably come to light in due course and at the hearing, there is often a strong argument for openness. It provides a degree of control over the manner in which information comes out and will build credence with the tribunal. Plainly these are difficult judgement calls that will have to be addressed against the individual facts of each case.

9. Once it becomes clear that a contested hearing is inevitable, all your investigations and work should be geared towards that, with the charges framing your approach to gathering evidence, drafting witness statements and submissions. Ultimately, Tribunal members want to make the right decision on the basis of the full evidential picture. You maximise your prospects by making sure you have correctly identified the issues in the case and secured the relevant evidence so that, ultimately, you can answer all or most of the questions put to you and the panel can have confidence in finding for your client.

10. To this end, you should have a "case theory" or, in other words, have thought your case through as comprehensively as possible in the time available to you. There will be points of fact in relation to which, even if you are not strictly subject to the burden of proof, you will be subject to an effective obligation to investigate and lead a positive case if you are to retain credibility. Again, the tribunal's instinct will be to find out what really happened and they will want your help with this.

11. Tribunals will usually find it very unattractive if your account is that the central factual issues in the case are unsolved mysteries. They will want you to give a reasoned account as to what happened, why it happened and how the evidence fits with that theory.

Building your case

12. As soon as you are instructed, identify any gaps in the papers provided to you so that you have the greatest possible opportunity to locate them prior to the hearing. If something the tribunal would generally expect you to produce is absent, you should be ready to explain why this is the case in order to mitigate the effects on your client's credibility.

13. Stephen Sedley's 12 Laws of Documents (attached) provide some excellent pointers to bear in mind in making decisions as to the documents placed before a tribunal. The common-sense guidance is clear. Decision-makers want only relevant information, presented in a user-friendly format, and find documents falling out of chronological order, mistaken pagination and illegible photocopies to be particular bugbears.

14. With disciplinary proceedings frequently turning on contested points of fact, the preparation of lucid, comprehensive witness statements is a critical part of the process. You should carefully identify all of the issues which the witness will have to deal with at the hearing, including points that may be made against them and contested parts of their account, and consider dealing with these head on. It is often better to pre-empt unhelpful points against your witness instead of letting them come out in cross-examination.

15. Make sure your respective witnesses' statements are consistent and, if there are unresolved inconsistencies in the evidence, explore these. If, having explored the points with the witnesses, the inconsistencies persist, make this explicit in the statements. It will save time at the hearing and build capital with the tribunal if you have clearly mapped out your witnesses' evidence on the key issues.

16. Careful thought needs to go into deciding which witnesses are required to attend the hearing. Often you will come under pressure to agree a number of the other side's witness statements and have them read. Make sure you do not leave any gaps in your ability to cross-examine on the central issues in the case. Care also needs to be taken in advising your witnesses as to how they should prepare to give their evidence, with a balance to be struck between a witness being ready to give a proper account of themselves, and presenting as wrote or rehearsed.

The hearing

17. From an advocate's perspective, your guiding principle should always be to make the tribunal-members' lives as easy as possible. Judges want the issues they are required to decide (and those they are not) clearly flagged to them, fully thought-through and investigated cases put before them, and courteous, professional, presentation.

18. Any advocate will tell you, having had the experience of walking into a hearing-room and discerneing within 30 seconds that the decision-maker's mind was already made up, that you can win a case with good written submissions. Any comprehensive statement of case-style submission should clearly mirror the tribunal's usual decisions, and contain a list of agreed and contested issues, as well as a relatively neutral account of the facts and legal principles. There should be plenty of exposition on the key issues and a clear indication of the client's response to their opponent's arguments – decision-makers will likely read the document in a hurry and you want them, nevertheless, to absorb the core of your case and use that to frame their experience of the hearing from the very beginning.

19. While tribunals may, under time pressure, suggest that openings can be dispensed with in light of their having read detailed skeleton arguments, it is almost always advisable for an advocate to open. Frequently the panel members will have read the documents in a hurry, and if you and they remain at cross-purposes regarding one of

the key issues in the case, it is important to correct the position before they start hearing the evidence.

20. Effective cross-examination is 95% preparation and familiarity with the material, and 5% inspiration. It is at this point that having a well-prepared case, with all the relevant evidence and a good chronology in hand, pays real dividends. It allows for simple, effective cross-examination whereby the tribunal and the witnesses being examined can be brought through the documents and the latter required to accept the propositions put to them (or adopt positions unsupported by the documents).

21. Closing submissions are another area where your work on fully thinking through and investigating your case will pay off. If the tribunal has ten points of concern about your witness' evidence, having reasonable and reasonably evidenced answers to 8 of those, as opposed to 4-5, can be the difference, for example, between a tribunal 'noting some inconsistencies in Mr X's evidence but ultimately finding the charges unproven', and your witness being labelled entirely unreliable and losing you the case.

The view from the Tribunal

22. Graeme's section of the podcast focuses on how a case can be most effectively presented before a Tribunal – some '*dos and don'ts*' of Tribunal advocacy. Drawing on his experience chairing professional and sporting disciplinary tribunals, Graeme's aim will be to identify some of the common pitfalls into which advocates can fall, and to make suggestions as to how to avoid them.

23. The talk focuses on the practical rather than the theoretical, and endeavours to cover a wide range of topics including:

    a. Written advocacy;

    b. Tailoring your case to the strengths and weaknesses of your Tribunal;

    c. Effective use of documents;

    d. Effective presentation of factual and expert evidence;

    e. Tying everything together in closing submissions.

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