Foreword

Sir Bruce Robertson

Day by day in courtrooms around this country, women and men argue their clients' cases. Some do it better than others. All want to do it well. On some days it really goes well but on others it doesn't. For generations, people have sought to understand the chemistry and magic: what is good advocacy and what is not.

There are some who hanker for the good old days and advocates like England's Marshall Hall or AC Hanlon, the giant of the New Zealand courtroom. Whether their style and approach would, in fact, be effective today is open to question, but the need for good advocacy in our time is as pressing as it ever was.

During the early 1980s, the possibility of New Zealand adopting some of the techniques which had been advanced by the National Institute for Trial Advocacy (NITA) in the United States of America was investigated. Largely because of the energy and impetus of the late Douglas Wilson and Terence Arnold, now a Supreme Court judge, the New Zealand Law Society's first Litigation Skills Programme took place at Porirua in 1986. There, the New Zealand legal community became familiar with *Mauet's Fundamentals of Trial Techniques*, a highly regarded and influential book. Eventually a New Zealand edition under the general editorship of Justice Eichelbaum (as he then was), with the invaluable assistance of Douglas Wilson and Terence Arnold, was published with contributions from judges and senior counsel, many of whom were on the faculty of that first Litigation Skills Programme and many of whom have maintained a close and enduring involvement in the programme. All royalties received by the authors were contributed to the New Zealand Law Society (later the Douglas Wilson Advocacy Scholarship Trust), the object of which was, and still is, to assist practitioners who may not otherwise be able to afford to attend litigation skills courses, to do so.

In 1997, Oxford University Press, which published *Mauet*, notified the Society that the book was out of print and that Oxford had decided not to undertake a new edition. The NZLS CLE Litigation Skills Programme still required a text so it was decided that the time had come for a book written from scratch by New Zealanders for advocates practising in New Zealand courts and within the New Zealand legal context. After much discussion and consideration it was decided that, rather than try again to adapt to New Zealand conditions a book written for the United States (and previously adapted for Canada and subsequently for Australia), it was time to have a distinctively New Zealand book on contemporary advocacy. The approach and attitude to this subject, which is encapsulated in *Mauet*, strongly influenced the production of the first edition of this book in 2000. In 2001 it won a prestigious American Continuing Legal Education Association award in the Best Publications category.

This book has now sold over 3,000 copies. The proceeds from its sale have continued to go to the Douglas Wilson Advocacy Scholarship Trust.

Time moves on – in the last ten or so years there have been several important changes to legislation, including the introduction of the Lawyers and Conveyancers Act 2006 which has brought with it the new Rules of Conduct and Client Care, replacing the Rules of Professional Conduct for Barristers and Solicitors[1]. This revised edition has been an opportunity to bring this text up to date as far as new legislation and the new rules are concerned, and to review its content generally.

The legal situation in New Zealand is different from that in most other jurisdictions influenced by western common law, not least because of the absence of civil jury work connected with personal injury litigation. It is important to remember that, absorbing as jury work may be, in terms of volume the overwhelming preponderance of work is carried out in District Courts in judge-alone hearings. Although there will always be lengthy, complex, high-profile matters which will capture attention, good advocacy is required at all levels and in all places to protect and maintain the interests of every individual client.

Added to this distinctive character of the New Zealand jurisdiction is the fact that there are no absolute and inflexible rules: effective advocacy is an art. Experience shows that the best advocates are those who can take, fashion, master and exploit their own natural talents and abilities. Being yourself is not a charter for individualistic and idiosyncratic mavericks. Mastery and exploitation have a core premise, namely, a thorough understanding of fundamental precepts.

Good advocacy sometimes requires breaking the rules, but such deviations will only be effective if counsel knows the rules and makes a considered judgment to break them. Departing from the norm is unlikely to be effective or compelling when, stumbling around in ignorance, a lawyer fails to maintain the applicable evidential, ethical and professional standards.

The prime purpose of this book is to provide a comprehensive and accessible reservoir of information about those fundamental precepts and factors that are essential to the conduct of any litigation in a New Zealand context, however, it is also about how to do the job well.

First, whether the case is big or small, high-profile or obscure, whether it involves liberty or property, no advocate will ever succeed without a complete appreciation and understanding of the client's factual problem. You can never advocate a position that you do not understand totally.

Needless to say, trying to find the facts is not a task for the weekend before trial.

[1] The Criminal Disclosure Act 2008, the Criminal Procedure Act 2011 and the Search and Surveillance Act 2012 have wrought quite radical change, particularly in the criminal field.

It is what you must do from the first time there is contact between you and your client. The need to take the time to listen to your client's story, to prod and probe the events in question so that every relevant factor is within your knowledge and grasp, cannot be over-emphasized.

As part of that process you must seek to understand the other side's perspective so you know what to counter on behalf of your client. Disputes usually have at least two facets. One perspective may be stronger than the others but you ignore other perspectives at your peril.

Secondly, and as importantly, you need to understand the legal framework arising from the factual position, and the relief that can be sought and obtained. Courts administer justice according to law. A clear understanding of the legal metes and bounds of that area is an essential requirement in preparing for any hearing.

Thirdly, having captured the facts and understood the law, there is a constant need to make judgments about how you will advocate the position that you are called on to advance in all aspects of the resolution of the dispute. Practice varies. Priority and emphasis will be needed in all cases, although there must be a correlation between the time and energy expended, and the possible outcome for your client.

NITA and the Litigation Skills Programme place particular emphasis on the theory of the case. In simple terms, this is the overall position and approach you take on behalf of the party you represent, based on facts you need to establish by evidence at the trial. For example, in a criminal defence it may be mistaken identity. If you are for the defendant in a civil claim, it may be misrepresentation, that the statements relied on were never made. Unless your case is totally derailed, this theory will remain constant throughout the litigation and be the lodestar against which you measure all decisions in the preparation and conduct of the trial. Applying a theory will ensure a constant testing, weighing and assessing of all the possibilities. Having and adhering to a theory of the case is critical to good advocacy and underlies all the advice in this book.

Beware – all the drama and persuasion of a silver tongue will be for nought if your case is constantly under attack from your opponent or the Bench because of your failure to abide by or apply the basic rules of litigation.

Your advocacy will be impaired if you are constantly interrupted by judges because you neglected to provide proper disclosure, or omitted to challenge opposing witnesses with your side's conflicting factual possibilities, or presented inadmissible hearsay, or tendered opinion evidence from a non-expert, or meandered through unhelpful and prejudicial irrelevancies. All of these will undermine the confidence of the adjudicator in you, your presentation and your case. That is the antithesis of good advocacy. First establish a theory of the case. Every action thereafter should be influenced by it.

A well presented case is characterised by meticulous attention to detail, thorough preparation, and careful assessment of the most effective route for that case. However, the way you dealt with a case last week (even if you were successful) will not necessarily tell you how to deal successfully with a case this week. The uniqueness (the special properties of a particular dispute) of the case needs to be understood and dealt with each time afresh. Bring to advocacy your personal flair and exercise your individuality, but do it in a professional, disciplined and compelling manner. You should not assume that knowing the rules and unthinkingly applying them will create a great advocate. But great advocates do not emerge without a total mastery of the essentials of the art.

Within this book you will find the collective knowledge of some of the most experienced advocates and judges in New Zealand, who highlight the essential matters that need to be considered in all cases. Because this book has been written and contributed to by some twenty writers you will inevitably find differences of style, approach and emphasis. We are unapologetic for that. It reflects the reality of the differences of those involved in the law and provides insight into the various approaches that you can develop and exploit for yourself. You will, however, find a general unity of purpose. You should remember that how you operate will depend on the nature of your case and the identity of the court or tribunal before which you are appearing. Approaches may vary in different parts of the country. The good advocate will understand the differences, respond to them and exploit them in the presentation of the case.

Not everything suggested will be applicable in every situation. You must be alert to the possibilities.

There have been times when, within the profession and in the wider community, there has been a strong belief that effective counsel were born and could never be created. Innate ability is undoubtedly a great advantage, but it is equally true that those with commitment and conscientious determination to succeed can improve their game and operate at high levels of effectiveness and efficiency. Sincerity and simplicity are the ultimate hallmarks of good advocacy. Those traits will emerge from an exercise of true professionalism by a thoroughly prepared and disciplined practitioner.

You will benefit from dipping into this book from time to time. The art and skill of advocacy is not learned in one quick burst. Constant reminders of the basic tenets and requirements will improve the performance of even the most seasoned advocate.

Legal disputes are often about what actually occurred or what a document or an agreed circumstance means. There is a very real sense in which the ordering and presentation of a case is a creative activity (although you should be aware that

there are traps in creating something that never occurred, or rewriting history). Advocacy is about having a story to tell. Organisation, completeness and congruity are essential elements in the process.

In the presentation of any case, economy is always an advantage. Establishing a necessary fact well, once, is all that is required. Half-hearted, peripheral and untidy encounters without conclusion are unhelpful and unnecessary. While it is essential that you call witnesses to cover every fact that is in contention, it is also good advocacy not to call any witness or introduce any testimony which is, in fact, not necessary. In both civil and criminal cases there is a crying need for rationalisation and reduction in the volume of material, most of which is not required for the resolution of a case.

This text is not a theoretical treatise but a practical guide for busy practitioners at all levels of competence and at all points in their careers, although it has been prepared primarily for participants in the Litigation Skills Programme.

I acknowledge again the unique contribution of the Right Honourable Sir Thomas Eichelbaum, former Chief Justice of New Zealand, in bringing about the first edition of this book. In this revision, we have been fortunate to have again the editorial assistance of Andrew Beck and Simon Mount, whose special contribution I acknowledge, together with all the authors who have been involved in updating their chapters or have joined the team on this revision. We are all heavily in the debt of Jane Battersby of the NZLS CLE who skilfully orchestrated the production of this update and revision with cheerful determination.