

BEASTLY ADVOCACY IN MOTION

by
Alexander W Street SC

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A. Nature of the Beast

- The art of persuasion
- Compelling use of logic
- Effective communication
- Intellectually appealing propositions
- Interesting rational argument
- Identified objectives within the paddock of strategy
- Inoculated by integrity and ethics

B. When is the Beast unleashed

- There is a role for advocacy from the moment there has crystallised a dispute in which a resolution is to be achieved by a decision maker or by consensus
- This means that the first correspondence should be enhanced by the art of the advocate
- Wherever there are persons to be persuaded, be it decision makers or the opposing party's clients/team, the artistic work of the advocate should be employed

C.1 Recognising the Beast

- Advocacy is not simply oral presentation. There are some senses that for reasons of decorum the advocate excludes
- Advocacy is not merely oral and/or written presentation
- Advocacy includes the unstated impact of style and presence
- Silence can be effective advocacy

C.2 Recognising the Beast

- The advocate paints with voice and appearance, trying to capture through eyes and ears the mind of the listener, or where in writing the mind of the reader
- Measured sincerity and conviction can be infectious.
- Determination, within ethical constraints, to succeed
- Confidence and polish without arrogance
- Humility dominating hubris
- Calm and likeable

D. Training the Beast

- As this is a dynamic art the quality of the work can only be improved by trying to master and refine your comprehension of the principles of advocacy
- Constantly endeavour to improve the brushstrokes that you wield
- No great artist ever sees the conquest to excel as being over or the capacity to improve as being exhausted
- The mirror revealing our own weaknesses or deficiencies in the creation of the artistic work of the advocate is always seen by others and the desire to self-improve should be constant.

E. The hallmarks of the Beast

- Integrity (which includes candour)
- Clarity
- Logic
- Brevity

F. Know the Beast

- Preparation
- Reflection
- Refinement
- Lineal progression
- Creative / lateral thinking
- Research (law, facts, expert areas, witnesses, court)

G. Anticipating the opposing Beast

- Identify the opponent's strengths
- Prepare persuasive answers
- Anticipate, if appropriate, those opposing contentions that can be dismissed
- Anticipate, if appropriate, those opposing contentions that require evidentiary / pleading answer

H. Grooming the Beast

- Appearance is important
- Avoid distractions of style or depiction of disorder
- Have the papers properly organised
- Have the passages or paragraphs readily accessible
- Have the books and passages readily to hand
- Quality not quantity

I.1 Feed the Beast

- Master the whole of the factual material
- Read and re-read the critical documents
- Identify the issues
- Distil issues into fact and law
- Identify any other currently omitted potential decisive issue

I.2 Feed the Beast

- Work up a sound and clear comprehension of the legal issues
- Work up and prepare the potential evidentiary issues
- Work up and reflect upon the adequacy of the pleadings, particulars where applicable, damages components and appropriateness of relief sought
- Review whether new causes of action or defences should be added or replies amended

J.1 Taming the Beast

- Prepare the written outline of topics and propositions
- Prepare a statement of issues summary
- Prepare a list of objections
- Prepare the intended final address
- Prepare in writing the oral opening

J.2 Taming the Beast

- Prepare the for the unexpected by reflecting on the merits and how they might be shifted
- Prepare for the opponents evidentiary gaps and weaknesses to be cured by devising the next line of attack
- Prepare for curing your opponents objections
- Prepare the preferable order and sequence of witnesses and tender

J.3 Taming the Beast

- Collate the documents for tender
- Prepare for each witness' evidence in chief
- Prepare your witnesses
- Prepare for each witness in cross examination
- Maintain the housekeeping list

K. Advantages of a script for the Beast

- Focus
- To avoid repetition
- To avoid omission
- To enhance flexibility
- To return to structure of the argument

L.1 Colouring in the Beast

- Remember in words you are painting a picture
- Give attention to the detail of the scene that lends emphasis to the perception you wish to convey
- The clearer the image, the clearer the message
- Disarming simplicity

L.2 Colouring in the Beast

- Be selective in the use of colour, florid jury openings and grandiloquence can pitch the case too high and by the very nature of the width of proposition open up avenues for material attack
- Eschew humour – except in enthusiastic acknowledgment of that from the bench
- It is submissions on behalf of the client that you are developing – not personal opinions or revelations as to the dull thinking process of the individual

M.1 Beast in battle

- Engage the listener
- Eye contact
- Welcome the judicial intervention and use the opportunity to provide both a responsive answer and rebuild the essential proposition
- Avoid repetition on the basis of your ineptitude and try to reformulate
- Avoid disengaging conduct

M.2 Beast in battle

- Selective and well thought out use of analogy or extremes
- Syllogistic logic. If ... then
- Inductive logic. Why ... because
- Deductive logic. Assume ... therefore
- Shift the equilibrium – by refining the vision of equivalence through synonyms and antonyms
- Flawed logic – by opponent

N.1 Beast biting the statutes

- Identify the relevant version as at the applicable date
- Master the history of the amendments, their commencement date and transitional provisions
- Consider the potential competing interests
- Identify the purpose
- Consider the policy implications
- Identify any supporting secondary material
- Consider the provision as a whole, the preamble and work in the relevant definitions

N.2 Beast biting the statutes

- Consider surrounding provisions
- Consider the structure of the statute as a whole
- Unlikelihood of absurd or no meaning
- Consider other provisions within the statute using the same language
- Consider the relevant *Interpretation Act* provisions
- Identify the leading authorities
- Identify analogous statutory provisions and the leading authorities

O. Anatomy of the Beast

- How can you label the parts being the essential issues in contest
- Is there a higher level of useful description
- Is a narrow definition of forensic advantage
- Is the relevant organ in the nature of an issue of substance, form, process, procedure, practice

P. The chameleon nature of the Beast

- Versatility of style and substance is essential
- Flexibility is an adornment
- Avoid the monotone or the lecturing martinet
- Fearless and forceful persuasion is achieved by the power of cogent reasoning
- Fight the issue, not the person
- Conflict at the Bar table is unendearing
- Avoid insolence by expression or otherwise

Q. The Beast on show

- What are the material incontrovertible facts
- What are the critical contemporaneous records
- What does common sense dictate
- Weigh the competing interests of justice
- Assist in the case management

R. The Beast in context

- What is the surrounding context
- Are there intertwined relationships or relevant earlier history
- How does surrounding context impact on:
 - probabilities
 - motives
 - credibility

S. The winning Beast

- Keep the object in mind
- Revise and adapt the strategy
- Concede where necessary
- Select the best points
- Exercise sound reasoned judgment
- Be deliberative and constructive in the just resolution

T.1 The Beast in opening

- Introduction – what I am going to say – say it – what I said
- Distil the contentious issues of fact or law
- Identify preferably in a single pithy sentence the nature of the dispute
- Interesting, chronological and structured
- Time lines, critical milestones, star bursts, charts, graphs, diagrams, photographs, video, samples

T.2 The Beast in opening

- Convey the merit – merit maketh the case
- Avoid unnecessary contentious issues and minimise the chance for interruption until completion of the opening (mark for identification)
- Can a view or other real evidence yet to be tendered assist
- Explain the likely areas of conflict – gloss with the competing probabilities and improbabilities
- What increases the likelihood of truth

T.3 The Beast in opening

- Highlight the smoking gun, the alarm bells or other salient features
- It was a Victorian practice to read the pleadings in opening and should remain so
- Weave in the contemporaneous records or documents that are supportive / destructive
- Convey the confidence of complete command of the case
- Diminish or demolish the pertinent contrary contention

T.4 The Beast in opening

- Tie in the diary, book entries, correspondence or other record to be used to lead or refresh your witnesses
- Build or destroy witness credibility
- Is the credit issue influenced by the taint of joint discussion, power of suggestion, reconstruction, fabrication, concoction
- Convey an enthusiasm to assist the Court in its task
- Present material and submissions in a way that will facilitate ease of adoption in a judgment

T.5 The Beast in opening

- Ensure audible with a respectful tone and pace
- Watch the Court and adapt as required
- Does the opening accord with pleading and particulars (consider amendments), the intended evidence, instructions and ethical constraints
- How will this opening impact on the prospects of settlement and tactical conduct of your case
- What is the impact of the adverse use that may be made of the opening
- Assist the Court in judging the beast by time estimates and sequence of performance

U. Own the Beast

- Prepare your own summary as to the essentials of the art of advocacy.
- Revise and update your own summary.
- Observe and learn from both the skilled and the unskilled.
- Be insatiable in your appetite for the truths of advocacy.

V. Beast in perspective

- Supremacy of rule of law
- Constitutional balance and Parliamentary powers
- Justiciable controversy – jurisdiction of Court
- Duties as officer of Court
- Ethical obligations and Bar rules
- Statutory duties – cost estimates, fee agreements, reasonably arguable
- Statutory matrix – just, quick, cheap
- Scope of retainer, alternative resolution, need for and compliance with instructions
- Duties owed to client