Ten Rules of Appellate Advocacy II

Justice Kirby Collection

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TEACHING ADVOCACY

Until recently it was assumed that advocates were born, not made. The only instruction was in the school of hard knocks. The legal profession, in its hierarchal organisation, provided the lawyer, during a typical life' s journey, with opportunities to watch and copy, cringe and avoid. Such written instruction as there was on the art of advocacy was found in books,[1] judicial essays[2] or commentaries by respect advocates[3] trying to explain conduct which seems so instinctual and spontaneous when observed but, when missing, is painfully and embarrassingly obvious.

Through the work of the Australian Advocacy Institute and the reading courses conducted by the various independent Bars in Australia, this is now changing. The change can only be for the better. Lord Nolan, lately elevated to the House of Lords, has commented on the need for improvement at the Bar:

The advocacy training to which his Lordship was referring was itself inspired by the Australian initiative. In this way, we are repaying, in part, our debt to the great tradition of the advocates of England. To the system of law which they and the judges of England built, we in Australia are heirs.[5]

The object of the advocacy course is to give the participants an opportunity to observe themselves on videotape and otherwise to be submitted to the constructive criticisms of experienced advocates and of their peers. Attention is paid to eradicating clear mistakes and to identifying repeated failings in the art of advocacy. This is an important advance. It will be critical that the Institute, judges and the advocates themselves monitor the extent to which the lessons learned survive the transit to real life situations in the courtroom and endure throughout the years of stressful, demanding work which is involved in the life of an advocate.

Many commentators have sought to identify the particular characteristics of outstanding advocates. They have done so upon the assumption that, if the qualities could only be identified, perhaps they could be taught and copied. Clearly, inherited intellectual gifts will allow one person a capacity to see issues, analyse problems, foresee perils and synthesise material more quickly than the next. Of Sir Garfield Barwick it was said that his power to recall detail and then to speak of it with simplicity represented his greatest skills as an advocate.[6] Many commentators talk of the primary talent of the advocate as being the

capacity to reduce complex matters to bare essentials by thinking out the issues necessary for decision and then presenting them to the decision-maker attractively and with precision.[7]

The recent emphasis, in the written work of lawyers, upon the rules of plain English expression may also have its reflection in oral communication. Short sentences. Speaking in the active voice. Avoiding circumlocution and clichés. These rules are as important to the advocate as to the drafter.[8] Of course, there are still those who doubt the possibility of teaching the art of good advocacy and who question the wisdom of even trying to do so. Congenital gifts of intellect are matched, but not always accompanied, by gifts of oral communication. There is no point in seeking to analyse why it should be so. Why some people can express themselves more clearly and vividly than others. Physiologists might trace the reasons to the connectors of the ganglia or the speed of electric messages in the brain. Psychologists might offer explanations in terms of the individual's childhood upbringing, communication with family or feelings of self-assurance and inner peace. Sociologists might suggest explanations in terms of the inclination of some people to escape their own bodies and to act on, a public stage, the dramas of others. But whatever the explanation, we all know that some people can argue with greater power and persuasiveness. Their voices sound more pleasing to the ear. Their physical presence commands attention. Perhaps their faces or their eyes demand notice. These are the stamps of nature which no course in advocacy can replace. Those who are the lucky ones may make the most of such gifts. But they may squander them. Those with fewer natural advantages may seek to compensate by learning basic rules which improve their daily performance.

The object of advocacy is not, ultimately, to please the ego of the advocate. Nor is it, in the end, functionally directed at impressing an instructing solicitor (if the advocate is a barrister), colleagues and opponents, important though that may be for professional success. It is not even satisfying the client, win or lose, that the case has been put with an appropriate command of the facts, a good grasp of the law and as persuasively as the facts and law permit. In the end, the object of advocacy is, by communication, to persuade. It is to influence the decision-maker (judge, magistrate, tribunal member, juror) to accept the propositions advanced by the advocate leading to the success of the advocate's cause.

If this is the object, it is ultimately targeted upon that moment in the decision-maker's process of reasoning when he or she takes the final leap to judgment that determines the decision (order, award, ruling, etc) which is to be made. If only one could identify, in every case, what that point of decision will be, and what will influence its course - leading on one opinion to a conclusion favourable to the advocate and on another to failure - the teaching of advocacy could be directed, with laser precision, to its proper object. There is precious little writing upon the process of judicial decision-making. Few judicial officers stop, themselves, to analyse what it is that led them, in a particular case, to this decision or that. Few judicial officers have the time for such introspection. But it is an important question, for all formal decision-making, to determine the magical point at which, effectively, the decision will be made. If that point can be identified, the advocate can fasten upon it.

Sometimes, a decision-maker will reach a preliminary view on reading the papers. I have known judges who were very difficult to shift from such a view. But judicial open-

mindedness and a willingness to attend to the argument is both the assumption[9] and the requirement[10] of our legal system. Sometimes, a critical and even dramatic moment, will be reached in the course of argument in an appeal. A telling point will be made. A judicial officer, obviously heading in one direction, will visibly come to a halt. A silence may fill the courtroom sending the trumpets of victory to one side and the muffled drum of defeat to the other. We have all experienced those moments. They do not come in every case. But when they come, and an advocate has truly turned the opinion of the decision-maker by argument, it is so rewarding that the advocate will endure days of pain to recapture the feeling. Advocates are rarely rewarded with such Perry Mason moments. Often, they will walk from the court, like the decision-makers themselves, uncertain as to what the outcome will be. Sometimes, signals sent during the course of argument will produce false expectations. Like every judge, I have left the courtroom convinced that an appeal must succeed or fail. There follows a time of research, reflection and preparation of reasons, at any point of which the decision may change. Sometimes, I have even commenced the exposition of reasons expecting to arrive at one result only to reach a point where the decision changes and the opposite result follows.[11] I have asked myself, many times, what it is that alters the conclusion. Is it a fact seen in a new light which demands a particular conclusion? Is it a passage in the reasoning of an earlier judge which falls heavily on the facts of the particular case? Is it a phrase in the legislation that takes its toll on the argument? Is it some half-remembered phrase of the advocate, insisting on legal authority or urging the justice of the case, that clinches the result?

Because that critical moment of decision is the ultimate object of the appellate's skills, it is important that he or she should consider, in advance, the predicament of the decision-maker - seeking to identify what that moment will be. If a single item cannot be perceived, the skilful advocate will nonetheless try to identify the salient issues. It is the advocate who puts himself or herself into the position of the decision-maker, and strives to see the problem from that perspective who is likely to have most influence on the outcome of the contest.

To lay down rules for appellate advocates is a presumption. To suggest that appellate advocacy can be reduced to ten rules is a fantasy. To purport to offer suggestions derived from a decade's service in one appellate court (concededly the busiest in Australia) for all appellate courts suggests plain error. To call the "rules" the "Ten Commandments", as I was originally inclined to do, suggests either heresy or the ultimate result of a life too long lived in the judiciary - intimate identification with the deity.

No simple set of rules will ever suffice to encapsulate the basic requirements of good appellate advocacy. No amount of time thinking about my rules will substitute for the experience of conducting, or even closely watching the conduct of good advocates in, a number of appeals. Nevertheless, the "rules" may help to organise some thoughts which the advocate, seeking to succeed before appellate courts, will do well to consider.

TEN RULES

1. ***Know the court:***

The first rule is to know the court. In the New South Wales Court of Appeal there was a time when the Court would not disclose in advance its constitution for particular appeals.

Generally, the Court of Appeal sits in Divisions of three and sometimes five judges. The theory behind the refusal to inform the parties (and the advocates) of the constitution of the Court was that the Court was a single institution and "playing the judges" was to be discouraged. A plaintive letter on behalf of the Bar from Mr David Bennett QC, written with every advocate's skill, eventually persuaded the Court to indicate on the afternoon before the hearing the names of the judges rostered to participate. Informed advocates will know, or soon find out, the general predilections, philosophy and attitude of the judges assigned to the case. Pre-supposition about judicial opinions, based upon result-oriented analysis may be dashed in a particular case. But every experienced appellate advocate will know that different judges have different interests and distinct approaches to those three determinants of many an appeal: legal authority, legal principle and legal policy.[12]

Having discovered the constitution of the court, it will be no bad thing if the advocate can find authority, particularly recent authority, from the assigned judges relevant to the issue in hand. It is important to check the recent cases. The judges will tend to know these because the probabilities are that one at least of them will have participated.[13] Nowadays, there are electronic systems which permit speedy analysis of legal issues, including by reference to the opinions of particular judges.. There are also extremely useful services which provide up to date information on the decisions of the appellate courts. In New South Wales, the Court of Appeal itself produces a monthly *Judgments Report*.[14] This is now distributed, free of charge, to the Bar Association, Law Society, libraries and courts. It may be copied. Its purpose is to ensure that the judiciary and the legal profession are kept up to date by a monthly report of all judgments of the Court of Appeal, analysed according to the legal issues dealt with. In addition, there is the *New South Wales Judgments Bulletin* with its excellent parallel services on the judgments of the High Court of Australia, the Federal Court of Australia, the various State and Territory Supreme Courts and the *Australian Sentencing Bulletin*.[15] Both for regular players and for occasional visitors to an appellate court, it is important to keep up to date in the knowledge of relevant legal authority.

Knowing the court is not simply a matter of pandering to particular judicial egos. It is also vital to know how the court operates. In New South Wales, the Court of Appeal works under very great pressure. There are ten Judges of Appeal (including the Chief Justice and the President). Occasional assistance is provided by the Chief Judges of the Divisions and by other Judges specially appointed for particular cases or periods. A recent amendment to the *Supreme Court Act* permits the Court to be constituted by two judges in certain damages appeals.[16]

It is no secret (for I have revealed it before) that, to cope with its very heavy workload, the Court has adopted a procedure for sharing the load. Each month, the President settles the Court of Appeal sitting list. In every appeal or summons listed for hearing, the President will have assigned a primary obligation to one of the Judges of Appeal, not necessarily the presiding judge. In certain cases, where it is thought that an *ex tempore* judgment may be appropriate, the list available to the judges (although not to the advocates) will assign the responsibility of preparing for the first *ex tempore* judgment to one judge. In all other cases, a judge will be assigned to prepare the first draft opinion. Of course, if an appeal proves unsuitable, in the opinion of any judge, to *ex tempore* judgment, the Court will order that

judgment be reserved. This system of judgment writing assignment is important for the handling of the hearing of the appeal. Although all judges will usually have read the judgment under appeal and reviewed and the written submissions of the parties, typically one judge will have a more detailed knowledge of the appeal papers and of the issues. The art of the advocate may be to attempt to carry that judge. But if it appears that he is antagonistic, it may be vital for the advocate to work particularly hard on the other judges - seeking to fill gaps in their knowledge which the primary judge may not feel that he suffers.

2. ***Know the law:***

It is vital that any advocate appearing before an appellate court should know the basic procedural rules which govern the bringing of the proceedings to the court. It is astonishing, more than twenty years after the *Supreme Court Act* 1970 and the new Rules of Court were introduced, that many advocates remain blissfully ignorant of the proper nomenclature for parties to motions (claimant/opponent), the requirements to bring summonses for leave to appeal within fourteen (not twenty-eight) days[17] and the obligation to file, in support of a summons for leave to appeal, a statement setting out the basic facts and explaining why leave should be granted.[18] Checking that the appeal is in the right place may also be important for, at least in New South Wales, some appeals and summonses are assigned to single judges of the Supreme Court with further appeal only by leave of the Court of Appeal.[19] It may also be a wise precaution to check, at least in important cases, that the required written submissions and other documentary material (eg chronologies, affidavits and narratives) have been received by the judges. It should not always be assumed that the material filed belatedly in the Court's Registry will have reached the judges in time for the hearing. It tends to be the advocates, not those behind, who suffer the irritation of a court delayed, when things go wrong in such practical matters.

Commanding the detail of the facts of the case and thoroughly researching the applicable law go without saying as prerequisites of the successful advocate. The advocate who has not really mastered the papers is soon exposed by sharp appellate questioning. Once so revealed, it is very difficult for that advocate to recapture the confidence of the court, at least in the case in hand. The court is then forced to the realisation that it will receive inadequate assistance and be obliged, unaided, to research the facts, or the law, for itself. Advocates who present in this way on a couple of occasions may have good excuses. They may be too busy. But the result will be that their reputations in the appellate court will be shattered. They may be able to deceive their clients and those instructing them. But they will rarely deceive a busy appellate court working under great pressure.

Certain legal developments of a general character must be understood by any appellate advocate in Australia today. One of them affects the gateway to appellate review of facts. I refer to that line of authority of the High Court of Australia which limits the power of appellate courts to disturb primary decision-making where it rests, directly or indirectly, upon judicial findings based on the credit of parties or witnesses.[20] In a series of decisions, the High Court has insisted upon restraining the interference of appellate courts, even where they have concluded that the merits of the case warrant a disturbance of the orders under appeal. Where the primary judge has not expressed reliance upon findings as to credit, but has

necessarily done so to reach the conclusion under appeal,[21] or where the primary judge may have been affected by the "subtle influence of demeanour",[22] the appellate court must stay its hand unless the truly exceptional circumstances of the case permit interference. The exceptions are very narrowly defined. They include a case where incontrovertible evidence shows that the primary judge misused the advantage of observing the witnesses and conducting the trial or where the conclusion is otherwise palpably wrong.[23]

Science casts serious doubt upon the capacity of a judicial officer, or anyone else, to decide the truthfulness of a witness' testimony by appearance - and particularly in the artificial circumstances of a courtroom. Some observers consider that a far greater advantage of the primary judge over an appellate court is the opportunity to see the whole of the evidence unfold in sequence, to absorb its detail and to have the opportunity to reflect upon it, in its entirety.[24] Typically, the appellate judge does not have the time to read every page of the appeal papers. The judge is often heavily reliant upon the advocates to highlight crucial passages of the evidence. But whatever the opinions of others may be, the binding rule which governs all appellate courts in Australia is that of restraint. It is a rule which upholds finality of primary decision-making. It affects the conduct of a great many appeals. It is crucial that advocates should fully advise their clients on this limitation. Otherwise false expectations may be raised by the process of appeal. Where credit is not in issue, and the judge has determined a matter, in agreed facts, strictly as an issue of law or where the judge has followed the logic of the evidence, the appellate court, in a rehearing, may reach its own conclusions. It must then resolutely give effect to those conclusions.[25] But in many other cases, the appellate court is controlled in what it can do by credibility findings made at first instance. If there are such findings, they will also control what the advocate can do. They will oblige him or her to address the appeal in a way conforming to binding legal authority. An appeal, even by way of rehearing, is not an occasion for a revisit to all of the supposed wrongs of the trial. It is not an opportunity to salve the wounded feelings of an advocate who thought the trial was won. It should never be forgotten that the process is an *appeal*. It is necessary to show that the primary decision is wrong. In finely balanced decisions, upon which differing judicial minds could reach differing conclusions, appellate courts will properly give respect to the advantages and opinions of the primary judge. The process of appeal is thus concerned with demonstrating error. This fact governs the way in which the good advocate will present the appeal in a quite different way than the primary hearing was conducted. It is also a reason why advocates who are wonderful in the constructive work of a trial may be less impressive in the often critical and destructive business of appeals. Ruth Bader Ginsberg, now a Judge of the Supreme Court of the United States, acknowledged the common reputation of appellate judges amongst their trial brethren "They are the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded".[26] There is more than a grain of truth in the accusation. It derives from the abiding appellate search for error.

3. ***Use the opening:***

The opening words of the advocate in an appeal can be an important opportunity to seize the attention of distracted and over-worked decision-makers. The point of attention may be the merits or justice of the case. It may be an interesting issue of legal policy. It may be the

clear requirement of legal authority. Sir Anthony Mason suggested that advocates should search for an exhilarating or humorous way to catch the attention of the court at the outset.[27] One leading advocate has, rightly in my view, cautioned against forced humour.[28]

Many judicial officers, myself included, usually commence their opinions with a sentence or two explaining the central issues at stake in the appeal: a citation from authority designed to achieve the same object; or a reference to an arresting fact which will intrigue the reader and capture attention. The advocate should seek to do likewise. The opening is generally the one moment when the advocate has the undivided attention of all members of an appellate court. The moment should not be squandered. Yet so often it is. The advocate plunges straight into reading a tedious extract from legislation or a lengthy citation of authority. The opening is the headline. It is the chance to communicate the advocate's basic point of view. It is a moment for selectivity. First impressions are often important.[29] The good advocate will therefore give a lot of thought to the opening words of argument and to the strategy of explaining the case to the decision-makers.

One very important point to understand is that the advocate will usually know much more about the case than any of the judges. No matter how clever the judges, and experienced, the pressure of work upon them is such that few, if any, will have read the appeal papers from cover to cover. Few will have had a lot of time to identify the key issues, still less to have thought about them at any depth. The system of judgment assignment, at least in the New South Wales Court of Appeal, makes it important that the advocate opening the case does not over-estimate the knowledge of the whole court about the case. It is important for the advocate to lay out the issues and at least the principal facts. This should be done, even in the face of some judicial resistance. Otherwise, it may not be possible ever to communicate the key issues to the minds of the decision-makers. Persistence in the face of judicial discouragement may be important until it is plain that all of the decision-makers have an appreciation of the crucial facts and issues or that persistence in the endeavour to secure that end is proving distinctly counter-productive.

4. ***Conceptualise the case:***

The minds of busy decision-makers hurry to the strongest (and weakest) points in a case.[30] Most decision-makers are interested in the merits and in correcting injustices, if they lawfully can.[31] Thus the advocate will do well to exercise discipline and to think through the issues - identifying the strengths and weaknesses of the argument to be pleaded. Directness in an advocate is a great strength. Candid acknowledgment of a problem may even enlist the assistance of the court, if the merits suggest that course. In the end, the law may not permit the correction of an apparent injustice. Then the decision-maker must conform to the law. But the merits of the case are usually very important to any judicial officer sworn to do justice. Depending upon whether the decision-maker reaches a provisional conclusion in the mind, in the heart or still lower down in the visceral anatomy, it is rarely a waste of time to present an appellate body, quite early, with the perspectives of the merits as seen by the clients who are presented. In most cases, the parties have a perspective of their own merits and of justice. Even if the justice to which they appeal is simply the consistent and neutral

application of a binding rule of law. The advocate who succeeds will usually have mastered the ability to conceptualise and communicate such merits.

5. ***Watch the Bench:***

Communication is more than a skill with words. It involves the eyes and indeed the whole body of the advocate. It is vital that advocates should watch those to whom they are addressing their arguments. In this way, they will be more likely to follow the tendencies of thought which may be expressed as much by body language and attitude as by oral expression. How many advocates I have seen clutching the podium as a support, lost in their books and in their reading and ignoring the very people whose decision is vital to their client's cause? Courtesy and tact will suggest that, in a multi-member bench, the advocate will look not only at the presiding member but at all members in due turn. Otherwise, the ego of neglected participants may be bruised or their attention lost.

I do not under-estimate the difficulty of capturing the attention of all members of a multi-member body. Different judicial officers, for example, have different attitudes to particular tools of advocacy. Thus, some dislike and even discourage the presentation of Ministerial Second Reading Speeches. Justice Meagher makes no secret of his view that they are generally worthless. Their limitations must be acknowledged.[32] Other judges, including myself, find it useful to have such material offered. The advocate must show deference to the one and persistence to the other. Such differences, in multi-member courts, may even extend to the choice of a dictionary to be used in argument about the meaning of words. Some judges prefer the *Macquarie Australian Dictionary*. Others cling to the *Oxford Shorter English Dictionary*. Some judges are attracted, in appropriate cases, to international human rights jurisprudence. Others regard it as heretical or irrelevant.[33] A good advocate, faced with such divergencies, will play the field with gentleness but persistence: winning the one with good humour without losing the other.

Watching the decision-makers' reactions to arguments can help the advocate know how far to push an issue and when enough has been said. Invariably, the advocates who make the biggest impact on an appellate court are those who, at least for a time, stand away from their books and engage in a conversation with the Bench. They have thought through their case. They can encapsulate its strengths and acknowledge it weaknesses. They show the appellate judge the way, if possible, to reach a just and lawful conclusion. If they can embellish these skills with a sense of confidence, an understanding of the legal complexities and a touch of elegance, they will make the decision-maker's task seem worthwhile, even perhaps enjoyable. That may not win the appeal. But they will attract sympathy for an expressed point of view that might otherwise be overlooked.

6. ***Substance over elegance:***

It is, of course, preferable that everything should be done in a courtroom with style. In an appellate courtroom, which misses much of the drama of the trial, the central skills are somewhat different. I have always thought that good appellate advocates will concentrate on substance. That is what their audience is usually interested in. If substance can be presented with style, so much the better. Many times, at the end of argument, I have watched and

waited as counsel of high talent go through their notes to make sure that every point of importance has been covered by their submissions. Such waiting is often worthwhile. Nowadays appellate courts are more lenient in permitting post-hearing submission of supplementary written arguments, by leave. But it is preferable that points should be covered before the judges depart the bench lest they hasten to judgment before brilliant, but late, thoughts occur to the advocate. The advocate will also keep an eye on statements which could later embarrass or even incriminate a client or involve a concession damning to the client's interests. Difficult as it may be, the good advocate will attend to the impact of oral argument but consider matters of substance that are recorded in the notes of the judicial officers or in the transcript of argument.

7. ***Cite authority with care:***

The tedious recitation of authority and the endless reading of old cases is the surest way of losing the attention of the decision-maker. Where an earlier decision is read, the advocate should always state at the beginning or at the end, or both, the holding which is extracted or the principle for which the case stands. In the welter of case law today, it is necessary to show great discernment in the reading of cases. Analogous reasoning by reference to previous decisions involves a subtle process. The court will be helped if the advocate can quickly and accurately summarise the relevant facts of the case, state the decision and proceed to the briefest possible recitation of the crucial passage. Nowadays, the New South Wales Court of Appeal imposes a limitation of five authorities without special order. This is because the Court found that large numbers of books were being brought to court. Rarely were more than five read. It is useful for the headnote and key passages (particularly in foreign or unreported decisions) to be photocopied and handed to the court.

One big change which has occurred during my ten years service as President is that the citation of English authority has declined as that of the courts in the other Australian jurisdictions, New Zealand, Canada, the United States and elsewhere has increased. This is a process which is sanctioned by the High Court of Australia.[34] Yet advocates still appear who cite a decision of the House of Lords as if it were a binding statement of Australian law. It is not. Unless it is adopted by applicable Australian authority, the court will remain obliged to consider whether what the English court has said is appropriate and should be accepted as part of the Australian law. Now that there are a number of courts of appeal in Australia, it is inappropriate to refer, as long we did, to the English Court of Appeal "the Court of Appeal". Lawyers, above all, should be aware of the constitutional developments which have made the Australian legal system completely independent. This imposes on the judge and advocate alike the obligation to develop the Australian common law and to interpret Australian statutes in a way appropriate for this country which is no longer subservient, in legal matters, to any other.

8. ***Honesty at all times:***

The corollary of the immunity from being sued, which advocates enjoy for what they do as advocates, is that they are obliged at all times to be honest to the court.[35] In the appellate court, this usually means that the advocate who discovers binding or even important

persuasive authority which stands in the way of the propositions advanced to the court is duty-bound to bring that authority to notice. Difficult passages in judgments of the High Court, or another appellate court, should be brought to attention. Advocates who do this faithfully are much valued by the judges. Their honesty is remembered. It adds to the most priceless possession of an advocate - reputation. It is easy today for a judicial officer, or other decision-maker to overlook a change of the law or to be unaware of recent statutory developments which may affect the case in hand. The advocate who brings to notice apparent difficulties of which the judicial officer was unaware, and then seeks to explain a way around those difficulties, will often enliven appreciative assistance, so far as the law permits. As the range of persons performing advocacy expands, it may be hoped that this marvellous relationship of honesty and support which has long existed between the Bench and the Bar will be preserved;

9. ***Courage under fire:***

A silent judge is a positive menace who may occasion an injustice by not exposing preliminary views.[37] But nowadays, the actors in the appellate courts of Australia rarely complain of judicial silence. The bad old days of appellate rudeness and even bullying have generally been replaced with a mixture of courtesy, insistence and efficiency. The advocate must be ready to move with the judicial questions. If it is thought that insufficient time has been allowed to express the factual or legal foundation of the argument, a request for further time, courteously addressed to the court, will rarely be denied. Courage and determination are wonderful qualities in advocates. They must not wilt under fire. They may not be required to concede that their case is meritless or doomed to fail. Few judges will seek to extract such concessions.

If it appears that a particular member of a multi-member body is irretrievably lost to the advocate, it will often be necessary for the advocate to concentrate attention on those who remain to be persuaded. The advocate, under fire from one member of an appellate court, may courteously acknowledge: "I can see that that is your Honour's view. I must therefore address my remarks to those who may not share that opinion". It is always possible that the other members of the court are as irritated by their colleague as the advocate may feel. The seemly conduct of proceedings requires the invariable display of tact and courtesy. Strong personalities will occasionally clash. In such a circumstance, the advocate must, I am afraid, bite the tongue. The privilege of emotional release will only be counter-productive to the clients' interests. Advocate and decision-maker must be aware of personality clashes. No judge should play favourites or disadvantage a litigant because of a dislike of an advocate. The law of bias will redress the most serious cases of judicial ill-temper.

Without indulging in intellectual pride, the advocate before an appellate court should sometimes press on even if the court appears antagonistic. Perhaps one judge will be induced into dissent which may attract a higher court, future development of the law or the High Court of the Law Reviews.

10. ***Explain policy and principle:***

Once a case comes on appeal, certainly to the Court of Appeal and even more so to the High Court of Australia, it is essential that the advocate should have considered the issues of legal principle and of legal policy which lie behind the case in hand. At least at these levels of the judicial hierarchy, it is usual for the decision-makers to be reflecting, as they consider the arguments, about the differential consequences of upholding, or rejecting, the contentions advanced in the appeal. In about a third of appeals, the facts are clear, the law is well known and the outcome is virtually automatic. But for the balance, there is real room for the advocate to manoeuvre. It may be in giving meaning to ambiguous words of a statute. It may be in urging an extension of the common law. This is where a mistake is commonly made by advocates. They think that only one outcome is possible. They consider that the answer is to be found solely in authority. But the words of statutes and of earlier judicial reasoning are rarely, such as to admit only one answer at the appellate level. A decision must be made. The decision-maker must be aided in the process of opting for one conclusion rather than another.

Principle and policy can be derived both from the context of the law under consideration and from a deep knowledge of the fundamental principles of our common and statute law and its history. In the life of an advocate (or of an appellate judge) there is rarely time to pause and think for an extended period about legal principle and legal policy. Such thoughts must occur, if at all, in the spare available moments of reflection in and out of the courtroom. Ideas about legal policy sometimes arise, by serendipity, when reading a decision in another case. The judge will suddenly see its significance for other tasks and note it for its utility there.

It is because of the pressure on judges and advocates that resort is increasingly had to academic writings. No longer do the judges unreasonably require the authors to perish before their thoughts may be read to a court. Appellate courts in Australia today generally welcome the a tender of law review articles or references to academic textbooks. Their authors may have had the time and inclination to analyse statute or case law, to see old principles in a broader context and to provide the conceptualisation that will help the court to place the decision in hand in its proper contest in the mosaic of the law. At least in the Court of Appeal, no advocate should be diffident about handing up relevant material which may assist in the consideration of legal principle and policy. Of course disputes may arise in such matters. Depending on the approach of the decision-makers involved, such material may be deemed important or insignificant. But the old days when legal principle and policy was ostensibly ignored in appellate decision-making and advocacy have gone forever. With greater candour about judicial choice, comes a larger realisation of the need to assist that choice with more than old case law, mutually inconsistent rules of statutory construction and the citation of dictionaries which please everyone and no-one.[38]

THE FUTURE

Doubtless every observer of the appellate scene in Australia today could add new or different rules to the list which I have proposed. Perhaps, in time, like President Wilson, I will find another four - four more than the Almighty. Perhaps the foregoing could be reduced to seven, always a magic number for the Hebrews and equally important in the seven steps towards Buddhist enlightenment.

Ten Rules of Appellate Advocacy II

Justice Kirby Collection

Advocacy, like judging, is changing. With the increase in the workload of the courts, there is a growing pressure to commit more argument to writing. It is thus more important today to recognise the special skills of written advocacy. On average, the written word can be read four times more quickly than the same word can be spoken. Hence the introduction of written submissions, designed to shorten oral hearings and to ensure that the advocate has truly focussed attention on the issues in hand.

This process will probably go further. Whether it will go so far as the preparation of written briefs, such as are presented to United States appellate courts, or whether something different will be tried in Australia, remains to be seen. In the New South Wales Court of Appeal, there is already a requirement in at least two areas for the parties to produce a narrative statement of relevant facts. This obligation arises where there are more than four appeal books and in damages appeals, where the Court may proceed to an *ex tempore* judgment. These are simply new ways by which advocates are invited to provide the courts with, what Oliver Wendell Holmes Jr once called the "implements of decision".

If the pressure on appellate courts continues to increase, and if the appointment of more judges is either unacceptable or thought undesirable, new techniques will be required. More appeals will require leave. More decisions will be given without reasons or with only short reasons. More of the load will be shifted to the advocate. I do not rule out the possibility of requiring advocates, in effect, to prepare submissions in the form of a draft opinion which, in some cases, the court could accept as its own, with or without modifications. That would certainly require the advocate to cast his or her mind into the judicial mode and to see the case as the decision-maker must do.

It will be important that the Australian Advocacy Institute's work is closely monitored - both by the Institute and by the legal profession. Its only utility is as it secures long-term improvement in the skills of advocates, which endures beyond the immediate recollection of the course. There may be a tendency of advocates to fall back upon ways that are natural to their particular modes of communication. I do not under-estimate the difficulty of changing something which is so basic to the personality of each one of us. After all, communication to a court is only one projection of the personality of the individual who happens to be an advocate. Being conscious of the basic rules, and practising them in daily life, represents the goal of advocacy training. But just as the Institute teaches that, ultimately, the advocate's criterion is the impact of argument on the decision-maker, so the Institute's success must be measured by its capacity to sustain improvement throughout the stressful, demanding work which advocates undertake.

Who would be an advocate? A kind of intellectual actor grappling with a drama in which the script changes, often unpredictably, every minute. A show-off with discipline. A person of command and authority searching for directness and the gift of clarity.[38] In the troughs of despair over an argument poorly executed or questions poorly asked or answered may be found the profound melancholy of public and private humiliation. But in bending the mind of another human being, with power of legal decision, to arguments successfully addressed which turn the tide and lead to forensic triumph - there can be few moments of human activity so rewarding. Certainly, there are few vocations that offer such excitement. That is

why the skills of the advocates must be sharpened and improved. To avoid the moments of despair. To multiply the moments of deserved exhilaration.

ENDNOTES

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** Adapted from an address to the Appellate Skills Workshop of the Australian Advocacy Institute, 5 May 1995, Supreme Court, Sydney.

1. See eg R Du Cann, *The Art of the Advocate*, Penguin Books, London, 1964; B Lynn, *Appellate Litigation*, 2nd ed, Austin and Winfield, San Francisco, 1993, 269; Robert J Martineau, *Appellate Justice in England and the United States, A Comparative Analysis*, W S Hein, Buffalo, 1990, 101.

2. See eg A F Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 ALJ 537; H T Gibbs, "Appellate Advocacy" (1986) 60 ALJ 496.

3. See eg D F Jackson "Appellate Advocacy" (1992) 8 *Aust Bar Rev* 245.

4. Lord Nolan quoted Institute of Advanced Legal Studies (1995) 19 *Bulletin*, 8, 12.

5. See Gaudron J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 263 ["Our legal heritage is the gift of the common law of England ...."]

6. Gibbs, above n 2, 497.

7. Mason, above n 2, 342.

8. J C Godbold, "Twenty Pages in Twenty Minutes - Effective Advocacy on Appeal", 30 *Southwestern LJ* 801 (1976), 812.

9. See *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145.

10. *Escobar v Spindalari* (1986) 7 NSWLR 51 (CA), 55; *Galea v Galea* (1990) 19 NSWLR 263 (CA), 280 applying *Jones v National Coal Board* [1957] 2 QB 55 (CA), 64.

11. A recent example where this happened is *Sydney City Council v Reid* (1994) 34 NSWLR 506 (CA) (SLR).

12. See Deane J in *Oceanic Sun Line Case* (above, n 5), 252.

13. J F Dubina, "Effective Appellate Advocacy", ABA, *Litigation*, Vol 20 No 2 [Winter 1994], 3 at 4.

14. Court of Appeal (NSW), *Judgments Report*, produced monthly by the CA Research Officer.

15. The series is published by *Legal Bulletin Service*. There are also other well known hardcopy legal update services such as *ALMD Advance*, published by the Law Book Company Limited.

16. See s 46A.

17. See Pt 51 r 3(3) SCR (NSW).

18. See Pt 51 r 3(7) SCR (NSW). The rule requires a statement of (a) the nature of the case; (b) the questions involved; and (c) the reasons why leave should be given.

19. See eg certain appeals from Masters of the Supreme Court of NSW. See Pt 60 r 10 SCR (NSW).

20. See eg *Jones v Hyde* (1989) 63 ALJR 349 (HC), 351; 85 ALR 23 (HC), 27.

21. See eg *Brunskill v Sovereign Marine and General Insurance Co Limited* (1985) 59 ALJR 842 (HC), 844.

22. See *Abalos v Australian Postal Commission* (1988) 171 CLR 167, 179.

23. See eg *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

24. See eg *Lend Lease Developments Pty Limited v Zemlicka* (1985) 3 NSWLR 207 (CA), 210f.

25. (1979) 142 CLR 531, 551; 23 ALR 205, 225.

26. See R B Ginsburg, "Remarks on Writing Separately", 64 *Washington L Rev* 133 (1990), 143.

27. Mason, above n 2, 542.

28. Jackson, above n 3, 250.

29. L H Silberman, "Plain Talk on Appellate Advocacy" in ABA, *Litigation*, Vol 20 No 3 [Spring 1994], 3, 4; Dubina, above n 13, 4.

30. Gibbs, above n 2, 497.

31. *Ibid*, 498.

32. See eg *Ex parte Beane; Re Bolton* (1987) 162 CLR 514, 518.

33. See eg the differing opinions expressed in *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 (CA). See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

34. See *Cook v Cook* (1986) 162 CLR 376, 390.

35. Goldbolt, above n 8, 816; Mason, above n 2, 538.

36. See *Galea*, above n 10.

37. See Scalia J in *United States v Smith* 113 S Ct 2050 (1993), 2060f.

38. As to the premium on directness see Gleeson CJ noted NSW Bar Association *Bar News*, (1993) 47. For the position in New Zealand see NSW Bar Association *Bar News*, Winter 1993, 33.

Ten Rules of Appellate Advocacy II

Justice Kirby Collection