

2073


# Advocacy

An Introduction

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...of the formal or conventional  
...the common law and the  
...this process of law-making

course is

J CURTHOYS · C KENDALL

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# Foreword

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Not so long ago it was assumed that the teaching of advocacy involved a contradiction in terms. Great advocates were born. Their heroic deeds were reverently passed in anecdotes from one generation to another: Erskine and Carson in England; Davis and Jackson in the United States; Robinette and Binnie in Canada; Sorabjee and Nariman in India; and Dixon, Barwick and J G Smyth in Australia. These were our exemplars. To learn advocacy, the young were encouraged to sit in the back of courtrooms and to watch them, or their modern equivalents, in the stressful, perilous, exhilarating work of the advocate.

A genetic component may underpin the finest advocacy. The fact is that some people have greater talents than others in communication: the ability to convey information and feelings from inside the brain of one human being to another. The time may come when gene shears and gene enhancement will improve, scientifically, the capacity of the young advocate to deliver the goods. Laugh not. The biological revolution is just beginning. Command of language, presentation of the face and body and the capacity to elicit feelings of empathy and understanding may indeed be hidden away somewhere on the human genome.

However, we have it on the authority of Mary Gaudron that skills in advocacy do not reside on the Y chromosome. They are not confined to men. Curiously, women remain seriously under-represented in the Bench and Bar of our tradition. The culture, mode of life and facilities for the advocate can sometimes be discouraging to women. Yet, the full participation of women, and of ethnic and other minorities, is essential because advocates take part in, and ultimately become leaders of, the most important decision-making in the judiciary. So they fulfil a vital role in our system of government.

Today, the legal profession in many countries is doing more than counselling its young members to watch the old tyros at work. Courses in advocacy training, several of them initiated in Australia, are now offered in common law countries in the four corners of the world. We have, for example, established the Australian Advocacy Institute to further this goal. In addition, notable trial and appellate advocates, such as Chester Porter QC and David Jackson QC, write helpfully on the techniques that can be deployed to assist the advocate win the case. This book is an endeavour to pull together many threads. Reading it will not turn the initiate overnight into a hero of the Bar. But there are rules and suggestions here which, if absorbed into daily life, will help improve the skills of those who set out to persuade decision-makers to favour the interests of their clients.

What I like about this book is that, like a good advocate at work, it adopts a systematic approach. It starts with general propositions about advocacy. It then works its way through the functions of the advocate conducting trials. It recognises the cardinal place that written submissions now play in advocacy. It traces the functions of persuasion through the opening statement; examination-in-chief; cross-examination; and the tender of expert evidence. It provides advice on how to approach the closing statement at trial, which will usually be the last chance of the advocate to convince the decision-maker. There is then an excellent chapter on the special features of appellate advocacy. This recognises, correctly, that the higher one goes in the court system the more important will be the issues of legal principle and policy and the more candid the discussion of those issues both by the advocates and by courts themselves.

I also like the way the authors have woven through the entire text a number of themes that advocates must learn if they are to succeed. The crisp presentation of the case at the outset when the decision-maker's mind is usually in its most impressionable phase. Putting the best points, witnesses and evidence first to win acceptance, in the hope that they will never be lost. Facing squarely the weaknesses in the case and not relying on the dubious chance that the decision-maker has not noticed. Unfailing courtesy and the avoidance of words or behaviour that show rudeness or anger towards witnesses, opponents or the decision-maker. Preparation, mastery of the detail and courage under fire are critical components of success as an advocate. A legal contest is often a very intense experience. Those who are best at it display the powerful mixture of good planning, calm self-control and flexibility to cope with the unpredictable twists and turns of a drama in which the advocate must be at once an author and an actor.

Most of all I like this book because it is full of illustrations and examples. Some of them are taken from well known stories, drawn from famous cases. Some are extracted from recent books and articles in which advocates have told their tales, mostly to laud their own skills but sometimes to acknowledge mistakes that inevitably occur. In a couple of instances extracts have been included from the internet where the daily transcripts of argument before the High Court of Australia now appear within hours of the exchanges. This phenomenon adds a new peril to the life of judge and advocate alike. But it does afford to the curious fingertip access to concrete illustrations of advocacy often struggling with the hardest questions that fact and law can present.

In advocacy, nothing is set in stone. It is constantly changing. Considerations of cost and efficiency will propel courts and tribunals to move, as the High Court of Australia has lately done in special leave applications, to disposing of issues solely by written argument. In the future, advocates will be subjected increasingly to fixed time limits. Hearings by video link and telephone will proliferate. Source materials will expand. New technology will change the courtroom. Artificial intelligence will come to play a growing part in legal decisions. Advocacy will need to adapt to such changes. Yet for all the changes, the skill of persuasion will remain crucial in those countries that commit important questions to be determined by independent decision-makers rather than by the power and influence of brute force and money.

The authors of this book acknowledge that each advocate develops his or her own style. This is natural and inevitable. There is no objectively correct style of advocacy. It is the product of experience and opportunities and doubtless of capacities inherited from unremembered ancestors. But if the basic lessons of this book, or some of them, can be incorporated in one's style, and the techniques and concrete examples taken to heart, natural talent can be enhanced so it flourishes.

Even the greatest advocates cannot win every case. But there are few human satisfactions that compare to the end of the day when the advocate knows that the job of persuasion was done well. In search of that moment, advocates subject themselves to years of toil, nights of stress and days of danger. This book is a good companion. It is helpful, truthful and wise.

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