



The future of appellate advocacy*

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In this essay, based on a lecture at the Inner Temple, London, the author updates his 'Ten Rules of Appellate Advocacy'. He identifies features of legal practice that are changing significantly the skills required of advocates. These include: (1) the shift from oral to written persuasion; (2) the introduction of time limits on advocates; (3) the use of new technology, such as videolinks, the Internet, powerpoint to illustrate submissions and CD-ROMs with hyperlinks to cited references and trial evidence; (4) the potential of voice recognition and other devices to access relevant statutes and decisions; (5) the arrival of comparative and international law to supplement traditional sources; and (6) the long-term potential of artificial intelligence. In the closing section, the author describes the advent of women advocates but demonstrates that they still have a long way to go to achieve full equality in a culture that is sometimes unwelcoming to their talents.

The 'rules' of appellate advocacy

Talent in advocacy has conventionally been viewed as a natural gift rather than a skill to be learned. Good advocates were thought to be born, not made. I do not deny that there may be a gene or two in the 36,000 genes on the human genome that are labelled 'top advocate — skills of communication and persuasion'. Such talents may indeed be inherited, at least to some extent. However, in recent decades it has increasingly been recognised that advocacy skills can be improved and sharpened. Formal advocacy training can be an effective way of enhancing the essential talents. The result of this conviction may be seen in the increasing number of advocacy courses being offered through law schools, Bar Associations, and other organisations throughout the world. In Australia, we have the Australian Advocacy Institute and courses offered by Bar Associations. The new focus on improving advocacy standards is a positive development. It can only enhance the efficient administration of justice and the service of clients.

Advocacy is about persuasion. Professor George Hampel — himself formerly a leading Victorian barrister and judge — has emphasised:

Advocacy — or persuasion — involves creating or changing perceptions to influence the result . . . Great advocates are not necessarily better lawyers than others — they are better communicators.[‡]

* Based on the Dame Ann Ebsworth Memorial Lecture, delivered in the Parliament Chamber of the Inner Temple, London, on 21 February 2006. Mrs Justice Ebsworth, the first woman appointed to the Queen's Bench Division in England, served from 1993 until her death from cancer in 2002.

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‡ Quoted in K Marshall, 'War Crimes Prosecutors set to learn art of persuasion', *Monash News*, December 2002. p 8.

Some intangible qualities identify individuals as outstanding advocates. But there is no single objectively correct style. Advocates have their individual approaches, being a reflection of their personalities and characters, their education, family upbringing and intangible elements such as appearance, voice timbre, skills in eye contact, sense of drama and humour and other intangible elements of the art.

For all this, it is possible to identify a number of common characteristics shared by effective advocates. So far as appellate advocacy is concerned I once collected 10 'rules' — but they are really only a few suggestions.² My 'rules' are certainly not exhaustive.³ Nor are they rigid requirements to be obeyed slavishly regardless of the particular circumstances. They do, however, provide a starting point for advocates hoping to refine their skills before appellate courts. Different 'rules' could be propounded by the intrepid for jury trials, judge-alone proceedings, multiple member tribunal hearings, magistrates' courts, professional bodies and so forth. Some of the big 10 suggestions that I nominated will be equally applicable in every venue — possibly even at the Pearly Gates of Heaven. So what are they?

- Know the court that you are appearing in;
- Know the law, including both the substantive law relating to your case and the basic procedural rules that govern the court you are appearing before;
- Use the opening of your oral submissions to make an immediate impression on the minds of the judges;
- Conceptualise the case, and focus the attention of the court directly on the heart of the matter;
- Watch the Bench;
- Give priority to substance over attempted elegance;
- Cite authority with care and discernment;
- Be honest with the court at all times;
- Demonstrate courage and persistence under fire; and
- Explain the legal policy and legal principle involved in the case.

The central aim of advocacy — being to persuade a decision-maker — has remained the same throughout history. It will remain the aim of advocates in the future. The need for advocates to be able to communicate complex ideas and arguments persuasively will always remain the touch-stone by which an advocate is judged. I am therefore addressing eternal verities. I do so with proper modesty, remembering that what impresses me may not impress others.

In a collegiate court it is common, virtually inevitable, for the judges, on leaving the courtroom, to comment on the performance of the advocates of the day. Sometimes the comments are less than flattering. One colleague of mine, in an earlier time, used to keep a list of the 'First Eleven' — not, I regret to

² M D Kirby, 'Ten Rules of Appellate Advocacy' (1995) 69 *ALJ* 964.

³ For other suggested 'rules' or 'tips' see R H Jackson, 'Advocacy before the United States Supreme Court' (2003) 5 *Jnl of Appellate Practice and Process* 219; R B Ginsburg, 'Remarks on Appellate Advocacy' (1999) 50 *South Carolina L Rev* 567; P M Wald, '19 Tips from 19 Years on the Appellate Bench' (1999) 1 *Jnl of Appellate Practice and Process* 7; R B Gilbreath, 'Lost Secrets Revealed: The Seven ABCs of Successful Appellate Advocacy' (Winter 2005) *Certworthy* 13; R H Barksale, 'The role of civility in appellate advocacy' (1999) 50 *South Carolina L Rev* 573.

say, the best advocates but the worst. He delighted in promoting new members to his list — and not a few judicial colleagues joined in with enthusiasm. In his day, the list-keeper had been a consummate advocate. So perhaps he could be forgiven for keeping his list. Yet even he had good and better days. Judges, when appointed, sometimes forget the stresses and pressures imposed on advocates. I have never done so. We all have good and bad experiences. But the object should be to maximise the good and to minimise the bad. Definitely to avoid joining any real or imagined 'First Elevens' kept by the decision-makers, with their observant and critical gaze.

The art of advocacy is changing. Over the past decades significant changes have occurred to the environment in which appellate advocates must work. The most noticeable changes involve court procedures and the advent of increasing numbers of female advocates and advocates from ethnic and other backgrounds different from the previous norm. There have also been significant developments in the tools available to assist advocates. These have largely come about through technological advances such as the Internet and other computer technologies. The rate of change seems bound to accelerate in the future. The impact that such developments will have on appellate advocacy, and the justice system more widely, remains to be seen.

Procedural changes

Two of the most significant procedural changes during the past 20 years within appellate courts, including my own, have been the increasing use of written submissions and the introduction of time limits for oral submissions. These changes have had a significant impact on appellate advocacy. They have changed the environment in which appellate advocates present their cases. If anything, the changes increase the importance of the 'rules' that advocates should always know the court they are appearing before and should always be aware of the basic procedural rules that govern the operations of that court. Otherwise, the available time will not be maximised. Opportunities for persuasion may be squandered and even lost forever.

Historically, in Australia as in England, the emphasis has been on oral advocacy. Less reliance has been placed on written submissions than, say, in the United States where abundant litigiousness, overlapping jurisdictions and a large population have long necessitated the adoption of means to maximise the efficient use of the decision-maker's time. Many Australian lawyers have experienced the sense of astonishment on the part of US judges and attorneys over what they see as our unduly languid approach to advocacy and refinement of the issues for decision. This is increasingly changing, at least in Australian courts, with written submissions assuming an ever greater importance both in appeals and also in trials. Even in jury trials in Australia written submissions are not unknown. Judicial directions are often produced in draft and become the focus of sharply targeted advocacy. Directions are sometimes given to juries in written form so that they have a written record of the main legal directions which they are obliged to apply.

The primary reason for this shift to writing is the ever increasing workload being placed upon the courts. For example, in the year ending 30 June 1998, two years after I joined the High Court of Australia, 358 applications for leave or special leave to appeal were filed. This number more than doubled in the

ensuing six years. There were 729 such applications filed in the year ending 30 June 2004.⁴ This trend is not exclusive to the High Court of Australia. It is repeated in appellate courts in many jurisdictions in all parts of the world.

The increased emphasis on written submissions has been a somewhat gradual development in Australia. Until 1982 the High Court relied almost exclusively upon oral argument. Even then, as I remember, some leaders of the Bar braved judicial disapproval and handed up a written précis of what they had said. 'They will go away and forget my (oral) submissions', one advocate told me, 'but then they will have my summary written in a style they can pick up and use in writing their reasons. It will be irresistible to them.' He was right; but he was ahead of his time. The traditionalists on the Bench looked disdainfully at his written efforts when they were offered. Now they are an essential part of the advocate's role.

In February 1982 the first steps were taken to adopt a universal requirement of written submissions. At first, the High Court required advocates to hand up a written outline of their main arguments immediately before commencing oral submissions. The requirement for a written list of the principal authorities was introduced in 1984. In 1987 further procedural amendments to the Court's practice expanded upon these requirements, with parties, by that time, being obliged to file detailed written submissions covering all significant points of argument.⁵ The written submissions filed by the applicant in a special leave application are now considered by the Court to be:

the principal vehicle for demonstrating that the case is one in which leave should be given.⁶

Only a small proportion of the cases in which such leave is sought from the High Court, succeed in securing it. In the average year, the Court disposes of about 85 proceedings, mostly appeals. This is slightly more than the House of Lords and the Supreme Court of the United States. It is slightly less than the Supreme Court of Canada and considerably less than the Supreme Court of India, with its higher complement of judges sitting in different panels.

New *High Court Rules 2004* commenced in January 2005. These rules give even greater emphasis to the importance of written submissions. Under the new rules, special leave applications filed in many cases, including most of those brought by self-represented applicants, are initially considered by two Justices on the papers. The application may be dismissed without further oral hearing of the parties if the two Justices conclude that the application is without merit or unsuitable for a grant of special leave to appeal. Similarly, if two Justices consider it to be appropriate, *any* application for leave or special leave to appeal may now be determined on the papers without an oral hearing

⁴ High Court of Australia, *Annual Report 2003-2004*, 2004, p 8. In the year ending 30 June 2005, 876 applications for leave or special leave to appeal were filed: High Court of Australia, *Annual Report 2004-2005*, 2005, p 85.

⁵ See High Court of Australia, Practice Direction No 1 of 2000. T Blackshield, M Coper and G Williams (Eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, South Melbourne, 2001, pp 197-8; M Groves and R Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001' (2004) 32 *Federal L Rev* 255.

⁶ High Court of Australia, *Annual Report 2003-2004*, 2004, p 8.

being held.⁷ In such applications, the written submissions obviously become of fundamental importance. Effectively, they are then the only opportunity the advocate has to convince the court of the merits of the case, its arguability and importance and the prospect of succeeding after a full hearing to reverse the decision below and to establish an important legal principle or cure an injustice.

The adoption of these new procedural rules reflects an attempt by the High Court to deal with the ever increasing number of applications that are being filed in its registries. It is too early to comment on the effect that these new rules will have on the parties filing applications and on the Court itself. However, the emphasis on written submissions is reflective of a trend occurring in many jurisdictions because of the pressure of cases, the limited time of the decision-makers and the manifest waste of time involved in oral hearings that are doomed to fail.

This said, the change in the practice of the High Court was not achieved without heart-burning: at least on my part. Our system of justice has long been one of oral advocacy, performed in open court. This is a system with many advantages. It ensures that judges themselves are constantly under public scrutiny in their decision-making. It ensures that the decision-makers focus their attention on the issues, even if only for a short time. In Australia, special leave advocates are afforded 20 minutes to persuade the court. Symbolically and functionally the old system had merits. However, most final courts have now adopted a filter involving written argument. Many intermediate courts have also done so. They have done so simply to cope with the case load. In adopting the new procedures the courts concerned have changed, probably forever, the skills of advocacy which they enlist.

Even in cases where an oral hearing does occur, the increasing importance of written submissions impacts on the way that an appellate advocate typically approaches the task at hand. Oral argument is not designed as a further opportunity to present submissions to the court already stated in writing. Reading written submissions aloud to the Bench does nothing to advance the argument — certainly beyond reading a particular passage. It tends to frustrate judges who, for the most part, will already be familiar with the material before them. If the judges are not, they will commonly reveal this fact, obliging adjustment to the advocates' presentation. But, normally, oral argument presents a contemporary advocate with an opportunity to focus the attention of the Court on the most important aspects of the case. Even more importantly, it provides an opportunity to engage in discussion with the decision-makers about the central issues and to clarify matters that may be troubling the judges.

A good advocate ordinarily uses oral argument to complement and strengthen written submissions, and not just to state them again in a slightly different way. More discerning advocates will keep in mind that some judges may not have had time to read the submissions carefully. In the particular case, some will be out of their familiar legal territory. Even in the age of written arguments, the advocate must tread a delicate path between keeping the interest of those judges who are 'hot' and have mastered the written materials and those who are not and are not really focusing on what the case is about.

⁷ Ibid, p 8.

It is quite a tall order. It is increased by the trend towards written argument.

In many jurisdictions, the increasing use of written submissions has been accompanied by the introduction of time limits on oral hearings. In the High Court of Australia such limits were first introduced in February 1994 in relation to applications for special leave to appeal. Applicants and respondents are limited to a maximum of 20 minutes each for oral submissions. The applicant then has a maximum of five minutes in reply. Amber and red lights directly in front of the Bar table warn advocates of the time they have left to complete their submissions. The attitude to strict observance of time varies between presiding judges. However, the daily list of cases for hearing usually demands that slippage be confined to no more than a minute or so in each case. Most advocates pace themselves well. They make their submissions in the time allotted. Self-represented litigants find the time limits much harder to observe. Under the new rules providing for disposal on the papers it must be expected that there will be fewer oral submissions by litigants without legal representation than has been the case in the recent past.

Generally speaking the time system has worked well. It certainly requires the concentration of mind and advocacy in a way that open-ended time does not. It also demonstrates that most cases are susceptible to presentation, so that their importance in legal and factual terms can be explained in 20 minutes. The need to do this ensures that the advocates usually go directly to the very heart of their case. That is why, when special leave is granted and the appeal proceeds to a full hearing, the first document I always read is the special leave transcript. The need for swiftness of mind adds to the pressures on the advocates and judges alike. Not all lawyers are at their best in that environment. Some who have the greatest skills of celerity are not necessarily best in explaining complex statutes and authority or in exercising judgment as to the outcome. Some advocates — and some judges — are sprinters. Others are better at running marathons.⁸

Unlike some jurisdictions, notably the US Supreme Court, the High Court of Australia does not have formal time limits in appeal hearings. Nevertheless, the duration of oral argument is significantly shorter now than it was at earlier times. The vast majority of appeals are listed for hearing on a single day. Only in the most complex appeals will oral argument be permitted to stretch into a second day or further. This contrasts with the 39 hearing days consumed in the *Bank Nationalisation* case⁹ and the 24 days of oral argument in the *Communist Party* case.¹⁰ The former case, in 1948, went on appeal to the Privy Council. It lasted 37 days and two of their Lordships perished in the course of the proceedings. It is not disclosed if this was the result of the Australian advocacy or just sheer boredom. Certainly, boredom can be a peril of unduly prolonged hearings from the point of view of judges and advocates alike. The trend towards shorter oral argument is possible because of the increased use of written submissions. It reflects the growing case-load confronting all

⁸ G D Finlayson, 'Appellate Advocacy: An Australian Perspective' (1999) 1 *Jnl of Appellate Practice and Process* 27.

⁹ *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

¹⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

contemporary courts, and especially final courts.¹¹ This shifts increasing burdens and responsibilities onto appellate judges.

Procedural changes, such as I have described, offer undoubted challenges for advocates. The introduction of procedural changes such as written submissions and formal time limits presents challenges for courts. Increasing workloads are leading appellate courts to seek more efficient methods of managing their case listings. In doing so it is important never to forget the important role that such courts play in society. Justice must be done, but manifestly done. Future procedural changes must always be evaluated in light of this greater purpose, and not viewed solely through the prism of supposed efficiency.¹² While courts must always strive to operate efficiently, they must also always remember that they are institutions with an important societal role. All reasonable persons coming before a court should feel confident that they will get a fair opportunity to present their case. The pursuit of justice is the ultimate concern of the court, not just the throughput of cases. Yet unless the cases can be decided in a timely and efficient way, the result is injustice, apparently of the court's own making.

The electronic revolution

The development of electronic technology has great implications for the justice system and the work of advocates within it. It is technological change that will drive many of the most important developments in advocacy.¹³ Technology will have a great impact on advocacy over the coming decades. Indeed, the effects of the 'electronic revolution' are already being felt.

One example of an innovation that has had a direct impact on oral advocacy is the introduction of video-link technology in the courts. In a country as large as Australia, having the ability to connect judges and parties at various locations through video link presents an enormous practical advantage. This technology is now frequently employed by the High Court for the hearing of special leave applications and the hearing by single judges of motions for the constitutional writs, stays of execution of judgments under appeal, expedition of hearings and so forth. The use of video-link technology in the High Court has been designed to allow hearings to proceed in the same manner as if all parties were situated in the same location.

The design and use of the technology tends to have an impact on the style of oral argument. While this technology may present some challenges for advocates, it does not substantially change the nature of advocacy in practice or the operation of the 'rules' that I have outlined. It is remarkable how quickly the human mind adapts to the apparent artificialities of speaking towards a large screen where the listeners can be seen. In a minute or so the advocate forgets the artificialities and engages in communication as if the

¹¹ Blackshield, Coper and Williams, above n 5, p 31.

¹² Cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 172; 141 ALR 353.

¹³ A Stanfield, 'Dinosaurs to Dynamos: Has the law reached its technological age?' (1998) 21 *UNSW L Jnl* 540; P A Talmadge, 'New Technologies and Appellate Practice' (2000) 2 *Jnl of Appellate Practice and Process* 363; G Nicholson, 'A vision of the future of appellate practice and process' (2000) 2 *Jnl of Appellate Practice and Process* 229; F I Lederer, 'The effect of courtroom technologies on and in appellate proceedings and courtrooms' (2000) 2 *Jnl of Appellate Practice and Process* 251.

listener were physically present in the same room. In fact, for a reason not yet certain, advocacy by video-link appears to be a little more abbreviated. Analysis of outcomes has not demonstrated any difference from results derived from hearings in the physical presence of the court. Obviously, the technology makes it possible for parties to come to the local courthouse and to witness the hearing and its outcome. The reduction of court and travel time is significant. Video-links are also used by the High Court judges to conduct their monthly conferences about cases that have just been heard and which stand for judgment. Such links save the judges the time (and the Court the expense) of travelling inter-State for the meetings.

Taking such technology a few steps further, it is possible to imagine a time when traditional, physical court-rooms may be replaced by virtual versions. Rather than sitting in a physical building in Canberra, Sydney or Perth, courts of the future may convene on the World Wide Web, with all participants connected by inter-active video-link technology. The need for such technology in a jurisdiction the size of England is less pressing. But in courts of international or regional operation (such as the European Court of Human Rights) or courts in a continental or sub-continental country (such as Australia, Canada and India) such links are extremely efficient. In my experience, advocacy quickly adapts to the new environment.

It is theoretically possible to foresee more such developments. They could reduce to some degree the need to build or maintain court buildings or facilities in the conventional way. They could reduce the inconvenience and cost of travel for judge, advocate and litigant alike. They could diminish the remoteness of courts and help to bring them closer to the people. However, such a prospect illustrates the need to think through the implications of adopting technology to this extent. The selective use of video technology has undoubtedly enhanced the efficiency of the High Court of Australia. However, the conduct of all proceedings through the World Wide Web could have negative consequences. The existence of physical court buildings and the holding of public proceedings there, in which all participants and the public are physically present in the one place, have important symbolic and practical purposes. The building of the High Court of Australia in Canberra has, for example, been described as being:

a benchmark in Australia for vital architectural expression that deliberately seeks to make the law visible, relevant, and accessible to the public. At the same time, it evokes an entirely fitting sense of monumentality, respectful of the image and also the scale of the law.¹⁴

The building, and others like it, stand as symbols of our societies' commitment to the principles of open justice and the rule of law. They help to promote dialogue between parties and their representatives. They can contribute to the settlement of disputes. Propinquity can help to promote dialogue between the decision-makers. Appearing in the same place as one's opponents fosters a collegiate spirit amongst specialist advocates. The same advantages are harder to achieve in a virtual court-room linking participants

¹⁴ Blackshield, Coper and Williams, above n 5, p 30. HRH The Duke of Edinburgh was less kind in his comment. Reportedly, he suggested that the building most resembled a power station.

who communicate in cyber-space but nowhere else.

Clearly, the need to employ technology in an appropriate manner is important. An example of such technology involves the use of the Internet to allow the electronic filing and transfer of court documents, and for the employment of multimedia electronic case management systems. Some courts have already begun trial or pilot programmes in this area. This technology potentially offers advantages in terms of distributing materials to all necessary recipients in the most time-efficient manner. At the same time, where applicable, it is still necessary to address issues of document security before such technology can be fully adopted by the courts. If such concerns can be adequately addressed, technology of this kind offers potential benefits for advocates by improving the administrative processes of courts and their transparency, to the advantage of all concerned.

Technology is changing the way in which advocates are presenting information to the courts. Electronic hyperlinked briefs, being briefs recorded on CD-ROM and containing not only the text of submissions but hyperlinks to all cited references, are already being filed in the United States.¹⁵ Occasionally (very rarely) such CD-ROMs have been offered to the Bench in Australia. So far, the response has generally been the same puzzlement, and lack of enthusiasm, as marked the first attempts, 30 years ago, to hand up written submissions summarising an advocate's main points. However, in large trials and even in some complex appeals (eg, dealing with the complex legal and factual issues such as native title to land) intrepid advocates are beginning the endeavour to educate the judges in the usefulness of such electronic materials. Multi-media briefs open up the possibility that in the near future:

a judge need no longer put down a printed brief to pull a law book from a library shelf. No longer will he or she have to dig through a multivolume appendix to find a documentary exhibit or set up a VCR to play a videotaped excerpt of testimony.¹⁶

The introduction of such multi-media briefs also raises interesting questions about the role of appellate courts and the limits to their function. In numerous cases the High Court of Australia has recognised the limits under which appellate courts operate, particularly in terms of the need to accord respect to the advantages of the trial judge in being present throughout the trial.¹⁷ Such advantages have conventionally been ascribed to the capacity to judge to assess the veracity of witnesses from their appearance in the witness box. If this consideration is now given less weight than was formally the case, because of scientific research that has cast doubt on its reliability, there remain

¹⁵ The first known CD-ROM appellate brief to be filed by a party was in *Yukiyo v Wantanabe* 111 F 3d 883 (Fed Cir 1997). The US Court of Appeals for the Federal Circuit ultimately struck the brief out on the grounds that the appellant had failed to seek leave from the court before filing the brief. A CD-ROM brief was however accepted by the same Court in the case of *In re Berg* 43 USPQ 17093, 1704 (Fed Cir 1997) (unpublished). Such briefs have also been accepted in a number of subsequent cases.

¹⁶ F Gindhart quoted in: F I Lederer, 'The effect of courtroom technologies on and in appellate proceedings and courtrooms' (2000) 2 *Jnl of Appellate Practice and Process* 251 at 263.

¹⁷ *Abalos v Australian Postal Commission* (1990) 171 CLR 167; 96 ALR 354; *Jones v Hyde* (1989) 63 ALJR 349 at 351-2; 85 ALR 23; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 482-3; 112 ALR 641.

advantages in the conduct of the trial. These include the observation of all the evidence in sequence and the availability of the time to think through all the issues. These advantages are commonly replaced in appellate courts by techniques that focus on the issues identified by skilful advocates.¹⁸ Already available technologies may permit appellate courts, where appropriate, to reduce the gap that has previously existed between the experiences of the trial judge and those of the appellate court.

One recent example of this is *Clark v Her Majesty's Advocate*.¹⁹ That was a decision by the Appeals Court, High Court of Justiciary, in Scotland. The Court quashed the appellant's conviction for assault and robbery after finding that the presiding Sheriff had misdirected the jury at trial. The novel feature of the case was that the misdirection was based not on the words used by the Sheriff in his charge to the jury, but rather on the tone of his voice. The Appeals Court stressed that there was:

nothing on the face of the transcript itself which would have justified a finding that the Sheriff had failed to observe the proper balance in presenting the issues to the jury.²⁰

Yet, after listening to a tape-recording of the charge, members of the appellate court:

formed the clear impression that, when posing a series of rhetorical questions, the Sheriff did indeed raise the register which he used and placed the emphasis on certain words in such a manner as to suggest that the answers to the questions would be unfavourable to the appellant. We stress that this was a clear impression which we all formed and that the phenomenon occurred repeatedly.²¹

In the past, advocates have sometimes complained about such phenomena, then generally improvable. In the future, as in *Clark*, advocates will have access to such result-changing data. They will only do so because of changes in technology. The use of technology, in *Clark* (the older technology of a sound recorder) may allow an appellate judge to experience aspects of the original trial almost as if he or she were there. Multi-media briefs may, in the future, provide an appellate judge with a direct hyperlink to a video-recording of the critical moments in the trial, as opposed to being confined to written references to the appropriate transcript page. Such new technology will obviously have an impact on appellate advocacy, providing the advocate with an entirely new range of tools with which to work. Careful judgments will have to be made because of the time implications for the appeal and the occasional risk that the new materials could backfire.

Obviously, the use of multi-media and hyper-linked briefs, video-link technology and electronic document systems is predicated on the relevant technology being available to judges and the courts. The courtroom of the

¹⁸ *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588; 73 ALJR 306 at [87]–[88]; *Fox v Percy* (2003) 214 CLR 118; 197 ALR 201 at [28]–[31].

¹⁹ App No C/633/99 (Scotland, 26 July 2000). This case is further discussed in G Nicholson, 'A vision of the future of appellate practice and process' (2000) 2 *Jnl of Appellate Practice and Process* 229.

²⁰ *Clark v Her Majesty's Advocate*, App No C/633/99 (Scotland, 26 July 2000) at [6].

²¹ *Ibid*, at [6].

future is likely to look different from the courtroom of today. The advocate of the future will operate in a different environment.

Examples of what such courtrooms might look like in a decade or so are being explored in innovative projects such as the University of Canberra's e-court Project and the so-called Courtroom 21 in the United States. Courtroom 21 is a mock courtroom located at the Marshall-Wythe School of Law of the College of William and Mary in America.²² It is described as the world's most technologically advanced courtroom. Courtroom 21 experiments with new technologies and seeks to determine how such technologies can best be used to improve the legal system. Features of Courtroom 21 include the SMART Board interactive whiteboard to facilitate multi-media presentations in court, linked LCD monitors allowing advocates to transmit images directly from their electronic briefs to the monitors of the judges — and quite possibly jurors — and a real-time electronic transcription system. Technology such as this is slowly being adopted in courtrooms around the world. Much depends on the technological skills of judges and advocates who, at the moment find themselves in a half-way world of those with and without electronic skills. Some judges in Australia are already set up with keyboard and screens on the Bench. Many counsel now appear at the Bar table with these facilities. In Perth, at least one judge conducting jury criminal trials uses power point in giving her instructions to the jury. Advocates cannot allow themselves to get far behind such judicial skills.

In the High Court of Australia, during a large native title appeal, the judges were offered the supply of instantaneous electronic access to the record. By majority, the offer was politely but firmly declined. More recently, in a copyright appeal, the High Court was shown a Play-Station CD-ROM in operation. The video game was safely demonstrated from the Bar table by an advocate who appeared to have more than a purely professional familiarity with its operations.²³ He was rewarded with silk in the next list, although that may have been purely coincidental.

What does such technology mean for advocates and for the art of advocacy? Using technology correctly and skilfully can assist an advocate in effectively presenting a case to the court. However, such technology is no more than a tool to be used. By itself, the technology cannot transform a losing argument into a winning one. It will not mask or improve inadequate advocacy. Even with the development of technology, the basic skills of effective advocacy remain the same as they have always been. A flashy power-point summary of arguments, if permitted, will not hide gaps in logic. Indeed, it may make such gaps more visible, more quickly. Yet as judges and jurors increasingly come from generation X (and even later generations) their willingness to sit for hours during tedious oral submissions, unadorned by technical aids and illustrations, will be severely diminished.²⁴ Already studies have shown generational changes in the attitudes of listeners and watchers to

22 See <<http://www.courtroom21.net>>.

23 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448; 79 ALJR 1850.

24 M D Kirby, 'Delivering justice in a democracy III — the jury of the future' (1998) 17 *Aust Bar Rev* 113.

conventional courtroom ways. Such attitudes will leap ahead as the technology does. Courtrooms cannot be cut off from the skills and interests of the people whom they serve.

Any discussion about technology and the law eventually arrives at artificial intelligence, and the potential of machines ultimately to replace advocates and judges. Would it be possible for the tasks of advocacy and judging to be left to machines using artificial intelligence to produce case outcomes based upon the input of factual case data and an analysis performed through pre-programmed precedent databases? Although the idea may seem far-fetched at present, so a few decades ago did much of the technology that courts and advocates now take for granted.

Admittedly, it is difficult to conceive of the practice of law ever being left entirely to artificial intelligence, no matter how quickly technology may advance. Law is as much an art as it is a science. There is an inherent creativity and an essential human element to both advocacy and judging. It is difficult to imagine even the most advanced artificial intelligence technology ever being able to replicate the human element that is essential to the justice system. It is impossible, at this stage, to conceive of a machine with a *will* to do justice to human parties. Yet even if artificial intelligence cannot completely replace human advocates and decision-makers, artificial intelligence may well have applications that will be used in the future to aid advocates and judges in achieving justice. The advocate of the future will have a mobile voice recognition module which can respond to commands and produce legal authority, statutory, judicial and academic on demand. Already, artificial intelligence is used to analyse taxation and immigration processes. When the essential criteria are simple, this technology is not far away. It is advancing all the time.²⁵

One final development that should be noted is the increasing importance of the Internet to the art of advocacy. The most obvious benefit is that the Internet has rendered physical barriers across the globe largely obsolete. Advocates around the world are now able to communicate easily, share information and learn from each other. Hopefully, this growing connectedness will be used by advocates to achieve the positive results of enhancing and developing advocacy skills and better serving their clients.

The Internet also has an enormous impact on the conduct of legal research. Sir Anthony Mason, past Chief Justice of Australia, looked towards the future in 1984 when he suggested that:

Access to comprehensive library facilities going beyond the mere provision of books is a matter of vital importance to the Bar. No doubt the advent of legal computer services will help to solve this problem.²⁶

Twenty years later, his prediction has proved correct. The use in Australia of Internet-based research tools such as AustLII, BAILII, Westlaw, LexisNexis and HeinOnline, to name but a few, has revolutionised legal research. Research can now be conducted more quickly and thoroughly. The

²⁵ M D Kirby, *The Judges*, ABC Boyer Lectures, 1983, p 77 describing the early 'TAXMAN' program in the United States. See L T McCarty, 'Reflections on TAXMAN: An experiment in artificial intelligence and legal reasoning' (1977) 90 *Harvard L Rev* 837.

²⁶ A F Mason, 'The Role of Counsel and Appellate Advocacy' (1984) 58 *ALJ* 537 at 540.

Internet provides every advocate and every judge with a practically unlimited pool of information. Indeed, it is the very immensity of the sources that presents a new challenge to the advocate — how to refine the problem; how to conceptualise the issues; how to limit the sources of data; how to ensure that enough time is left to think about the problem and its solution. How to assure enough time to reflect on the justice of the case and not to be overly dazzled by the mass of information that is now at our fingertips, from so many sources.

While acknowledging the benefits of information technology, advocates should remember that legal authority should be cited with care. The Internet is of enormous value to an advocate if it is used for the selective retrieval of information that strengthens the submissions. It is not so valuable if it is used indiscriminately to generate masses of unread or ill-considered material. This point was emphasised by Sir Gerard Brennan, also a past Chief Justice of Australia. He observed that:

technology is but a tool for the well trained analytical mind.²⁷

As today's judges and decision-makers view with mounting alarm the mountains of information provided to courts by advocates to 'assist' them in their tasks, a groan can sometimes be heard begging for the return of the days when one of the true skills of the advocate was discernment — economical selection of material critical to the decision that has to be made. Deliberate decisions to cut-away irrelevant or insignificant materials, unlikely to help the decision-maker to come to the desired outcome.

The use of international materials

A further development, encouraged by the Internet, has been the use of international law in legal argument. This is another illustration of the fact that globalisation is changing the way that advocates and judges approach current legal issues and problems.

In Australia, the most contentious debate concerning international law relates to its use in constitutional interpretation, particularly where such law expresses the international law of human rights. This debate has also been particularly public and vigorous in the United States.²⁸ One recent Australian example of the controversy may be found in the different opinions on this issue expressed by Justice McHugh and myself in *Al-Kateb v Godwin*.²⁹

In my view international law is a legitimate influence upon domestic legal and constitutional development. Municipal judges ultimately derive their

²⁷ F G Brennan, Introductory Address, presented at the Australian Institute of Judicial Administration Technology for Justice Conference, April 1998.

²⁸ P M Wald, 'The use of international law in the American adjudicative process' (2004) 27 *Harvard Jnl of Law and Public Policy* 431; J H Wilkinson III, 'The use of international law in judicial decisions' (2004) 27 *Harvard Jnl of Law and Public Policy* 423; R B Ginsburg, 'A decent respect to the opinions of [Human]kind: The value of a comparative perspective in constitutional adjudication', Keynote address to the 2005 Annual Meeting of the American Society of International Law, 1 April 2005.

²⁹ (2004) 219 CLR 562; 208 ALR 124 at [31]–[74] per McHugh J, [144]–[194] per Kirby J. The more recent US examples include *Atkins v Virginia* 536 US 304 at 347–8 (2002) and *Lawrence v Texas* 539 US 558 at 576 (2003). See, eg, H Koh, 'International Law as Part of Our Law' (2004) 98 *American Jnl of International Law* 43.

authority from a national Constitution.³⁰ They are bound to uphold that Constitution. They cannot give preference to unincorporated international law over the clear requirements of their national law, specifically the law of the Constitution. Within this limitation, however, international law can be an important and persuasive influence. Being exposed to the approaches adopted, and the ideas considered, by judges in other jurisdictions, who have faced similar legal questions, can only expand and enhance judicial thinking. All wisdom is not necessarily local. International material may provide important and persuasive insights into common problems. Ultimately, it is up to the individual judge to decide on the value and usefulness of such material within the context of each case.

The use by an advocate of international materials can enhance submissions and provide a useful point of reference for the reasons of an appellate court. Such materials will become more important in future years. The quickening pace of globalisation makes it inevitable that the law will become more international. Municipal law will increasingly be influenced by the content of international law. Given, however, the differing views of present judges as to the value of such materials, advocates contemplating the use of international law materials do well to keep in mind the 'rule' of advocacy commending knowledge of the court and of the judges deciding the case. In a multi-member court, that includes judges who hold differing views on such topics, considerable skill is demanded of the advocate. He or she must at once secure the agreement of the judge who is interested in, and influenced by, such global sources while avoiding irritation of the judge who is antagonistic to such materials, regarding them as an invitation to legal heresy.

In the United Kingdom, the enactment of the Human Rights Act 1998 (UK) has meant that the use of the European Convention on Human Rights and other sources of international human rights law in advocacy is now less controversial. Indeed, it is now virtually mandatory. It is the duty of judges and thus it is the duty of advocates.³¹ Books are written to aid the advocate in this new territory.³² Such books must be in the modern advocate's library.

It is not only in the contentious area of domestic constitutional interpretation that international or comparative law can play a role in the contemporary courtroom. Advocates before the High Court of Australia have often referred to comparative materials from other jurisdictions to advance their submissions. Over the years, the sources of such comparative materials has gradually widened beyond the traditional references to English law. Now it extends to new sources both in the common law world and beyond. Australian courts are not alone in recognising the potential value of comparative law materials. Lord Steyn recently observed that:

30 M D Kirby, 'International Law — The Impact on National Constitutions' (2006) 21 *American University International L Rev* 327.

31 *A(FC) v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] 3 All ER 169 at [41] per Lord Bingham of Cornhill citing *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at [27] per Simon Brown LJ.

32 A P Lester and D Pannick (Eds), *Human Rights Law and Practice*, LexisNexis, London, 2004. See also S Joseph, J Schultz and M Castan (Eds), *The International Covenant of Civil and Political Rights — Cases, Materials and Commentary*, 2nd ed, OUP, 2004.

The Law Lords expect a high standard of research and presentation from barristers . . . For example, if the appeal involves a statutory offence we would expect counsel to be familiar with . . . comparative material from, say, Australia and New Zealand.³³

While material from other jurisdictions will not, of course, be binding on a municipal court it will, in the same way as international law, frequently provide a relevant and illuminating point of contextual reference. In the future, with physical distances becoming increasingly less relevant to advocacy and with the law increasingly international and available on line, we can expect both advocates and judges to refer to authorities from new sources around the world and to do so more frequently.

As technology reduces global barriers, comparative legal research will continue to grow in significance and value. Yet advocates must remember that comparative material is simply one further tool that is available to them. Such material has little value of itself until it is placed in context, and until it is effectively and appropriately deployed in furtherance of propositions useful to the case in hand.

The arrival of female advocates

I have left to last one of the most significant developments in appellate advocacy over the past 50 years. I refer to the arrival of women advocates.

In Australia, it was not until 1905 that Grata Flos Greig became the first woman admitted to legal practice. It would take a further 52 years before Roma Mitchell, in Adelaide, became the first woman to be appointed as Queen's Counsel. The young Miss Mitchell had earlier become the first female practitioner to be recorded as appearing before the High Court. She appeared in 1937 as junior counsel in *Maeder v Busch*.³⁴ It was a patent suit. There was no gender element whatever in the case. In the way of those times, junior counsel for the plaintiff was simply named as 'Ross'. But Roma Mitchell appeared in the glory of her full name — to show that she had arrived. The law reporter was sufficiently surprised, or impressed, by her appearance on the record to draw the distinction.

It was not until the following year, 35 years after the first sitting of the High Court, that a female advocate is recorded as having a 'speaking part' in the argument of an appeal. Miss Joan Rosanove briefly addressed the Court as junior counsel in *Briginshaw v Briginshaw*.³⁵ She too appeared in the reports in her full name. In Melbourne today a set of counsel's chambers are named after Joan Rosanove. In February 2005, in Adelaide, the Prime Minister of Australia opened the new Federal Courts Building named after Roma Mitchell.

In many Australian law schools women now account for over half of the graduating law students. For the past few years the majority of legal

³³ Quoted in C Booth and M du Plessis, 'Home Alone? — The US Supreme Court and International and Transnational Judicial Learning' (2005) 2 *European Human Rights L Rev* 127 at 133–4.

³⁴ *Maeder v Busch* (1938) 59 CLR 684.

³⁵ (1938) 60 CLR 336 at 379.

practitioners being admitted in New South Wales have been women.³⁶ Women such as Dame Roma Mitchell and Justice Mary Gaudron, to name but two, have made large contributions to the development of Australian law. The most recent appointment to the High Court of Australia, Justice Susan Crennan, was formerly Chairman of the Victorian Bar and later a Judge of the Federal Court of Australia. Inevitably such women lawyers become role models for countless women who follow. Likewise in England, women have been pioneers. They have left a lasting mark on legal practice. They have a place in legal history because they were there first.

Nevertheless, in the sphere of advocacy this change is happening slowly. While the number of female barristers is growing in Australia, there is still a considerable disparity between males and females in terms of numbers at the Bar. In New South Wales, for example, only 14.7% of barristers and 3.2% of senior counsel are female.³⁷ A recent study in Australia showed that considerable differences still exist between male and female barristers in terms of the nature of the work undertaken. One of the interesting findings of that study was that male barristers were significantly more likely than female barristers to nominate appellate work as an area of their practice.³⁸ That self-identification is borne out by my observation.

In the 10 years I have served on the High Court of Australia, there have been comparatively few female advocates with 'speaking parts'. Statistics compiled by the Registry of the High Court reveal that in 2004 a total of 161 counsel appeared before the Court in appeal hearings. Of these, seven were women. This number increases somewhat in relation to special leave applications, where 51 of the 634 counsel appearing before the Court were female. In 2004, therefore, fewer than 7% of the advocates appearing before the Court, in appeals, summonses or special leave applications, were women. One hundred years after the first woman was admitted to legal practice in Australia it is difficult to understand why there is still such a big gap between the numbers of men and women appearing as advocates before the nation's highest court. The reasons would seem to lie deep in legal cultural and professional attitudes and practices.

The Registry of the High Court of Australia has collected the following statistics as to the number of female advocates appearing in matters heard by the High Court during 2004 and 2005. These figures include women appearing as either senior or junior counsel. The figures contain repeat players.

36 I Taylor and C Winslow, 'A Statistical Analysis of Gender at the NSW Bar' (Winter 2004) *Bar News* 20 at 20.

37 *Ibid.*, at 25-6.

38 *Ibid.*, at 23-4.

	Male Counsel		Female Counsel	
	2004	2005	2004	2005
Special Leave Applications	634	1027	51	127
Appeals & Single Judge	154	477	7	70
Total	788	1504	58	197

The comparison of the last two years shows that there has been an increase in the number of appearances of women and a near doubling of the proportions from 7.5% to 13%. However, the base figure remains low and the statistics do not reflect 'speaking parts'.

In the 12 years before my appointment, when I served as President of the Court of Appeal of New South Wales, the position was no better. On an impressionistic basis, proportionately, it was probably worse. It may have improved in that court since 1996. In 1996 there were no women Judges of Appeal in New South Wales. Now there are two in a court of 13, although women judges of the State Supreme Court sometimes participate as Acting Judges of Appeal or Judges in the Court of Criminal Appeal.

Why is it that senior female advocates are still the exception in appellate advocacy? Justice Michael McHugh, before his retirement, suggested that:

The inescapable conclusion is that it is a product of the discriminatory, systemic and structural practices in the legal profession that have been well-documented in recent years and which prevent female advocates from getting the same opportunities as male advocates.³⁹

The practices referred to include the prevailing masculine culture of Bar, the difficulties of reconciling aspects of life at the Bar with family responsibilities, and the continuing impact of patronage on briefing decisions. These elements combine to produce a sometimes aggressively male environment in which it is not entirely surprising to discover a comparative lack of women. It need not be so. As Justice Mary Gaudron used to say, when a member of the High Court of Australia, although there may be genetic factors at work in skills of communication, there is no evidence that the relevant genes reside on the Y chromosome.

The standard response to these statistics, showing continued female under-representation in the top work of advocacy in Australia (reflected also in most other countries of the common law) is simply to urge the need for patience. Some take the view that it is only a matter of time before women, who have only recently begun entering the profession in numbers equivalent to men, rise through the ranks by virtue of their merit. But how much time is required? It is 68 years since the first female advocate appeared in a case before the High Court of Australia. It is 43 years since the first Australian woman was appointed as senior counsel. Despite the passage of so many years, here we are in the twenty-first century still talking about the need for

³⁹ M H McHugh, 'Women Justices for the High Court', Speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004.

women to just wait patiently for equal opportunity to become a reality in advocacy before our courts.

Does this disparity matter? In my opinion, it does. At its most basic level, unjustifiable discrimination of any form should be a matter of concern to every member of a profession committed to justice under law. The problem is a pressing one.⁴⁰

Australian lawyers, and indeed all citizens, should be concerned about gender disparity because it has significant practical implications. Women are not just men who wear skirts.⁴¹ Women bring a different perspective to the practice and content of the law. Inevitably, their perspective is reflective of their different life experiences. Given the importance of our legal systems to the development of a fair society, it is critical that the best and the brightest young lawyers are encouraged to take up the profession of advocacy. Barriers to full participation in that profession, based on gender, ultimately have consequences both for the development of the law and for justice in society.

In countries such as Australia and the United Kingdom, where judges are normally appointed from the ranks of senior advocates, the comparative lack of senior female advocates has important consequences for the composition of the senior judiciary. If the number of women appearing as appellate advocates before the highest courts continues to be so low, it is likely that women will continue to be under-represented in future appointments to such courts. This has consequences for the public perception of the judiciary as a branch of government able to make effective and just decisions on behalf of the entire community. It also has consequences for the way cases tend to be viewed in court, for the way courts of justice are perceived, for the insight that women can sometimes give for the resolution of issues in a case⁴² and for the perception that women often bring to the disadvantages faced by other vulnerable groups in society — such as indigenous people, social minorities, drug dependent people and homosexuals.⁴³

It is no coincidence, I think, that a recent comprehensive survey of homophobia in Australia revealed that discriminatory attitudes are markedly less prevalent amongst Australian women than they are amongst men⁴⁴ — especially older men such as are now occupying, or aspiring to, judicial appointment. As a homosexual man myself, and a judge, this is data that makes me sit up and pay attention when I consider the composition of the judiciary in Australia.

What can be done to improve the participation of women advocates? There is no single, easy solution that will ensure equal opportunities for women as advocates. A number of recent initiatives have been tried. They address some

40 Baroness Hale of Richmond, 'Making a Difference? Why We Need a More Diverse Judiciary' (2005) 56 *Northern Ireland Legal Quarterly* 281 at 282; B McLachlin, 'Equality and the Judiciary: Why should we want more women judges?' [2001] *Public Law* 489.

41 M D Kirby, 'Women in the Law — What Next?' (2002) 16 *Australian Feminist L Jnl* 148 at 154. See also, 'Will Women ever be Equal?' (November 2004) *The National Jurist* 18 at 20-1, showing that the picture emerging in Australia is repeated in the United States.

42 See, eg, *U v U* (2002) 211 CLR 238; 191 ALR 289 at [28] per Gaudron J.

43 See *A(FC) v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] 3 All ER 169 at [237] per Baroness Hale of Richmond.

44 M Flood and C Hamilton, 'Mapping Homophobia in Australia', *Australia Institute Webpaper*, July 2005, at <www.tai.org.au>.

of the practical issues confronting female advocates. Two examples include the efforts to secure equitable national briefing policies in the large legal firms and by government clients and the introduction of an In-Home Emergency Child Care Scheme launched by the New South Wales Bar Association. Reformers must also examine practical ways of modifying some aspects of the culture at the Bar, so that it becomes a more welcoming environment for female advocates. In the medical profession it is sometimes said that surgeons are the least likeable of the specialists — they are commonly regarded by their colleagues as more vain, less communicative and more macho in their attitudes. No doubt this is a stereotype. Yet it is often mentioned. Are advocates the law's surgeons? If so, is there anything that can be done to correct this feature of legal practice? Or do we just have to keep telling female advocates to steel themselves and be a little brutal back? It is a big ask.

The advent of female advocates, and the considerable achievements of some of them, constitute an important development in the practice of appellate advocacy in my lifetime. After all, it has taken centuries to get to the point we are at now. Addressing the imbalance between male and female advocates, and ensuring that all advocates are provided with opportunities based upon their ability and not their gender, race, age, sexuality or other immaterial features will remain a challenge into the future for judges and all members of the legal profession.

New challenges in appellate advocacy

Many important changes have occurred in the past two decades affecting advocacy, including appellate advocacy. These include procedural changes as appellate courts strive to cope with increasing workloads; technological developments that have provided advocates with new tools with which to work; and an increasing, but still not proportionate, number of female advocates. As the pace of globalisation and technological developments increases in the practice of law the future will undoubtedly bring even greater challenges in the practice of advocacy.

Yet the fundamental purpose of advocacy remains the same. Plato said that 'rhetoric is the art of ruling the minds of men'. This holds as true in the modern age as it did in the ancient world, even if today we would include women, as Plato neglected to do. The legal environment in which advocates operate will change. The tools at hand will continue to develop beyond contemporary recognition or imagination. Yet the fundamental task of an advocate is constant. It is to persuade the minds of others to meet in agreement with one's argument. The terrors of advocacy, especially for the young and inexperienced, remain the stimulus for each succeeding generation of advocates as they rise to address decision-makers. The joys of advocacy, after a day in court when the tasks have been well and skilfully performed, particularly when crowned with success, are greater than virtually any other vocation can offer — a heady mixture of intellect, emotion and drama — sure to get the adrenalin flowing. So the challenges of advocacy are greater today than ever before.

Bench and Bar need to refine the best of the old traditions and skills. We can make the traditions better, juster and more welcoming to all. It is our destiny as human beings to strive for ever-greater rationality and progress.

Advocacy is not only an ancient, honourable profession, full of tradition. It is a dynamic, adaptive art and a modern vocation. It aspires to improve itself by adjusting to new notions of justice, by using new technology to bring justice more efficiently to more people and by adjusting its culture and values so that all with training and talent can share in its exciting opportunities and enjoy its many rewards.