

The Art of Advocacy

On 17 October 1991 Lord Alexander of Weedon QC addressed the New South Wales Bar Association on the art of advocacy. Lord Alexander was educated at King's College, Cambridge. He was admitted to the Inner Temple in 1961 and took silk in 1973. He became a bencher in the late seventies and took silk in New South Wales in 1983. He was Chairman of the English Bar between 1985 and 1986. In 1989 he became Chairman of the National Westminster Bank Plc. His speech is reproduced by Bar News not only for the benefit of those who were unable to attend, but also for the benefit of those who, having attended, would undoubtedly wish to remind themselves of his pertinent advice.

I was early on taught a golden rule of advocacy. Not the golden rule of rugby football which is always get your retaliation in first, but rather the golden rule of advocacy that you always make your best point whilst the Court is fresh and hopes that you may be going to talk sense. So may I immediately say what a delight it is to be back amongst colleagues of the New South Wales Bar. I have the happiest memory of working closely with them from time to time over some 15 years.

Perhaps it is because of my affection for your Bar that I rashly assented to the title of this talk. All my life I have fought shy of attempting to speak about the art of advocacy. Last year, for the first time, I was lured to do so far from the metropolis in Sheffield in Yorkshire, and before an audience of academics and students. Tonight, before skilled barristers, is much more daunting. For advocacy is more of an art than a science, and we each have our own style. I have always suspected that once we attempted to analyse our own approach it would, like the proverbial piece of china, fall to pieces in our hands. But, for all these doubts, I am very glad to be here, and here goes.

For all of us, advocacy is, in its classic definition, the task of pleading a cause before a Court of Justice. But advocacy in Court is but one species of the art of persuasion, and it depends on the same fundamental principles as when it is used in other areas of life. This means that it calls for an infinite variety of styles to match the occasion. In the home, in the pub or wine bar, or at debate, we are all seeking essentially the best way of putting across a particular point of view. A solicitor negotiating a settlement needs to be an expert advocate. So, as I am learning, does a company chairman. We will seek, depending on the occasion, sometimes to be gently persuasive or quietly provocative, or coldly lucid or forceful, or perhaps more rarely, but sometimes necessarily, obstinate or dogmatic. To be able to be master of all these styles, yet to have the touch to decide which is the one to use at any moment, would make us truly master of the great art of advocacy. Winston Churchill, writing of his great friend the barrister and later Lord Chancellor, F E Smith, said:

"For all the purposes of discussion, argument, exposition, appeal or altercation, F E had a complete armoury. The bludgeon for the platform; the rapier for the personal disputes; the entangling net and unexpected trident for the Courts of Law; and a jug of clear spring water for an anxious and perplexed conclave."

And yet, as we all know, F E Smith's style had a certain abrasiveness. The jokes are legendary and they essentially consisted of one inherent characteristic, rudeness to the Tribunal. All very impressive but Lord Hailsham once told me that there was many a young barrister in the '20s and the '30s who ruined what might otherwise have been quite a reasonable career by attempting to emulate F E Smith. Smith himself described the excitement of fine argument in these words:

"Eloquence is like the flame. It requires fuel to feed it, motion to excite it, and it brightens as it burns."



Lord Alexander of Weedon QC

This matchless description emphasises the flow of vital forces which is inherent in the art of persuasion. Words are harnessed to capture the imagination, and to carry along the hearer. Some advocacy may be quite deliberately unemotional, not least in situations where naked appeal to emotions rather than logic would be suspect. But lurking below the surface is almost invariably an attempt to persuade people not just in their heads but in their hearts. Indeed, sometimes the attempt is to persuade them in their hearts when they are wholly unpersuaded in the head. This is not only true of jury advocacy. Judges are sensibly human in their reactions, as we are

reminded by the old aphorism that beneath the ermine robes of the judge beats the heart of a common jury man. And the canvas is wide, thrillingly wide, for the variety and the evolution of the problems of the law creates genuine and legitimate choice for the Court between rival contentions. There is often no absolutely right, or totally logical, answer. Here it is that advocacy shapes the vitality of the law, and moulds the argument, blending precedent and principle, and ever reaching out to adapt to the new challenges which society throws down. Lord Wilberforce once put it with his usual acumen when he said that in all fine arguments, and in all great judgments, there will be a leap which logic has to make to adapt to a novel or a subtly altered problem. For judgments, as well as arguments, are essentially essays in advocacy.

So the canvas for us as advocates is large. What characteristics should he or she, should the advocate possess? There is a temptation in any profession, and the law is no exception, to confine its practitioners too narrowly. This can constrict the personality, as Disraeli recognised, when contemplating a choice of possible professions for one of his fictional characters. He spoke thus of the bar:

"The Bar. Pooh! Law and bad jokes until we are forty;

and then with the most brilliant success the prospect of gout and a coronet. Besides, to succeed as an advocate, I must be a great lawyer and to be a great lawyer I must give up my chance of being a great man."

So, too, if we confine ourselves only to the erudite or the scholarly argument, as a Mr Pepler wrote in a short poem:-

"The law the lawyers know about
Is property and land;
But why the leaves are on the trees,
And why the winds disturb the seas, ...
And Hope survives the worst disease,
And Charity is more than these
They do not understand."

The more rounded the advocate, the more likely he or she is to reach the heart of the case. For it is an indefinable flair, coupled with strength of character and articulacy, which made Marshall Hall and Carson, Birkett and Hastings stand out amongst their peers. There is, in the end, a magic about the great performances in Court which reminds us again and again that advocacy is an art not a science. The single hour's advocacy which I would most have liked to hear since the Second World War was the start of Garfield Barwick's speech for the Respondents in the Commonwealth Banking case. Both Kenneth Diplock, then one of the Counsel and subsequently a senior Law Lord, and Cyril Green, one of the most experienced of wily Privy Counsel managing clerks, separately, and from very different perspectives, described it to me as the best advocacy they ever heard. Evatt had addressed the Court with many erudite arguments. Perhaps he had been slightly too lengthy. Barwick rose half an hour before lunch and, from force of personality and, more importantly, by grasping immediately the central issues in the case, he stamped his argument indelibly upon the pages of the judgment. No one who heard him ever forgot the occasion. And that is an illustration of instinctive magic, power and force of personality.

But, with flair as the ultimate gift, what are the techniques with which you can supplement it? There have been books written to help the aspiring advocate. When I was young I avidly read Harris's *Hints on Advocacy*. It was very helpful in telling me how to cross-examine someone who had been injured in a collision between a horse and carriage. Of more recent time there are *The Art of the Advocate* by Richard du Cann QC and *The Technique of Persuasion* by Sir David Napley. One other book, from which I gained much help, is *The Examination of Witnesses* by Sir Frederick Wrottesley. He had seen advocacy from two perspectives, both as barrister and judge. This, of itself, was a very great help. In England we still encourage young barristers to go out as marshalls with judges and to watch arguments sitting on the bench and sharpening the judge's pencils.

But there is an even more fundamental basic quality. Our work is founded upon the use of language. Words and their nuances and subtleties, and their shades of composition, are all

important. To speak the language of the law, search out, if you can find it, an admirable but now sadly out of print anthology, *The Law as Literature* gathered together and edited by Louis Blom-Cooper QC. Read the cross-examination of Pigott before the Parnell Commission, and also Sir Richard Muir's notes for the cross-examination of Crippen. Read also the thoughts of the late Sir Harold Laski, as he travelled home after defeat in a libel action. If you do so you will know the sensitivity and agony of the losing litigant who will inevitably make up a proportion of the clients of, dare I say it, even the best of you. Remember too the words of Lord Denning:

"No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers - or your readers - will turn aside. They will not stop to listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice."

Lord Denning has also emphasised the words of Sir Walter Scott in Guy Mannering. The hero visits a Scottish advocate, Counsellor Pleydell, who points out the books of history and literature on his walls saying this:

"These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

So it is a priceless advantage for advocates to be widely read and literate as they set out on a career in which the use of language is central.

What comes after education? Preparation, advice and management are not glamorous, but are essential parts of the art of advocacy. One of the great talents of us as barristers and often unrecognised outside is discouraging a client from suing. This involves evaluating the case, recognising its strengths and weaknesses and either discouraging clients wholly from suing or at least encouraging them to settle. Take libel actions. Since we are all sensitive to our reputation, people very quickly reach for their libel lawyer. They tend to forget that other people may instantly half-forget what is written about them, and that an action in Court may simply resurrect and remind people of the libel two years later. The client may need education in the uncertainty that attends any jury trial. My personal approach was to encourage them to sue only in the plainest cases, or where the libel so struck at the heart of their reputation as to leave them effectively no alternative. The techniques of advocacy are inevitably employed at this stage of the case - in approaching, rather like a game of chess, how you seek to think through the various issues and permutations to give the right advice. In the same way the thoroughness of preparation of evidence, whether factual or expert, is key. Such advice and case management are fundamental to our success and engage all the skills and instincts of the advocate. For, whilst unpredictability is at the essence of litigation, we can always seek to lessen its incidence.

This means, does it not, that there is no substitute in fact for the most intense and careful preparation and planning of the case. We should know what arguments we are to adopt, and in

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what order we should present them. We should take, insofar as we can, firm decisions in advance as to which witnesses should be called, and in what order, because for an advocate to carry conviction in court, it is necessary to be master both of the facts and legal arguments. We should also have advised our clients carefully which points should be taken, and which by contrast would sacrifice credibility, and we must have taken trouble to persuade our client to agree with us as to the sensible mode of presentation. There was nothing worse than sometimes the tedious American client who, having been told which points were good and which were bad, would ask of the bad points "Yes, but can we not take the position on those points". Well, I believe that taking the position on bad points destroys the case of credibility.

But, I hear you say, however conscientious we may be, we can never wholly exclude surprise. I agree. May I take the true story of the shipping case in which the issue was whether the vessel was scuttled. Such cases can have their murky side. The expert witness for the plaintiff seemed to have an impeccable pedigree - not least a long and distinguished period in a colonial police force. His evidence-in-chief finished about ten minutes before the mid-day adjournment. Cross-examining counsel, taken by surprise, played for time. He began desultorily:

"May I ask you some questions about your very impressive curriculum vitae?"

"Yes certainly."

"There appears to be a gap between your time in the Hong Kong police, and your becoming a private investigator?"

"Yes."

"Perhaps you would tell me what you were doing then?"

"I was temporarily unavailable for work."

"Oh, I'm sorry, were you ill?"

"No."

"What were you doing then?"

"I was in prison."

"Oh," said quick-witted Counsel, realising that he might inadvertently have struck lucky, "how long were you in prison?"

"For five years."

"Five years, that's a long time. What was the offence?"

"Perjury," came the answer.

At that moment lunch mercifully intervened, but the claim - like the vessel - sank without trace. So much for the essential preliminaries. I hope they are enough to indicate that the skill of an advocate in my view begins long before a case comes to Court, and that a principal skill is good judgment. The strongly-developed perception of reality, as well as knowledge of precedent, are vital. May I say a word about the interaction of precedent and principle. They must be tested together. One way, which was I think my own, and probably the lazy way was to look for what appeared to be the purposive, and the sensible result of the case, and then test it against the authorities. If the authorities were against the approach, then how strong were

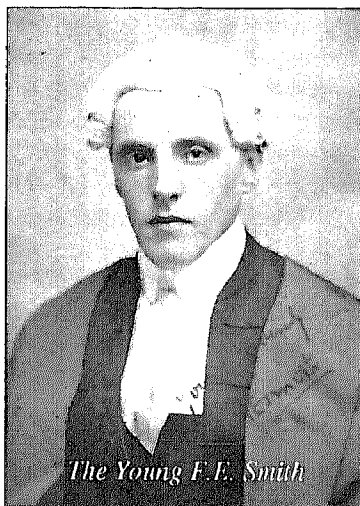
they? If there was an odd case standing out like a jagged rock at first instance, then the answer was to go and have a word with Lord Denning. Indeed, perhaps the greatest quality of Lord Denning, who, along with Lord Reid, did most to keep English law in touch with society in a speedily changing world, was his unremitting search for principle. And principle is not abstract: it evolves, and it inevitably reflects a view of sensible morality. Well, that's one approach, but another approach, often equally valid, is to see where the authorities lead, and then to stand back and see whether they are consonant with principle. In some ways this may be a sounder way, since it means that the historical strengths of the law are weighed before the practitioner applies what may well be his or her own idiosyncratic approach to principle. But the one approach which, in my view, is fatal is to go to the authorities, establish the precedents, and then assume unthinkingly and without more ado that they supply the

answer. Because at some point they must be tested against the purpose of the law, which is ultimately the unremitting lode star for the Courts. Areas of education, general knowledge, sensitivity and analysis of argument come together in the choice of arguments to be advanced, and mould that indefinable, sometimes elusive, quality of judgment.

One of the essential qualities of good judgment is selection of the points to be argued. Clearly we must argue the points we are instructed but we have a large say in persuading the client which are the good ones to be put forward. It has recently been a criticism of some within the English profession that they

are prepared to put all points before the Court without too much discrimination, in the hope that one or other of the arguments may appeal to the Court. This cannot be good advocacy. It is all very well to think that this approach may lead to a case succeeding on a point which could only appeal to a bad judge on an off day. But it is our job to weed out those points, both to give credibility to the sound argument and to keep it within sensible bounds. We risk an adverse judicial reaction which has sometimes recently been voiced at home if we argue points by which we ourselves are wholly and completely unconvinced. As I say, we may sometimes be instructed to do so, but we should exercise our own power of persuasion with the client to seek to limit the case to those points which are sensibly arguable.

How then, perfectly armed in a sense with all these qualities, and I only make no apology for devoting quite a bit of what I am going to say to advocacy before we get to the Court room because I believe that without it we are nowhere. But perfectly armed with these qualities how should the advocate approach the task in Court? I would not attempt to talk about individual tricks of advocacy. You will all know them, you will have evaluated them, you will know which work for you, and they are ultimately less important than fundamental principles. What should our attitudes and approach be? Perhaps the most important key, which should never be forgotten, is that we as



The Young F. E. Smith

the advocates are not the audience. We have throughout to be asking ourselves the difficult question: "What is my hearer thinking? What is he or she concerned or worried about? What points are impressing them? What points are troubling them?" This sensitivity to the tribunal requires flexibility, and is probably easier when the trial is by judge alone, since the intervention of the Court tends to make known the way the tribunal is thinking. In my experience, the most important aspect of a case tried by judge alone is what is called the Socratic dialogue - or, more prosaically, the questions from the tribunal and the answers of Counsel. These are central to the case. However much we may have thought about them in advance, the answers always have to some extent to be shaped to meet concerns which are explicit or implicit in the way the question is put. In appellate advocacy, where the arguments for each side often have considerable merits, the way in which the judge's doubts are satisfied is the critical and vital difference between success and failure. And that does not mean of course that when a question is put we simply reassert our proposition with confidence. We have to see, if we can, into the mind of the judge, examining what lies behind the question and seeing where if the question tends to be against our argument we should probably start in order to establish logically and sequentially why the approach adopted by the judge should not be preferred to our own case, in the same way in which any doubts he has about the case for the other side are subtly enhanced, preferably under the guise of apparent objectivity. Sensitivity to the tribunal is a quality which is difficult to learn, but it is the most priceless gift which an advocate can be granted. One of the best advocates who ever led me in practice, James Comyn QC, was not so much of a wordsmith as some of his contemporaries, nor as stylish. But he had the priceless gift of antennae which appeared to reach right out to read the minds of the judges whom he was addressing. I remember once, we were having a difficult argument before a court of 3, one judge was being very favourable to our case. He was really our strong man and at lunch time I said to James "Well, it's marvellous that we've everything to fight for because we have Cyril Salmon on our side". James nodded his head and said "He's not on our side, he's simply being kind to our argument because he doesn't like the way the other two are reacting". But I had been wholly fooled. My leader was closer to it. He was feeling into the minds of the judges all the time and that was the priceless gift.

If, in addition to sensitivity, I had to select two qualities which, taking integrity for granted, are the most valuable to an advocate, they would, I think, be these.

First, in presentation it is critical to be adaptable. Advocacy is after all about influencing people to our views, and people do not exist in the abstract, and they are not computers. They have human emotions. These are very different, and it is our job as advocates to seek to respond to their sensitivities.

Secondly, it is highly desirable I personally think, that our basic style of advocacy should be courteous, quiet, and thoughtful as well as lucid. There are always moments when it is necessary to be more forceful, for example when a witness is holding material back or when a judge is not doing justice to your point. But the forcefulness gains more weight if it emerges in contrast to what is in general almost a conversational style. In short, we

should never declaim or speak to our tribunal in a manner by which we ourselves would be antagonised. In the same way controlled passion can be very effective, but not if the currency is debased by too frequent use.

All this differs from advocacy as some practised it in Victorian times. Then, it seems, the role of the advocate was often to create fear in opposing witnesses and to declaim to the jury. Listen to the way that Anthony Trollope, in *Cousin Henry*, describes the skills of the barrister called Mr Cheekey:

"He could pause in his cross-examination, look at a man, projecting his face forward by degrees as he did so, in a manner which would crush any false witness who was not armed with triple courage at his breast, - and, alas! not infrequently a witness who was not false."

This reflected a generally gladiatorial style of advocate, locked in combat with the witness and his opponent, generally seeking to impress the jury more than the judge. In those days of course the public, which still treated public hangings as a carnival, expected Court proceedings to be dramatic theatre. Society ladies sat on the bench with the judge watching the spectacle. The doorkeepers recognised they were in the entertainment business and sometimes charged for entry. But even at this time the mainspring of the art of some advocates was the same as it is today: to seek to know what the tribunal is, or may be, thinking and to present a more quietly reasoned argument. Of James Scarlett, later Lord Abinger, it was said by the Duke of Wellington, "When Scarlett is addressing the jury, there are thirteen jurymen".

So advocacy even in Victorian times was not just declamatory. Wrottesley, whose book I have mentioned, drawing on an earlier work by Edward W Cox, *Sergeant-at-Law*, suggests a delicacy of style when touching on the art of cross-questioning or cross-examination:

"There are two styles of cross-examination, which we may call the savage style and the smiling style. The aim of the savage style is to terrify the witness into telling the truth; the aim of the smiling style is to win him to a confession. The former is by far the most frequently in use, especially by young advocates, who probably imagine that a frown and a fierce voice are proofs of power. Great is their mistake. The passions rouse the passions. Anger, real or assumed, kindles anger. An attack stimulates to defiance. By showing suspicion of a witness, you insult his self-love - you make him your enemy at once - you arm his resolution to resist you - to defy - to tell you no more than he is obliged to tell - to defeat you if he can."

As one senior advocate put it to me when I was young, the best cross-examination results are achieved by kindness. When preparing cross-examination, wherever possible it is a salutary discipline to frame the questions in such a way as can only permit of the answer "yes".

There is a neat story still from the 19th century which illustrates how this gentler quality of advocacy has often triumphed over the talent of a more ostentatiously dramatic contemporary. Lord Brougham, another Scot to practise at the English Bar, was against Scarlett in a succession of cases on

Assize. At the end of the series of cases, of which Scarlett had won twelve and Brougham had won one, a juror met a barrister in the street and said to him:

"Well that lawyer Brougham be a wonderful man: he can talk he can: but I don't think nowt of lawyer Scarlett."
"Indeed," was the barrister's response: "You surprise me. Why have you been giving Mr Scarlett a!! the verdicts?"

"Oh, there's nothing in that," said the juror, "He be so lucky, you see, he be always on the right side."

Moral: we should always make our case seem simple, obvious and common sense, and we are then, hey presto, always on the right side.

The way in which we lay out the argument may depend on the stage of the case. In opening, we may to some extent be setting out the arguments in an exploratory way, so as to test the way in which they appeal to the Court. Whilst we will have selected the issues we wish to advance, we may sometimes put them forward tentatively. We wish to encourage the judge to believe that the point is one which he, or she, has thought of for themselves.

This way of gaining the sympathy of the Court is illustrated in the story told - perhaps apocryphally - of a comment of Lord Halsbury to his colleagues when discussing the qualities of certain advocates. He said: "X is the best advocate I have ever heard." Since X was commonly regarded as somewhat lacking in the highest skills, his colleagues queried Lord Halsbury's judgment. Lord Halsbury explained: "X always argues in such a way as to give the impression he has got a wonderful case being spoiled by a third class advocate." There again I think there is a moral. One of the undoubted skills of an advocate is to put a point, if he can, in such a way that the judge feels sorry for us, takes it up, expresses it better, and then makes it his own, because then it's home for sure.

This technique of laying the arguments out, without being too precise until the Court indicates which are of interest, may work in opening. But it has no place in reply. The importance of a reply is sometimes understated. For, by this time, the rival arguments are set out with clarity. Here is an opportunity, to which your opponent has no response, to summarise his or her arguments, and to refute them one by one. By this stage of the case the arguments are finely-honed, precise, and any weaknesses in the opponent's case can be nailed by precise surgery. We can also put our own gloss on those arguments, and illustrate by example where they might lead, and we can occasionally slip in that slight forensic extravagance which can be safely used if we have the last word.

But what of the part that judges play in our advocacy? For much of what we do must inevitably depend on the quality of the tribunal. The most difficult task for an advocate is when he is unsure whether a court is grasping the argument. This tends

to promote a despairing repetition, or even a declamatory haranguing, from even the most lucid of advocates. But, in addition to quality, which is so important, judges have their idiosyncrasies and it is worth studying them. I once heard an advocate asked for an example of a "good win". He responded "Success before Lord Denning, when you have all the law but none of the merits on your side."

Often the judge's interests, and idiosyncrasies, are revealed in the course of argument during the case. This means that no preparation can be too inflexible. Once, as a young advocate, I was set the task of representing a rather amiable businessman of what I would call the old school, under the old drink/driving law. The businessman had imbibed generously, to the extent of about 300mg/100ml. He adamantly pleaded not guilty, impressing on me that whatever other people were like he was perfectly able to drink that amount and drive properly. He was, however, wholly unable to remember why his car had collided with a bollard in the middle of the road, where the Police had

found him slumped over the wheel. Prospects were not bright. The Stipendiary Magistrate was, however, much decorated in the war, in advanced middle age, of a comfortable, mildly self-indulgent personality, dining at his club, courteous to his wife, and kind to children and dogs. In short he was virtually the mirror image of my client. When my client took what I thought would be the final damaging step of insisting on giving evidence,

the Magistrate saw a kindred soul and tried to help him and as we called it tried to run him out.

"Well you have to explain why you had the accident. Is it possible that there was a car on the wrong side of the road which caused you to swerve?"

"I wish I could say so, Sir, but I cannot remember one."

"I wonder then was visibility impeded by the rain, and bad street lighting?"

"It was, Sir, alas a moonlit night for driving with only a slight drizzle and and quite good street lighting."

"Is it possible that the vehicle had a steering failure?"

"I had the system checked the next morning, and it was all right."

My client steadfastly resisted all the opportunities offered to him. Come the time for me to make my hopeless and dramatic final speech. I had prepared a note well before the case began. In despair I threw the notes away, and said that I would make just three points. First, my client was a decent, upright Englishman who during a long career had served his country well. The magistrate nodded. Secondly, my client was clearly honestly adamant that he was capable of driving on the evening in question. The magistrate again nodded. Thirdly, my client had been too upright to resist the Magistrate's very honourable attempts to bring objectivity into the case by attempting to find out why the accident had happened. He had in short declined any attempts to help him contrary to his own

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version of the truth and was he not therefore an honest man who should be believed when he said that he could hold his drink. The Magistrate nodded, instantly acquitted him, and the two old soldiers bowed to each other in mutual admiration and the Court closed for the day. The point of this story is not my own eloquence, nor the quality of English businessmen, but simply to indicate that the only arguments which matter in the end are those which appeal to the tribunal. And it is those that we have therefore to be searching for in our adaptability.

May I turn from that somewhat trivial story to consider a little the advocate of the future. Some years ago I found myself in Las Vegas for an ABA Conference. Some people who regard litigation as a lottery would no doubt regard this as a highly appropriate venue. Perhaps this is why Chief Justice Warren Burger chose the occasion to lay out his view of what would be required of the lawyer of the twenty-first century. In a memorable phrase, he said that the public would increasingly expect lawyers to be "reconcilers not warriors, healers not hired guns". Will this be a general impetus? For, if it is, it obviously will have to apply equally to the advocate as to other lawyers. In one sense the advocate, as part of the system of the administration of justice, has always been part of a process which is intended, we may often forget, as a healing element in society. A fair trial is, after all, an alternative to lynch law, to trial by battle or to trial by ordeal, and in that sense is a civilised way of resolving disputes. But, under our adversarial system, it is still often seen, certainly at home, as very gladiatorial. It is also inaccessible to most people in civil proceedings without great cost and without substantial delay. In my own country, I increasingly doubt whether people generally want their disputes resolved under a formalistic process, which takes a long time for actions to come to Court, and where they have to harness so many financial and emotional resources to go through what for them is a personal ordeal.

This attitude will, if it continues, inevitably point more and more to alternative dispute resolution. Industries may develop their own complaints resolution procedure: some have them already - complaints procedures against solicitors, ombudsmen to hear complaints against banks and building societies, arbitration within the travel industry, as well as our Press Complaints Commission. The creation of all these alternative dispute agencies reflects a realisation that a highly-developed adversarial system of law may in certain cases operate to frustrate rather than to facilitate justice. Matrimonial disputes, where the custody of children is involved, call as we all know, for extremely sensitive handling, and there is growing recognition that conciliation is much to be preferred to an adversarial contest. I do not know whether any of this strikes a chord in New South Wales but, if we move at all in this direction, then what is to be the modified role of the advocate?

The advocate will clearly have to develop techniques appropriate to alternative dispute resolution. Whether the process is done in writing or orally, the essential task of persuasion lies at the heart of mediation, and of alternative dispute resolution, just as much as it does in the more orthodox form of adversarial conflict. Those skills will need to be available in all areas where legal disputes have to be resolved. They are also needed in the mundane, workaday areas of the law

which are often so vital to the client. In his Hamlyn Lectures as long ago as 1973, Lord Scarman commented on the amount of law affecting the individual - such as social security law - which was then largely ignored by the practising profession. Much has changed in this direction in the intervening years. At once this makes the task of the lawyer more humdrum, more prosaic and more day-to-day, but also more uniformly relevant.

But I think that whatever the merits of informal dispute resolution, there will always be some civil cases in which there are crunch issues which need to be resolved in Court. Traditionally all these issues have been decided by full oral procedures. More and more, in our own Appellate Courts in England as well as in the Commercial Court, a written element has been introduced, and the tribunal is asked to read key documents in advance. I do not personally believe that we should curtail oral advocacy as drastically as it has been foreshortened in some Appellate Courts in the United States. But I do equally believe that in England certainly the balance has further to tilt in favour of the written argument. The time saved can be great, and it enables the parties to get to what is the heart of the case. In my experience, the central and most challenging aspect of appellate advocacy, and, indeed, of much advocacy in civil cases in the trial Courts, comes when the advocate is asked to respond to questions from the judges. These are the areas of doubt which, when we're dealing with intelligent judges, have to be resolved, and we as advocates have to seek to ensure that the framework is provided in an uncluttered, efficient way so that we can speedily reach the heart of the case.

There will still, however, be some situations where the full adversarial procedure will be necessary. Many criminal cases, where there is a straight contest of fact, need to be rigorously explored through examination and through cross-examination. And so this will be in civil cases where there is a dispute between witnesses. Written statements can be exchanged, but there is still scope for the traditional art of cross-examination. We will never be able to assume that all witnesses will be truthful, or that none will be mistaken, and there will be no substitute in these cases for perspicacious cross-examination. But in the vast majority of cases without significant factual dispute, there seems no reason why much of the advocacy should not be written, and sensible limits placed on oral argument. Such limitations on the scope of a trial would not be a denial of justice. On the contrary, they would facilitate a more effective and economical resolution of the dispute. They would help to ensure that the costs of a trial are kept within some sort of bounds, or so, at any rate, it strikes me on the basis of English experience. But I would make on this the final point that it will make more rather than less demands on the advocate and we must never forget that the written arguments we put forward are as much exercises in advocacy as the oral argument.

What, if I may draw to an end, of the framework within which we as advocates must practise? I deliberately use the word advocate, as I have done throughout, because this, rather than the term barrister or the term solicitor, to me emphasises the true nature of the role. But it is a distinct role, the role of the advocate, different from other aspects of practice of the law. I happen to believe that advocacy is a speciality. It is a full-

time, not a part-time occupation. It is not a business. It is a calling. As everyone in this room knows, it is damnably nerve-racking, often exciting, highly time-consuming, and all-absorbing. It demands the most total dedication, striving and commitment throughout the duration of a case. And our work is visible, it calls for instant and intuitive judgments, and the advocate carries an immense burden of accountability to the client. For standards to be maintained, it is important that those societies which value advocacy should continue to recognise it as a separate professional activity.

But it is not a narrow activity. The work of the profession of advocate does not end with the individual case. We are all as a profession involved in the development of our system of law, and its procedures, and in the need to keep them in tune with the requirements of society. This has not always been sufficiently appreciated in England. It was not until six years ago that the Bar Council had a Public Affairs Committee. It was previously thought that anyone who happened to be interested in wider aspects of the law could take part in the work of the great law reform agencies such as JUSTICE. This is all very well, but the profession itself has an important and cohesive role to play in promoting sensible developments in the law. We have our part to play in the reform of law and procedures. We have to be vigilant to assist and uphold human rights, especially those of minorities. This is of the essence of our profession. One of these rights is the right of individuals to representation in Court. This obviously includes wherever possible an effective and properly funded legal aid system. But it also includes the principle that all litigants are entitled to a lawyer of their choice. It is easy for us, practising in England and Australia, to forget the immensity of our privilege to practise before independent judges of integrity, and to advance our client's case without fear of any personal impact upon ourselves. This, on one level, is a tribute to the effectiveness of the cab-rank principle which, since the days of Erskine, lies at the heart of our profession. We have seen attempts to whittle away at the cab-rank principle in the United Kingdom, and a few advocates who say that they will not, for example, act for the Police or act against Trade Unions. I believe it remains of immense importance that our services should be available to all comers. This principle not only serves the public but enables the profession freely to carry out its work. We have known this freedom so long that we tend to take it for granted. But experience elsewhere in the world suggests that we have to be on guard to maintain it. Here our professional body, and a united professional body and the work we do for it, has a key role.

May I conclude. I have not attempted to talk of detailed techniques or tricks of advocacy. They exist, but some of them are not always very worthy and those that are are of less importance than the general principles which each of us can seek to apply according to our own instincts, personalities and the needs of the case. I have spoken perhaps for too long and I'm sorry for that. If you had asked me to describe good advocacy in but a single sentence, instead of the time you generously allowed, I would simply have reminded you of Sir Owen Dixon's words which for me summarised it: Advocacy is "tact in action". □

Readers Re-unite

On 6 August 1990, a group of eager young (ish) persons assembled in the Bar Common Room to embark upon a thankless round of papers, lectures, videos, talks by important people, ethics enigmas and yet more lectures and papers. On 27 August, 1990 an appreciative Bar Association, in recognition of the Readers' hard work and David's increased revenue, donated practising certificates to these pioneers of the reading programme.

In August 1991 they reunited ... The first Annual Reunion of the August 1990 Readers took place on 23 August 1991 at the Forbes Hotel Grill Room. In answer to a Summons from Messrs Needham and Colyer, thirty-four of the sixty readers came to swap stories of what they said to the Judge, what the Judge said to them, how they foiled the Prosecution, their masterful ways with consent adjournments, and the like. Food and drink were had by all, some more than others. Perhaps the night was best summed up by the following letter, from Peter McGrath (who would probably prefer to remain nameless):

26th August 1991

Messrs. Need'em and Collar ya,
Solicitors,

Dear Sirs,

GOODWIN AND GREENWOOD v. AUGUST 1990 BAR READERS

I appeared for the respondents at the Forbes Grill Room on 23 August 1990 before a rather full bench. So did a lot of other people. The hearing did not run smoothly. The arguments of the various parties appeared to lack direction and coherence as the hearing wore on. Judgment was delivered early on Saturday morning.

Although the costs awarded were high, given the joint and several (and continuing) liability of the respondents, I feel they escaped lightly. I would not consider you appealing in any circumstances. Please return my briefs.

Yours faithfully, (sgd) Peter McGrath

The Goodwin and Greenwood contribution to the success of the Readers' programme was acknowledged - we invited them. The success of the Readers' programme itself is apparent through the numbers who replied (responses were received from all but two of the readers) and those who eventually came (45 said they would come, but 9 were unable to do so for various reasons). The camaraderie engendered by three weeks of enforced proximity had not disappeared over the passing of a year, and the consensus was that the reunion should be an annual event. If the spirit of the Bar tended towards effervescence nearing the end of the evening (that Opal Nera Sambucca is a killer) the friendships and support forged during August 1990 should indicate to those in charge of it that the full-time Readers' Programme is, on balance, a Good Thing.

PS: To those who haven't yet paid: We know where you live.

□ Jane Needham