RULES OF APPELLATE ADVOCACY: AN AUSTRALIAN PERSPECTIVE

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I. ADVOCACY AND AUSTRALIAN COURTS

Australia is a common law federation. Its constitution,[1] originally enacted as an annex to a statute of the Parliament of the United Kingdom, was profoundly affected—so far as the judiciary was concerned—by the model presented to the framers by the Constitution of the United States of America.[2] The federal polity is called the Commonwealth, a word with links to Cromwell and American revolutionaries, a word to which Queen Victoria was said to have initially objected. The colonists were insistent; Commonwealth it became. The sub-national regions of the Commonwealth are the States. There are also territories, both internal[3] and external,[4] in respect of which, under the Constitution, the federal Parliament enjoys plenary law-making power. In the internal territories and the territory of Norfolk Island, a high measure of self-government has been granted by federal legislation.

When the Commonwealth of Australia was established there were already courts operating in each of the colonies that united in the federation. They became the state courts. Generally

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1. AUSTL. CONST. (Constitution Act, 1900, 63 & 64 Vict., ch. 12 (Eng.)).

2. Sir Owen Dixon, Chief Justice of Australia (1952-64), observed that the framers of the Australian constitution "could not escape" from the fascination of the United States model. *Cf.* The Queen v. Kirby (1956) 94 C.L.R. 254, 279 (Austl.).

3. The Northern Territory of Australia and the Australian Capital Territory.

4. These include many island territories scattered around continental Australia. The Norfolk Island Territory enjoys self-government. The other Territories include Christmas Island, the Jervis Bay Territory, and the Australian Antarctic Territory.

speaking, there were three tiers: the Supreme Court of the State, a District or County Court, and the Magistrate's Courts (commonly now called Local Courts or Courts of Petty Sessions). The constitution provided for the creation of what it called a "Federal Supreme Court" to be known as the High Court of Australia.[5] It permitted the federal Parliament to create other federal courts.[6] The one important point of departure from the United States model for the Judicature was a provision by which federal legislation could vest federal jurisdiction in state courts. For the better part of the century, until the late 1970s, federal courts were few. Save for the High Court of Australia, their jurisdiction was narrow. But then the Federal Parliament created the Family Court of Australia[7] and the Federal Court of Australia[8] to exercise federal jurisdiction in specialized federal matters of national concern. Since that time, the work of the federal courts has grown exponentially, generally at the cost of the state courts.

At federation in 1901, appeals lay from decisions of the State Supreme Courts and of the High Court of Australia to the Judicial Committee of the Privy Council in London. An important exception was provided in the case of certain constitutional questions.[9] This system persisted for more than seventy years. It was finally terminated in 1986 by enactments passed concurrently by the Australian Federal and State Parliaments and by the United Kingdom Parliament.[10] After that year, the High Court of Australia became, in constitutional as well as general legal appeals, the final appellate court of the nation in all matters. Its character is stamped by the fact that it is a court of general legal jurisdiction as well as an ultimate constitutional court.

The High Court of Australia has an original jurisdiction under the Constitution, with many provisions modeled on those in Article III of the United States Constitution. Except for the constitutional writs, which permit constitutional questions to be

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5. AUSTL. CONST. ch. III, § 71.
6. *Id.* §§ 71-73.
7. Family Law Act, 1974 (Austl.).
8. Federal Court of Australia Act, 1976 (Austl.).
9. AUSTL. CONST. ch. III, § 74.
10. *See* Australia Acts, 1986 (Austl.).

brought directly to the High Court, the original jurisdiction has declined with the growth of federal courts. However, the Court's appellate jurisdiction expanded greatly, to such an extent that a break was needed if the Court was to be able to cope. That break was provided in 1976 by an amendment to the Judiciary Act of 1903[11] requiring that, in civil and criminal appeals, special leave of the High Court is needed before an appeal may be heard. This provision creates a gateway through which an applicant must pass if a full appeal is to be heard. That gateway is controlled by the seven Justices of the High Court.

Applications for special leave to appeal are rarely dealt with on the papers. Ordinarily, they are grouped for hearing of about twelve matters on "special leave days." Commonly two Justices sit to decide whether to grant or refuse special leave. Sometimes three Justices will sit, particularly if the case is important or the result of the application appears problematic. Generally, of twelve applications, one or two will be granted in the day. Interestingly, many of these applications are heard by video-link. The Justices ordinarily sit at the seat of the Court in Canberra, Australia's federal capital. The lawyers (and their clients) appear at a courtroom in the capital city of one of the outlying States or the capital of the Northern Territory of Australia (Darwin). Parties are normally represented by barristers briefed by solicitors. Solicitors can and do appear without counsel. So do litigants in person. Depending on the legal tradition of the jurisdiction concerned, barristers ordinarily wear traditional legal dress of robes and wigs. The Justices of the High Court of Australia discarded wigs in 1986. They wear a simple black robe that appears not unfamiliar to United States visitors.

In special leave applications the parties are allotted twenty minutes to advance their case. After seventeen minutes they face a yellow light. The red light shines after twenty minutes and they must stop. Often their opponents are not called upon if the case is clearly one in which special leave should be refused. If the respondent is called on, the applicant has five minutes to reply. The imposition of time limits adds great stress to the work of advocates. But the days are also intensive for the Justices

11. Judiciary Act, 1903, pt. V, § 35.2 (amended 1976) (Austl.).

who, sitting in different combinations, must keep in mind the detailed issues of complex cases that have already been through one appellate court—state, federal or territory. Short reasons are given for refusals of special leave. Cases granted special leave are assigned to the general hearing list of the High Court. Australian judges and advocates are generally resistant to the determination of proceedings on paper alone. One unexpected phenomenon of video-links is that it tends to abbreviate oral submissions when compared with the time ordinarily taken by advocates who turn up in the flesh.

There is no similarly strict time limit or flashing lights for cases assigned to the appellate list of the High Court of Australia or in cases within the original jurisdiction of the High Court.[12] However, in large cases the matter will often be called over before a single Justice to fix a timetable for written submissions (which are ordinarily substantial) and for the presentation of oral argument.

Most appeals to the High Court of Australia are heard by a bench of five Justices. Commonly the hearing of appeals involving general legal points is concluded within a day. Appeals or original proceedings involving the Constitution may take a longer time, as may very important questions of general law such as those concerned with native title in Australia.[13] There are three courtrooms in the High Court building in Canberra, a modern building that signaled the shift of the seat of the Court to the nation's capital in 1980. The first courtroom is reserved for cases in which the seven Justices sit, as they invariably do where the Constitution is involved or when some other general legal principle of importance is raised. The second courtroom accommodates five Justices and is the ordinary working room of the Court. There is also a courtroom for a single Justice to deal with practice matters.

For nearly thirteen years before my appointment as a Justice of the High Court of Australia in 1996, I served as President of the Court of Appeal of the Supreme Court of New

12. Under the Australian constitution, section 75(v) constitutional writs are available against officers of the Commonwealth in cases of alleged unconstitutionality or other illegality.

13. *See, e.g.*, Wik Peoples v. Queensland (1996) 187 CLR 1 (Austl.); Mabo v. Queensland [No 2] (1992) 175 CLR 1 (Austl.).

South Wales. This is the largest and busiest of the permanent appellate courts of Australia. There are eleven permanent appellate judges in that Court. They carry an extremely heavy workload. Whereas in an average year a single Justice of the High Court will sign about 80 to 90 opinions, in my last year as President of the Court of Appeal, I signed nearly 400—many being revisions of reasons earlier delivered ex tempore. Working in the Court of Appeal involved different pressures for judges and advocates from those experienced in the ultimate court of Australia. In the High Court, the case flow is reduced but, of their nature, most matters are complex and important. Yet the skills required of advocates are substantially the same in both courts.

Necessarily, in an ultimate court, there may be marginally less attention to past precedent, especially of courts other than the High Court of Australia itself. Furthermore, in an ultimate court, there tends to be more attention to issues of legal policy and legal principle. Rules of general law laid down by the Court must operate throughout the nation, can only be amended by Parliament and, if involving a constitutional question, can only be changed by the Court itself or by the Federal Parliament with the approval of a referendum of the electors of Australia, carried out in accordance with the Constitution.[14]

A Justice of the High Court of Australia gains a perspective of the quality of advocates from all over Australia. This experience is enhanced by the continuance of a tradition, which dates back to the days before the Court building in Canberra was opened, whereby the Court conducts a circuit to some of the outlying States for sittings one week each year. The basic requirements of appellate advocacy are common to every appellate court. There is no jury, yet persuasion is still important. There are no witnesses, and the judges must work from transcript and pre-read written argument. Yet the advocate must bring the case to life. If possible, he or she must show the merits (even if only the legal merits) of the case.

On the eve of my departure from the Court of Appeal, I wrote an essay identifying ten rules of appellate advocacy for

14. AUSTL. CONST. ch. VIII, § 128. This provision requires that a proposal to amend the constitution must secure a majority vote of all the electors of the Commonwealth as well as a majority vote of the electors in a majority of the States.

Australian advocates.[15] Necessarily, it was written from my perspective after more than a decade in the central seat of an extremely busy state appellate court of general jurisdiction in Australia. It also called on my experience sitting in the Court of Appeal of Solomon Islands. Most of my ten rules remain true for the ultimate national court on which I now sit. To limit the rules for advocates to ten and, indeed, to call them "rules" is a presumption. No simple set of rules will ever suffice to encapsulate the basic requirements of good appellate advocacy. No amount of time or thinking about such rules will substitute for the experience of conducting oral argument, or even closely watching other good advocates. Nevertheless, the rules may help to organize some thoughts that an advocate, seeking to succeed before an appellate court, will do well to consider. Obviously my rules would need adaptation in jurisdictions of the common law where procedures are significantly different from those that we follow in Australia and other countries of the same tradition.

II. TEN RULES

1. Know the Court

In the New South Wales Court of Appeal, the Court will make available to the parties, on the afternoon before the case, the names of the judges rostered to participate. Informed advocates will know, or soon find out, the general predilections, philosophy and attitude of the judges assigned to the case. Presupposition about judicial opinions, based upon result-oriented analysis, may be dashed in a particular decision. But every experienced appellate advocate will be aware that different judges have different interests and distinct approaches to the three determinants of many an appeal: legal authority, legal principle, and legal policy.[16] In the High Court of Australia, there is no pre-announcement of the names of the Justices who will sit, either on special leave applications or on an appeal.

15. *See* Michael D. Kirby, *Ten Rules of Appellate Advocacy*, 69 AUSTL. L.J. 964 (1995).

16. *See* Oceanic Sun Line Special Shipping Co. v. Fahey (1988) 165 C.L.R. 197, 252 (Austl.) (Deane, J., dissenting).

Obviously, if a constitutional question is involved, the advocates will know that all of the seven justices (save any who are disqualified) will participate. But in other appeals, original proceedings and special leave applications, the advocate must be prepared for any combination.

Having discovered, or worked out if they can, the composition of the Court, it will be no bad thing if advocates can find authority, particularly recent authority, from the sitting judges relevant to the issue at hand. It is important to check the recent cases. The judges will tend to know these because the probabilities are that one or more of them will have participated. Nowadays, electronic systems permit speedy analysis of legal issues, including by reference to the opinions of particular judges. Knowing the court is not simply a matter of pandering to particular judicial egos. It is also vital to know how the court operates. In the High Court of Australia, there is no system of pre-hearing assignment of the obligation to prepare the first draft of the Court's reasons. Obviously, some of the Justices may have a greater interest in certain areas of the law than in others. Although before the hearing all judges will usually have read the opinion under appeal and reviewed the written submissions of the parties, typically one judge will have a more detailed knowledge of the appeal papers and of the issues. The art of the advocate may be to attempt to carry that judge. But if it appears that he or she is antagonistic, it may be vital for the advocate to work particularly hard on the other judges—seeking to fill gaps in knowledge that the primary judge may not care to recognize.

2. *Know the Law*

It is vital that any advocate appearing before an appellate court know the basic procedural rules that govern the bringing of the proceedings to the court. Checking that the appeal is in the right place may also be important because some appeals and summonses are assigned to single judges with further appeal only by leave. It may also be a wise precaution to check, at least in important cases, that the required written submissions and other documentary material (e.g., chronologies, affidavits and narratives) have been received by the judges.

Commanding the detail of the facts of the case and thoroughly researching the applicable law go without saying as

prerequisites of the successful advocate. The advocate who has not really mastered the papers is soon exposed in Australia by sharp judicial questioning. Once so revealed, it is very difficult for that advocate to recapture the confidence of the court, at least in the case at hand. The court is then forced to the realization that it will receive inadequate assistance and be obliged, unaided, to research the facts, or the law, fully for itself. Advocates who present in this way on a couple of occasions may have good excuses. They may be too busy. But the result will be that their reputations in the appellate court will be shattered. They may be able to deceive their clients and those instructing them, but they will rarely deceive the court.

Certain legal developments of a general character must be understood by any appellate advocate in Australia today. One of them affects the gateway to appellate review of facts. Authority of the High Court of Australia limits the power of appellate courts to disturb primary decision-making where it rests, directly or indirectly, upon judicial findings based on the credit of parties or witnesses.[17] Science casts doubt upon the capacity of a judge, or anyone else, to decide the truthfulness of a witness's testimony by appearance—and particularly in the artificial circumstances of a courtroom. Some observers consider that a far greater advantage of the primary judge over an appellate court is the opportunity to see the whole of the evidence unfold in sequence, to absorb its detail and to have the opportunity to reflect upon it, in its entirety.[18] Typically, the appellate judge does not have the time to read every page of the appeal papers. In Australia, the judge is often heavily reliant upon the advocates to highlight crucial passages of the evidence.

An appeal, even by way of rehearing, is not an occasion for a revisit to all of the supposed wrongs of a trial. Still less is it an opportunity to salve the wounded feelings of an advocate who thought the trial was won. It should never be forgotten that the process is an *appeal*. It is necessary to show that the primary decision is wrong. In finely balanced decisions, upon which

17. *See, e.g.*, Jones v Hyde (1989) 63 A.L.J.R. 349, 351 (Austl.); *but see* State Rail Auth. v. Earthline Constr. Pty. Ltd. (1999) 73 A.L.J.R. 306, 331 (Austl.) (giving exceptions).

18. *See, e.g.*, Lend Lease Devs. Pty. Ltd. v. Zemlicka (Ct. App. 1985) 3 N.S.W.L.R. 207, 210f.

differing judicial minds could reach differing conclusions, appellate courts will ordinarily give great respect to the advantages and opinions of the primary judge. The process of appeal is thus concerned with demonstrating error.

Therefore, a good advocate will present the appeal in a quite different way than the primary hearing was conducted. This is also why advocates who are wonderful in the constructive work of a trial may be less impressive in the often critical and destructive business of appellate advocacy. In ultimate courts, the technique of permission will require that less attention be given to factual nuances and more to legal differences and issues of legal policy. Justice Ruth Bader Ginsberg acknowledged the common reputation of appellate judges amongst their trial brethren: "They are the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded."[19] There is more than a grain of truth in this accusation, but it derives from the abiding appellate search for error.

3. *Use the Opening*

The opening words of the advocate in an appeal can be an important opportunity to seize the attention of distracted and over-worked decisionmakers. The point of attention may be the merits or justice of the case. It may be an interesting issue of legal policy. It may be the clear requirement of legal authority. Sir Anthony Mason, a former Chief Justice of Australia, suggested that advocates should search for an exhilarating or humorous way to catch the attention of the court at the outset.[20] However, one leading Australian advocate has, rightly in my view, cautioned against forced humor.[21]

Many judicial officers, myself included, usually commence their opinions with a sentence or two explaining the central issues at stake in the appeal, a citation from authority designed to achieve the same object, or a reference to an arresting fact

19. *See* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 64 WASH L. REV. 133, 143 (1990).

20. A.F. Mason, *The Role of Counsel and Appellate Advocacy*, 58 AUSTL. L.J. 537, 542 (1984).

21. D.F. Jackson, *Appellate Advocacy*, 8 AUSTL. B. REV. 245, 250 (1992).

that will intrigue the reader and capture his attention. The advocate should seek to do likewise. The opening is generally the one moment when the advocate has the undivided attention of all members of an appellate court. Do not squander the moment by plunging straight into the reading of a tedious extract from legislation or a lengthy citation of authority. The opening is the headline. It is the chance to communicate the advocate's basic point of view. It is a moment for selectivity. First impressions are often important.[22] The good advocate will therefore give a lot of thought to the opening oral argument and to the strategy of explaining the case to the court.

One very important point to understand is that the advocate will usually know much more about the case than any of the judges. No matter how clever and experienced the judges are, the pressure of work upon them today is such that few, if any, will have read the appeal papers from cover to cover. Few will have thought about them at any depth. It is important for the advocate to lay out the issues and at least the principal facts. This should be done, even in the face of some judicial resistance. Otherwise, it may not be possible ever to communicate the key issues to the minds of all of the decisionmakers.

4. Conceptualize the Case

An advocate's mind naturally hastens to the strongest (and weakest) points in a case.[23] Most decisionmakers are interested in the merits and in correcting injustices, if they lawfully can.[24] Thus the advocate will do well to exercise discipline and to think through the issues—identifying the strengths and weaknesses of the argument to be pleaded. Candid acknowledgment of a problem may even enlist the assistance of the court, if the merits suggest that course. In the end, the decisionmaker must conform to the law and the law may not permit the correction even of an apparent injustice, but the

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22. *See* Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, LITIGATION, Spring 1994, at 3, 4.

23. *See* Harry Gibbs, *Appellate Advocacy*, 60 AUSTL. L.J. 496, 497 (1986).

24. *Id.*

merits of the case are usually very important to any judge sworn to do justice.

5. *Watch the Bench*

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

I do not underestimate the difficulty of capturing the attention of all members of a multi-member body, especially if they are as many as seven or nine. Different judges, for example, have different attitudes to particular tools of advocacy. Some like and even encourage the presentation of Ministerial Second Reading Speeches in aid of statutory construction. Some appellate judges in Australia make no secret of their view that such materials are generally worthless.[25] Differences in multi-member courts may even extend to the choice of a dictionary to be used in argument about the meaning of words. Some judges are attracted, in appropriate cases, to international human rights jurisprudence. Others regard it as completely heretical or irrelevant.[26] A good advocate, faced with such divergences of opinion, will play the field with gentleness but persistence: winning the one with good humor without losing the other.

Watching the judges' reactions to arguments can help the advocate know how far to push an issue and when enough has

25. Obviously, their limitations must be acknowledged. *See, e.g.*, In re Bolton (1987) 162 C.L.R. 514, 518 (Austl.).

26. See, e.g., the differing opinions expressed in *Young v. Registrar, Court of Appeal [No 3]* (Ct. App. 1993) 32 N.S.W.L.R. 262 (CA). *See also* Mabo v. Queensland [No 2] (1992) 175 C.L.R. 1, 42 (Austl.).

been said. Invariably, the advocates who make the biggest impact on an appellate court are those who, at least for a time, stand away from their books and engage in a direct conversation with the bench. They will have thought through their case. They can encapsulate its strengths and acknowledge its weaknesses. They show the appellate judge the way, if possible, to reach a just and lawful conclusion.

6. Substance Over Elegance

It is, of course, preferable that everything done in a courtroom be done with style. In an appellate courtroom, which misses much of the drama of the trial, the central skills are somewhat different. I have always thought that good appellate advocates will concentrate on substance. That is what their audience is usually interested in. If substance can be presented with style, so much the better. Many times, at the end of argument, I have watched and waited as counsel of high talent go through their notes to make sure that every point of importance has been covered by their submissions. Such waiting is often worthwhile. Nowadays appellate courts in Australia are more lenient in permitting post-hearing submission of supplementary written arguments, by leave. But it is preferable that points should be covered before the judges depart the bench lest they hasten to judgment before brilliant, but late, thoughts occur to the advocate.

7. Cite Authority With Care

The tedious recitation of authority and the endless reading of old cases is the surest way of losing the attention of the decisionmaker. Where an earlier decision is read, the advocate should always state at the beginning or at the end, or both, the holding that is extracted or the principle for which the case stands. In the welter of case law today, it is necessary to show great discernment in the reading of cases to an appellate court. Analogous reasoning by reference to previous decisions involves a subtle process. The court will be helped if the advocate can quickly and accurately summarize the relevant facts of the case, state the decision, and proceed to the briefest possible recitation of the crucial passage.

One big change that has occurred during my fifteen years service in appellate courts in Australia is that the citation of English authority has declined as that of the courts in the other Australian jurisdictions, New Zealand, Canada, the United States, and elsewhere has increased. This is a process that is encouraged by the High Court of Australia.[27]

8. *Honesty at All Times*

The corollary of the immunity from being sued, which advocates enjoy in Australia for what they do in court as advocates, is that they are obliged at all times to be honest to the court.[28] In the appellate court, this usually means that the advocate who discovers binding or even persuasive legal authority that stands in the way of the propositions advanced to the court is duty-bound to bring that authority to notice. Difficult passages in opinions of appellate courts should be brought to attention. Advocates who do this faithfully are much valued by the judges. Their honesty is remembered. It adds to the most priceless possession of an advocate—reputation. It is easy today for a judicial officer or other decisionmaker to overlook a change of the law or to be unaware of recent statutory developments that may affect the case at hand. The advocate who brings to notice apparent difficulties of which the judicial officer was unaware, and then seeks to explain a way around those difficulties, will often enliven appreciative assistance, so far as the law permits.

9. *Courage Under Fire*

A silent appellate judge is a positive menace who may occasion an injustice by not exposing his or her preliminary views.[29] The actors in the appellate courts of Australia rarely complain of judicial silence. The bad old days of appellate rudeness and even bullying have generally been replaced with a mixture of courtesy, insistence, and efficiency. The advocate

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27. *See* Cook v. Cook (1986) 162 C.L.R. 376, 390 (Austl.).

28. *See* John Godbold, *Twenty Pages in Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 812 (1976).

29. *See* Galea v. Galea (Ct. App. 1990) 19 N.S.W.L.R. 263, 280.

must be ready to move with the judicial questions. If it is thought that insufficient time has been allowed to express the factual or legal foundations of the argument, a request for further time, courteously addressed to the court, will rarely be denied. Courage and determination are wonderful qualities in advocates. They must not wilt under fire.

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

10. Explain Policy and Principle

Once a case comes on appeal, and in particular in an ultimate national court, it is essential that the advocate should have considered the issues of legal principle and of legal policy that lie behind the case at hand. At least at these levels of the judicial hierarchy, it is typical for the decisionmakers to be reflecting, as they consider the arguments, the differential consequences of upholding, or rejecting, the contentions advanced in the appeal. There are some appeals in which the facts are clear, the law is well known, and the outcome is virtually automatic. But in most, there is real room for the advocate to maneuver.

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

The pressure on judges and advocates today has encouraged an increasing reliance in Australia on academic writings. No longer do the judges unreasonably require that

academic authors have died before their thoughts may be read to a court. The old days when legal principle and policy were ostensibly ignored in appellate decisionmaking and advocacy are gone forever. With greater candor about judicial choice comes a larger realization of the need to assist that choice with more than old case law, mutually inconsistent rules of statutory construction, and the citation of dictionaries that pleases everyone and no one.[30]

III. THE FUTURE

The rules that I have stated would have much less application in jurisdictions of the common law where an appellant (like the applicant for special leave to appeal in the High Court of Australia) is strictly limited to a fixed time for extended oral persuasion. The foregoing rules are therefore most helpful to those jurisdictions that continue to follow, so far as they can, the tradition of oral persuasion. This was the tradition that we all originally inherited from England. In most countries of the Commonwealth of Nations and in Ireland, that tradition is maintained. Only in recent decades has there been, for efficiency's sake, a shift to the requirement of detailed written submissions in the hope of saving time in court. In jurisdictions of the United States of America and those that follow their lead, strict time limits are commonly imposed for advocacy. More detailed written briefs must be filed than are usual in my country. Different necessities will obviously produce different rules. However, the situation in Australia is sufficiently similar to that in many other common law jurisdictions as to make the foregoing discussion applicable to countries far from my own.

If the pressure on appellate courts continues to increase in Australia and other common law jurisdictions that cling to oral persuasion, and if the appointment of more judges is either unacceptable or thought undesirable, new techniques will clearly be required. More appeals will require leave of the court. More decisions will be given without reasons or with only short reasons. More of the load will be shifted to the advocate. I would not rule out the possibility of requiring advocates in the

30. *See* Smith v. United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting).

future, in effect, to prepare submissions in the form of a draft opinion for the Court which, in some cases, the Court could accept as its own, with or without modifications. Preparing a draft opinion would certainly require the advocate to cast his or her mind into the judicial mode and to see the case as the decisionmaker must. This, indeed, is the ultimate challenge of the advocate: to see the case as the judges will, and thereby more effectively persuade the judges to see the case from the client's perspective. There are few occupations with so many perils, as well as so many exhilarating rewards when the work is well done. The skills of the advocate must therefore be sharpened and improved to avoid the moments of peril and to multiply the moments of deserved exhilaration.