

RUNNING APPEALS IN THE 21ST CENTURY
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- 1 It is immediately apparent that the topic for this session is a broad one.
- 2 What I have chosen to focus upon is the changing nature of the conduct of appeals. I speak from my perspective as an appellate judge. At Noel Hutley SC's request, I will also make some remarks on how different the perspective of an appellate judge is from the perspective of a barrister who appears largely in appeals, as I had done. Perhaps this aspect could be called 'things I wish I had known'.
- 3 In 1995 Michael Kirby famously identified 10 'rules' of appellate advocacy² and refreshed them in 2006.³
- 4 The 'rules' or 'ideals' were never intended as commands or to be permanently enduring. What is interesting, though, is to consider whether they need to be adjusted for 2018. For my part, I believe that they do. I think that some of them should be replaced. Some should be varied. Moreover, they need to be supplemented. This is because in the 21st century there are some significant departures from the way appeals have been traditionally conducted.
- 5 Michael Kirby's original 10 'rules' were as follows:

¹ Court of Appeal, Supreme Court of Victoria, Melbourne, Australia.

² Michael Kirby, 'Ten Rules of Appellate Advocacy' (1995) 69 *Australian Law Journal* 964.

³ Michael Kirby, 'The Future of Appellate Advocacy' (2006) 27 *Australian Bar Review* 141. Justice Ruth Bader Ginsburg made her own remarks on appellate advocacy in 1999: Justice Ginsburg, 'Remarks on Appellate Advocacy' (1999) 50 *South Carolina Law Review* 567. Other judges, especially in the United States, have given their accounts of years on an appellate bench and made assessments of how appeals should be conducted: Justice Robert H Jackson, 'Advocacy before the United States Supreme Court' (2003) 5 *Journal of Appellate Practice and Process* 219 (originally published at (1951) 37 *Cornell Law Quarterly* 1); Justice Patricia M Wald, '19 Tips from 19 years on the Appellate Bench' (1999) 1 *Journal of Appellate Practice and Process* 7; Justice Rhesa Hawkins Barksdale, 'The role of civility in appellate advocacy' (1999) 50 *South Carolina Law Review* 573.

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

6 Many of these rules assume that appellate advocacy takes place wholly in the courtroom. Michael Kirby later added some general observations about the increasing use of written submissions, the impact of technology, and the rarity of senior female advocates in appeals.⁴ During the course of examining whether the original 10 rules need to be adjusted, I look at each of those issues.

Written Submissions

7 Turning first to the issue of written submissions in 21st century appeals.

8 In 2018 effective appellate advocacy requires the preparation of rigorous persuasive written submissions. This is critical for appeals for three reasons:

⁴ Michael Kirby, 'The Future of Appellate Advocacy' (2006) 27 *Australian Bar Review* 141.

- (1) The first is because appeals, unlike trials, require the identification of error in the judgment below;
- (2) The rigour and analytical clarity needed to identify error is facilitated by the written word, especially in the careful choice of language;
- (3) The task for an appellate court is ultimately a task in analytical writing. There is little substantive case management; there is no jury to manage; there are few preliminary steps that take any court time. Aside from the hearing – and I will say something about that in a moment – the role of an appellate court is primarily to engage in written legal analysis. If, in carrying out that task, the Court can pick up your written submissions and use your conceptual framework, your structure, and your language, you are more than half-way home.

9 In my view, written submissions now play equally as important a role as oral advocacy. Much as in the United States, they should no longer be seen as supplementary but rather as an indispensable means of persuasion.⁵

10 I consider that the best standard of written submissions is achieved if they are prepared on the assumption – usually fictitious – that there will be no opportunity for oral advocacy. Everything necessary to persuade the judge should be laid bare.

11 The rationale for that is clear.

⁵ Justice Ruth Bader Ginsburg notes that, with respect to appellate advocacy, written submissions are more enduring than oral submissions, and that in the United States it is seen as especially important that written submissions are well executed: Justice Ginsburg, 'Remarks on Appellate Advocacy' (1999) 50 *South Carolina Law Review* 567, 567-568. However, other judges see oral argument as being of 'controlling importance': Justice Robert H Jackson, 'Advocacy before the United States Supreme Court' (2003) 5 *Journal of Appellate Practice and Process* 219, 220 (originally published at (1951) 37 *Cornell Law Quarterly* 1). As for oral submissions, Justice Ginsburg and other judges warn against treating questions from the Bench as an interruption or intrusion when in fact they are a useful indication of the matters the judges think are significant: Justice Ruth Bader Ginsburg, 'Remarks on Appellate Advocacy' (1999) 50 *South Carolina Law Review* 567, 568-569. Others emphasise the fundamentals – that you should be professional, well-prepared and know your case inside and out so that the Bench can have confidence in what you say: Justice Robert H Jackson, 'Advocacy before the United States Supreme Court' (2003) 5 *Journal of Appellate Practice and Process* 219, 228-229 (originally published at (1951) 37 *Cornell Law Quarterly* 1), Justice Patricia M Wald, '19 Tips from 19 years on the Appellate Bench' (1999) 1 *Journal of Appellate Practice and Process* 7, 19-21.

12 There is now a firm expectation that judges come to the hearing of an appeal having read the reasons below and the bulk of all other relevant materials. This is not only because court time is increasingly precious. It also springs from a recognition that unless the Bench has a detailed understanding of the competing arguments, the opportunity may be lost for a meaningful exchange at the hearing.

13 The preparation by a judge for an appeal is extensive. Unlike a trial, there are few unknowns. Before coming onto the bench, a judge, in addition to engaging in a careful review of the judgment below, will have examined any statutory context and the principal authorities. The written submissions provide an opportunity for counsel to persuade the judge of their client's case during that critical stage of preparation. This is the time when an appellate judge is forming a view of the merits on the issues raised – albeit preliminary only and while keeping an open mind. The well-supported identification of error at this early stage can be powerful. Equally, so too can a well-reasoned defence of the judge's reasons below.

14 This is not to diminish the significance of oral advocacy when it does occur. It is instead to recognise that the purpose of an appeal hearing has changed. Ideally, it should not be used, and should not need to be used, to make judges familiar with a party's case. Rather, the hearing of an appeal has become a site for oral exchange with the Bench.

15 In my view, this brings with it a professional obligation on judges. It is incumbent on appellate judges to make parties aware of any legal or logical flaw they consider they have identified in a party's case. The inscrutable demeanour of a judge – once regarded as obligatory – has now diminished to vanishing point. Given the recent reports of judicial bullying, I might add that counsel should be given a fair opportunity to respond.

16 I recommend as an additional guide to appellate advocacy, rule 11:

11. Prepare written submissions for the appeal as though there will be no opportunity for oral argument.

- 17 Let me say something about rule 10, the encouragement to ‘explain the legal policy and legal principle involved in the case’.
- 18 I am sure I am not alone in recognising that resort to legal policy in an appeal in the 21st century in Australia is, if not rare, somewhat uncommon. Reliance on policy tends not to be encouraged. This is only partly to be explained by the preponderance of appeals that turn on matters of statutory interpretation.
- 19 It was once commonplace to rely upon the policy behind a statute when difficult questions of construction arose.⁶ The shift away from policy, and the legislative history which explained it, is rather a consequence of the increasing emphasis the High Court has placed on the statutory text.
- 20 We are all well aware of the High Court’s directive that the process of statutory interpretation ‘begins and ends with the text’.⁷ We are ever conscious that legislative history and extrinsic materials ‘cannot be relied upon to displace the clear meaning of the text’.⁸ Where the purpose of legislation is resorted to, it is sought to be located in the objects expressly identified in the Act. The objective theory of legislative intention reinforces this by emphasising that such intention is strictly a fiction but in so far as it is to be discerned, it is to be discerned in the words manifest in the statute and not from materials outside of the statute.⁹ Commenting on this shift is nothing new.¹⁰
- 21 However, the shift is a fundamental one, jurisprudentially. The effect on appeals is that counsel are well advised to ensure their case can be wholly supported by the

⁶ *Mills v Meeking* (1990) 169 CLR 214, 241, 243 (McHugh J) is an example.

⁷ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (*‘Alcan’*); *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78].

⁸ *Alcan* (2009) 239 CLR 27, 46–7 [47].

⁹ See, for example, *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 389–90, [25] (French CJ and Hayne J); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁰ In 2010 former Chief Justice Spigelman traced some of the developments from the contextualism of *CIC Insurance v Bankstown* (1997) 187 CLR 384 and *Project Blue Sky* (1998) 194 CLR 355 to the primacy later afforded to statutory language: James Spigelman, ‘The intolerable wrestle: Developments in statutory interpretation’ (2010) 84 *Australian Law Journal* 822. See also *SM v The Queen* (2013) 46 VR 464, 475–9 [41]–[55] (Weinberg JA).

statutory text and can be developed without resort to any extrinsic materials including legislative history.

22 In those circumstances, I recommend replacing rule 10 – ‘Explain the legal policy and principle involved in the case’ – with a rule which states:

10. Explain the statutory scheme and any principle it may embrace while focusing with exactitude on the statutory language.

23 I also recommend the addition of another rule, rule 12:

12. Calculate the minimum steps you need for the appeal to be decided in your favour.

24 This falls into the category of ‘things I wish I had known’.

25 Appellate judges will not determine an issue unless it is necessary to do so. Indeed, it has become accepted that if it is not necessary for a particular issue to be determined, then it is necessary not to determine it.

26 As a barrister I used to be so disappointed when a Court, including the High Court, did not take what I saw as ‘the opportunity’ to clarify a point of principle, or resolve a question of constructional choice, when it was clearly live and important although not necessarily determinative of the dispute. ‘Why wait until the appropriate vehicle arrives?’, I used to think. ‘This matter ought to be seen as sufficient’. ‘At least the court could give us some guidance’.

27 I now recognise that the restraint shown by an appellate court is not timidity or lack of imagination or resolve. The judges are often eager to resolve an issue but if the issue is not determinative, or if there is an alternative and simpler means to determining the matter, the court will typically feel obliged to adopt a minimalist approach.

28 The explanation for the minimalism is because an appellate court has an acute sense of its responsibility to ensure that an issue is left open until it is vital for it to be

determined. To resolve an issue, or give firm guidance on it, unnecessarily, is seen as fundamentally unfair to the future litigant whose circumstances may vary slightly from the instant case, or where the overall merits may be distributed differently.

29 An implication flowing from this is that if you, as counsel, do not provide those minimalist steps, the Court will start looking for them.

30 Many questions from the Bench may be directed at finding just those steps.

31 The brilliance of your argument may be undermined because it is not the simplest way home, consistent with authority and accepted principle.

32 Let me move, then, to the impact of technology on appeals. Developments in technology have had an impact not only on hearings in court but also on communications from the courts to the community.

33 Technology has meant that courts are now directly involved in the communication to the community of everything we do. We in the legal profession are no longer only speaking amongst ourselves. The reduction in the number of professional journalists engaged in court-reporting means that the courts are now obliged to provide intelligible and accurate reports of court processes and outcomes. Appellate courts are increasingly producing summaries of judgments to enhance community understanding. Judges are involved in settling the tweets our Court produces on significant decisions. Our Court is about to release internally produced podcasts. One can imagine courts in the not too distant future having full media production facilities to transmit, and report on, completed hearings.

34 With the increasing importance of court communications in mind, I recommend the following variation to rule 6, the rule that invited counsel to 'give priority to substance over attempted elegance', namely to:

6. Strive towards simplicity, clarity, and intelligibility, because ultimately the court will seek to communicate to the community the case you put and the reasons for its success or failure.

- 35 I now turn to address the rarity of female advocates in speaking roles in appeals.
- 36 It was Joan Rosanove's appearance in *Briginshaw v Briginshaw*¹¹ that is recorded as the first occasion in the High Court in which a female advocate had a 'speaking part' in the argument of an appeal. This was 1938 and Joan Rosanove was not yet a barrister.¹² In the High Court she split the oral submissions with her leader.¹³
- 37 In the Victorian Court of Appeal we have been collecting statistics for almost three years on the number of women who have a speaking role in appeals. In criminal appeals it is not uncommon to have women speak. Usually they are Crown prosecutors employed by the Office of Public Prosecutions. In civil appeals there is a significant under-representation of women.
- 38 In June 2017 we found that women counsel spoke in 17% of criminal appeals. Women appeared in 15% but spoke in only 5% of civil appeals.¹⁴ For the last financial year, in June 2018 we had women counsel speak in 20% of criminal appeals. Women appeared in 15% of civil appeals and spoke in 7%.¹⁵ There have been some months in which we have had no women speak in civil appeals.¹⁶
- 39 This compares with the percentage of women at the Victorian Bar of 29% in 2017.¹⁷

¹¹ (1938) 60 CLR 336, 339.

¹² The report of the hearing describes Joan Rosanove as a solicitor: (1938) 60 CLR 336, 374. See Pamela Tate SC SG, 'Extending the Boundary of Right: Flos Greig, Joan Rosanove and Mary Gaudron, Three Australian Women Lawyers', *Victorian Bar News* (2006) Summer edition 48, Address transcript delivered at the Tenth Ethel Benjamin Commemorative Address in Dunedin, New Zealand, Victorian Bar Council, 22 September 2006, 48. Joan Rosanove was the first woman to take Silk at the Victorian Bar in 1965. She subsequently took silk at the New South Wales Bar in 1967.

¹³ Mark Lazarus, Joan Rosanove's father, who was a solicitor-advocate and to whom she was articulated.

¹⁴ Court of Appeal, Quarterly Statistical Report, September 2018 Figs 1.2.7 and 2.2.6, respectively. Women appeared (in a speaking or non-speaking capacity) in 23% of criminal appeals.

¹⁵ Court of Appeal, Quarterly Statistical Report, September 2018 Figs 1.2.7 and 2.2.6, respectively. Women appeared (in a speaking or non-speaking capacity) in 22% of criminal appeals.

¹⁶ For example, in April 2017 only one woman counsel appeared in a civil matter and she did not speak: Court of Appeal, Quarterly Statistical Report, June 2017 Fig 2.2.6.

¹⁷ Victorian Bar, *The State of the Victorian Bar: Performance, challenges and opportunities*, March 2018, 4.

As a percentage of Silks, women make up 13%.¹⁸

40 The explanations for this are diverse. Justice Susan Glazebrook of the New Zealand Supreme Court disavows the myth that it is just a matter of time before parity is achieved.¹⁹

41 Given that women have been admitted to the profession in Victoria in much more considerable numbers than men over at least the last 15 years,²⁰ the proposition that the sheer weight of numbers will eventually cause a 'trickle up' effect would predict a much faster movement than the glacial progress we have experienced.

42 Justice Glazebrook also disavows the myth that women's professional experience is no different to men until women hit a 'glass ceiling'. Addressing oral argument to a multi-member appellate Bench is not a 'glass ceiling', in the sense that it is the first encounter of an impenetrable discriminatory barrier, when the paucity of female counsel appears to be largely reflected in all Divisions across our Court.²¹

43 In a recent speech, Justice Geoffrey Nettle of the High Court acknowledged that it had become more or less accepted, at least as part of what he described as 'the realpolitik of the situation', that positive measures to achieve gender equity may be fruitful.²²

44 Might I suggest a positive measure that I believe could make a profound difference.

45 This is to adopt the *Briginshaw* approach. The issues in an appeal can be divided. The female junior is given an opportunity to make oral submissions on at least one ground

¹⁸ Ibid, 5.

¹⁹ Dame Susan Glazebrook, 'It is just a matter of time and other myths' (Paper presented at Get up and Speak 2013, Wellington, 15 August 2013).

²⁰ Justice Geoffrey Nettle, 'Keynote Address: A Feminising Profession' (Speech delivered at the Judicial Conference of Australia Annual Colloquium, Melbourne, 5 October 2018), Sch 2, Table 1, 53. With respect to law students, in the late 1980s, the number of women studying law was nearing equal to the number of men. Today, female law students outnumber male students at almost all law schools.

²¹ See also Lady Justice Arden, 'Diversity in the appointment of Queen's counsel and judges - what does the future hold' (Speech delivered at the Chancery Bar Association, London, 12 January 2007).

²² Justice Geoffrey Nettle, 'Keynote Address: A Feminising Profession' (Speech delivered at the Judicial Conference of Australia Annual Colloquium, Melbourne, 5 October 2018), 42.

of appeal. A single primary issue. On the *Briginshaw* approach, the heightened visibility of female counsel on an appeal would be immeasurable.

46 My final addition to the rules for running appeals, addressed to the 21st century, is two-fold:

13. Adhere to the Law Council's Equitable Briefing Policy; and
14. In respect of at least one of the grounds of appeal, give your female junior a speaking role.
