# Be your own advocate

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## Introduction

1. About a year ago, in a case before a woman judge, my male opponent was presenting his argument with great confidence. He seemed delighted with his performance, while his junior looked on admiringly. Until he inadvertently addressed Her Honour as "Sir". Aghast, he stopped mid-sentence. An icy chill descended over the Bench. His gaffe was rewarded with a frosty rebuke: "Mr Bloggs, there have been women judges in this Court long enough for you to have noticed that."

2. There has indeed been great change. When I first practised law there was only one woman judge in the whole of New Zealand, the redoubtable Dame Augusta Wallace.[1] Inspirational and highly regarded, she was a true trailblazer. She also liked to maintain what she called a "dragon image". She did so with some success. She sat in the District Court, where she famously survived a machete attack.[2] Today, women judges head all our courts -- the Supreme Court, Court of Appeal, High Court, and District Court.[3] But below the Bench, at the Bar Table, change has been slower. Despite the dramatic increase in the number of women practising law[4] we are still significantly under-represented in the courtroom as advocates in lead and speaking roles. It is more often the men who star, especially in commercial and appellate cases.

3. I am going to discuss:

   (a) why there is still such a gender gap at the Bar Table;

   (b) the importance of having a "speaking part", and how to get it;

   (c) how to increase your confidence to speak and be your own advocate.

4. My message has direct relevance to the advocates (both litigation solicitors and barristers) in the audience. But much of what I say will also resonate with those of you who brief advocates, and who regularly speak in other contexts such as business presentations, meetings, seminars, and so on.

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1 She was New Zealand's first woman judge, appointed to the District Court in September 1975. In 1993, on her retirement, she was made a Dame Commander of the Order of the British Empire.

2 "Dame Augusta Wallace. Judge a No-nonsense role model", article in Dominion Post, 17 April 2008, http://www.stuff.co.nz/dominion-post/news/obituaries/370626/Dame-Augusta-Wallace.

3 The Rt Hon Dame Sian Elias, Chief Justice, The Hon Ellen France, President of the Court of Appeal; The Hon Justice Helen Winkelmann, Chief High Court Judge, and Chief District Court Judge Jan-Marie Doogue.

4 As at February this year, women comprise over 46% of solicitors in law firms, 36% of barristers at the Independent Bar, and 58% of inhouse counsel (corporate and government): "Snapshot of the Profession", *LawTalk*, 28 February 2014.

**Why is there still a gender gap at the Bar Table?**

5. Our Chief Justice, Dame Sian Elias, who was appointed one of our first women silks in 1988, has spoken poignantly of how tough it was for women seeking to practise in the courts at that time:[5]

> "I accepted appointment to the Bench …at the urging of male colleagues whose view (based on their lack of success in recommending me for briefs) was …that I would never get instructed in the cases I aspired to lead. I went on the Bench to practise law".
>
> "I was beginning to feel invisible within the profession".

6. Today professional life for women advocates is not so brutal and short, but more needs to be done. We have yet to achieve equal billing. In Australia research data has been collected on gender appearance in the higher courts.[6] This shows that women advocates are still not getting their share of speaking and lead roles.[7] Observation and impression suggest the same is true in New Zealand, particularly in the more complex and lucrative commercial and appellate cases -- the "big league" in litigation.

7. By way of a small 'snapshot', I informally reviewed the Supreme Court's 157 judgments delivered in 2013, and the 118 judgments so far delivered in 2014. The judgments covered both leave applications (decided on the papers) and oral hearings. This revealed some interesting information:

   - In the 2013 judgments only about 27% of all counsel in a lead or sole counsel role were women. If judgments in the oral hearings only are counted, that figure reduces to 13.6%. The equivalent figures for 2014 are 20.19% and 13.7%;

   - Of those lead women counsel, a high percentage were employed by the Crown Law Office, the Police or another government entity: about 60% in 2013, and about 68% in 2014;

   - Women silks are recorded as counsel in only one of the 157 judgments in 2013, and in only two of the 118 judgments so far this year.[8]

   There is clearly still a long way to go. The Chief Justice said in 2012 that her impression is that the rate of female appearances in Supreme Court hearings (especially as leaders) has, if anything, declined in recent years.

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5 The Rt Hon Dame Sian Elias, Chief Justice of New Zealand, "Address to the Australian Women Lawyers' Conference", 13 June 2008, pp 4, 9.

6 Law Council of Australia, *Beyond the Statistical Gap*: *2009 Court Appearance Survey*, 2009; Australian Women Lawyers, *Gender Appearance Survey Information: August 2006*, 2006.

7 The Hon Justice Melissa Perry, Justice of the Federal Court of Australia, "Women at the Bar: Aspirations and Inspirations", speech at Women Barristers Forum, Sydney, 5 April 2014; The Hon Justice M A McMurdo AC, President, Court of Appeal, "A Report Card on Gender Equality at the Queensland Bar and Bench and The Invisible Women", address to Queensland women judicial officers and barristers, 21 March 2014; the Hon Justice Marilyn Warren, speech on the occasion of the Tenth Anniversary of the Victorian Women Lawyers, 24 August 2006; Francesca Bartlett, "Model Advocates or a Model For Change? The Model Equal Opportunity Briefing Policy as Affirmative Action" (2008) 32 *Melbourne University Law Review* 351.

8 The 2013 judgment (in which one woman QC appeared) was a criminal appeal hearing. The two 2014 judgments both related to leave applications in relationship property cases. Two women QCs appeared in one, and one in the other. There should be formal research undertaken in New Zealand on gender appearance rates.

8. Why does this gender gap persist? The main reasons seem to be:

   (a) Traditional briefing practices, based on a stereotyped perception that good advocacy requires a "masculine personality", and that women may not have the necessary "intestinal fortitude"[9] to stand their ground when required. This is of course nonsense. Advocacy is an art, not a rugby scrum. [10]

   (b) Women who shine as advocates have tended to be promoted rapidly to the Bench. While this has been good (and necessary) for the Bench, it has reduced the number of women at the senior Bar. Bear in mind also that the senior women lawyers today began in practice when women were still a small minority of the profession. That history necessarily still impacts on the current numbers of senior women relative to men.[11]

   (c) Women advocates are, more so than their male colleagues, settling for less visible roles in court. In more complex cases, women tend to remain in junior roles for longer than the men. And they may more often settle for a *silent* junior role rather than a speaking part. Addressing this third factor, at least, lies to some extent in our own hands. As Justice Melissa Perry of the Federal Court of Australia has recently said, we can break down perceptions more powerfully by our actions, than by words alone: "We are the most effective advocates for ourselves when we *are* effective advocates".[12]

9. As more women's voices are heard in court, this will in turn slowly influence briefing patterns and the Bar culture. It is this last factor, the need to speak up, that I am going to focus on.

**Why is it important to speak up?**

10. You do not need to be a senior counsel to lead a case. For novice advocates, the opportunity to do minor court appearances on your own provides essential experience. These solo appearances should begin on day one, with the level of complexity these cases increasing over time. A role as junior to a leading counsel in larger cases is also a valuable training ground. It may not always be possible, or appropriate, for a junior to have a speaking part. But a silent role should certainly be the exception rather than the rule. [13]

11. There are very good reasons for speaking up, and for senior counsel and supervising partners to encourage their juniors to do so:

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9 Law Council of Australia, above, n 6, pp 17, 21; The Hon Justice Melissa Perry, above, n 7, pp5-6.

10 The fact that women are still under-represented as partners in the private law firms may in part explain these briefing practices. In large law firms (over 20 partners/directors) 20% of partners/directors are women, and in law firms with 2-5 partners/directors 24% are women: "Snapshot of the Profession", *LawTalk*, 28 February 2014.

11 Data prepared by Statistics New Zealand for the New Zealand Law Society shows that 44.6% of all New Zealand lawyers are aged 45 or more. But there are significant gender differences. Only 29.9% of women lawyers are aged 45 or older, whereas 57.6% of male lawyers are: https://www.lawsociety.org.nz/news-and-communications/news/august-2014/majority-of-lawyers-aged-under-44.

12 The Hon Justice Melissa Perry, above, n 7, p 6.

13 Former Federal Court Judge Ray Finkelstein QC, speaking at the New Zealand Bar Association Conference in Melbourne on 25 August 2012, observed that in Australia junior counsel, both male and female, are increasingly silent. He attributed this largely to senior counsel being unwilling to share the oral presentation, contrary to tradition.

(a) A speaking part is the best opportunity to learn and improve. For most of us, public speaking is not a natural talent. Few of us are born persuaders. Justice Michael Kirby once described the differing abilities of advocates as follows:

> "Some advocates…are sprinters. Others are better at running marathons. Some, alas, are down to a walk. A few are walking in the wrong direction."[14]

But good advocacy – indeed all good public speaking -- is a skill that can be learned. You can, with practice, learn to sprint, or at least get up to a respectable jog. There is just no substitute for direct experience. This requires getting to your feet and speaking.

Only by speaking up in court will you really learn how to handle difficult situations -- unexpected developments or vigorous (and occasionally hostile) questioning by the Judge. Only by leading evidence will you learn how to manage and control witnesses. Only by presenting oral submissions will you gain the confidence and skill to present a clear, concise argument that is pared to its bare essentials. You need to experience for yourself, and be tested in, the tough school of advocacy, and to make all the necessary mistakes. As Oscar Wilde said "Experience is the one thing you cannot get for nothing".

(b) Although challenging, oral advocacy can be the most satisfying and exciting part of the case. The oral hearing is your only opportunity to engage with the Judge. It is the culmination of all your hard work. Justice Michael Kirby has spoken of the "joys of advocacy", a "heady mixture of intellect, emotion and drama": [15] You need to move out of your silent comfort zone to experience that. You may even be rewarded with an occasional 'Martha Costello' moment, when the Court is dazzled by your persuasive power.

(c) The judges *want* to hear from you. A number of judges have said that they would like to see a wider range of advocates in lead roles, and more juniors with speaking parts. They tire of the same old faces, especially in the appeal courts. And when senior counsel confer constantly with their juniors before answering questions, this can give a disquieting impression that the senior is not fully in command of the material. They would rather hear directly from the junior on the relevant point.

(d) If you habitually settle for the role of a silent junior, eventually you will get a reputation as the able assistant but not a leader. You may write powerful submissions. You may prepare the case superbly. But the reality is that most of the credit will go to the advocates who present the case in court. The judge will not know what your contribution has been.

Even juniors who regularly have a significant speaking part can find it difficult to emerge from the shadow of senior counsel and establish themselves as a 'go-to' advocate in their own right. But if you do not speak up at all, you may be permanently consigned to a supporting role – the second violin. The reliable,

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[14] The Hon Justice Michael Kirby, "Appellate Advocacy – New Challenges", the Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006, pp 17-18.

[15] The Hon Justice Michael Kirby, above, n 14, p 48.

> hard working, but invisible, worker bee. You may be in demand as a junior and attract lucrative work in that role. But in the long run it will hold you back if you are planning a career as an advocate, whether as a litigation solicitor or a barrister.

Settling for a silent, supporting role will equally hold you back in other professional spheres.

12. If more women proactively pursue lead and 'speaking junior' roles, it will help to change the traditional briefing patterns and combat the misconception that good advocacy requires 'male traits'. Good advocacy requires excellent communication skills combined with intellect, sound judgment, tenacity, and hard work. The judges repeatedly say that, based on their observation of counsel, advocacy skills have nothing to do with gender.[16]

**How do you get a speaking part?**

13. How do you secure a speaking part as a young advocate? You need to ask, and you should do this from the start. Again, supervising partners and senior counsel should encourage this. My early experience at Russell McVeagh in the 1980s was that the partners, particularly the late Robert Fardell QC, were very receptive to sharing the oral presentation, and that in turn reassured the clients. Once you have senior counsel's confidence it will be taken for granted that you will speak. But in the early days you may need to be a bit pushy. Sometimes my allocated speaking part was in danger of being squeezed to vanishing point. Once in the Court of Appeal, senior counsel, who was in full flight addressing the Bench, turned and asked "Shall I just keep going?" I replied "No, I want my go."

14. Additional opportunities often arise in the course of a hearing. For example, new, unexpected issues may emerge, and you may be asked by your already overloaded senior counsel to deal with them. Say yes, no matter how daunting it may seem. If you are offered an 'out' --"I'll do it if you don't feel able to" -- don't take it. Grab the opportunity, however challenging.

15. Always be willing to step up. Chance events can present great opportunities. Once I was to present part of the oral argument in a case in the Court of Appeal. A few days before the hearing the senior silk I was to appear with rang to say he had been injured dodging a car while out jogging and was incapacitated. Later he said: "You could look a little less pleased about it". And then: "That wasn't you driving that car was it?"

16. I emphasise again that it is unwise to appear only in a junior role. From the time of your admission to the Bar you also need to have cases (at a level appropriate to your experience) in which you are appearing by yourself. Also, make the most of advocacy opportunities in non-courtroom settings such as tribunal hearings, and arbitrations. You can also create opportunities by taking on pro bono cases, or reducing your fee so that deserving cases are not defeated by economics. Speak up whenever you can -- at

[16] The Hon Justice Ruth McColl, Court of Appeal, Supreme Court of New South Wales, "Celebrating Women in the Judiciary 2014", address to the New South Wales Women Lawyers, 27 February 2014; The Hon Justice Pamela Tate, Court of Appeal, Supreme Court of Victoria, "A Woman's Place is at the Bar", paper presented at "Celebrating Women in the Law", Foley's List function, 23 October 2012.

seminars, meetings, videoconferences, anywhere. You will gradually emerge as an advocate in your own right.

**How can you manage fear and increase your confidence to speak?**

17. I have mentioned the "joys of advocacy". The 'terrors of oral advocacy' are also very real. Nervousness before a hearing is perfectly normal – and indeed necessary. There is an "upside" to anxiety.[17] It sharpens your focus and propels you to a better performance. To quote Oscar Wilde again, "The anxiety is unbearable. I only hope it lasts forever".

18. Feelings of apprehension become much more manageable with experience -- another reason to speak up as often as possible. In the meantime, here are some suggestions for overcoming fear and increasing confidence. Again, many will apply equally in other public speaking contexts:

    (a) Be thoroughly prepared. This is absolutely key.[18] If you know what you are talking about you will be much more confident. Intense preparation compensates for lack of speaking experience, and will improve your advocacy, both in your handling of witnesses and your presentation of oral argument. You will speak with more conviction and credibility, and will have ready answers to the judge's questions. Above all, judges want your help. They get more help from an inexperienced counsel who knows the case cold than from an experienced counsel who has not put in the time.

    (b) Take comfort from the fact that anxiety usually diminishes once you begin speaking. Many advocates tend to be at their most nervous just before standing up. This can be managed by removing distractions, and getting into a 'zone' of quiet calm. Have your materials marked up and ready. Keep over-zealous instructing solicitors and clients at bay. Arrive in court early, preferably before the judge. Few could manage the aplomb of Cleaver Greene (for those of you are fans of the Australian TV series "Rake"), who had this exchange with a woman judge upon his tardy arrival at a hearing:

        Judge: Delighted you could make it Mr Greene.
        Counsel: Your Honour, only you and Beyonce have the pulling power.

    (c) Invest in some professional voice training.[19] Think "The King's Speech". An advocate's voice is a vital tool of trade. It makes sense to work on improving it. This is more common overseas. For example, the Women Lawyers Association of NSW has recently developed voice training workshops for its members.

        I had little natural public speaking ability, but was lucky to be tutored, in my early days as a lawyer, by the late Lois Alberta Paynter. I sought her out soon after graduating because I found it far too alarming to speak up at the weekly litigation department meetings at Russell McVeagh…or on any other occasions.

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17 Donna Chilsolm, "The upside to anxiety", *North & South*, September 2014, p 36.

18 The three rules of oral advocacy are preparation, preparation and preparation: Justice Rothstein "Winning Appellate Advocacy: Persuasive Presentations" (2007) 32(1) *Manitoba Law Journal* 163, 166.

19 Speech New Zealand can recommend speech teachers.

Lois was a formidable grande dame of New Zealand speech and drama. Once, when forewarned by an adjudicator to stay within her allocated presentation time, she replied: "Young man, Lois Paynter *invented* time." She frequently described my delivery as "soporific". I had to consult the dictionary to see whether she had insulted me.

Voice training can provide many benefits, including:

- It will enhance the clarity, tone, and projection of your voice, and lower the pitch. An improvement in the sound of your voice will inevitably boost your performance, and therefore your confidence and persuasive power. You will have greater presence, and will make your audience sit up and listen.

- You will become more adept at thinking on your feet. You will feel more confident about pausing, and taking time to collect your thoughts and to decide what to say next. This may save you from blurting out ill-considered answers to questions, or making unwise concessions. You will be less likely to become overwhelmed and unable to listen properly or think clearly. In short, you will be less likely to panic when the going gets tough.

- You will learn how to add colour and liveliness through variation in intonation, pitch, speed and volume of delivery. You don't need to be spell-binding, but nor should you anaethetise. Think of the poor judges who are forced to listen, often for hours or even days, to counsel who have made an art form of the monotone -- tedium in its purest form. By injecting even a small amount of vitality and energy you will stand out.

(d) What are we most afraid of? Often it is the fear of getting it wrong in public – in front of the judge, other counsel, instructing solicitor, and client. Now television coverage, social media, and the attack bloggers add new pressures. This must, however, be kept in perspective. Difficult moments in court happen to all advocates, at all levels of experience. There will always be good and better days. It is great when your team seems pleased with your performance. But sometimes you may sit down to a chilly, uncomfortable, silence. Once, while I was presenting my argument, my senior counsel groaned audibly and slumped onto the Bar Table with his head in his hands. But I am sure my most humiliating days in court are still well ahead of me.

No one is immune. A senior New Zealand silk was interrupted in a Privy Council hearing by a Law Lord who looked up and said, softly, "But that can't be a serious argument, surely? However, with practice and preparation the good experiences will far exceed the not so good.

(e) Remember that it is not all about you. Your job is to persuade the judge that your client has the better case. Keep your focus on that end goal. From first to last, your duty is to advance your client's interests, consistent with your duties to the court. What the judge really wants is your help. Be attentive and responsive to the judge, particularly during questions, rather than absorbed in your own performance. You will largely forget about your anxiety.

(f) Nervousness about speaking may stem from a misconception about what oral advocacy requires of you, and whether you are up to it. Aggression is not, for example, an essential ingredient of effective advocacy. Indeed, too much assertiveness is counter-productive. Nor is flamboyant rhetoric required. Judges do not appreciate excessive huff and puff. Some very skilled senior silks have a surprisingly low-key delivery. A respectful conversational tone is best, but do try and inject some liveliness, conviction, and flair.

A certain robustness is, however, required. You do need to convey confidence and resilience. "Attitude is everything in advocacy".[20] You may not feel confident initially, but you must at least appear confident. As an advocate you are performing a role. If you appear to be confident, the judge is more likely to be convinced by your argument.

19. In the end, you will find your own speaking style. There are many skills you can learn from senior counsel – by observing and copying, or, sometimes, by "cringing and avoiding".[21] But ultimately you will discover what approach works best for you. Be yourself, and let your advocacy style reflect your own personality, and you will present more confidently and powerfully.

## Conclusion

20. Institutional change may be needed in order to close the gender gap at the Bar Table. We cannot achieve all the necessary changes on our own. But by speaking up, many more of you will emerge as strong advocates and enjoy an exciting career. And for those of you who brief advocates, remember that we women are out there.

21. Returning to Dame Augusta Wallace, even after she retired from the District Court Bench she continued to display the same invincible spirit. When, as an elderly woman, "small, wrinkled and white-haired", she found herself lined up at the lights with young men who were revving to go, she said: "I always felt obliged to take the advantage."[22] She would then roar off, beating the young men off the mark. And so, in the spirit of Dame Augusta, press those heels down and make your presence felt. Be your own advocate.

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[20] Mr Justice Ian Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada", John Sopinka Advocacy Lecture presented to the Criminal Lawyers' Association at Toronto, November 27 1998, p 24.

[21] M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964.

[22] "Dame Augusta Wallace. Dame a no-nonsense role model" *The Dominion Post*, 17 April 2008, http://www.stuff.co.nz/dominion-post/news/obituaries/370626/Dame-Augusta-Wallace.