

6-1-1997

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Recommended Citation

Wolski, Bobette (1997) "Book Review: The Advocate's Notebook, by Anthony Young," *Bond Law Review*: Vol. 9: Iss. 1, Article 8.
Available at: <http://epublications.bond.edu.au/blr/vol9/iss1/8>

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Book Review: The Advocate's Notebook, by Anthony Young

Abstract

I have not read The Advocate's Notebook, by Mr Anthony Young, from cover to cover. It is not the kind of book that one picks up and reads from beginning to end. It is more akin to an encyclopaedia. I have heard of people who read (or claim to read) the entirety of encyclopaedias, but most people I think refer to them only if and when the need arises.

BOOK REVIEW: THE ADVOCATE'S NOTEBOOK
BY ANTHONY YOUNG¹

by
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I have not read *The Advocate's Notebook*, by Mr Anthony Young, from cover to cover. It is not the kind of book that one picks up and reads from beginning to end. It is more akin to an encyclopaedia. I have heard of people who read (or claim to read) the entirety of encyclopaedias, but most people I think refer to them only if and when the need arises.

Mr Anthony Young, the author of *The Advocate's Notebook*, practised at the New South Wales Bar for nearly 30 years. Lacking what he refers to as 'the encyclopaedic knowledge'² of many of his opponents, Mr Young compiled a notebook of useful statements from various reported cases and, as he tells his readers in the Preface of the book, he kept the notebook with him at the Bar table for ready reference when he had need of an answer in relation to a range of issues that arose during many of the trials in which he was involved.³ He now offers his notebook, in published form, to other practitioners.

Mr Young's book does not have a central theme. It addresses an assortment of issues, grouped under 72 topic headings. The topics, which are presented in alphabetical order, are diverse. They comprise matters of procedure (such as adjournments and costs, cross-vesting, discovery and interrogatories, pleadings and particulars), evidence (such as admissibility of business records, burden and onus of proof, confessions, hearsay, hostile witness, and refreshing memory) and substantive law (including the law in relation to agents, trustees for sale, implied terms, tenders, constructive and resulting trusts, equitable damages, and loss of earnings and earning capacity).

Each topic heading is followed by a statement of issue phrased in question format, then by quotations from a selection of relevant case authorities. To take one example, the topic 'Family Law: Custody and Access' is followed by the statement 'what principles are applicable in relation to interim custody' which is then followed by a series of quotations from the decision of the Full Court of the

¹ Young A, *The Advocate's Notebook* (1997) Prospect Media Pty Ltd, St Leonards.

² Ibid at vii.

³ Ibid.

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Family Court in *In the Marriage of Cilento* [1980] FLC 75, 344.⁴ In all, the book is said to contain quotations from nearly 200 reported cases (I admit to not having counted them myself). A short list of citations to other relevant cases is provided for most topics. This scheme of presentation is adopted throughout the book. Although the focus is on case law, in some instances reference is made to relevant Commonwealth and New South Wales legislation. Practitioners in other state jurisdictions will have to search for the legislative provisions relevant in their own state.

Although Mr Young asserts that the information contained in his book is updated to 1 January 1997,⁵ the example given above provides evidence of at least one substantive area of law which is not current, for the terms 'custody' and 'access' are used by Mr Young instead of the phraseology imported into the Family Law regime with the *Family Law Reform Act 1995* (Cth).⁶

The Advocate's Notebook is aimed primarily at 'other practitioners' of advocacy. It may be of use to practitioners but only as a beginning tool (this is evident in the fact that all 72 topics are canvassed in but 160 pages of text). Mr Young recognises this limitation. The topics he covers are those which 'cropped up' in his own practice. He suggests that other practitioners add to the notebook from time to time from their own experiences.⁷

The book does not appear to be intended for use by university students and would be ill-suited to any particular subject in the standard law school curriculum. It is also unlikely that *The Advocate's Notebook* would be appropriate as either a primary or secondary text in a trial advocacy elective subject, although its use would at least communicate to students that trial practice is a blend of substantive law, the law of evidence and of procedure.⁸

The story involved in the process of publishing *The Advocate's Notebook* (this I gleaned from the Acknowledgments section written by Mr Young) is interesting in itself. Mr Young notes that the publishers, Prospect Publishing,⁹ 'felt that it was essential to supplement [his manuscript] with some practical guides to advocacy'.¹⁰ As a result, the book contains four essay-style commentaries from a number of leading practitioners at the Bar and the Bench (one of whom is now retired) which are apparently intended to fit this description.

⁴ Ibid at 66.

⁵ Ibid at viii.

⁶ See *Family Law Reform Act 1995* (Cth), effective as of 11 June 1996, which inserted a new Part VII in the *Family Law Act 1975* (Cth).

⁷ Ibid at vii.

⁸ See for example Lubet S, 'What We Should Teach (But Don't) When We Teach Trial Advocacy' (1987) 37 *J. Legal Educ.* 123.

⁹ Prospect Publishing is a division of Prospect Media Pty Ltd.

¹⁰ Above n 1 at ix.

The commentary by Mr Ian Barker Q.C., entitled 'A Guileless Lawyer in a Strange Land'¹¹ is a humorous account of his experiences as a novice advocate in the Northern Territory in the 1960's. Mr Barker believes that *The Advocate's Notebook* would have assisted him in coping with some of the strange circumstances in which he found himself.¹² He notes that the book will be particularly useful to the country practitioner who is 'not always in immediate reach of a library or a computer'.¹³ Some country practitioners (I was one myself for 10 years) might be taken aback by this comment. I do not recall ever having great difficulty getting access to a reasonably well-stocked law library. Certainly in the late 1990's most country practitioners have access to both library and computer facilities. Mr Barker's comment is disturbing on another account. If he suggests that an advocate, whether city or country-based, can 'get by' solely on the basis of reference to Mr Young's book, it is a dangerous suggestion. The topics in *The Advocate's Notebook* are more complex than presented in its 160 pages. Furthermore, if the material contained in the book is not regularly updated, it may lead some to rely upon redundant case authority and statute law which has subsequently been amended.

The commentary by Mr David Bennett Q.C., appropriately entitled 'Getting Dumped',¹⁴ is also a humorous piece. Mr Bennett reflects upon his anguish when, as a young and inexperienced junior barrister, he was 'dumped' on. The moral of his story is: 'Never trust anyone, even your revered tutor, when he asks you to 'just slip over to court and adjourn the matter'.¹⁵ His tip for the unprepared junior whose request for an adjournment is denied: ingenuity - read all the Affidavit material slowly until your learned senior arrives.

John Coombs Q.C. provides the third commentary. He delves into 'the art of advocacy' adopting Sir Owen Dixon's expression 'Tact in Action' in his title.¹⁶ Mr Coombs is intent on identifying the attributes of the great advocate; characteristics such as eloquence, flair, flexibility and humour, sensitivity to the tribunal and selectivity in the issues presented, not to mention 'sheer hard work'.¹⁷

The final contribution to *The Advocate's Notebook* is a joint article by Messrs Rod Blackmore S.M. (now retired) and Maurice Rooney S.M. They question whether the adversary system is in the true interests of children.¹⁸

In some ways, it is a pity that the commentaries were added to *The Advocate's Notebook*. The first two, while a delight to read, hardly offer practical

¹¹ Ibid at 165.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid at 168.

¹⁵ Ibid at 170.

¹⁶ Ibid at 172.

¹⁷ Ibid at 174.

¹⁸ Ibid at 177-183.

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advice. The third skims a subject which is more extensively covered in a number of excellent books such as Richard du Cann's *The Art of the Advocate*.¹⁹ The fourth essay seems oddly out of place.

Discounting trial history books, there are two main categories or types of books and articles dealing with advocacy.

Into the first category, fall those works whose authors approach advocacy as an elusive form of art. They maintain that, for the most part, the great advocate is born, not made; that advocacy skills are innate, rather than acquired.

In the second category, are those works whose authors seek to analyse and explain the practicalities and techniques of advocacy, and which provide procedural 'how to' advice on a range of matters such as the conduct of cross-examination. Authors of works in this category take the view that advocacy skills can be acquired through training, application and practice. Mauet and McCrimmon's *Fundamentals of Trial Techniques* provides an example.²⁰

There are a number of books on advocacy which cannot be categorised in this manner. Richard du Cann's *The Art of the Advocate*,²¹ Irving Younger's *The Advocate's Deskbook: The Essentials of Trying a Case*,²² and Sir David Napley's *The Technique of Persuasion*²³ appropriately recognise that effective advocacy consists of a combination of God-given talent and technique which can be learnt with training, practice and more practice. These authors inquire into the essential qualities of the successful advocate and, at the same time, canvass the 'know-how' or 'how to' of advocacy.

Actually, there are now so many 'how to' advocacy books available that one could be forgiven for expecting, as I did, that *The Advocate's Notebook* was another such book. After I had spent some time examining it, it occurred to me that it might more appropriately be titled 'The Advocate's Notebook on Evidence, Procedure and Substance'. However, on further reflection, I have decided that I like its title, its concept and Mr Young's freshness of approach. It is described on its jacket as a unique book - it is that. It could also be a useful practical tool for practitioners of advocacy, but only a beginning tool. Its usefulness will depend on its users recognising it as such.

¹⁹ du Cann R, *The Art of the Advocate* (1993) Penguin Books, London.

²⁰ Mauet T A and McCrimmon L A, *Fundamentals of Trial Techniques* (Australian Edition, 1993) Longman Professional Publishing, Melbourne.

²¹ Above n 18.

²² Younger I, *The Advocate's Deskbook: The Essentials of Trying a Case* (1988) Prentice Hall Law & Business, Clifton, N.J.

²³ Napley D, *The Technique of Persuasion* (4th edn, 1991) Sweet & Maxwell, London.