

Episode 13: Summary

Episode name: Zooming into Court: Digitalisation of Australian Courts

Guest(s): Talitha Fishburn

What area(s) of practice does this episode consider?

Talitha discusses the increasingly digital nature of practice in Australian courts and digital advocacy.

Why is this topic relevant?

Renowned legal futurist, Richard Susskind, once wrote: *“For tomorrow’s lawyers, appearance in physical courtrooms may become a rarity. Virtual appearances will become the norm, and new presentational and advocacy skills will be required. I am not suggesting that virtual courtrooms will be pervasive in the short or medium term. But they will become commonplace in due course, I have little doubt.”*

Even before the COVID-19 pandemic, there was a growing trend toward conducting the less contentious work of courts remotely and digitally, and using technology to conduct in-person hearings more efficiently. Online registries, online courts, and e-courts promoted quick, efficient and less costly alternatives. However, as a result of the pandemic, digital advocacy has become a necessity – at least for now. As remote advocacy becomes more and more mainstream, advocates must learn how to adapt their advocacy and presentation styles to thrive in a new digital forum.

What are the main points?

If embraced, technology can support the just, quick and cheap resolution of disputes being the overriding purpose of the court in civil proceedings (section 56(1) of the Civil Procedure Act 2005 NSW). It can be used to create efficiencies, convenience and flexibility, in addition to improving access to justice.

According to the Organisation for Economic Cooperation and Development, only 46% of people live under a system of established law, with access to lawyers and the courts. For many, engaging a lawyer or resolving a dispute through the court costs too much and takes too long, resulting in many people being aware of a legal need but being unwilling to seek advice. Technology, including the implementation of online courts, could improve access to justice.

As with any sort of change, the digitalisation of court processes has both pros and cons depending on the hat you wear. For judges, court staff, advocates and lawyers, we are forced to learn and adopt new processes. Whereas those we represent, being those seeking a resolution through the legal system, are provided with a process that is arguably more efficient which reduces both the costs and time it takes to achieve a resolution.

When appearing in a new court or list, knowing the traditions and unwritten rules of the court is important to both being comfortable and confident in appearing as an advocate. Familiar cultural artefacts like the dress code, robing, and when to sit, stand and bow have tripped up some advocates recently.

Advocates may feel more comfortable appearing by reading the guidance on remote appearances published by each of the respective courts and having technology set up and tested beforehand – a test run of the microphone, speakers and internet connection ahead of any scheduled listing is recommended. Whilst courts have

published guidance from their respective chief judges throughout the COVID-19 pandemic, in the future we can expect practice notes that give detailed directions on remote appearances.

What are the practical takeaways?

Tips for lawyers and advocates:

- Talitha interestingly found that online hearings were somewhat of a levelling of the playing field when it came to the physical characteristics of advocates. In a real-life court, an advocate may be particularly robust in physique or have a particularly loud voice. Digital hearings are more clinical, so advocates cannot rely on those physical traits as much.
- There is an increasing trend towards written submissions as a primary form of advocacy. One tip for written submissions is that you should set out the main issues to be determined by the court at the very beginning of your submissions, followed by a brief recitation of the facts. Despite the professional audience, use plain and straightforward language.
- Engage with issues, including disputed directions prior to the listing date. Often, these issues can be resolved with a phone call which will allow orders to be made by consent.
- Pick your battles! Resolving the issues in dispute may take a week (or weeks as the case may be) but try not to get tied up in disputes over timetables and other ancillary issues unless you have to. These issues can take up the time of lawyers, advocates and the Court, sometimes to the detriment of the parties.
- It can be easy to forget eye contact during a remote appearance, but eye contact and mirroring remains as important as ever to building a rapport.
- One downside of the move to more remote and digital court work is that young lawyers and advocates who would have previously gained essential advocacy experience in more 'low risk' applications or appearances in court, like directions hearings, might not be given these opportunities.

Show notes

Richard Susskind, *Tomorrow's Lawyers*, (Oxford University Press, 2013).

Richard Susskind, *Online Courts and the Future of Justice*, (Oxford University Press, 2019).

[Online lecture for e-Filing in Commonwealth Courts](#)

[Justice Allsop's lecture 'Technology and the Future of the Courts'](#)

[AusPubLaw Blog Post on COVID-19 and digital courts](#)