Written submissions

By Gerard Mullins

Written submissions are routinely required in most courts throughout Australia. Whether submissions are being made on an interlocutory application, at the conclusion of a trial or on appeal, almost all oral argument is preceded by the delivery of a written submission or outline of argument. The importance of the written submission and its ability to convey a clear message is fundamental to good advocacy in the 21st century.

Despite the insistence by courts on the provision of written submissions, there is not a great deal of guidance given to young practitioners as to the appropriate form of submissions or what they should contain. I recently reviewed an article on written submissions by Andrew H Baida, Solicitor-General of the State of Maryland, which first appeared in the *Journal of Appellant Practice and Process*, published by the William H Bowen School of Law at the University of Arkansas at Little Rock. It was reprinted in the *Australian Bar Review* in 2002 and contains an excellent practical analysis of the purpose, content and structure of a written submission. The following comments summarise some of the keys issues raised.

KNOW THE AUDIENCE

It is trite to say that a written submission made to a judge needs to be tailored to the requirements of the judiciary. But as lawyers, we sometimes try to support our argument with the weight of authority even where that authority is well known. For example, judges are generally very familiar with the basic principles of statutory construction. So if the argument is about the interpretation of a particular beneficial or remedial statute, it is unnecessary to extract large extracts of high court authority dealing with the need to interpret remedial statutes beneficially. One line stating the principle is enough. The major focus should be on the particular statute in question and its administrative history, not the history of statutory construction. A long recitation on the latter will simply detract from the clear and cogent arguments on the former.

DEVELOP THE THEME

Baida cites Senior US Circuit Judge, Ruggero J Aldisert, as defining the 'theme'. He states that it is the unifying focus of the brief that directs the court's attention to where the heart of the matter lies and to the equitable heart of the appeal. It also answers the question: what is the message?

He continues:

'The theme not only sets the flavour of your argument, but also sets the mood. It is both the focus and the thesis. It directs the judge's attention immediately to where the trial court's error took place and explains straight away why the trial court was wrong or ... why it was right. It tells the appellate court what relief you want.'

STATEMENT OF FACTS

The statement of facts generally precedes the argument. It must 'set up' the reader to be in a position to sensibly comprehend the argument that follows.

The difficulty is in weighing a balance between presenting a 'neutral' argument (and not offending the court by making statements about disputed facts that might mislead the court) and placing the facts in a form that might reflect favourably or comprehend your theme.

Baida states:

'The story you tell in the statement of facts is a road map to the record. Every statement must be accurate and supported by material in the record. A good way to ensure this level of accuracy is to follow every sentence with a citation to the record. An occasional sentence of summary or orientation may not need a record citation, but be sure the facts contributing to such a sentence are stated nearby with a citation.

Judges check the record. If you stretch facts or distort the record, you will lose credibility; one error often casts into doubt your entire effort.

A first cousin of accuracy is fairness, but do not confuse fairness with neutrality. If a witness at trial testified clearly to facts establishing your case, it is perfectly fair to state those facts in your brief forcefully and as an advocate. Neutralising that favourable fact into a sterile statement to which your opponent would not object surrenders an opportunity to lay the foundation for your position. Effective advocacy occurs when you marshall favourable facts and state them accurately and fairly, with detailed citations to the record. Fair advocacy often gives way to inappropriate (and weak) argument, however, when buzz words like "obviously" and "clearly" creep into a statement of fact. These adverbs are tell-tale signs of weak or non-existence record support.'

>>

THE SUMMARY

There are different views as to where the summary of argument should be in the outline. Many advocates summarise their argument at the outset. Others prefer to place it at the end of the argument and use a briefer statement of the essential argument at the commencement. Either way, a summary of argument can be used as an organisational tool during the course of preparing the submission as a whole. To express your argument in a summary form assists in clarifying the preparation process. Issues often fall into multiple issues and sub-issues, and a summary of the argument helps to breakdown the issues into a comprehensive form.

MISCELLANEOUS MATTERS

Baida gives some very good practical advice on the general presentation of submissions.

For example, he commends the use of case authority to support propositions, which suggests that one should avoid a lengthy explanation of the facts of the case where possible. A protracted discussion of another case's facts might interfere with the flow of an argument. In addition, a detailed and elaborate deconstruction of a case used by one's opponent can have the same effect and indirectly add 'importance' to the authorities cited by the opposition.

Baida also suggests that you should sustain your argument with substance, not adjectives:

> *'Bombast and hyperbole do not produce effective advocacy. Once you have vented your spleen at opposing counsel in a draft, step back as an editor to assess whether your tone is appropriate. In almost every instance, sharp rhetoric is risky and unnecessary. When you write that your opponent's argument is "ludicrous" and "beyond the reach of any reasoning mind", you will have offended the court for no reason if the judge reading your brief has any inclination at all towards that conclusion. Similarly, when your position really is compelling, your argument will lead your reader to that conclusion without you providing adjectives like "clearly", "plainly" and "obviously". When your position is not so compelling, don't be afraid to say so. You are no less an advocate if you tell the court that an issue presents a close question and then explain the sound reasons why that close call should go to your client.'*

Written submissions are here to stay. The articulation of argument in written submissions is fast becoming more important than oral advocacy. Whether in a court room or mediation, a clear and cogent written argument can provide the foundation for a successful outcome or a good settlement. ■

Gerard Mullins *is the Australian Lawyers Alliance's Queensland President and a barrister at Ronan Chambers, Brisbane.*
PHONE *(07) 3236 1882.* **EMAIL** *gerrymullins@ozemail.com.au*