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ADVOCACY AND THE WRITTEN WORD

Appealing Written Submissions

The other President – Glenn Martin's – brief to me in presenting this paper was in these terms:

"Much of the teaching of advocacy has … concentrated on court room advocacy. While this remains important, the ability to present a cogent written argument has become of increasing (perhaps equal) importance at appellate levels. As Queensland is the only jurisdiction in which full written submissions are normally required, the Court of Appeal has had greater exposure than other equivalent courts to the written argument.

It has been said by some judges that many written submissions are nothing more than a series of assertions without any coherent argument. The ability to argue forcefully and concisely is a skill which can be taught and we hope that [you] would be able to assist us in that regard."

I shall do my best.

We are all constantly reminded of Queensland's uniqueness but the requirement of its Court of Appeal for written submissions is not unique. The USA has a well-established tradition of the primary submissions in appeals being contained in a very full written brief, supplemented by only short oral hearings subject to time limitations. By contrast, the English tradition places much greater emphasis on oral argument in court but, in the 21st century, even the Practice Directions of the Court of Appeal of England and Wales Practice Directions now require written skeleton arguments in applications and appeals in both civil and criminal matters.[1]

The Queensland Court of Appeal Practice Direction No 26 of 1999 fully sets out the requirements for written submissions. Familiarise yourself with it and keep up to date with amendments. It is to be amended in the near future. Failure to comply with its provisions may result in the matter

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[1] See Practice Direction – Court of Appeal (Civil Division), Pt 2 and Consolidated Criminal Practice Direction – Court of Appeal (Criminal Division), 11.17.

being listed before a judge of appeal for directions; a costs order could be made against the party at fault; or the matter could even be struck out.[2] Like the High Court, the Federal Court and all other State appellate courts,[3] it requires them to be filed well before the appeal hearing. In *Whyte v Brosch*,[4] a five judge bench in New South Wales in 1998 stated that without provision of timely written submissions the court cannot efficiently use judicial resources in preparing matters with a view to, where appropriate, delivering *ex tempore* reasons. The court accepted apologies from the respective legal practitioners for failing to provide written outlines but noted that future lapses may result in sanctions such as costs orders against legal practitioners personally, referral to the professional associations or even the exercise of the court's inherent power to discipline members of the legal profession. Queensland practitioners are much better trained and more carefully watched by the vigilant registry staff so that, to date, they have not been subjected to such firm judicial warnings. You should all remember, however, that meeting such time limits is your responsibility as officers of the court.

In a paper delivered to the inaugural annual conference of the Australian Bar Association in 1984, Mason J (as he then was) with his customary foresight and at a time when written submissions, even at High Court level, were not mandatory, observed that the delivery of a written case before the hearing enables the judge to see the issues in sharper focus, to consider the arguments before oral presentation and to derive greater benefit from it. It shortens the hearing without involving fixed time limits and assists counsel by enabling the judges to appreciate more clearly a party's submissions in the full context of the case and provides a buttress for counsel in maintaining the structural integrity of argument during oral presentation.[5] Written submissions expose early the vulnerable aspects of a case. There is no virtue in written submissions after oral argument has closed for written submissions pave the way for oral argument, they should not revise it. Whilst observing that his enthusiasm for the written case was a minority view in the 1984 High

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2 Practice Direction No 26 of 1999, para [39].

3 High Court Practice Direction No 1 of 2000, esp para 7 and 9; Federal Court of Australia Practice Note 1-Appeals to a Full Court; Supreme Court of New South Wales, Practice Note Nos 65 and 76 and Supreme Court of New South Wales Rules 1970, rr 51.4B, 51.4C and 54.46; Supreme Court of Victoria Court of Appeal Practice Statement No 1 of 1995, paras 8-12 and Practice Statement No 1 of 2000, paras [4]-[8]; Supreme Court of Western Australia Practice Directions No 5 of 1997, No 1 of 1998 and No 4 of 1999; Supreme Court of South Australia Practice Direction No 25, 12 November 1999; Supreme Court of Tasmania Practice Direction No 6 of 2005 and ACT Supreme Court Rules 42 and 43.

4 (1998) 45 NSWLR 354, 355.

5 *The Role of Counsel and Appellate Advocacy*, Mason J; paper delivered to the Australian Bar Association Conference, 1 July 1984.

Court, he prophetically considered it an inevitable future development in the long term in Australian appeal courts:

> "The art of producing persuasive written argument is not highly developed in Australia. Here the bar tradition is an oral tradition. The opinion and the advice, the written medium with which the barrister is familiar, are not a sufficient introduction to the formulation of persuasive argument in writing. Academic lawyers, on the other hand, are much more accustomed to expressing themselves in writing with a view to convincing the reader. The result is that written submissions tend to be either too lengthy so that the arguments are lost in the forest of detail, or too scanty so that the points are listed seriatim like particulars of negligence without the supporting elaboration which gives flesh and blood to the bare bones of the propositions. In the process, persuasion, which is the object of all presentation, seems to have been overlooked."[6]

Mason J advised that an appellate advocate should never sacrifice accuracy of expression on the altar of expediency because the judges' rejection of counsel's version on one issue may lead them to reject counsel's submissions generally. He recommended identifying only the critical passages from the judgment under appeal which are said either to reflect heresy or to represent a compelling statement of received doctrine.

Justice Ronald Sackville has observed that it may be useful to file a chronology recording the events critical to the case so as to assist the court understand your argument and even where appellate courts do not require the preparation and filing of written submissions or outlines, the practice should be followed unless positively prohibited[7] because "making life easier for the judges is no guarantee of success, but it is certainly no hindrance."

One of Australia's leading appellate advocates and on a State of Origin basis a Queenslander, D F Jackson QC, noted at last year's Law Symposium in his paper, *Appeals*:

> "Every appellate court today requires written submissions in advance of the hearing. The written submissions are as much part of the advocacy on appeal as the oral submissions at the hearing, and it is a waste of an opportunity, and a disservice to

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6 (1984) 58 ALJ, 537, 540-541.

7 Sackville J, "Appellate Advocacy" (1996-7) 15 *Australian Bar Review*, 99.

> the client, if sufficient attention is not paid to them, or if they are simply a 'rehash' of written submissions at trial."[8]

In Queensland, written outlines of argument are required to be filed not only in appeals but in all appellate applications. Court of Appeal matters may be heard solely on the written outlines of argument[9] although this will only be done by order of the court or a judge of appeal and ordinarily only when all parties consent. It has been popular with some unrepresented regular North Queensland litigants who see the Court of Appeal as but a whistlestop to Justice Callinan in Canberra, not worth the trip to Brisbane or even the cost of the video or telephone link. The practice has its place in minor applications but the Court is presently able to manage its workload in a timely fashion so that there is certainly no current justification for written outlines to routinely replace, rather than supplement, oral submissions.

You should prepare your oral argument expecting the members of the Court to have read the notice of appeal, the judgment the subject of the appeal and the written outlines of argument before the hearing. It follows that the written outlines present a great advocacy opportunity. Their style and content will vary with the facts and issues in each case, but there are some constants.

The beginner appellate advocate will find helpful the information sheets originally prepared to assist unrepresented litigants which are available from the Court of Appeal registry either in hard copy form or on the website: courts.qld.gov.au. The information sheets emphasise the importance of meeting the time frames contained in the Practice Direction which can be extended or abridged for good reason by the registrar or the Court. They stress, as does the Practice Direction, that the outline should be concise and ordinarily not more than ten pages. I am sure many practitioners think the ten page rule is unreasonable, especially in complex cases. It is all too often ignored. The Federal Court has a similar requirement. Other jurisdictions require even more concise outlines of argument: in South Australia the outline is ordinarily not to exceed three pages. Frequently the requirements of the Practice Direction to explain in writing any breaches of the 10 page rule result in something like: "Because the appellant had 22 grounds of appeal and a 60 page outline, the respondent has shown moderation in filing but a 59 page outline." What a missed opportunity! Get the judges onside before they

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8 D F Jackson QC, *Appeals,* paper presented to 2004 Law Symposium, Hyatt Coolum, Queensland, para [48].

9 Practice Direction No 26 of 1999, para [39].

even come into court by cutting to what those 22 grounds of appeal are really about and explain concisely and clearly why the primary decision is right and the appellant wrong. That is not to say that the ten page rule is inflexible. In some cases it will be impossible to avoid exceeding it. Even in those rare instances, it is important to focus on being concise and relevant to the grounds of appeal. Do not think the ten page rule will be met by providing outlines in tiny font: it would be extremely poor advocacy to provide illegible outlines of argument for aging judges with fading eyesight! The foreshadowed amendments to the Practice Direction will forbid it, anyway!

Before commencing your concise outline of argument, be sure you understand how you get before the Court of Appeal. Is there a right of appeal or do you need leave? If you need leave, you should address in the first paragraph of your outline why leave should be given. This will generally require a consideration of the strengths of the grounds of appeal sought to be argued. In case leave is granted, the parties will often prefer the Court to deal with any appeal at the same time as the leave application so that you should address the merits of the appeal grounds in the written outline or supply a separate outline of argument for the appeal. The appeal will only be heard together with the leave application when the Court and the parties agree that this is appropriate.

Is an extension of time needed? If so, you should address in the first paragraph of your outline why there was a delay and why the extension of time should be given by referring to your proposed grounds of appeal, for if the grounds are unmeritorious, there will be no point granting an extension of time.

Are the grounds of appeal limited, for example, to error of law or lack of jurisdiction? If so, explain at the commencement of the outline how the grounds of appeal come within those set limits.

Next, deal with the grounds of appeal contained in the notice of appeal. If, as appellant, you realise those grounds are no longer apposite, then apply to amend the grounds in an early paragraph of your outline before addressing the amended grounds.

Keane JA, recently Queensland's leading appellate advocate, with whom I briefly discussed this paper, suggested I emphasise that you remember the constraints on appellate courts in preparing the written outlines. If you are appealing from an exercise of discretion, explain the basis on which you say the Court can interfere within the principles set out in *House v*

R.[10] If you are seeking to overturn findings of fact, address why that is justified in terms of the principles discussed in *Fox v Percy*.[11]

Remembering the 10 page rule, focus on the heart of the case and what the appeal is really about. Limit the issues, if more than one, to your best points and deal with each issue separately and sequentially using headings.

Keane JA recommends commencing the outline of argument with a statement of the issue and how it affects the orders sought and to later conclude the outline of argument with a statement of the orders sought.

If the order you now seek differs from that requested in the notice of appeal, explain why at the beginning of the outline.

In stating the issue, it will often be useful to refer to the critical parts of the reasons for judgment the subject of appeal and to explain either why they are wrong and what should have happened or why they are supportable and the appellant is wrong.

Be concise but ensure your arguments are not so pared down that they become incomprehensible.

Make sure your legal and factual submissions are accurate: if judges find you unreliable in one case you will probably lose that case and certainly be on the back foot in future cases.

Construct your sentences grammatically: you do not want judges distracted from the merits of your arguments by poor grammar or spelling, unnecessarily complicated sentence structure or big words that require a dictionary to comprehend.

It is not good advocacy to discuss the facts of cited cases at length nor to quote long passages: state the principle and how it is relevant to your argument. For non-crucial propositions or to reinforce a point made in the text, use footnotes giving page and paragraph references.

All references to the evidence should have footnotes giving the transcript references.

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10 (1936) 55 CLR 499.

11 (2003) 214 CLR 118, [25]-[31].

A clever advocate understands the parties have given the appeal judges a problem and will use the written outline to provide the answer. Make your submissions so appealing that the judges will want to incorporate them into their reasons giving judgment for your client. What greater praise for an advocate than to not only win the appeal but also to find his or her written words incorporated in and adopted by the judges in their reasons; even better, when the adoption is acknowledged rather than plagiarised!

In the last paragraph of the outline state the order you seek.

When you have completed your outline you should ERR, Edit, Revise and Refine. The more you revise and refine your written outline, the better you will understand your case and the better your ability to present it orally.

I mentioned earlier the well-established US tradition of very lengthy written appellate submissions. In Maryland, the office of the Attorney-General conducts a civil appellate brief writing program and has its own civil appeals style manual. Maryland's Solicitor-General, Andrew H Baida, in a recent article in the Australian Bar Review[12] summarises in a mere 47 points the main principles! Relax, I am not going to give you all 47 points nor his detailed examples! If I did, I would not only outstay my welcome but I would be encouraging you to offend the 10 page rule. I could not help but notice Mr Baida's preferred examples were always twice as long as those he rejected! Nevertheless, he has some useful suggestions but with a US flamboyance. They reminded me that advocates and judges have different interests: you want your client to win the appeal according to the rules; we want to get it right and to see through those shark-advocates approaching the bench!

Baida advises:

- identifying the theme, the unifying focus of your brief, the equitable heart of the appeal. Continue to refer to that theme throughout your submissions.
- advocate from the beginning, but do not be argumentative; select your information and package it advantageously while not appearing to unfairly colour your case for this would risk alienating the judges. Paint a persuasive story in a structured way; structure becomes even

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[12] A H Baida, "Writing a Better Brief: Civil Appeals Style Manual of the Office of the Maryland Attorney-General", (2001) 3 *J App Prac and Process*, 685. Reproduced in (2002) 22 *Australian Bar Review* 1.

more important in a complex case. State the case concisely but not so briefly that the reader cannot understand the issues.

- present the question for the court to answer in a brief summary argument that is adversarial, designed to elicit a favourable response.
- develop enough law and facts to give the reader a sufficient understanding of the case and provide a full explanation of the issue on appeal.
- minimise the questions to be determined and consider whether you can condense your opponent's questions.
- establish and maintain your credibility with accurate statements advancing your theme, supported by material from the appeal record. Do not confuse fairness with neutrality.
- generally facts should not be repeated unless they are "great" facts.
- effective advocacy also includes dealing directly with facts unfavourable to your position. It is better to do so in your outline than by way of reply. It is usually necessary to include a complete statement of facts in your brief even if already stated in your opponent's brief because this is the most efficient way for the judges to learn your view of the facts without turning repeatedly to the opponent's brief. This allows you to put the facts in what you say is the appropriate context. (I must observe that this advice is directly contrary to the Practice Direction and is unlikely to result in compliance with the 10 page rule!).
- discuss the decision being reviewed to highlight the central error in either the judgment under review or in your opponent's argument.
- before descending into detail, give context to your argument in an introduction that "goes for the jugular". (They do a lot of that in the US!)
- succinctly identify the central issue in the appeal. State why that issue was correctly or incorrectly resolved below. Set out the applicable law and why it supports your position. Incorporate well-settled legal principles after you have identified the factual findings made at first instance and the evidence that either supports or undermines those findings and then use the well-settled legal principles to drive home your point. Submissions should advocate your case and not merely discuss general legal propositions. Baida describes this as IRAC. (No, silly, not Saddam Hussein's and George Bush's Iraq! He means the acronym for Issue, Rule, Application, Conclusion.)
- structure your sentences to move the argument forward, for example, Baida contends it is more effective to say "There is no merit in X's argument that black is white" than to say "X claims black is white; there is no merit in this argument". (I am not entirely persuaded.)

- use headings and sub-headings to organise and separate issues
- it is generally better to develop your position in argument before advancing the rebuttal argument, even when writing a reply.
- be brief in distinguishing cases relied upon by your opponent so that you do not spend too much time discussing your opponent's authority.
- be selective in the use of distracting footnotes: if the matter is important enough to communicate to the court, put it in the text. (I agree with Baida that footnotes are not a place for ideas but their selective use will help you meet the dreaded 10 page rule).
- avoid using lengthy quotations, whether from cases, statutes or the evidence, and make sure quotations are in context.
- sustain your argument with substance, not adjectives, bombast and hyperbole. (I hope Queensland advocates scarcely need to be reminded by Baida that it is unnecessary to label your opponent's argument as "ludicrous" or "beyond the reach of any reasoning mind". Nor is it ordinarily considered good advocacy in the Queensland Court of Appeal to use such terms to describe the reasoning in the decision under appeal.)
- do not include substantive argument in the concluding paragraph of the outline which should state the form of the order sought.
- have a break and then critically revise and edit it and have a colleague revise and edit it. (Baida must have very generous colleagues!)

Keane JA's observations on Mr Baida's advice? It has some good points but "much of the language of persuasion is also the language of spin doctors – don't insult the Court!"

Conclusion

- Make sure you put sufficient time aside in your diary to fully prepare the written submissions, just as you diarise your court appearances.
- Written submissions are a great opportunity to get the judges interested in your client's cause so that when your case is called on for oral argument the judges are looking forward to hearing from you. Don't waste this opportunity.
- There is no substitute for thorough preparation. Make sure you know whether you have a right of appeal or whether you need leave to appeal and whether you are within time limits. Focus on what you need to persuade the court; either why leave should be given, why time should be extended, or address the issue or issues in the grounds of appeal.
- Do not raise too many. If more than one, concentrate on your best. Deal with each separately using headings.
- Relate the issue or issues to the order you are seeking.

- Set out the critical parts of the reasons under attack and explain either why they are wrong and what should have been done, or why they are defended.
- Make sure your submissions are accurate, concise, comprehensible, grammatical and logically ordered, remembering the judges will not be as familiar as you are with either the relevant facts or law.
- You and your opponent have given the judges a problem: use your written submissions to solve it for them.
- Use Baida's **I**ssue, **R**ule, **A**pplication to the issues, **C**onclusion.
- State the order you want the judge to make.
- Finally, do what the appellant says the primary judge did: E R R: **E**dit, **R**efine and **R**evise your written argument until it is as clear and succinct as you can make it,