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SUPREME COURT OF QUEENSLAND

WRITTEN SUBMISSIONS AT TRIAL

Address to the Bar Association of Queensland Conference

Gold Coast – 6 March 2010

Justice Margaret Wilson

There are three qualities which an advocate needs to bring to the preparation of written submissions at trial:

(1) discernment;

(2) an aptitude for management;

(3) courage.

Let me explain.

Discernment

- the ability to identify the issues for determination, and the sub-issues of fact and law which need to be determined in your favour if you are to succeed on the ultimate issues.
- the ability to distinguish your strong points from your weak points.
- the ability to anticipate the arguments you will have to refute.

An aptitude for management

- the ability and inclination to organise the facts and law;
- the ability and inclination to manage the time available for the preparation of the submissions efficiently.

Courage

- courage to rely on those arguments you assess to be strong
- courage to forgo those arguments you assess to be weak.

The issues

Your role is to chart a course for the judge – a course through the law and the facts to an outcome which is favourable to your client.

Whether you succeed may well turn on how you frame the issues, and on whether you remain focused on those issues. In the words of a Canadian judge –

> "To use a military metaphor, the success of a campaign may depend upon whether the army engages its foe on one battlefield rather than another."[1]

When judges receive written submissions, often one of the first things they do is to look for formulations of the issues. They want to know whether counsel agree or disagree on what are the issues for determination.

Where there is disagreement, one of the first obstacles you may have to surmount is persuading the trial judge what the real issues are.

Having identified the issues, remain focused on them.

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[1] Paul H Perell "Written Argument at Trial" in Thomas A Cromwell (ed), *Effective Written Advocacy* (2008), Ontatio: The Cartright Group Ltd. 111, 114.

The facts

At trial level many cases turn on facts rather than on questions of law.

If the applicable legal principles are not in dispute, state them succinctly, citing only the leading authorities in support of them.

Then list the findings of fact which you are asking the judge to make.

Responsibility for determining disputed questions of fact is what distinguishes the work of courts at trial level from that at interlocutory or appellate level.

The trial judge is often presented with days of oral evidence and reams of documentary evidence to sift. In many cases the materials are unnecessarily profuse – but that is a topic for another day.

In preparing written submissions, it is your task to assist the judge find a way through the maze.

Do this in an orderly and disciplined way.

Take each finding of fact you are asking the judge to make in turn.

Is it in contention or not?

If it is not contentious, it is seldom necessary to say more than that it is common ground.

If it is disputed, you will usually need to persuade the judge to make a number of subsidiary findings of fact before he or she can make the ultimate finding.

Identify the subsidiary facts. Address them one by one.

If a subsidiary fact is not contentious, simply say so.

If it is contentious, identify the evidence which you submit supports it. If it was oral, provide transcript references. If it was written, identify the document and where the judge can find it.

Then provide a reasoned submission as to why the fact should be found in your favour – addressing matters such as the relevance of the evidence on which you rely, its credibility – the honesty and reliability of the witness who gave the evidence, how that witness fared in cross-examination. If credibility is in issue, you will need to address matters such as consistency with objective facts, probability, reliability and demeanour. If you rely on demeanour, explain what it was about the way the witness presented in the box which you submit is telling.

You will need to explain away conflicting evidence.

You must persuade the judge why the fact should be determined in your client's favour.

Time management

I referred to time management.

There is often little, if any, time between the conclusion of the evidence and the judge calling for counsel's submissions.

You may have written an opinion on prospects before trial – an opinion based on the evidence you expected to be led at trial, and the findings of fact you thought would be open.

But the evidence at trial may have been different. Your own witnesses may have departed from their statements in chief or in cross-examination, and you may not have anticipated evidence led by your opponent.

Submissions largely prepared before the trial and based on what you expected the evidence would be will not advance your case.

It is often best to prepare draft submissions on the law and the facts before the trial begins. But you need to be constantly revising your draft to ensure that what you give the judge is based on the issues at trial and the evidence actually presented.

I don't suggest this is an easy task.

I know how much there is for counsel to do during the hours out of court in the course of a trial. With experience, devise the system which works best for you. Word processors can be a god-send in these situations.

Judges allow time for the finalisation of written submissions wherever they can. But often their lists are heavy, and they have to move on to other cases without delay.

Law

I won't say very much about written submissions on questions of law, because I expect that Justice Martin and Justice Keane,[2] between them, will cover the field. What they say will apply at trial level, too.

But there is one point I want to highlight. It echoes what I have just said about the facts.

The submissions you make must be on the law as it applies to the facts established at trial.

If there is no evidentiary basis for a finding of fact essential to a submission you want to make on a point of law, then don't make the submission.

You may have spent many hours researching the point and refining your argument, but if the necessary finding of fact is not open, the submission cannot succeed.

If the finding of fact is open, but not inevitable, it may be prudent to make submissions in the alternative: submissions on the law if the fact is found in your favour and on the law if it is found against you.

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[2] At the same conference Justice Martin addressed written advocacy at the interlocutory level and Justice Keane at the appellate level.

Select your best arguments

Justice Scalia and Bryan Garner have recently observed:-

> "The most important – the very most important – step which you will take in any presentation, whether before a trial court or an appellate court, is selecting the arguments you'll advance.
>
> …
>
> Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court. If you're not going to win on your stronger arguments, you surely won't win on your weaker ones. It is the skill of the lawyer to know which is which."[3]

This applies to all advocacy, whether at interlocutory, trial or appellate level, and whether oral or written.

Of course you should have considered all possible arguments when you were preparing the case. You should have explained their relative strengths and weaknesses to your solicitor and client, and given them the opportunity to have constructive input into ranking them.

But you are the one who must persuade the court to find in your client's favour. Ultimately you must decide which arguments you will advance, and the order in which you will advance them.

It can take courage.

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[3] Antonin Scalia and Bryan A Garner, *Making Your Case: The Art of Persuading Judges* (2008) St Paul: Thomson/West, 22.

Interaction between written submissions and oral argument

When the court receives written submissions at the conclusion of a trial, it will probably limit the time for oral argument.

You need to plan how you are going to take best advantage of that time.

Don’t just stand up and say, “Your Honour, I rely on my written submissions,” and sit down.

Don’t just stand up and regurgitate your written submissions.

Use the time to put your arguments in perspective, honing in on the crux of your case. Speak to your submissions on the critical issues.

Use the time to respond to submissions made by your opponent.

Take advantage of the opportunity to answer questions from the bench, endeavouring to keep the judge on the course you have charted for him or her in your written submissions.

The time allocated for oral argument may test your mental agility and resolve.

Don’t underestimate its importance to the overall presentation of your case.

Style

Let me conclude with a few thoughts about style.

Your task is to persuade the judge to arrive at an outcome favourable to your client.

The medium through which you do that is the English language – which is surely one of the richest parts of our heritage.

Use the language carefully, and treat it with respect. Words are your tools: select the words which will best express the meaning you want to convey.

Above all, write simply and concisely. Understated elegance leaves a lasting impression.