HITTING THE RIGHT NOTE

HON. JUSTICE STEPHEN ESTCOURT AM

When I was appointed as a judge in 2013 I noted that the practice that I had given up had taken me all over Australia both as Queen's Counsel and as a part time deputy president of the Commonwealth Administrative Appeals Tribunal. It had exposed me to counsel from every Australian State and Territory, both appearing before me and as opponents in many cases. From that experience I was able to say that Tasmania could be very proud of the standard of its advocates both senior and junior. They are the equal of any in this country.

At my welcome sitting I said:

> Presenting written submissions orally in a way that involves the minimum court time will keep the cost of access to justice to the lowest possible level and that is something about which every person in this room is or has been concerned at one time or another. The corresponding challenge for me as a judge will be to use counsel's written submissions in an efficient and practical way so as to avoid overwritten judgments and to be able to provide decisions in the minimum possible time.

I have a particular interest in advocacy of course, having coached both in Australia and overseas for almost 30 years. The Tasmanian profession can have faith in itself, as I am sure it does, and it should embrace and be proud of its wonderfully high standards of advocacy. Counsel face modern challenges however, as on both the civil and criminal sides of the Court we are now very firmly in the age of written advocacy.

Written submissions on appeals and in other matters where they are required by the Court's Practice Directions have now transcended the original idea of "skeletons" or "outlines", and frequently run for many pages, as the Court, unlike most other State and Federal Courts, has not (as yet), imposed a page limit, much less a font size restriction as applies in the High Court. In the last year or so, for my part, I have also encouraged and have received written submissions on pleas of guilty in the Criminal Court. These are of great assistance in the timely handing down of sentences and are certainly advantageous to clients of defence counsel in a number of respects.

Written submissions are not just a precursor to the argument of counsel, they are an integral part of it. As Allsop P, as his Honour then was, put it, in a paper presented at Lincolns Inn in January 2012;

> Written submissions are not mere preparations for the appeal, they are not a mere procedural precondition for the appeal. They are now the first half of the appeal. You do not get enough time to argue appeals entirely orally. If you do written submissions badly, half your appeal has been done badly.

I think written advocacy is so much part of the work of busy counsel these days that the challenge has become, not their preparation, but their presentation. The real skill is in knowing how to present written submissions to the Court in a way that involves the minimum hearing time in oral advocacy – heresy twenty years ago – fact of life now.

In my experience the real difficulty presented by the very valuable transition over the last decade from chiefly oral argument to principally written submissions is to know how to present the argument to the court in a persuasive way, which of course is the essence of good advocacy. Having had the benefit of reading and considering the written submissions in a matter before going into court, what judges need, in my view, is to the hear the essence of the argument, not to hear a repetition of the written case.

Of the very fine advocates I have had the privilege of appearing with or against what each of them had in common was that their oral argument plucked the very heart from their written submissions, but did not necessarily refer to those submissions expressly, or even speak directly to the written document. The worst possible advocacy is to waste court time by reading out, word for word your written submissions, or even paraphrasing them paragraph by paragraph.

Finding the balance is not always easy as not all appeal court judges will have had time to read everything in the appeal book or referred to but not set out in the written submissions. In Tasmania, the relevant Practice Direction states that you may assume that the judgment below or the summing up and the notice of appeal have already been read by the Full Court. However, often with a busy court with no separate Court of Appeal, that is all you may assume. If a member of such a Bench calls upon you, either expressly (or impliedly by questions), to address your written submissions in more detail, then you will need to do so, whatever I may have said or am about to say in this short paper. I would suggest counsel could start with presenting oral argument at a relatively high level of abstraction, expecting a Socratic dialogue with the Bench, but be prepared to descend if necessary.

I note in passing that it now ought to be taken as read that as counsel you rely on the written submissions that have been filed. However, out of excessive caution, it does no harm to state that clearly to the court.

Headlining the points that you propose to make at the outset of your oral submissions is often no bad thing and can provide the court with a roadmap of your submissions. However, if you say you have four points then stick to them because the judges will have written down the four points, and if it turns out

that there are six points, or, worse still, four points each with five subparts, your headlining will have proved confusing and not helpful.

A good tip, I think, is to identify a small number of key points". And remember what has been dubbed the "infection" theory of advocacy – your weak points infect your good ones. If you have weak ones then leave them to speak from the written document. Counsel should seek to identify the essence of the written argument, and orally present the pith and substance of that argument. And avoid, at all costs, repeating the point. It goes without saying that a point is not improved by repeating it or by embellishing it with epithets or intensifiers.

I believe that the most important technique to be utilized, in both preparing and orally presenting written submissions, is the framing of the essential issue in the case. Hayne J, in a paper given to the Victorian Bar Continuing Legal Education program in November 2004, albeit referring to the written argument, put it this way:

> In any written argument, but especially an application for special leave to appeal, a statement of the issue that is said to arise is very often of critical importance. Putting the issue in terms that reveal the issue of principle that is said to be at stake is very important. That is not done by saying that 'the issue is whether the Court of appeal erred in making the orders it did'. Such a statement of issue tells the High Court absolutely nothing about the case.

Bryan A Garner is a US lawyer, lexicographer and teacher. He has written several books about English usage and style, including *Garner's Modern American Usage and Elements of Legal Style*. He is the editor-in-chief of all current editions of *Black's Law Dictionary*, and he has co-authored two books with Justice Antonin Scalia: *Making Your Case: The Art of Persuading Judges* (2008), and *Reading Law: The Interpretation of Legal Texts* (2012). In A *Dictionary of Modern Legal Usage*, 2nd ed (1995) at 471, Garner said:

> "There is no more important point in persuasive and analytical writings – and certainly no point that is more commonly bungled – than framing the issue."

Garner maintains that the framed issue should be no more than 75 words and should be phrased in separate sentences. He says that the format should either be "statement, statement, question" or "premise, premise, conclusion".

Garner offers an example of framing the issue in an appeal in the case of a man charged with murder whose doctor is unavailable to give evidence at his trial, and an application for an adjournment has been refused:

> John Smith will likely be convicted of capital murder and sentenced to death at next week's trial unless he can present evidence of his mental retardation. Smith's expert on mental retardation must undergo emergency surgery to remove a cancer that his doctor had just discovered. Did the court abuse its discretion in refusing to grant Smith an adjournment?

There is, of course, nothing to stop counsel from writing down their oral argument. Indeed there is a good deal to recommend it. In the High Court, counsel are required to provide a written summary of their oral argument. Hayne J points out in his paper that opinion differs about how much of your oral argument you should write down. He said:

> Some of the best advocates in the country have had very full notes of their argument. This has enabled them to cut and paste on their feet according to the direction that debate takes. Others seem to treat it as a badge of honour that they have very little written material before them except the application book or the appeal book. In the end, it is of course, a matter for individual choice but, if in doubt, write it down. The discipline of writing often conduces to brevity and accuracy. Whether as American literature suggests, you prepare a 'podium book' in which you have your speaking notes, chronology and one or two critical documents, is a matter for you. Some find it helpful. The guiding principle is that you must be able to present your argument in a way in which you are engaging the Court. Counsel who puts his or her head down in order to read a prepared speech, or a slab of judgment, foregoes any opportunity to engage the Court.

There is also good advice to be found in Allsop P's paper. His Honour said:

> Remember – your court will be busy. They will have read your written submissions – perhaps more than once, perhaps once. They are quite likely not to have fully absorbed them. You have a group of intelligent, busy people who may have a jumbled or confused understanding of what you want to say. You have to ensure that the structure and detail of their understanding accords with your argument. What must they grasp? What structure of argument? What central body of facts? Take them in the materials to what you wish them to understand. Do not just read the written submissions. Time is precious. Think about what case, what facts, what parts of the trial judgment you wish to read – then and there.

Use of transcript references, and, in my view, equally, use of authorities should be made sparingly in oral argument. The relevant references and authorities will be in your written submissions, with page references and important passages set out in full. It is poor advocacy for counsel to read long passages from the judgments, even more so from the quotations from them that have already been set out in the written submissions. In my view, only the most persuasive, highly authoritative (and never trite), cases should be read to the court.

IMAGE: ADOBE STOCK

THE HONOURABLE JUSTICE STEPHEN ESTCOURT AM
Judge
Supreme Court of Tasmania