Appeal Advocacy – Written and Oral

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The Hon Justice Stephen Estcourt AM
Judge, Supreme Court of Tasmania

Justice Robert Jackson, a former Associate Justice of the United States Supreme Court said that as Attorney General he made three arguments in every case:

> "*First came the one that I planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.*"

Judge Learned Hand, who was one of the greatest American judges, although he was never appointed to the Supreme Court, in the 1920s, 1930s and 1940s, nonetheless commanded, together with his cousin Augustus Hand (Gus) and Dean Swann, one of the finest appellate courts ever, the 2nd Circuit Court of Appeals.

As was pointed out however, by Allsop P, now Chief Justice Allsop of the Federal Court of Australia, in a paper presented at Lincoln's Inn in January 2012; just after Learned Hand moved to practise in New York City in 1905, he lamented his lack of a thriving practice. All he was given was work for other law firms on a contract basis. That work was writing briefs (in effect written submissions), for appeals in the New York Court of Appeals and the 2nd Circuit Court of Appeals. Gus was getting all the trial work and Learned wasn't happy. But I would add, he was gaining very valuable written advocacy skills.

This paper is not intended though to explore the US history of the written brief, or the academic or theoretical issues of written advocacy.

For those interested in those facets of written advocacy there is an excellent paper given by Hayne J to the Western Australian Bar in Perth in October 2004, entitled *Advocacy and Special Leave Applications*. It is available on the High Court of Australia website under "Publications/Speeches". The articles and texts Hayne J mentions in his paper would also repay reading.

This paper focusses on written appellate advocacy and the oral presentation of them, but the skills required are fairly readily adapted to written submissions prepared for a trial judge or primary judge.

The most important technique to be practised for the purpose of preparing 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, expanding on the paper I have just referred to, 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*."

As noted, the United States appellate practice places much greater emphasis on the written brief than on oral argument, and the key step in the preparation of the written brief is said to be the identification of the issue that is to be decided by the Court. It is referred to as "issue framing".

Bryan A Garner is a US lawyer who has written several books about English usage and style. In his book, *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 about 75 words and should be phrased in separate sentences.

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. He frames the issue this way, three sentences, statement, statement and question:

> "*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.* [statement] *Smith's expert on mental retardation must undergo emergency surgery to remove a cancer that his doctor had just discovered.* [statement] *Did the court abuse its discretion in refusing to grant Smith an adjournment?* [question]"

However, in order to frame the issue for an appeal you need to first ***find*** the issue, and in order to find the issue, you need to go to the decision against which the appeal is brought.

Fortunately though, the very heart of a judge's or a court's written reasons for judgment can often be found in as little as a couple of sentences.

True it is that the reasons overall may contain many cited cases and numerous steps in the reasoning process, but almost invariably the decision will hinge on a very simple statement or statements.

So after considering all of these things, and after checking any practice directions of the court you are in, as to when your written submissions are due to be filed and served etc, you may put pen to paper.

First you will need a framework, and to do that you will need to consider how best to logically express your statement of the issue or issues and then develop your

explanation of the facts of the case, the decision below and your contentions of both law and fact.

By way of example, for an application where you are counsel for the appellant, you might choose to outline the submissions as follows:

- the issue;
- the orders sought;
- the decision appealed from;
- the factual background;
- your arguments or contentions; and
- a summarised conclusion.

Each case will be different, but you will need to remember that every word you use must be easily understood by a first-time reader of your submissions – the judge or judges. You must keep steadily in mind that you are explaining something to someone who doesn't know anything of your argument and only has a fairly basic grasp, at first at least, of the facts and the decision below.

You can best facilitate this by headings in the document which flag for the reader, for example, the identified issues, the orders sought, the decision appealed from, the factual background, the decision below, your argument or contentions, and your conclusion.

Whether you are for an appellant or a respondent, each of these considerations is equally applicable.

If you are for the appellant, you will need to remember that good practice requires that your submissions be linked by cross-reference to the grounds of appeal under which they are raised, so often, as well as your topic headings, you will need sub-headings to identify the grounds of appeal.

If you are for a respondent you will need to decide whether you propose to make your written submissions referrable directly to the appellant's written submissions, or whether you propose to develop your own argument without specific reference to the numbered paragraphs in your opponent's submissions. If you do wish to do the former, you may wish to commence by saying something like:

> "*These submissions address the written submission to the Court made on behalf of the appellant by reference to the same subheadings and paragraph numbers as used in that document.*"

These are all variations on themes, but they serve to show that you may vary your approach to the written submissions to suit your purposes; particularly where, like Justice Jackson, you think of better or slightly different arguments after you have received your opponent's submissions.

Before turning to the presentation of the written submissions orally before the Court, I should say a word about the set out and appearance of your written submissions.

Some court rules govern the form of documents to be filed including written submissions. For example they might govern the number of pages that are allowed, or specify that only one side of the page is to be printed on, or that nothing smaller than 12 point typeface is to be used and so on.

It will pay to check the practice directions in the court in which your appeal is pending before you prepare your document in order to make sure of the applicable rules as to set out and style.

As counsel I preferred to use a typeface of at least 12 point size, as anything smaller is confusing to the reader and difficult for you as counsel to follow when on your feet, particularly when interrupted by questions from the bench (although of course you can always increase the font size in your own copy that you are going to address the court from).

I think it is also possible to use typefaces that are more appealing than others. I prefer Times New Roman 12 point and I don't like non-serif fonts.

In the case of a summary of argument for the Australian High Court that I was preparing some years ago in conjunction with a very experienced silk, he said to me that he had changed the typeface that our instructing solicitors had used to prepare our document because "it didn't look interesting". There is something in that I think.

Again, as to the form of the document, I personally favoured the following when I was acting as counsel:

- short paragraphs;
- individually numbered paragraphs;
- the use of footnotes (but not endnotes), instead of setting out citations in the body of the text;
- the elimination of intensifiers, such as, "extremely" relevant or "hopelessly" weak – a good argument speaks for itself;
- minimising the use of underlining and bold italics;

As to the substance of your written document, Allsop CJ pointed out in the paper to which I have already referred, that you need to remember when preparing your written submissions that generally they have three quite separate functions and they must be drafted to fulfil all three of those functions.

The first, his Honour says, is that the written submissions will be read before the appeal hearing by a busy reader, who may have two, three or four appeals that week. So, there must be a short, coherent and readable encapsulation of the essence of your argument.

The second, he says, is that the written submissions will be used during the argument to follow and understand the appeal. So the structure and text should reflect how you intend to speak. "Where are you in your written submissions, Mr Estcourt?" is often a forerunner to expressed irritation by the judge if what you are saying cannot be easily spotted in your written document; or, it can be the beginning of a warm and

meaningful relationship if it can be seen that what is being said by you reflects a clear written position.

The third function, his Honour says, is that the written submissions will frequently be used after the hearing by the judge to help to write the judgment. So, not only must there be a crisp intelligible introduction, and an elegant structure reflecting the oral address, but there must be a reasonably comprehensive placement of significant information.

It is as to this third function that his Honour notes that long, dense and badly organised, submissions make judges irritable and unenthusiastic in their attention, and ruin the written submissions.

In my own advocacy teaching I have dubbed Allsop CJ's threefold function requirement of written submissions as "the hook, line and sinker".

If written submissions are hard to grasp, then the first function is not fulfilled as they do not provide the necessary hook to catch the judge's initial interest and facilitate his or her understanding.

If they are useless to use to follow your oral argument, then their second function is not fulfilled because they will not have served as a line on which to play the judge in court and get him or her understanding you, and onside.

And if your written submissions are not well organised and comprehensive and annotated and marked, so as to be the bench's primary reference point, then they will not be the sinker on the judges' desks weighting the outcome in your favour by being the "go to" document when the judgments are being written.

To quote Allsop CJ:

> "*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.*"

So, having filed and served your written submissions, the question which arises on the hearing of the appeal is the extent to which, and the manner in which you will address those submissions in oral argument.

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 to the court in a persuasive way, which of course is the essence of good advocacy, the gravamen of your written argument. The pith and substance as an English colleague of mine, Nicholas Green QC, puts it.

Allsop CJ says as to this:

> "*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 them to read – then and there."*

Hayne J points out in his paper referred to earlier 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.*"

Everyone is different. Some years ago I was involved in a High Court case in Brisbane with three of the best counsel in Australia, Bret Walker SC, Stephen Gageler SC (now Justice Gageler of the High Court) and Geoff Lindsay SC.

Bret Walker had handwritten notes at the lectern, quite messy and accompanied by scribbling on various pages of the appeal book, and the summaries of argument of other parties all strewn around.

Stephen Gageler had rather full typed notes of his argument and Geoff Lindsay SC, now Lindsay J of the NSW Supreme Court, had a series of old office style business index cards with individual propositions written on them.

The thing that each had in common was that their oral argument plucked the very essence from their written submissions but did not refer to it expressly or even speak directly to it, much less, as one sometimes sees, read it out word for word.

The object is to present the court with the very heart of your written submissions.

This is easier to do of course with courts that have had the time to read everything in the appeal book as well as the written submissions. With some courts you may assume that the judgment below or the summing-up and the notice of appeal have already been read by the judges. Often with a busy court with no separate court of appeal that is all you may assume.

On the other hand, in Victoria and New South Wales in Australia for example, with a dedicated Court of Appeal and before the Full Federal Court or the High Court of Australia, you can take it that everything, including your written submissions and the

cases will have been read and re-read, and you will need to address only the essential features of your case and not necessarily follow your written submissions.

The difficulty is to know how to cope in every circumstance.

My practice, even before the requirement in the High Court for counsel to hand up a one page written outline of oral submissions in addition to the written submissions filed earlier, was always to prepare one or two pages of typed, "written oral submissions". I would work from those and not from the written submissions.

However, if a court calls upon you, either expressly or impliedly to address your written submissions in more detail, then you will need to do so. Sometimes, not too often I would hope, a giveaway might be if a member of the bench says something to you as you commence presenting your oral submissions that indicates an incomplete command of the material.

Unless something like that happens, it is very bad advocacy to stand up and just read your written submissions to the court.

Although, having said that, it all depends on the circumstances as to what reference you make to matters contained in them. Allsop CJ had this to say on this subject:

> "'*Why are you taking us to this Ms X, the references are all in your very helpful submissions?' his Lordship asks, not without a touch of impatience. 'Yes your Lordship; they are, but I wish to take you to selected parts of the evidence of the meeting to demonstrate that there can be no doubt that the learned judge's findings on this central issue were wrong. I will take you to the first three references in [61] and leave the court to read the other seven there referred to which are in like terms.'*
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> *Judges love that:*
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> - *you have command of the paper;*
> - *you have command of the facts and your brief; and*
> - *you have command of the court.*
>
> *Well-structured written submissions enable you to achieve what all advocacy is about:*
>
> - *control of the occasion and*
> - *persuasion*."

While on the topic of the sparing use of transcript references, I should say, that in my view, equally sparing use should be made of authorities. The relevant authorities will be in your written submissions with page references and important passages set out in full. Nothing is more annoying to the judges of an appellate court than to have counsel read passage after passage from the judgments, or from the quotations from them set out in the written submissions. Only the most important, highly authoritative, and never well recognised and understood, case law should be read aloud to the court.

Returning to how to use your written submissions in oral argument, I always used to start with my one to two pages of "written oral submissions" which were always in

short paragraphs each of which hopefully related to and picked up the essence of each major point contained in the written submissions.

I would start with that in addressing the bench and would see where that took me. Often you will find that two sentences into your oral submissions you are asked questions that take you away from the order in which you had set out the issues in your document.

In a case where you are questioned early in that manner, as will often happen, if you have your "written oral submissions" set out in self-contained short paragraphs, you can go immediately to the paragraph that contains the answer to the question you have been asked (you hope anyway), and can then come back quite easily a little later to where you were and start again.

This is what Hayne J refers to as counsel "cutting and pasting" on their feet according to the direction that the debate takes. You simply "cut" the paragraph that contains the answer and "paste" it at the point you are at, and then pick up again where you left off after you have addressed the question.

Despite what anyone says, it is my view that you must answer questions as they are asked of you. As Hayne J said in his paper to the Victorian Bar:

> "*Because the Court wants to gain as much as it can from oral argument, it is inevitable that argument never quite follows the order which counsel intends to follow. Answering a question from the Bench with 'I will come to that later' is not often sensible. Much more often than not it is better to deal with the question then and there, at least in summary form. But it means you will have to alter the way in which you intended to present your argument.*"

Cutting and pasting from your written oral submissions allows you to do that without becoming lost and without losing sight of any other essential features of the argument you wish to present orally.

On the subject of questions from the bench, I offer a number of comments.

You must stop, engage the judge who is asking you the question and listen to the question carefully.

You must not be over-anxious to answer the question, just because you think you know the answer. You need to think about it. It may not be as simple as you think.

You must not, either in your anxiety to answer the question or for any other reason, talk over the top of the judge who is asking you the question. If you do, apologise.

Do not be obsequious. Limit the number of "your Honours" and "if it pleases". Overuse of these phrases is irritating and it is not necessary in order to be respectful to pepper everything you say with these ritualised incantations. You can be conversational in the presentation of your oral argument, so long as you are not disrespectful in tone or inflection.

Nicholas Green tells the story of being led by the legendary Sir Sydney Kenbridge QC. Kenbridge was renowned for his wit and deadpan delivery. As an advocate in South

Africa he had acted for Nelson Mandela and Archbishop Desmond Tutu and, in the 1950s for Chief Albert Luthulu, then president of the ANC. Kenbridge was played by Albert Finney in a film about the Stephen Biko inquiry.

On one occasion Sir Sydney was addressing the Supreme Court in London on behalf the Law Society. It was the day after his 90th birthday. He opened his submissions by saying "I have three points: one is very good: one is quite good and the third is not very good". Upon being asked from the bench to tell the Court which was his very good point, Sydney replied, "That is for me to know and for you to find out."

Personally I would wait until the day after my 90th birthday before imitating Sydney's humour. It is sometimes said that humour in court is best left to the judges.

Finally, do not interrupt your opponent during his or her argument; wait to answer it in reply, or by leave as the case may be.

Equally, do not sledge your opponent either audibly or under your breath.

We may have been way behind the USA in getting started, but there can be no doubt that written advocacy is the new advocacy for all of us now.

It is hard work and requires a disciplined approach. Each word you use, particularly in "written oral submissions", must be carefully chosen so as to endeavour to make crystal clear to a first time reader or listener what are frequently complex propositions.

Written submissions will also require you to rethink how you prioritise your work and how you timetable the things that you have to do well ahead of time. The preparation of written submissions and the inevitable editing and re-editing is time consuming.

Whilst time consuming however, the discipline of preparing written submissions brings about greater precision in the identification and presentation of argument.

Moreover, written submissions are fair as they avoid ambush and allow the issues to be ventilated before a court by counsel who understand fully and in advance what their opponent's contentions are.

Never, in my view, should you hand to your opponent and/or the court a set of written submissions on the day of the hearing. What good are they if they are seen for the first time just as you are about to commence? They won't have been read by the judges or your opponent. If you do this then, out of fairness to your opponent and out of respect for the court, you will have to read them out in full and at the very least that is bad advocacy.

Written submissions can be very satisfying, because of the need to lay out for a first time reader difficult propositions in a simple and understandable fashion.

There is no doubt that written submissions will become the norm for most if not all jurisdictions and not just on appeals.

My advice is to embrace this new advocacy, because it is here to stay.