A BASIC GUIDE TO GOOD WRITTEN AND ORAL ADVOCACY[1]

WRITTEN ADVOCACY[2]

Remember

1. Written submissions are almost always helpful, irrespective of the nature of the case, and whether or not the court/tribunal has actually directed you to file and serve any. Provided you give a copy to your opposing party, rarely will a judge complain about the provision of written submissions in advance of the hearing.
2. Written submissions are your first opportunity to 'poison the well'. It is likely to be the first thing the judge reads.

Basic Rules

3. All written submissions should:
   - identify the case and the party on whose behalf the submissions are made;
   - be page numbered;
   - be paragraph numbered;
   - be of a readable font size;
   - provide accurate and precise references to the evidence, cases, transcript etc. For this purpose make sure the tender bundles, affidavits and reports etc, are page numbered throughout the entire document, including all annexures; and

[1] Presentation given to Australian National University, College of Law, Masters of Criminal Practice, 19 March 2015.
[2] Content taken from presentation by Jagot J to NSW Bar Association in 2009.

- be succinct, be structured; and be helpful to the decision-maker.

Tips

4. By succinct, be as brief as the issues in the case allow you to be. Don't be unnecessarily repetitive.

5. By structured, be appropriately structured for the nature of the case. No one structure fits all but all submissions should be structured, so:

   - use headings and sub-headings appropriately. If the case if long and complex, provide a table of contents;
   - make headings useful and not simply generic;
   - work out the structure that suits the case before you start writing;
   - think of a logical order that will assist the decision-maker;
   - all cases are different but many follow a similar pattern – so think about what you have to establish to succeed and work your structure around those elements, including:
     - ➢ whether the court/tribunal has jurisdiction, and if so how?
     - ➢ what are the powers/functions of the court/tribunal relating to the matter? (for example, *de novo*, appeal by way of rehearing, appeal in strict sense)
     - ➢ do the rules of evidence apply, or not?
     - ➢ what orders does your client say should or should not be made?
     - ➢ what is the source of the power of the court/tribunal to grant the relief sought?

- ➢ what are the issues of law and fact the court/tribunal must decide?
- ➢ what are your submissions on each issue of law and fact? Specifically, what conclusions/findings on each issue do you say the decision-maker should reach/make?
- ➢ does the court/tribunal have any discretion?
- ➢ what do you say should be the result?

6. By helpful to the decision-maker, write your submissions with the decision-maker, as a person who will themselves have to write the decision based on all of the evidence and submissions, in mind. So:

- imagine that you will have to write the decision – what submissions would you like to have to assist you?
- focus on your own case, but do not just ignore the other side's case altogether. You have to deal with the other side's case meaningfully and explain why your case should be preferred;
- do not try to ignore or overlook an obvious weakness in your own case. If it is obvious you need to deal with it and make the best argument you can; and
- check whether your submissions actually match your pleadings. If they do not, think about what you might need to do to make the two consistent.

7. Write early and write often. It is usually when you are drafting your written submissions that problems in your case emerge. The earlier you identify these, the earlier they can be fixed.

Opening Submissions

8. Written submissions are a particularly helpful aid to openings. In this context:

   - try to ensure that you get your submissions to the judge's chambers at least one working day before the hearing (at the very least the morning of the hearing and, at the very worst, hand a copy up at the start of the hearing). Don't fax the submissions; email them to chambers and file them in the registry;
   - the existence of factual disputes depending on contested evidence is no reason to avoid opening submissions – it is very helpful for opening submissions to identify the anticipated factual disputes, and the factual propositions you say should be found, depending on the evidence;
   - try to structure opening submissions (by headings and sub headings) in a way that you can simply expand and re-use as your closing submissions; and
   - clearly identify whether your arguments are cumulative or in the alternative.

Legal issues

9. Written submissions are almost essential for any case in which the issue is one of law only or in respect of appeals on questions of law. In this context, opening submissions are also the closing submissions – and it is even more important to get the submissions to the Judge's chambers at least one working day before the hearing.

10. You must (as a matter of ethics) bring to the court's attention case law that is against you if you are aware of it. But remember, almost every case is distinguishable.

Closing Submissions

11. Think of written closing submissions as the document the decision-maker will first look to when writing the decision. So:

    - the closing submission should be the decision-maker's guide to reaching the decision you want. They should guide the decision-maker through the issues of fact and law, the evidence, the findings of fact and conclusions of law the decision-maker should reach and the result you say is required or appropriate;
    - the submissions should also be set out in a manner that is easy for you to follow as you guide the Court through them in your closing address;
    - they should make clear how the party believes the case works in terms of:
        - ➢ dependent and independent propositions (for example, if you find X, then the issue is Y, or issue Y is rendered irrelevant, or issues X and Y are alternatives etc); and
        - ➢ the chain of reasoning that leads to the result for which you contend;
    - they should refer to the evidence that arose throughout the trial (i.e. transcript references, tender bundle references and exhibits);
    - they should also have accurate references to pages in the court books/appeal books; and

- they should deal with the opposing case fairly but explain why it should not be accepted by reason of some or many proposition of law or finding of fact.

Finally

12. Do proofread your written work. Spelling mistakes, grammatical errors and poor formatting are unnecessary distractions.

13. Do not throw numerous authorities in just for the sake of it. Think of the decision-maker. If you cite it they have to read it. If it is not relevant or not in dispute, or repetitive, you are just adding to potential delay in getting the decision out. A careful consideration of the most important authorities is better than glossing the surface of multiple decisions.

14. If you do cite authority give a paragraph reference if available, or a page reference if not. Useful and carefully selected quotes from cases in the submissions can save time – but not if the selection in any way misrepresents the decision.

15. Do not hand up a giant folder of cases then only refer to one of them (or worse, none). Make sure your solicitors know to minimise photocopying of cases – preferably only unreported decisions. And if you are going to provide copies let the judge's chambers know so they do not waste time collecting what you are going to hand up. Also extracts from long decisions only are fine provided you have the reference to the full decision written on the extract (eg the headmost plus the relevant pages only). In this regard, make sure you are familiar with the Practice Note dealing with the provision of authorities relevant to the jurisdiction.

16. Serve what you intend to rely upon by way of submissions on your opposition. Do not hold back submissions already filed or sent to the court/tribunal until the day of the hearing.

17. You MUST NOT further submissions after the conclusion of the hearing unless you have leave to do so from the court/tribunal. To do so is a breach of your ethical obligations.

ORAL ADVOCACY

The Golden Rules

18. Your first duty is to the court, not to your client. Accordingly, you must never ever mislead the court. If you have done so inadvertently, then remedy the situation at the first available opportunity. Once an advocate gets a reputation for being unreliable or worse, dishonest, it is very hard to lose. If your clients instructs you otherwise, too bad. Correct the misinformation and then withdraw from the case.

19. While you hope to persuade the court, the court is actually looking to you for assistance. A helpful barrister is on the path to being a good barrister. Thus if the court asks you a question, answer it. Usually the court wants help when it asks counsel questions, it is not trying to be tricky. If you can’t answer it immediately, seek instructions or take it on notice.

20. Seek wherever possible to refine and narrow the scope of what is in contest before the court (i.e. seek agreement wherever possible on matters or fact and/or law with your opponent). This is an efficient use of everyone’s time and will save your client money.

Directions Hearings

21. The court is busy, your matter is not the only matter to be dealt with in the list so therefore:

    - after stating "may it please the Court", make sure you announce your name (spell it if unusual) and who you are appearing for, clearly;
    - know the history of the matter and what relief is ultimately being sought. Don't go to court knowing nothing about the matter. Just because the orders you seek are by consent, the court may not grant them. You many need to answer questions from the bench;
    - come prepared with written short minutes of order (which you have discussed with the other side beforehand);
    - try to reach agreement on as much as you can before the court;
    - state what is and what is not contentious;
    - have whatever documents you need to hand up already prepared, with copies for your opponent;
    - bring a copy of the rules of court;
    - be sure to know what power the court has to grant the orders you seek.

22. If you are in default, first, say so; and second, explain why; then third, provide a remedy.

Notices of Motion

23. You should DO the following:

    - if not contained in the motion, state the power for the relief sought;

- hand up a succinct but useful set of written submissions (with a copy for the other side);
- give a brief summary of what the proceedings are about, where the motion fits into the proceedings, and why you seek the relief stated in the motion;
- state what evidence you are relying on and why it is relevant;
- have copies of all authorities you seek to rely upon if you are appearing in a motions list or, if possible and the motion has been specially fixed, have them sent through the day before a list of authorities to the judge (but still hand up copies of unreported judgments).

Hearings

24. In addition to the dos and don'ts listed below, the following suggestions are offered.

Opening Submissions

25. Do an opening, even if only brief (if in doubt, ask the court if it would be assisted by one), especially if no written submissions have been filed.

26. The functioning of an opening is to give an outline of your case to the court. This will include a brief recitation of: the facts that you hope to prove if not agreed; the evidence you will be relying on; and of the law. The idea is to provide a 'roadmap' to the court of your case.

27. Tell the court what has been agreed to factually and/or legally and what has not (i.e. what the main areas of contest will be).

Evidence

28. Try to get agreement on the non-contentious matters of fact (e.g. material contained in affidavits where there are no objections and no cross examination is proposed);

29. Ask yourself, is this evidence relevant? To what issue does it go? Do I really need to read this affidavit or cross examine this witness?

30. Remember to read the affidavits you rely on but to tender all exhibits and affidavits.

31. When objecting to affidavits don't just object for the sake of it. The evidence may be of assistance. Nothing irritates a judge more than pages of objections to material that is not really contentious.

32. Have a copy of the *Evidence Act* on hand at all times.

33. If leading evidence-in-chief, be structured (which usually means chronological).

34. Cross examination should be targeted i.e. what evidence do you need to get from this witness? It should not be 'cross' in the sense of raising your voice, or be sarcastic or belittling. Be polite at all times.

35. Have clean copies of any document you want to put to a witness or to tender. In this regard, confer with the other side to ensure that a clean tender bundle is available to put to witnesses.

36. Always make sure that you have a clean copy of your witness' affidavit present if the witness is required for cross examination.

Closing Submissions

37. Don't simply read out your written submissions. If they have been provided to the court beforehand, generally they will have been read in advance. Talk to your written submissions and remember that if the court asks you a question, answer it as directly as you can.

38. A useful tip is to have speaking notes that will provide a structure to your oral address and will ensure that if you are diverted by questions from the bench you will know where to return to in your submissions.

39. Don't make submissions that are no longer maintainable on the evidence. A good advocate (and one that can be trusted) makes concessions. It is not a sign of weakness.

40. Make sure you actually refer to the evidence you have tendered, read and elicited in questioning. Nothing is more frustrating than a tender bundle to which only a handful of documents have been referred to. Increasingly the general rule is that if the court has not been specifically taken to a document in the tender bundle, then it is excluded from it.

41. Likewise in relation to legal authorities. While bundles of authorities are useful to the court, do not hand up authorities only to then not refer to them. Generally, only hand up unreported or difficult to access authorities. If you have filed a list of authorities then it is not necessary to hand up reported decisions of the well known and commonly used law reports. And avoid long lists of authorities to which only a handful of decisions are referred to.

42. Your oral submissions should be structured in such a way so as to tell the court where you are going (i.e. what the issue is, what the law is and what evidence you are relying on to ensure that the court will find in your favour on any given issue).

43. A reply should not be a restatement of your submissions. It should be responsive to points raised by your opponent that were either not dealt with, or not dealt with fully, by you in your submissions.

Ex Parte Hearings

44. Remember that during an *ex parte* hearing, you are under an ethical obligation to tell the court everything, even if it does not assist your case.

Litigants in Person

45. Litigants in person may test your patience, but never lose your temper. Always be respectful and courteous.

46. Try to assist the court wherever appropriate and possible.

47. Resist the urge to make numerous objections or interjections. Sometimes a court will simply allow inadmissible evidence as it is more efficient to do so. State your objections globally and for the record and then sit down.

Do

48. Be mindful to DO the following:

    - speak clearly and not too fast. For shorter matters there is often is no transcript or the transcript arrives after the judgment has been delivered;
    - if you are nervous – remember to breathe and take a drink of water;
    - stand up when addressed by the court;

- be polite, reasonable and courteous to the court. Remember to say “may it please the Court”;
- be polite, reasonable and courteous to your opposition. In doing so you are providing assistance to the court and what goes around comes around;
- go to the bathroom before court and during breaks; and
- if there is a problem, raise it early with your opponent and, if necessary, the court. Problems arise in litigation, it is how they are dealt with that counts;
- inside the courtroom it is “your Honour”; outside the courtroom, unless told otherwise, it is “Judge”;
- prepare, prepare, prepare. Preparation calms the nerves.

Don’t

49. DO NOT do the following:

- be late to court (if so apologise, profusely);
- dress inappropriately. You need to look professional;
- put bags, food, coffee or bottles of water on the bar table;
- fill the void with a preponderance of pontificating prolix purple prose. For example, if you don’t know the answer to a question, don’t blather, as stated above, say so candidly and take it on notice and/or seek instructions;
- sledge or make comments from the bar table. If you want to say something, wait your turn and then say it. If you are the victim of sledging, just sit down and tell the court that your opponent has something to say. This will usually deal with it;
- discuss anything you don’t want the judge to hear in court while the judge is present. The acoustics of some courts are such that the judge hears more than you thought possible;
- discuss anything you don’t want the judge to hear in front of the tipstaff or court officer. Just because the judge is not in the court

room you cannot assume that information will not travel back to the judge in chambers; or

- engage in *ex parte* communications with the court. If you need to contact the court or the chambers of a judge then you MUST make sure that you have your opponent's consent first. Again, to do so is a breach of your ethical duties.

18 March 2015

Justice Rachel Pepper
Land and Environment Court of New South Wales