Effective written submissions

by

Justice Susan Glazebrook[1]

It has, like most things, been said before. But it bears repeating. Your role as advocate is to persuade the court to find in favour of your client. Of course, there will be some cases where, barring miracles, this is not possible and realistically the goal is damage control. But this does not alter the basic task: persuasion.

First and lasting impression

The written submissions filed before the hearing will be your first real opportunity to persuade.[2] Do not squander that opportunity. First impressions count.

The submissions will be considered by judges individually and sometimes collectively in pre-hearing discussions. Judges will usually come to a preliminary view of the case on the basis of those written submissions.[3] At the least, they will have identified what they see as the vital issues or (an advocate's worst nightmare) the fatal flaws or omissions.

The written submissions thus set the scene for the oral submissions. Judges can of course be persuaded[4] that fatal flaws do not exist and they can be steered away from preliminary views by your brilliant oral advocacy but it is usually better to have them in your camp, or still unsure, before the hearing starts.

But the written submissions will not only be the first impression. They will often be the last impression too. Just as important. Remember that written submissions will be read again

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1 Judge of the Supreme Court of New Zealand. This paper is based on an address given to the New Zealand Bar Association's Appellate Advocacy Workshop, World Bar Conference, Queenstown on 7 September 2014. I thank my clerk, Andrew Row, for his assistance with the paper. The views are my personal views and not those of the Court.

2 A well drafted notice of appeal will have set the scene and, where leave is needed, you will also have had the leave submissions but the impact of these will likely have faded by the time of the substantive appeal.

3 This is slightly simplistic as the judges will of course have considered a range of other material before the hearing, including the judgment or judgments below. They will also come to the appeal with their experience of other cases, both in practice and on the Bench.

4 And in fact often are. Good oral advocacy can make a difference.

during the deliberation and judgment writing process. They will endure long after your brilliant or not so brilliant oral advocacy has faded.[5] They will often be more important in that post-hearing process than the judges' dim memory of the oral hearing, their more or less coherent notes taken at the hearing and the rather chaotic and often disjointed transcript of the hearing.[6]

Role of written submissions

The written submissions have a dual role. They should introduce the judges to your client's case and they should persuade them to accept it. Or at least start that process.

Do not forget the importance of the first step: of introduction to the case. To get the judges into your camp and keep them there, they must first understand what your client's case is. They have not lived with it like you and your client. They are coming to it fresh. They are busy and have other cases. You will not persuade if you do not make sure that they understand the factual and legal background of the case and the issues that arise.

As to the second step of persuasion, the judges must be brought to understand the reasons the court should find in your client's favour on the issues and (not necessarily the same thing) why the court should not find in favour of your opponent.

And do not forget the relief sought. It is surprising how often submissions fail to say what a client wants to get out of the appeal. And failing to ask and answer that question can mean badly focused submissions. (Here you may need a back up position if your primary submissions fail).

Costs are also often forgotten. They will now rarely be reserved and so address the issue in your submissions unless your client is content with the normal costs orders.

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5 For a discussion on the use of written submissions and their value before, during and after the oral submissions, see: K M Hayne "Written Advocacy" (A paper delivered as part of the Continuing Legal Education Program of the Victorian Bar, 5 and 26 March 2007) at 5–6.

6 The importance of first and last impressions is highlighted by psychological research which has shown that, when asked to recall a list of items, individuals are more likely to remember the first few and last few items. This is called the primacy and the recency effect, respectively. See for example B B Murdock Jr "The serial position effect of free recall" (1962) 64(5) Journal of Experimental Psychology 482.

Try and make your argument engaging and interesting. It helps if you are interested in the case (whether real or manufactured). Cultivate finding interest in the dullest of subjects.

Wider context

The written submissions should lead the judges through your client's case, both factually and legally. And, particularly where issues may be novel (as against pure error correction), the submissions should also put the case in its wider legal and social or commercial context.

One of my (now retired) colleagues on the Court of Appeal was famous, at least among his colleagues, for asking in a pained tone, "But how would that operate in the real world, Mr or Ms So and So?" In the same vein, a nickname of another retired judge I spoke to recently was "modicum" as she is a great believer in common sense (and often urged that value on recalcitrant litigants and counsel).

While both perhaps may have been seen as overstressing the concept, thinking about where your arguments fit within the general legal, social and commercial framework and the effect your arguments, if accepted, would have on other cases and on the state of the law generally is always a good idea.[7]

But care with this wider context too. If the case is about a statute or contract, get to that as soon as possible. Trawling through lengthy background and avoiding addressing the words of the contract or statute in question will lead to the suspicion from the reader that the wording is against you. If it is, better to front up and put the best case on the wording as soon as possible.

And a further matter. If you are in a specialist area, do not assume specialist knowledge.[8] Take it back to basics (but do not talk down). Avoid the blinkers of specialisation. Remember what is obvious to you may not be so to a non-specialist bench. You may even

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7 See the discussion of Robert Jackson, former Associate Justice of the United States Supreme Court, who emphasised the significance of an advocate's role in developing the law in significant cases. He said "[a]t such a moment the lawyer's case ceases to be an episode in the affairs of a client and becomes a stone in the edifice of the law": "Advocacy Before the United States Supreme Court" (1951) 37(1) Cornell LQ 1 at 16.

8 See Jane R Roth and Mani S Walia "Persuading Quickly: Tips for Writing an Effective Appellate Brief" (2010) 11(2) J App Prac & Process 443 at 454–455.

find your most basic assumptions challenged. Be prepared to defend them or to abandon them if indefensible. Just because an issue has always been thought about that way in your specialist field does not mean that it is right when considered in the wider context. So read widely and try and anticipate and head off those criticisms at the outset in your written submissions.

Make the first paragraph count

Capture the essence of the case at the beginning of the written submissions.[9] The first paragraph should outline the essential facts and issues of the case. As you would explain it to an interested, but slightly distracted friend over coffee.

Your description of the essence of the case, if skilfully done, will set the scene for a decision in favour of your client. But subtlety rather than overt partisanship will be more persuasive.

Try for an arresting first sentence. Listen to these.

> It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife.[10]
>
> All children, except one, grow up.[11]
>
> He was an old man who fished alone in a skiff in the Gulf Stream and he had gone eighty-four days now without taking a fish.[12]
>
> Happy families are all alike; every unhappy family is unhappy in its own way.[13]

All are simple but catch the ear, engage the attention and anticipate the story to come.

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9 As noted by Douglas Hassall "Quintilian and the Public Attainment of Justice" in Justin Gleeson SC and Ruth Higgins (eds) *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion (*Federation Press, Sydney, 2008) 87 at 94, "he [or she] who runs his [or her] ship ashore while leaving port is certainly the least efficient of pilots".

10 Jane Austen *Pride and Prejudice* (T Egerton, Whitehall, 1813).

11 J M Barrie *Peter Pan* (Hodder & Stoughton, London, 1911).

12 Ernest Hemingway *The Old Man and The Sea* (Charles Scribner's Sons, New York, 1952).

13 Leo Tolstoy *Anna Karenina* (The Russian Messenger, Moscow, 1878).

And in the legal sphere:

Lord Denning in *Lloyds Bank Ltd. v Bundy*:[14]

> Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him.

No prizes for guessing which way this judgment goes.[15] This opening probably breaks the rules by being too partisan but you get the idea.

Another example is the Constitutional Court's opening in *Minister of Home Affairs v Fourie*.[16] Sachs J began his judgment with:

> [1] Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.

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14 *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA) at 334 (Lord Denning MR, Cairns LJ and Sir Eric Sachs).

15 The appeal was allowed and all three Judges were of the view the case was one of undue influence. Lord Denning MR, however, relied on undue influence in the alternative and also justified his conclusion on other more novel grounds.

16 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC). Sachs J was writing for eight of the nine justices. O'Regan J wrote a separate judgment. Her Honour agreed with all of Sachs J's judgment except on the issue of remedies: see at [165].

As may be surmised from the opening, the Court unanimously declared that the common law definition of marriage was inconsistent with the South African Constitution.

My final example comes from an article by Professor Jim Raymond, English professor turned teacher of legal writing.[17] The case was from the Ontario Court of Appeal.[18] It began:

> [1] Professor Starson is an exceptionally intelligent man. His field of expertise is physics. Although he has no formal qualifications in that field, he is in regular contact with some of the leading physicists in the world. … Professor Noyes [of Stanford] has described Professor Starson's thinking in the field of physics as being ten years ahead of its time.
>
> [2] Unfortunately, Professor Starson has a history of mental illness, dating back to 1985. He has been diagnosed as suffering from a bipolar affective disorder. On several occasions during the last 15 years he has spent time in mental institutions. … In January 1999 the Ontario Review Board ordered that he be detained at the Centre of Addiction and Mental Health …

The issue in the case (explained in the third paragraph) was whether Professor Starson should be medicated against his will by the Centre. This is a more subtle opening than the Lord Denning example but you can still guess where the Court is going on this one.

Moving now to the second paragraph of your submissions, this should, if possible, set out in overview why your client should win. This is often referred to as outlining your theory of the case. It never ceases to amaze me that counsel often (even on a second appeal) do not have a succinct theory of the case. Without this, submissions risk being rambling and unfocused.

In your second paragraph try and show succinctly why your theory of the case is the right one in terms of precedent, policy and the justice of the case as seen from the perspective of your client, but in a low key way (no jury speeches).

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17 James C Raymond "The Architecture of Argument" (2004) 7 TJR 39 at 53.

18 *Starson v Swayze* (2001) 201 DLR (4d) 123 (ONCA). On appeal, the majority of Supreme Court of Canada (6 to 3) held that Professor Starson had the right to refuse treatment: *Starson v Swayze* 2003 SCC 32, [2003] 1 SCR 722.

Here is how the Ontario Court of Appeal in the *Starson* case concluded its judgment but it could equally have been used as a summary up front:

> [14] Putting aside any paternalistic instincts …we conclude that Professor Starson understood, through the screen of his mental illness, all aspects of the decision whether to be treated. He understands the information relevant to that decision and its reasonably foreseeable consequences. He has made a decision that may cost him his freedom and accelerate his illness. Many would agree with the Board that it is a decision that is against his best interests. But for Professor Starson, it is a rational decision, and not one that reflects a lack of capacity. And therefore it is a decision that the statute and s. 7 of the *Canadian Charter of Rights and Freedoms* permit him to make.

The two opening paragraphs I suggest you put in your written submission are in addition to the summary and the narrative of relevant facts that are required by the Rules of Court. The first two paragraphs, apart from engaging the interest of the court, are essential for framing the summary of your client's position on the issues and the selection of facts to put in the narrative of facts.

Summary of argument

As to the required summary of argument, this is one of the most important parts of the written submissions. Many counsel do not take full advantage of this opportunity to persuade. I think this is sometimes because counsel wish to preserve pages for what they see as their "real" substantive argument.

But the summary should be able to be detached from the rest of the submissions and read alone as a persuasive document in its own right. Ideally, it should make the reading of the remainder of the submissions optional.

Structure your summary issue by issue. It will depend on the case of course how you deal with each issue but a good rule of thumb is to put your client's position on each issue in a sentence or two with a brief explanation as to why it is correct, then (for the appellant) to set out briefly why the court below erred in its assessment of that issue and (for the respondent)

the flaws in the appellant's argument on the issue. Finish off by outlining in more detail why your client's position on the issue is correct for precedent, logic, policy and justice reasons.

The six C's

And now some tips, grouped under six headings, which, with some contrivance, all begin with the letter "c".

Clarity

Speak English, not lawyer in your submissions.[19] Borrowing from Professor Jim Raymond again, I give an example of two ways of telling the same story and you can decide which might be more persuasive:[20]

> This is an application by three inter-related plaintiffs against two related defendants (the second defendant having been joined at the commencement of the hearing without opposition) seeking an interim injunction against the defendants, their agent, servants or employees, restraining them from using the word 'Regal' upon or in relation to paints; or a trademark so nearly resembling Regal as to be likely to cause confusion between the plaintiff's products and the defendant's product, and more specifically for an injunction to prevent the use of the word, Regal, or any word confusingly similar there to by the defendants upon paint containers, advertising materials, signs, packaging, fascias, stationary, labels or other printed matter.

That is the lawyer version (for those who are so mired in lawyer they thought it to be English).

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19 Robert Jackson, above n 7, at 15, said "master the short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding. [An effective advocate] will never drive the judge to his dictionary".

20 See also the example given by James C Raymond in "Writing to Be Read *or* Why Can't Lawyers Write Like Katherine Mansfield?" (1997) 3 TJR 153 at 160–161. Also compare the different approaches *In re Vandervell's Trusts (No 2)* [1974] Ch 269 (Ch) at 273–274 with *In re Vandervell's Trusts (No 2)* [1974] Ch 269 (CA) at 316: see the extracts given in Michael Kirby "On the Writing of Judgments" (1990) 64 ALJ 691 at 704.

Now for the English version, which is a slightly adapted version of Professor Raymond's example:

> Regal Paints and its associates, have been using the name, "Regal", for many years. They seek an injunction to prevent Prince and Princess Paints, from using the word "Regal" (or anything too similar) in relation to their paint products.

Some more advice. Your clients have names. Use them. No Latin unless strictly necessary and, if you must use it, give a translation. Meet the usual rules of good writing. Use short sentences. One idea per paragraph. Keep adjectives and literary flourishes to a minimum. An argument can ironically appear weaker if it is adorned with hyperbole and adjectives.[21]

Make sure your submissions are logically structured, pleasingly arranged, with plenty of road signs.[22] Charts and diagrams may help but make sure they are big enough to read and, if colour coded, that the judges are not given black and white photocopies.

Conciseness

As they say on road signs, the maximum page rule is a limit and not a target. And most cases do not require submissions to the limit. There are no prizes for empty verbiage and it can detract from persuasion, not enhance it.[23]

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21 Robert French "Appellate Advocacy in the High Court of Australia" (Speech to the World Bar Conference, London, 29 June 2012) at 4 tells the story of counsel in a special leave application maintaining that the point at issue in a case was one of 'transcendental' importance. The Chief Justice remarked that it was difficult to appreciate that word's application to the provision of the Goods and Services Tax legislation at issue in that case.

22 As noted by Helen Winkelmann in "Written Submissions" (New Zealand Bar Association Webinar, 7 May 2014), "[i]t should not require the skills of a forensic archaeologist to excavate [the critical propositions] from the rubble of a poorly structured submission." See also Gillian Coumbe "Crafting readable submissions" (Paper presented at the New Zealand Bar Association Seminar on written advocacy, 7 May 2014) at 8–11.

23 As John Wild said in "Written Appellate Advocacy" (Paper presented at a New Zealand Bar Association Webinar, 7 May 2014), "[s]trive hard for brevity. A 'slim' submission has an immediate appeal to a busy appellate judge. Conversely, a 'thick' submission tends to be a put off." See also Brian K Keller "Whittling: Drafting Concise and Effective Appellate Briefs" (2013) 14(2) J App Prac & Process 285.

If you need to go to the limit because of the complexities of the case and the number of issues, then by all means do so. If in rare case you require more pages, then ask. But do not cheat with small type or half of your argument in footnotes longer than what is on the page. Judges may like to act hip but age and reading glasses catch up with most eventually.

So how to keep it concise? Being concise is not the same as short (although, where possible, short is a good idea). Being concise means getting rid of unnecessary detail.

Know your case, read and digest the full record, have the facts at your fingertips but do not drown the reader in the detail in the written submissions. Only set out the essential facts. But it might not hurt to include a few facts that capture the human interest in the case. Arrange them so you "tell the story" in an interesting and arresting manner.

Have the courage to rely on your best arguments – the kitchen sink approach is not of assistance.[24]

Give procedural history only if you must and it is necessary for the appeal.

Set out the propositions you are arguing for and give only the main authority you rely on. I know legal search engines are wonderful but it is not a pie eating contest. Quantity will not necessarily win the day.

Avoid long quotations from cases. Most people skip over them (and judges are people too). It is usually better to paraphrase the essential point arising from the case, even if you also quote from it.

Keep footnotes for citations and not for anything of substance. Avoid asides in footnotes (usually). If the point merits being mentioned, it merits a place in the text.

Do remember to file a chronology. It allows you to avoid unnecessary detail in your written submissions.

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[24] As noted by French, above n 21, at 4, "[d]iscrimination in judgment about what is essential and what is inessential to argument" is key.

Edit, edit and edit. Be ruthless. Dare yourself to cut out half and even half again. As Justice Louis Brandeis said, "[t]here is no such thing as good writing. There is only good re-writing."[25]

Candour

While your role is to persuade, this must be done in an ethical manner. So you have a duty to put before the court contrary authorities and not to misrepresent the facts or the law.

Candour more generally can be seen as a powerful weapon of advocacy. Know and deal with the weak points of your case up front. Do not leave out inconvenient facts but try and place them in the best light.[26] The same applies to contrary authorities.

If not essential, even concede some of your points[27] – or, if instructed to continue, put the argument but do not flog it beyond its useful life if it is clear the law is against you. Repetition makes a weak argument appear even weaker.

While you want to persuade, beware of putting too much of a "spin" on the facts and the law. Try and find as much neutral and uncontroversial ground as possible so as to narrow the battlefield. That helps with conciseness too.

Correctness

Typos make you look sloppy. Inaccuracies in the facts and the law are even worse. Get someone to check your work. You can get too close.[28]

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25 Louis Brandeis, quoted in Susan Kiefel "Reasons for judgment: objects and observations" (Speech delivered at the Sir Harry Gibbs Law Dinner, University of Queensland, 18 May 2012) at 7.

26 Sometimes referred to as "embracing the ugly": Roth and Walia, above n 8, at 448. Being honest with the court is one of Michael Kirby's Ten Commandments: "The future of appellate advocacy" (2006) 27 Aust Bar Rev 141 at 142.

27 See Winkelmann, above n 22, where she noted that concessions allow "the true issues to emerge clearly, and Judges value responsible concessions, and they value counsel who make them".

28 If you do not have anyone to read over the submissions, then you should cast your own "fresh eyes" over them. To do this, leave some time between writing and proofreading. For tips on effective self-editing, see Wes Hendrix "From Good to Great: The Four Stages of Effective Self-Editing" (2013) 14(2) J App Prac & Process 267.

Check your authorities at the source. Don't rely on secondary sources. They often have the citation or quotation slightly wrong and sometimes even the principle. Check carefully the case that you are relying on has not been appealed. Remember the annoying tendency for case names to change on appeal.

Where you are dealing with a case with multiple judgments, make sure you give the majority view, or, if not, make it clear it was not the view of the court and explain why it is nevertheless helpful.

If you are referring to an overseas case, then give the New Zealand case that adopted it. If it has not been adopted here, explain why it should be relied on.

Make sure you have the correct version of the statute in the materials and explain why that is the correct version (and probably footnote later versions for information).

Contour

Many advocacy writings advise you to quote from the judgments of panel members. You are told that judges love to be reminded of and referred to judgments they have written. That may apply to some judges but many cringe, particularly when faced with decisions they wrote long ago. They write a lot. They may not remember. They may have moved on. If you are going to quote from a panel member's judgment, make sure it is a decision right on point and, if there are better or more authoritative decisions on the same point, then refer to them.

You are also often advised to tailor your arguments to suit the composition of the Bench and their known preferences (and to read as many of their judgments as possible to ascertain these).[29] There are difficulties in doing so for other than the Supreme Court as you will likely not know the composition of the Court so far in advance.

I also have my doubts as to the efficacy of this. I sit with the same colleagues all the time and I would often have difficulty in predicting how they will see a particular case. Even if you

[29] For more discussion on this topic, see Michael Kirby "Differential Advocacy in Appellate Courts" (Paper presented at Advocacy Conference, Adelaide, 4 February 2011).

can work out general preferences, you are not to know how the particular case will strike them.

You also risk your tailored arguments for one judge annoying or alienating the others and, if you try and please everyone, you may end up with an incoherent mishmash. So my advice is just to put the argument the way you see it.

Chunkification

A term coined by my very dear friend and colleague, the late Sir Robert Chambers. By chunkification, he meant that you should split the argument into organised bite sized chunks with headings and subheadings. And a table of contents helps.

Even if your submissions are of necessity long, they will be more easily digested in chunks. Further, by dividing up the submissions, this helps you to identify the issues arising in the case and to set up a logical structure for your submissions, which leads inexorably to the conclusion you want the judges to arrive at. Your task of persuasion will be much easier if the judges can easily see where the argument is going.

There can be a subsidiary reason for chunkification. It can help in the task of persuasion, particularly for busy courts. It will save the judges' time if they can structure the judgment on the basis of your submissions.

Conclusion

Just as the opening should catch the attention so should the end of your submissions. This is the lasting impression you want to convey. Your conclusion should sum up your argument and return to and show why your theory of the case is the one that should carry the day.

Relationship with oral submissions

I have put this heading as a statement and not a question.

The oral submissions should be related to the written submissions. This is not to say that you should read the written submissions (please do not). It is not to say that the oral submissions should follow the structure of the written submissions. It is often a good idea that they do not. After all, the written submissions will have been read and a fresh way of presenting the same material may be the way to go. Further, it is a good idea to limit the oral submissions to your best points (even more so than in the written submissions).[30]

But there is nothing more annoying to the court (and it is always better to avoid needless annoyance) than to have senior counsel brush off the written submissions and present a totally different case. It is also not wise.[31] Remember that the written submissions are both the first and last impression. So make sure that senior counsel have input into what is filed.

This is not to say that you should not present orally the brilliant argument you thought of in the early hours before the hearing (although test it in the full light of day first) but this should be relatively rare and usually in addition to, and not in substitution for, arguments made in writing.

Of course, if you are for the appellant, you will not have had the opportunity in your written submissions to address the respondent's submissions, although you should have anticipated most of the arguments.

You will need to start thinking about your response to any new points as soon as you receive your opponent's submissions. But try and weave your answers into the body of your oral submissions by reducing what the respondent says to propositions and then pointing out the flaw in those propositions in the course of your submissions on the issue concerned.

Do not snipe or get immersed in trivialities. Only counter the most important points that could affect the result. The same comments apply to those acting for the respondents when replying to the appellant's submissions in their written submissions.

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30 For a discussion as to the relationship between written and oral submissions, see Karl N Llewellyn "A Lecture on Appellate Advocacy" (2005) 7(1) J App Prac & Process 173 at 188–189.

31 Unless of course there has been that sinking realisation after filing the written submissions, that the case has been argued on a totally misconceived basis. But, if that occurs, be upfront and honest to the Court about that in your oral submissions.

All the above means that your oral submissions will differ from the written ones. Start thinking about the structure and content of your oral submissions as soon as possible after filing the written submissions. Do not ever try and wing it. It almost always ends in tears. The appearance of spontaneity of brilliant advocates almost always builds on lots of reading and thinking about the case before the hearing (and experience).

Directing the traffic

It is usually a good idea to draft what is often called a road map of your oral submissions.[32] This serves a number of functions, apart from helping you to structure your oral argument logically (vital) and making sure you do not leave anything out.

In your task of persuasion, the outline shows the court where the argument is heading and may discourage too enthusiastic questioning which might otherwise derail your cleverly constructed oral argument. It also serves as a reminder of the oral argument for the judges in the post-hearing phase.

The best road maps I have seen have set out the series of propositions that will be argued in relation to each issue, ordered progressively and logically, with, in separate columns, the important references to the case on appeal and the authorities and also cross references to where in the written submissions the point is dealt with.

It may also be useful to have a separate small bundle of documents and cases that will be referred to in oral submissions,[33] rather than have the judges roam through voluminous volumes. And watch the Bench when you refer them to something to make sure everyone has found the correct page. Or risk a judge missing the point you are making.[34] When in doubt as to documents refer to Sir Stephen Sedley's "Laws of Documents," which include the following:[35]

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[32] This is more difficult if you are for the respondent with no convenient gap before you begin the submissions as the focus may have changed after the appellant's submissions and, more importantly, the Court's reaction to those submissions may require a rethink.

[33] Of course better still limit the material put before the Court to the most relevant authorities and essential documents.

[34] Not to mention getting irritated. The same point is made by Marshall Rothstein, current Justice of the Supreme Court of Canada, who recommends having a condensed book of references: see "Winning Appellate Advocacy: Persuasive Presentations" (2007) 32(1) Man LJ 163 at 169–170.

[35] Stephen Sedley "Sedley J's Laws of Documents" (1996) 1 JR 37.

FIFTH LAW

Any important documents shall be omitted …

SEVENTH LAW

As many photocopies as practicable shall be illegible, truncated or cropped.

EIGHTH LAW

(a) At least 80 per cent of the documents shall be irrelevant.

(b) Counsel shall refer in court to no more than 10 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.

Into the 21st century

Soon electronic files will soon be the norm. Get familiar with the technology and consider the possibilities of innovation in your submissions.[36]

Experience counts. Allow your assistant counsel to get some. Make a point of injecting a bit of gender equality here too. As a junior, ask to be able to do a small part of the argument (believe me often the court is wishing for that where senior counsel is floundering through the facts).

Modern judges should welcome juniors having a speaking role (and usually will be nicer to them than they are to senior counsel).

Your reputation is precious

One of your most valuable assets as a litigator is your reputation. Work at developing a reputation for top quality work and integrity. A good reputation will assist in your dealings with other litigators and the court.

[36] For a discussion as to the impact of technological changes on advocacy see Kirby, above n 26, at 147–153.

And to finish

In case all of this has left you slightly dispirited, I thought I would leave you with a quote from Justice Robert Jackson. He apparently once said that, when he was Solicitor General of the United States, he made three arguments in every case:[37]

> "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."

[37] Jackson, above n 7, at 6.