Crafting readable submissions[1]

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If Rudyard Kipling had been a lawyer, his celebrated poem "If" would have been called "In the Event That"[2]

1. Introduction

1.1. Few cases are easy. The real skill in writing legal submissions is to craft, from the inevitable mire of complexity and detail, an argument that is both clear and engaging. This involves intense effort, and just a touch of artistry. What should emerge are readable submissions that give little hint of the extent of your toil, and indeed look rather straightforward.

1.2. The goal is persuasion. It always helps to have a winning point, but even a good point can falter if presented in a confusing, or turgid, dull manner. Persuasion is greatly enhanced by clarity – both of structure and language -- and by a lively, confident style that captures the court's attention.

1.3. This paper will address these three topics:

(a) the growing movement away from legalese and towards clarity. Clear, simple expression in legal writing is no longer a novelty but an expectation;

(b) the role of written submissions. To write effectively it is important to understand the basic function of written submissions, and how they complement the oral argument;

(c) how to craft legal submissions that are readable -- both clear and engaging. This requires, foremost, a logical, easy-to-follow structure; and secondly, plain, concise language. You also need to inject some originality and flair along the way.

2. The rise and rise of clear expression in legal writing

2.1. New Zealand, like Australia, inherited from England a centuries old style of legal writing. When I began practising law in the early 1980s our statutes, contracts, pleadings and correspondence were still thick with pompous, antique expressions.

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1 A paper presented at the New Zealand Bar Association Seminar on written advocacy on 7 May 2014.

2 A quip referred to by Bryan Garner, *The Elements of Legal Style*, 2nd ed, 2002, at 192.

2.2. As a fledgling litigator at Russell McVeagh, my written work earned modest kudos. It was not dazzling or brilliant, but people could often understand what I was saying. Two things gave me an unexpected head start in plain writing. First, at university I had studied mathematics. My legal analysis was therefore constrained by a poverty of vocabulary, and a dedication to simple, step-by-step reasoning. Secondly, my father, a former journalist, had sometimes edited my essays during my school days. He did so with newsroom ruthlessness. Sometimes he went too far, recasting my efforts entirely in his own image. Once, my standard two teacher was startled by a drole reference in my homework to "the fair sex". I therefore began life in the law with none of the tools needed for obfuscation.

2.3. At the same time, a nascent international movement towards plain legal language had begun.[3] The late Brad Giles (later Justice Giles) and others at Russell McVeagh who supervised my early writing efforts, were proponents of this style. Entire pages would fall to Brad's red pen. Clarity was not, however, a universal goal back then. One of the litigation partners kept *The Superior Person's Book of Words* prominently displayed on his desk, and took pride in being unintelligible – sometimes even to himself. I will not mention names.

2.4. The movement to clear, simple expression has since gained considerable momentum. Despite the continuing stereotype of legal language as abstruse, significant change is occurring. Judges now write their decisions in simpler language, and routinely use tables of contents, headings, and subheadings, all designed to assist comprehension. Appellate judgments commonly state the result upfront. And the courts often issue press summaries to aid the efficient communication of decisions. Statutory drafting is also undergoing a transformation. The Parliamentary Counsel Office vision statement declares that the PCO is committed to improving access to legislation through use of clear and simple drafting.[4] This commitment is evident in recent legislation and in Bills before the House. The Judicature Modernisation Bill, for example, will re-enact with modernised language the provisions of the Judicature Amendment Act 1972 relating to judicial review applications. The drafting improvement is marked.

2.5. Lawyers, long ridiculed for their legalese, now express themselves more clearly and with more pizzazz than many in business. This is especially true of middle-management, with their corporate-speak gibberish. Brief examples of this business jargon include: "touch base offline", "marinate on this one", "manage the optics of the situation", "reverse infallibility",

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[3] M D Kirby, "The Monumental Task of Simplifying the Law", unpublished, Constitutional Association of Australia, 15 March 1982 (Kirby Speeches 314). The Hon Michael Kirby has been a leading advocate for clarity, most recently in "How I learned to drop Latin and love plain legal language", Law Society Journal, February, 2013; L L McKay, "Intelligible Drafting", Paper for the New Zealand Law Society's Conference, Dunedin, April 1981.

[4] Chapter 3 of the PCO's in-house drafting manual sets out the principles of clear drafting.

"open the kimono", "all-hands meetings 60/60/24/7/365", and "square the circle". Lawyers also express themselves far more clearly than those in academia, where a certain amount of obfuscation is essential to professional success. Indeed, for many academics clarity is a sin on a par with plagiarism.

2.6. In legal prose clarity is now an expectation. That is a message we constantly hear from the judges. Some traditionalists lament this development. But striving for clarity does not mean a dumbing down of legal writing. Nor does it mean sacrificing precision, eloquence or vigour. Plain English does not mean pale English. Often the clearest, simplest style is the most powerful and elegant.

3. Keep in mind the purpose of written submissions

3.1. To ensure that your written submissions are effective, focus on their purpose, and how they relate to the oral argument. The emphasis on written submissions has significantly increased since the early 1980s. They are now a central part of advocacy. The written and oral submissions each have essential, but complementary, roles:

(a) The written submissions, usually filed in advance, are your first opportunity to communicate your entire argument to the court, and your only chance to do so without interruption. First impressions count. If your argument is skilfully written, the court may already be attracted to it when you stand to deliver your oral presentation. You will have a head start. If you acquire a reputation for habitually writing good submissions this will add to the persuasiveness of your advocacy, both written and oral. Your credibility with the court is a "hidden persuader".[5]

(b) Well-structured written submissions provide a solid, logical, foundation for your case that then allows a more free-moving approach in oral argument. Your oral address is not a mere "audio version" of your written submissions. "If it was we could save resources by enclosing a disc with the factum and cancelling the hearing".[6] The main purpose of oral argument is to engage in discussion with the court about the central issues. It is during oral argument that cases are "pounded and hammered".[7] The court expects you to answer questions as they arise. You will have more confidence to do so, and to depart

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5 Justice John Laskin "What persuades (or, What's going on inside the Judge's mind)", *The Advocates' Society Journal*, June 2004.

6 Justice Joel Fichaud, "How to Catch the Judge's Wave", online: http://www.courts.ns.ca/bench/judges_wave_fichaud.htm.

7 The Hon Justice JD Heydon AC, "Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years", in *Rediscovering Rhetoric*, 2008, at 241.

from your preferred order, if the structure of your argument is clearly set out in the written submissions.

(c) Remember that written submissions have a functional role – to help the court. They are not a literary work. The judge will not be reading your submissions in the leisurely way that he or she reads a novel, enjoying the suspense as the plot slowly unfolds towards a surprise ending. Nor is it an opportunity to impress the court with your scholarship and erudition. Judges have heavy workloads. Your submissions are one of many. They should communicate the essentials of your argument as clearly, swiftly and engagingly as possible. Winston Churchill once said "If you have an important point to make, don't try to be subtle or clever. Use a pile driver."

Lacan reputedly said to his students when they complained of the relentless obscurity of his lectures "The less you understand the better you listen". In the case of a busy judge, the reverse is true. Unintelligible or tedious submissions are likely to be skipped over. Your submissions do not need to be spellbinding. But nor should they anaesthetise, or worse, leave the judge wondering what your case is.

(d) Finally, the written submissions can have a crucial influence on the outcome of a case. They are available to the court before the oral argument, during the hearing, and at the judgment writing stage. At the beginning of the hearing many judges say that they have already read the written submissions. Occasionally it is apparent that he or she may not have read every word. But eventually the submissions will be read, and perhaps reread, often very critically. If a submission is well written, much of its content may find its way into the judgment.

4. Structure is everything

4.1. The most critical aspect of a written argument is its structure – both the overall structure of the document, and the conceptual structure of the argument.

Structure of the document

4.2. There is no such thing as a precedent for a written submission. Each must be tailored to the particular case. However, the document structure of a good submission often lends itself to this reusable formula:

Introduction. This succinctly states what the case is about, and identifies the key issues;

Summary of submissions. This provides the party's answer to the key issues by setting out, in brief summary form, the principal submissions, in a logical order;

Factual narrative. This summarises the relevant facts. Relevance is dictated by the earlier identification of issues and summary of submissions;

Submissions. Each of the principal submissions is addressed in detail, in the order set out in the summary. This development of the argument is the substance of the document;

Conclusion. This says something short, and forceful or vivid to sum up your case.

4.3. The written submissions for most kinds of defended hearings -- interlocutory applications, judicial review applications, trials, appeals to the High Court, and appeals to the appellate courts -- suit the above structure, or a variation of it: Some court rules require this or a similar structure.[8] Sometimes the structure will be more case-dependent, for example, opening submissions at trial. Or circumstances may dictate a more abbreviated approach.

Conceptual structure of the argument

4.4. More challenging is the conceptual structure of the argument. This is the identification and organisation of the issues -- the step-by-step development of the argument. The key issues should clearly be signalled upfront, in a logical, sensible order, and then dealt with in that order. A haphazard argument will confuse and exasperate. The court will be unable to follow your reasoning, and will wonder where you are going. But if your argument is well organised and flows logically and seamlessly, you will have a much better chance of taking the judge, unresisting, along with you.

Logical ordering of issues

4.5. Law is not a purely logical discipline like mathematics. It involves policy, value judgments, and discretion. But, even allowing for that, the development of an argument should follow a logical sequence of reasoning. The route you take depends on what, legally, you have to establish to make your case. For example, in a judicial review case where you are alleging an unlawful exercise of a statutory power, you will need to demonstrate, in this order, that:

- the respondent has exercised a statutory power;

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[8] Rule 41(1), Court of Appeal (Civil) Rules 2005 requires each party to an appeal to file written submissions setting out a summary of the argument, a narrative of facts, and the party's submissions. Rule 36(1) of the Supreme Court Rules 2004 is in similar terms. The only stated requirement about submissions in the High Court Rules is rule 7.39(3), relating to the synopsis of argument in a defended interlocutory application. This must identify the general nature of the case, include a chronology of the material facts, and outline the applicant's principal submissions. The respondent's synopsis must set out any additional or disputed facts (rule 7.39(6)).

- the exercise of that power was unlawful. This involves identifying and addressing, in turn, each ground of unlawfulness relied on -- for example, improper purpose, taking into account irrelevant considerations, and so on;

- the court should exercise its discretion to grant a remedy. This involves listing each of the factors relevant to remedial discretion, and why they support the court's intervention; and

- the specific orders you are seeking.

4.6. If you are alleging a breach of s 36 of the Commerce Act 1986 you need to establish, in this order, that:

- there is a market in which the defendant has substantial market power;

- the defendant took advantage of that market power;

- the defendant did so for one of the proscribed purposes in s 36(2).

4.7. In cases where the court's decision will turn on the exercise of discretion, as, for example, a decision on penalty under s 80 of the Commerce Act, the ordering of the relevant discretionary factors may still have a logical sequence. But the position is likely more fluid. You should still identify, upfront, what factors are relevant, and then address them in that order.

4.8. Where a case involves a jurisdictional issue, such as a limitation issue, which might dispose of the entire case, that issue logically should always go first.

4.9. To ensure you get the structure right, you need to have a good understanding of the legal principles applicable to your claim or defence. The relevant case law will often demonstrate, in the structure of the judgments, the logical order of the main issues. Each issue may, in turn, involve several sub-issues, depending on the facts. They should also be identified and then addressed in a sensible order.

4.10. Much has been written about reasoning in the law, including deductive syllogistic reasoning,[9] and evaluation and balancing. It is unnecessary to analyse your argument in such a technical way, although often that is implicitly what occurs. I prefer to keep things simple. The

[9] Put very simply: major premise, all *x is y;* minor premise, this case is *x;* conclusion: this case is *y.* In legal argument the major premise is often the controlling rule, which may be a legal principle, case law precedent, text (legislative provision, contract) or policy. The minor premise is usually derived from the facts of the case. The controlling rule applied to the facts leads to the conclusion. See, for example, the discussions in Bryan A Garner and Antonin Scalia *Making Your Case: The Art of Persuasion*, 2008; Professor James C Raymond, "The Architecture of Argument" (2004) 7 TJR 39.

governing question always is: what do I have to prove to achieve the legal outcome sought, and in what order? Careful legal and factual analysis in each case, and exercise of judgment, should answer that question.

Adjusting the structure to put your strongest arguments first

4.11. Should your strongest arguments go first in the written submissions? In general that makes sense, if logic permits. Again, if there is a serious jurisdictional issue, that should normally come first. But, that aside, logic often will permit a choice to lead with your best argument on a point. For example:

(a) If you are advancing more than one cause of action, it makes sense to deal with the strongest one first. Then, in establishing each element of the cause of action, a logical order should be followed, but if there is more than one possible argument in support of each element deal with the best one first.

(b) In a judicial review case the logical order set out in paragraph 4.5 above should normally be adhered to, but in addressing the specific grounds of review, begin with the strongest ground. In discussing the factors relevant to the remedial discretion, address those factors in order of strength.

(c) If you are representing an appellant, your grounds of appeal may have a logical order -- for example, liability before damages. But in addressing liability, begin with the strongest argument supporting that ground. Where logic allows begin with your strongest ground of appeal. If your strongest ground will (if successful) dispose of the appeal, always begin with that.

(d) Similarly, if you are acting for a respondent on appeal, where logic permits put the strongest argument first. If the appellant has followed a sensible structure, it will help the court if you address the issues in the same order. But if the other party's structure is convoluted, follow your own.

4.12. As always, exercise judgment in each case. There is no one approach. Oral argument is usually more free moving than the written submissions. You may decide to go straight to your best point, even if it is not logically first. The court will not hesitate to ask you about a prior point if it wants a more structured approach.

Know where you are going before you start writing

4.13. Until you have conceptualised the structure of your entire argument – identified the main issues, determined the order in which each issue should be addressed, and analysed each issue, do not begin to draft your submissions. Otherwise you will end up with typing, not writing. First you need to master the facts and the law. Then spend time carefully thinking through your argument. You should note down your ideas as they occur to you, in no particular order. When you have a good grasp of the overall argument, begin to identify and partition the issues. A good discipline is to begin by writing an informal outline of your argument, just in bullet form. I often begin in this way. This approach helps sharpen your focus, and provides the framework for the formal argument.

4.14. The more time you spend in this planning phase, the better you will conceptualise your case, and the easier it will be to condense your arguments, however complex, into plain, simple expression. If a written submission appears overly complicated, the problem is not that the issues have been over-analysed. The problem is that they have been under-analysed.

Clearly signpost the structure throughout

4.15. Not only must the argument be well structured, that structure must be clearly signposted throughout your submissions, so that the court can easily – at a glance -- see where you are going.

Include a table of contents

4.16. Always include a table of contents, unless your submission is very short. The courts often now do this in their judgments, and you should set out your table of contents in a similar way. This should repeat the headings in the body of your document. It helps the court navigate your document, and foreshadows the arguments to come.

Use headings and sub-headings

4.17. An obvious way to signal what issue is being addressed at any point is to make selective use of headings and sub-headings. This structural partitioning makes your arguments clearer by isolating, and signalling in advance, the issues being addressed. It also gives the appearance of greater conciseness. The overall document structure set out in paragraph 4.2 above provides the generic main headings. Then you need appropriate case-specific sub-headings. Keep the headings short and punchy. Frame the headings as arguments, rather than rhetorical questions. Instead of "Did the defendant take advantage of its substantial market power?" put "The defendant took advantage of its substantial market power". Instead of "First issue: whether

there was a duty of care", write "First issue: the trial judge erred in finding a duty of care". Use the headings as part of your advocacy.

Adopt a point-first style of writing throughout

4.18. Wherever possible, in all parts of your submissions, use a "point-first"[10] approach in the text. This means stating your proposition first, instead of launching straight into the supporting detail. It eliminates suspense and mystery. Readers remember and absorb information better when they first know why it matters and how it is relevant. Where there are a number of distinct factors that support your proposition it can be very effective to state your point first, and then set out the supporting detail in numbered or bullet lists. This increases clarity, and persuasiveness. The cumulation of supporting factors can have a compelling effect. Writing in this way also focuses your mind on just what factors do support your proposition, and their relative strengths, and can drive you to a more trenchant analysis.

4.19. The simple example below illustrates this point first approach. My argument was part of a submission opposing an application that an applicant in a judicial review case appear at the substantive hearing by audio visual link (AVL) rather than in person:

> 8. Although the hearing is unlikely to require oral evidence or cross-examination, the Applicant inevitably will be prejudiced in presenting his case if he is not physically present in the courtroom, for the following reasons:
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> (a) The Applicant's role at the hearing is not a limited one like that of a witness. He is a self-represented party, and will be conducting his entire case himself. A demanding task for a non-lawyer, and even more so for a prisoner who is already disadvantaged in terms of resources and preparation. The disadvantage will increase if he is required to appear by AVL.
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> (b) The Respondents say that they can make facilities available to permit confidential communication and to allow documents to be transmitted promptly (by fax). However, that may disrupt the hearing, and is no substitute for the ability to confer immediately and directly with counsel and the other party, to make discreet aside comments and pass notes, and to hand up documents. Hearings frequently take surprise turns. Participation by AVL may also prevent the Applicant from dealing effectively with unexpected developments.
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> (c) A party who is conducting a case via AVL is bound to feel a level of 'disconnection' with what is happening in the courtroom. They may also fear that their contribution will be devalued, and have less impact -- in short, that the hearing is unfair.
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> (d) The Respondents have offered to have Crown counsel also appear by AVL, presumably to redress any inequality of treatment. That is not, in my submission, a sensible suggestion. Indeed, to have both parties appear remotely would compound the problem. A judicial review case should not be decided by a 'virtual hearing'. In addition, as counsel assisting I would prefer not to be the

[10] "Some tips on oral advocacy from Justice Rothstein", a speech given by Justice David Rothstein, Federal Court of Appeal, Canada, www.davidstratas.com/queensu/rothstein.htm

> sole advocate present in the courtroom. Nor would I wish to present my submissions by AVL.

4.20. Another advantage of this approach is that it increases the 'white space' of your document, reducing the number of dense, block paragraphs. A good-looking document is more readable. Number your subparagraphs in a simple way. Try to avoid going further than a third level of breakdown, and use a simple style of numbering (for example, 2.1(a)(i)). But lists should not be overused. If the submission becomes an endless chain of subparagraphs this will also reduce its visual appeal.

Writing the introduction

4.21. Writing the introduction demands great focus and selectivity. A good opening not only encapsulates the essential issues, it sets the scene. It is also your chance to develop an underlying theme, and, where appropriate, to address strategically factors that are likely to trouble the court. It is important to get it right. As Quintilian said, "he who runs his ship ashore while leaving port is certainly the least efficient of pilots".[11]

4.22. A case involving a judicial review challenge to a prison smoking ban[12] provides a good recent example of a case where the opening was important. The central issue was whether the ban was authorised by the rule-making power in the Corrections Act 2004. There were some factors that were likely to evoke the Court's sense of justice. For example:

(a) smoking had long been an accepted part of New Zealand prison life;

(b) the ban was a blanket one, applying both to remand and convicted prisoners, and to cells and outdoor exercise yards. It forced prisoners to go "cold turkey"; and

(c) despite its significance, the ban had not been imposed by statute following a full consultation and public submission process. Rather, it was imposed by prison rules made by each prison manager.

4.23. Against that, there were also factors that might make the Court less sympathetic to the claim:

(a) smoking is known to cause serious health problems, both to smokers and passive smokers, and there was evidence that the ban had had some positive effects on the prison environment;

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[11] Douglas Hassall, "Quintilian and the Public Attainment of Justice", in *Rediscovering Rhetoric. Law, Language and the Practice of Persuasion*, 2008, at 94.

[12] *Taylor v Manager of Auckland Prison* [2012] NZHC 3591. I was counsel assisting the court, but with the task of advancing arguments on behalf of the unrepresented applicant.

(b) even law-abiding citizens are subject to some constraints under the Smoke-free Environments Act 1990, and cannot just smoke anywhere they choose; and

(c) there was a real risk that if the rule were declared invalid the government would enact corrective legislation. This added an element of potential futility.

4.24. The challenge therefore was to write an introduction that addressed these factors, whilst also underlining that this was purely a legal argument, not about whether smoking is good or bad:

> 1.1. The prohibition on smoking in prisons is a significant – indeed extreme – measure. Smoking has traditionally been an integral part of prison life in New Zealand. What was imposed, with effect from 1 July 2011, was a blanket ban on smoking by all prisoners, at all times, in all areas (inside and outside) of all prisons. The blanket ban extends to possession of tobacco and tobacco-related products.
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> 1.2. This significant change had no democratic endorsement. It did not follow a consultation and public submission process, and was not subject to any parliamentary scrutiny. Instead, all prison managers were required to make prison rules under s 33 of the Corrections Act 2004 ("**CA**") to give effect, as from 1 July 2011, to a national smoke-free policy.
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> 1.3. On 30 June 2011 prisoners had their last cigarette. They are now denied access to an activity that, outside prison, is lawful. They are also prohibited from possessing products that, outside prison, are lawful. All New Zealanders are subject to restrictions under the Smoke-free Environments Act 1990 ("**SEA**") on smoking in workplaces and public places. But they are still free to smoke in many outdoor areas and, importantly, in their own homes. Prisoners, whose cell is in effect their home, often for a substantial length of time, are now denied this freedom.
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> 1.4. It is accepted that smoking, and exposure to second-hand smoke, pose risks to the health of smokers and non-smokers. However, this case is not about whether a complete ban is good policy, or about the benefits or dangers of smoking, or about whether the Court approves of the activity of smoking. The issue is whether the Respondent has acted within his powers under the CA and SEA.
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> 1.5. Given the significance of the ban, and given that prisoners are one of the most disadvantaged groups in the community, the ban's lawfulness deserves careful scrutiny by the Court. It has been signalled that if the Applicant's claim is successful then corrective primary legislation may be enacted to legalise the ban. That prospect cannot, however, deter a proper assessment of whether what was done was a lawful exercise of delegated power.

4.25. Following this introduction to set the scene, a summary (in list form) of the main submissions then followed. These answered the central issue -- whether the ban was authorised – by setting out the specific grounds of review. Sometimes shorter or a more low key introduction will be better, or the introduction and summary of submissions may be combined. But many cases contain a few special features that can be highlighted to advantage in a brief introduction. In oral argument the opening demands even more impact, and flexibility, as I have discussed in an earlier paper.[13]

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[13] "Oral argument in civil cases" [2013] NZLJ 29.

Writing the summary of submissions

4.26. Even though it appears near the beginning of the document, some counsel write the summary last. I always write a first draft right after the introduction. It sharpens your focus, and shapes the argument that follows. I then return to the summary to refine and improve it as I go. Here are some suggestions:

(a) Arrange your summary in a series of subparagraphs, one for each submission, and express each point as a positive, confident, statement.

(b) Keep each point succinct, with just enough detail and depth to make the point meaningful and compelling. If it is too short and bland it will have no impact. The summary is also part of your advocacy. Make it work.

(c) This is not the place to begin citing cases or evidence, unless they are absolutely central to your case, and even then be sparing.

Writing the factual narration: the story in brief

4.27. The skill is in selecting which facts to include and which to leave out. This requires discernment, and some courage. The introduction and the summary will largely dictate what facts are relevant. And the detail of some facts can be left until later, when you deal with the specific submissions to which they relate. The narration needs to be lucid, brief and plausible. But not too brief. It is better to say a little more than necessary than a little less. As Quintilian said, "Although a diffuse irrelevance is tedious, the omission of what is necessary is positively dangerous."[14]

4.28. This narration is part of your advocacy. The way you frame the facts should reflect the theme of your submission set out in your opening. It should also (if possible) appeal to the court's sense of justice. And tell a story. It is not a mere chronology – that will be in a separate document or in an attached appendix. Nor should it be a witness by witness account. The facts should be grouped in a logical, story-telling manner. What happened and why? Leave dates out, unless they are key. Be strategic in your narration. Referring to certain helpful facts, or the skilful juxtaposition of bad facts with good facts, can create a more favourable impression. So can the way that specific conduct is characterised. For example, in a recent competition law case the same conduct was described by one party as "blatantly exploiting an arbitrage

[14] Quoted by Douglas Hassall, "Quintilian and the Public Attainment of Justice", in *Rediscovering Rhetoric. Law, Language and the Practice of Persuasion*, 2008, at 95.

opportunity", and by the other party as "legitimate pro-competitive conduct by a disadvantaged new entrant".

4.29. As a general rule, refer to the parties by a name or term, rather than as the plaintiff and defendant, or appellant and respondent. Sometimes this will not work -- for example, where a party is joined in an official capacity, like the Attorney-General. Use acronyms sparingly, as they can make writing look cluttered and unattractive. For example, the Postal Network Access Committee becomes the "Committee" not the "PNAC".

4.30. Factual conclusions should not merely be asserted. Demonstrate the facts, through careful selection and arrangement of detail, so that the court is able to draw the conclusions you want it to draw. Similarly, rather than use colourful adjectives and adverbs let the facts, skillfully arranged, speak for themselves. You can inject more colour into y our oral argument. There is often some factual gloss that is better left for oral submission, when you can judge how the case is going.

4.31. In complex cases, especially where there are technical concepts to explain, visual aids can help to simplify and clarify.[15] These include, for example, diagrams, graphs, tables, charts and illustrations. Sometimes a picture really is worth a thousand words.

4.32. Remember that the judge will be critical, cautious and wary when reading your account of the facts. Be accurate and fair. Do not misrepresent, exaggerate, or put an unfair spin on the facts. Nor should you omit relevant facts that are unfavourable. Always be honest with the evidentiary record. Take no risks, not even small ones. Otherwise you may discredit your entire argument, and permanently damage your reputation. You have a duty of candour to the court. But this is also a guiding rule of good advocacy. The court needs to be able to rely on you. When the court has confidence that it can do so this "ethical appeal"[16] enhances your persuasiveness.

More about putting your strongest argument first –evaluating which one it is

4.33. I have touched on this topic already in discussing conceptual structure. Evaluating the relative strength of your arguments can be a fine judgment call. I have found that my own assessment is not always shared by the judge.

4.34. This was brought home to me early on. As a junior solicitor I had written draft submissions for an appeal. There were two arguments, and there was disagreement as to which was stronger.

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15 "Oral argument in civil cases" [2013] NZLJ 29, at 33, 34. There I have discussed visual aids in more detail.

16 The Hon Justice JD Heydon AC, "Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years", in *Rediscovering Rhetoric*, 2008, at 227.

Senior counsel wanted his preferred argument to go first, but my supervising partner thought the other argument should be first. When senior counsel met with us to review the draft, he detected rebellion. He told me to fetch some scissors and a stapler. He then cut the document in half, reversed the order of the arguments, stapled it back up, and left without saying another word. Later, at the Court of Appeal hearing, the Judges thought of a new, third argument. We quickly adopted it in oral submissions and the case was won solely on that point.

4.35. Unless you are very experienced, it is unwise to rely only on one ground if there is another reasonably arguable ground. You may unwittingly ditch a potential winner. However, obviously weak arguments should be culled. They will infect your submissions and detract from your good points. Some counsel fail to separate the wheat from the chaff. Some do so, but then use only the chaff.

4.36. During oral argument, it will become much clearer which of your arguments you should focus on. A hasty re-ordering may sometimes be needed.

Refuting your opponent's arguments – where in your structure does this go?

4.37. The main focus of your written submissions should always be your own case. But you do need to deal with your opponent's arguments – or at least the significant ones. At the trial stage these will be apparent from the pleadings, conferences, discovery, and the evidence. At the appellate stage you can rely on what was argued below, bearing in mind that arguments often evolve as a case proceeds upwards. It is essential to anticipate and refute the opposing arguments, for several reasons:

(a) If you do not, the court may think you have overlooked an obvious problem with your own argument. Worse, you may look as though you have avoided the difficulty and have no good answer.

(b) By pre-emptively identifying the contrary arguments, then dealing with them effectively, your primary argument will be stronger. You also add to your credibility.

(c) You are able to introduce the opposing arguments on your own terms.

4.38. In general, if you are representing a plaintiff or appellant, retain control and lead with your arguments, not your opponent's. When dealing with each issue in your submissions, set out your own arguments first. Then state briefly what the other side says about that issue, and answer it. After that, make some further comments in support of your own position. In short, for each issue make your own positive case then pre-emptively refute. Refuting first can look defensive, and refuting last may leave the court focused on the opposing arguments.

4.39. However, if you are representing a defendant or respondent the order you adopt will depend on the nature and strength of your opponent's arguments. If, for example, your opponent has raised a compelling jurisdictional or other 'king hit' point it may be wise to refute that argument first, to make space for your own arguments. Then adopt the same approach outlined above for each issue – make your own positive case, then refute. Again, you will have more flexibility later, during oral argument.

4.40. Sometimes you may perceive potential weaknesses in your own argument which your opponent may or may not raise. Again, it is always better to meet these difficulties head-on in your written submissions than to leave them unanswered. This avoids the sting of them being raised for the first time by your opponent, or by the court. If there is a good answer, then set it out. If not, you may have to acknowledge the point, but explain why it does not affect your case. Sometimes it is right to make a concession. Rarely will all the points of fact and law be in your favour. As Justice Laskin has stated:[17]

> "Nothing instils trust more than facing up to your weaknesses. Better it come from you than from your opponent. The right concession not only enhances your credibility, but is itself a persuasive technique…".

Grapple with the real area of controversy

4.41. Sometimes both counsel focus only or primarily on favourable arguments, and avoid grappling with the real area of controversy, described as "no man's land -- the grey area of debate -- where the case is likely to be won or lost".[18] The cases presented by the parties may therefore represent two extremes, and in effect, 'miss' each other. Well-structured submissions should lock together and engage directly on the hard issues. There is no point in shying away from obvious difficulties. If you do not address them, the court very likely will.

Writing a conclusion

4.42. A powerful conclusion is more important in oral argument than in the written submissions. But this is not the time to just fizzle out. If you can do so without needless repetition, say something forceful or vivid to sum up your case. The conclusion can also provide a 'bookend' to your opening theme. The trite phrase "for all the foregoing reasons…" is miserably feeble. And do not forget to state clearly what relief you seek, if you have not done so earlier.

5. Use plain language

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[17] The Hon Justice Laskin, "What persuades (or, What's going on inside the judges's mind), *The Advocates' Society Journal,* June 2004, at 5.

[18] The Hon Justice A F Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 ALJ 537, at 542.

5.1. The readability of your submission depends primarily on your structure. In addition, your language should, throughout, be simple, concise and clear. A legendary Cambridge University Professor explained the concept of plain language to his students as the difference between "He was conveyed to his place of residence in an intoxicated condition" and "He was carried home drunk".[19]

Keep your document short

5.2. Prolixity in legal writing is not a new problem. Over four centuries ago the Lord Chancellor of England took radical action against a lawyer who had drafted a particularly lengthy document. A hole was cut through the centre of the document and the lawyer was ordered to wear it around his head. He was paraded through the courts as a warning to others.[20]

5.3. In the early 1980s in New Zealand the focus was still on oral argument. If written submissions were handed up they were only short outlines. Then, with the proliferation of word processors, submissions rapidly became much longer. Little discipline was exercised. A paper war began. Law firms competed to present the longest submissions with the most quotes and citations. The Courts responded by imposing page lengths -- now 30 pages in both the Court of Appeal and the Supreme Court. An extension can be sought, but that should be reserved for exceptionally complex cases. It is always better to try and come in short of the limit.

5.4. Maximum page lengths force counsel into a more rigorous analysis. The cliche that 'it takes longer to write a short submission than a long one' is very true. It takes far more effort, and art, to condense a complex argument to 30 pages or less. Even where there are no prescribed page restrictions in the relevant court rules, the limits that have been set elsewhere signal that prolixity is unwelcome.

5.5. In England, new records for long-windedness were broken in the so-called *BCCI* case. The opening submissions of Gordon Pollock QC lasted 86 days. In reply Nicholas Stadlen QC addressed the Court for even longer, 119 days. Described in the media as "a load of Pollock", the case (involving a claim of $850m) collapsed on day 256 of the trial.[21] It led to tighter control on the conduct of commercial trials, including recommendations that opening arguments should not exceed 50 pages or two days, even in the heaviest cases.[22]

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19 Martin Cutts, *Oxford Guide to Plain English*, 4th ed, 2013, at vi.

20 Described in R Wydick *Plain English for Lawyers*, 2nd,1985, at 3, and referred to by Justice Kirby, "Is Law Poorly Written? Plain legal language" (1993) 31 ALJ 1091.

21 A barrier of files built up between the legal teams, five boxes high, dubbed the "Berlin Wall" because neither team could see the other across the top: "A modern day Bleak House", *The Guardian*, 25 May 2005.

22 "Report and Recommendations of the Commercial Court Long Trials Working Party", December 2007.

Use short sentences and paragraphs

5.6. In an exalted literary work such as *In Search of Lost Time*, long 'stream of consciousness' sentences and paragraphs may be forgiven. Proust's longest sentence "would, if arranged along a single line in standard-sized text, run on for a little short of four metres and stretch around the base of a bottle of wine seventeen times."[23]

5.7. However, in written legal submissions sentences and paragraphs should be of variable length and generally short. The discipline of short sentences need not involve a loss of sophisticated analysis. It need not always be "bluebell time in Kent".[24] Lord Denning's judgments in complex commercial cases were models of clear analysis.[25] Closer to home, Lord Cooke's judgments also demonstrated the power of simple expression, no matter how complex the case.

Banish wordy expressions

5.8. As I have discussed earlier, legal prose has lightened up significantly over the years. But we lawyers still need to banish some fusty expressions, and enliven our writing more.[26] For example:

(a) Where there is a choice, use the shorter word that conveys the same meaning rather than the longer one. The old adage is "never use a long word when a diminutive one will suffice". Only lawyers regularly use words like "cognizant", "endeavour", "procure", "reside", "requisite", "terminate", "utilise" and "intoxicated". We are also very fond of euphemisms. In a case where the respondent (a vexatious litigant) had concealed his true identity by using an alias, he was described by his counsel as a "semi-skilled practitioner of dissemblance". One of the judges inquired "Oh, you mean he is untruthful?"

Plain language does not mean informal or jargon words. Written submissions should have a degree of formality. But an occasional touch of slang, used with discretion, can add impact -- for example, referring to a psychoactive substance as a "legal high" or a "fun drug".

(b) Ditch legalisms, Latinisms, archaisms -- all the isms. Although the worst antique words and expressions have largely gone, others remain in popular use, like "my learned

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23 Alain De Botton, *How Proust Can Change Your Life*, 1997, at 32. Of course, not all of Proust's sentences were long, and he did use unaffected, clear language. The opening sentence of the first volume, *Swan's Way*, was admirably short: "For a long time I would go to bed early".

24 *Hinz v Berry* [1970] 2 QB 40 at 42.

25 See, for example, *In re Pergamon Press Ltd* [1971] 1 Ch 388 (CA); *Maxwell v Department of Trade and Industry* [1974] QB 523 (CA).

26 The topic is covered in depth in Joseph Kimble, "Lifting the fog on Legalese. Essays on Plain Language", 3rd reprint, 2011.

friend", "the said", "save that", "abovementioned", "aforesaid", "foregoing", "hitherto", "whomsoever", "hereafter", "herein", "hereunder", "thereafter", and so on.

As for Latin, some phrases have truly been imported into the English language, and fill a gap, such as *a priori, de facto* and *prima facie*. Or they may be terms of art. But otherwise Latin should be given the chop.[27] Latin expressions that have ready English equivalents just add affectation to an otherwise trite statement. A few examples include *ab initio, ad idem, ex contractu, ex delicto, pari passu, mutatis mutandis, inter alia, in esse, in praesenti,* and *inter se*. As Gibbs CJ said "platitudes often sound better in Latin".[28]

(c) Avoid long-winded phrases. Lawyers seem to love these. Strong verbs are often replaced by a noun phrase, as in: "undertake consultation" instead of "consult"; "give consideration to" instead of "consider"; and "make an application" instead of "apply". I have included a list of commonly used verbose expressions in the Appendix to this paper. It is a long list.

(d) Timid, apologetic phrases should not be overused. Lawyers often qualify their statements with words, such as: "it would seem", "it would appear that", "it might be said that", "it is respectfully submitted that", and "it should be noted that". They have a place, but if used too frequently deprive your arguments of force.

(e) Avoid doublets and triplets. Too many verbal equivalents will make your submissions look like an extract from *Roget's Thesaurus*. Examples include "cease and desist", "due and payable", "good and sufficient" "first and foremost", "null and void", "well and good", "alter or change".

(f) Avoid clichés like the plague. As well as the 'traditional' clichés this includes more modern, but tired, buzzwords. I have already given some examples of 'corporate speak'. Here are some that we lawyers are fond of: "walk the talk", "paradigm shift", "level playing field", "factual matrix", "push the envelope", "going forward", "moving the goal posts", "the parameters of…", "win win", "think outside the box", "tipping point", "drill down", "ramp up", "at the end of the day…", "the bottom line", "at the coal face", "go-to", "push-back", "next steps", "cut to the chase", "acid test", and "cutting edge".

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[27] See the comments of the Hon Michael Kirby, "How I learned to drop Latin and love plain legal language", *Law Society Journal*, February 2013, at 6-7. He would get rid of all Latin words.

[28] The Right Hon Sir Harry Gibbs, Chief Justice of Australia, "Appellate Advocacy" (1986) 60 ALJ 496, at 497.

(g) Use the active rather than the passive. Whilst the passive has a place, the active voice is usually more direct and vigorous. The passive voice has been described as "the most horrible enemy of clear expression."[29]

(h) Do not over-adorn with metaphors and similes. Simplicity and clarity will enliven your writing far more than strained attempts to be poetic.

(i) Understatement usually works better than overstatement. Most cases that reach the stage of a defended hearing are finely balanced. Let your analysis speak for itself. Let the court form its own view that, for example, your opponent's submission is "totally misconceived", "unsupported by the law or the evidence", or "utter rubbish". It is not something you should write.

Revise, revise, revise

5.9. It has been said that there is no such thing as good writing, only good rewriting.[30] Good editing does not mean a quick once-over at the end. Writing is a dynamic process, and you should constantly review and improve your submissions while the first draft is taking shape. Then review them again, and again, mercilessly, until you are satisfied. You should also check spelling and grammar, and the accuracy of all legal citations, quotations and evidential references. Sloppiness undermines even good arguments. Can the content be expressed more succinctly, or more elegantly? It is surprising how much verbiage can be culled. This is drudgery, but essential. Oscar Wilde encapsulated this when he said: "This morning I took out a comma. This afternoon I put it back in again".

6. Conclusion

6.1. At a certain point in the writing and editing process, your argument will begin to look quite straightforward. You may even wonder where all the effort went. Alas, sometimes clients also wonder. They may think you have been a mere channel for a rather obvious argument. If so, you have achieved what you set out to do and have written a readable submission.

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[29] Interview of Justice Michael Kirby, High Court of Australia by Kathryn O'Brien, law student at the University of Sydney, Wednesday, 1 November 2006.

[30] A remark made by Justice Louis Brandeis, quoted in Garner *The Elements of Legal Style*, 2nd, 2002, at 218.

Appendix

Verbose expressions to avoid

instead of:	*use:*	*instead of:*	*use:*
a number of	many, several	in like manner	as, in the same way
a sufficient number of	enough	in many cases	often
an adequate number of	enough	in order to	to, for
as a consequence of	because, from	in proximity to	close to, near
as to whether	whether	in pursuance of	under, because of
at present	now, currently	in receipt of	have
at such time as	when	in relation to	for, to, about, concerning
at that point in time	then	in respect of	for, to, about, concerning
at the place where	where	in some instances	sometimes
at the present time	now	in terms of	in
at the time that	when	in the absence of	without
at the time when	when	in the case of	when
at this point in time	now	in the course of	during
attend at	go to	in the determination of	in determining
because of the fact that	because	in the event that	if
by means of	by	in the instant case	here, in this case
by reason of	because	in the majority of cases	usually
by virtue of	under, because of	in the nature of	like
conduct a hearing	hear	in the near future	soon
conduct an examination of	examine	in the neighbourhood of	about, roughly
conduct an investigation	investigate	in the vicinity of	near
despite the fact that	although	in view of the fact that	because, since, given that
due to the fact that	because, since	is able to	can
during such time as	while	is authorised to	may
during the course of	during	is constituted by	consists of
during the period of	for	is not entitled to	cannot
during the time that	while	is permitted to	may
ensure compliance with	comply	is required to	must
excessive number of	too many	it is necessary that	must, should
for the period of	for	it is not the case that he	he did not
for the purpose of	to, for	it is probable that	probably
for the reason that	because	it is the case that	it is
from the point of view	for	it would appear that	apparently
give consideration to	consider	legal practitioner	lawyer
has discretion to	may	make a discovery	discover
have a negative impact	hurt, harm	make accommodation for	accommodate
he was aware of the fact that	he knew that	make adjustments to	adjust
herein	in this	make application for	apply for
in a precise manner	previously	make delivery	deliver
in accordance with	under	make provision for	provide for
in as much as	since, because	make reference to	refer to
in connection with	about	meets the requirements of	complies with
in excess of	more than	motor vehicle	car
in favour of	for	no later than	before
in lieu of	instead of	not less than	at least

instead of:	*use:*
notwithstanding the fact that	although, despite, even if
on a daily basis	daily
on behalf of	for
on or before	before
on the basis of	by
on the grounds that	because
on the occasion of	on
otherwise than	except
per annum	a year
previous to	before
prior to	before
provide a description of	describe
pursuant to	under, by, in accordance with
submit an application	apply
subsequent to	after
such steps are appropriate	appropriate steps
sufficient number of	enough
take into consideration	consider
the day immediately preceding	the day before
the day immediately succeeding	the day after
the fact that she had died	her death
the giving of advice	giving advice, advising
the majority of	most
the question as to whether	whether
there is no doubt but that	no doubt
thereafter	later
therein	in it, in them
undertake consultation	consult
until such time as	until
with a view to	to
with reference to	about, concerning
with regard to	about
with respect to	about
whether or not	whether
with the exception of	except for
with the object of	to, for