EFFECTIVE APPELLATE ADVOCACY – Written Advocacy

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WRITTEN ADVOCACY

In times past

1. Some persons will recall the time when written advocacy was virtually unknown. Back in the day, oral advocacy was the almost invariable norm and in this, as in so many other areas, Jamaican practice mirrored the English. In one famous case, not all that many years ago, resort to written arguments by a litigant in person was frowned on by a senior judge, who described it as "wholly irregular and contrary to the practice of the court"[1]. In fact, even today, the topic of written advocacy is hardly dealt with at all in most modern textbooks on advocacy[2].

2. As is well known, the position has for a very long time been the opposite in the United States, where there is a well-developed tradition of preparing written arguments ("briefs") for use in Federal and Supreme Court appeals[3]. There is therefore much to be gained from the American experience in this regard.

3. My own recollection is that some form of written advocacy started to be used in Jamaica in the late 1980s and continued into the 1990s, particularly in more complex civil cases. But this was exceptional and there were some legendary stories of opening addresses spanning days and running into weeks. Signs of change begun to appear in the late 1990s, during the period of the Woolf reform process in England and, for us,

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[1] **Rondel v Worsley** [1967] 1 QB 443, per Danckwerts LJ at page 509; and see Andrew Goodman, Effective Written Advocacy – A Guide for Practitioners (Wildy, Simmonds & Hill), 2nd edn, pages 1-6

[2] See, for example, Lee Stuesser, An Advocacy Primer (Thomson/Carswell), 3rd edn, chapter 5

[3] Goodman, pages 39-40

the real turning point was the introduction of the Civil Procedure Rules 2002 ('the CPR'). With the new rules came the concept of case management, the most important of the innovations designed to ensure the more efficient use of the court's resources and the expeditious conduct of proceedings.

4. Written advocacy, in the form of skeleton arguments, is one of the tools available to promote achievement of this ideal in the new dispensation. In this presentation I will discuss some of the ways in which written advocacy may be enhanced by way of thorough preparation; complete command of the law and the facts; detailed planning; and careful execution.

What the rules say

5. Rule 38.7(1) of the CPR provides that, at the pre-trial review, the court may give directions "as to the conduct of the trial in order to ensure the fair, expeditious and economic trial of the issues". In particular, rule 38.7(2)(b) continues, the court may give directions for the filing by the parties of (i) a skeleton argument; (ii) a chronology of recent events; (iii) a summary of any legal propositions to be relied on; and (iv) a list of the authorities to be cited in support of these propositions.

6. Under the Court of Appeal Rules 2002 ('the CAR'), the requirement for skeleton arguments is even stronger. As regards civil appeals, rule 2.6(1) provides that, within 21 days of being notified that the record of proceedings in the court below has been lodged in the registry of the court, "the appellant must file with the registry and serve on all the other parties a skeleton argument". Within a further 21 days, any other party

wishing to be heard on the appeal must also file and serve a skeleton argument and, within another 14 days, the appellant may file and serve a skeleton argument in reply. This timetable can be, and often is, adjusted at case management.

7. The actual content of a skeleton argument is covered by rule 2.6(4) of the CAR:

> "A skeleton argument must
>
> (a) set out concisely the nature of the party's arguments on each ground of appeal;
> (b) in the case of a point of law, state the point and cite the principal authorities in support with reference to the particular page (s) where the principle of law is set out;
> (c) in the case of questions of fact, state briefly the basis on which it is contended that the court can interfere with the finding of fact concerned with cross references to the passages in the transcript or notes of evidence which bear on the point."

8. Rule 2.6(5) provides that the appellant's skeleton argument must be accompanied by a written chronology of events "relevant to the appeal cross-referenced to the core bundle or record".

9. As regards criminal appeals, the requirements are similar. Under rule 3.12(1), the appellant must file a skeleton argument within 21 days of receiving notice of the filing of the record of the proceedings in the court below. The respondent must file a skeleton argument within 21 days of service of the appellant's skeleton argument (rule 3.12(2)), and the appellant may file a skeleton argument in reply within a further 14 days of service of the respondent's skeleton (rule 3.12(3)). Rule 3.12(4) prescribes the content of a skeleton argument in virtually identical terms to rule 2.6(4).

10. The timetable established by the CAR for the filing of skeleton arguments in criminal appeals has proved difficult to administer in practice and, as a result, it is almost invariably modified by permission of the court. It is in fact one of the areas of the CAR that is in need of the urgent attention of the Rules Committee.

11. Although both the CPR and the CAR speak only to skeleton arguments, it should be noted that orders are increasingly made in practice for the production by the parties of full written submissions. Indeed, it is often difficult to distinguish between the two and much of what follows is therefore equally applicable to both. But it is nevertheless important to note what the rules actually say that a skeleton argument should contain.

The objective of skeleton arguments

12. Keep in mind the utility and value that judges seek from skeleton arguments:

> "Judges rely on case summaries, skeleton arguments and written submissions to find the quickest way into the case. The pressure of business and the distribution of work, particularly in the superior courts, are such that applications and even trials will come before tribunals who do not have the time to absorb the papers…where it happens that the judge comes into a contested matter entirely afresh, it is the well-presented and coherent skeleton that will be read before the statements of case and, if reliable, in place of them. In the Court of Appeal a dependable skeleton will subsume and deal with all of the live grounds of appeal: in an average appeal contesting the legal basis for the decision of the court below, unless skeleton submissions are unclear or extremely short, the…justices of appeal need read only the two sides' respective skeleton arguments and the relevant part of the first instance judgment.
>
> For a judge, the skeleton should tell him whether it is necessary to read anything else, and if so what, and in what order…

> The impact of a well thought out and carefully crafted skeleton argument should not be underestimated. Written submissions do not cease to be useful to the court merely because the trial or appeal has commenced. In the Court of Appeal upwards of 60% of appeals now have reserved judgments: the written argument is not only used before the hearing to enable the judge to formulate a preliminary view of the case, but also *afterwards* as an aide memoir to write his judgment. Much the same can be said of trial judges, and increasingly it is common for advocates to be asked to prepare closing submissions in writing, usually in lieu of closing argument, and to furnish the judge with a copy in electronic format."[4]

13. Although our rules do not prescribe its length, a skeleton argument is intended "to summarise in writing the relevant issues of fact and law…not to argue them fully in writing". It is therefore important to guard against unnecessarily long written submissions, a point which was forcefully made by Mummery LJ, speaking for the court[5], in **Tombstone v Raja (representing the Estate of the late Mohammed Raja) and another[6]**:

> "[126] We remind practitioners that skeleton arguments should not be prepared as verbatim scripts to be read out in public or as footnoted theses to be read in private. Good skeleton arguments are tools with practical uses: an agenda for the hearing, a summary of the main points, propositions and arguments to be developed orally, a useful way of noting citations and references, a convenient place for making cross references, a time-saving means of avoiding unnecessary dictation to the court and laborious and pointless note-taking by the court.

[4] Goodman, pages 27-28
[5] Mummery, Dyson and Maurice Kay LJJ
[6] [2008] EWCA Civ 1444, paras [126]-[128]

> [127] Skeleton arguments are aids to oral advocacy. They are not written briefs which are used in some jurisdictions as substitutes for oral advocacy. An unintended and unfortunate side effect of the growth in written advocacy (written opening and closing submissions and 'speaking notes', as well as skeleton arguments) has been that too many practitioners, at increased cost to their clients and diminishing assistance to the court, burden their opponents and the court with written briefs. They are anything but brief. The result is that there is no real saving of legal costs, or of precious hearing, reading and writing time. As has happened in this case, the opponent's skeleton argument becomes longer and the judgment reflecting the lengthy written submissions tends to be longer than is really necessary to explain to the parties why they have won or lost an appeal.
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> [128] The skeletal nature of written advocacy is in danger of being overlooked. In some cases we are weighed down by the skeleton arguments and when we dare to complain about the time they take up, we are sometimes told that we can read them 'in our own time' after the hearing. In our judgment, this is not what appellate advocacy is about, or ought to be about, in this court."

14. Just over two years later, in **Midgulf International Ltd v Groupe Chimique Tunisien**[7], the appellant's first effort at a skeleton argument ran to 132 pages, supported by five volumes of authorities (totalling well over 100). When the appellant was ordered to supply a proper summary of its argument, it produced a 15 page summary, in which it complained that it was unable to develop its argument in proper detail and referred the court back to its original skeleton argument. Then, in reply to the respondent's 23 page skeleton argument, the appellant next served a supplementary skeleton argument running to a further 30 pages. Many of its previous arguments were repeated in the supplementary skeleton. In a judgment with which the

[7] [2010] EWCA Civ 66

other members of the court[8] agreed, Toulson LJ characterised the case as "a grotesque example of a tendency to burden the court with documents of grossly disproportionate quantity and length". The learned judge complained that the work of the court had been made "infinitely harder" by the "wasted hours" spent reading through the appellant's skeleton arguments; this "will no doubt also have added greatly and unnecessarily to the costs of the appeal"[9].

15. Even in the United States, where full written briefs are the norm, judges have been known to react to marathon offerings:

> "The more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes…Repetitious, extraneous facts, over-long arguments (by the 20th page, we are muttering to ourselves, 'I get it, I get it. No more for God's sake') still occur more often than capable counsel should tolerate."[10]

16. Despite these strong judicial pronouncements in support of economy in the length of skeleton arguments, this is not a matter on which it is possible to be unduly prescriptive. Underlying these outbursts is the clear sense that the length of the skeleton arguments in the particular case was not justified, either by its complexity or

[8] Mummery and Patten LJJ

[9] Para. [72]. In the Eastern Caribbean, it has been considered necessary to restrict the length of skeleton arguments in normal cases to 10 pages in the case of an appeal on law and 15 pages in the case of an appeal on fact, with a warning that practitioners "should not, however, assume that longer cases justify proportionately longer skeleton arguments" – Eastern Caribbean Supreme Court Civil Procedure Rules, Practice Direction 62(D), No. 10 of 2011.

[10] Patricia Wald, former Chief Judge , U.S. Court of Appeals, D.C. Circuit, writing extra-judicially in 19 Tips from 19 Years on the Appellate Bench, quoted in Ross Guberman, Point Made (OUP, 2011), page 278

by the nature of the issues involved on appeal[11]. In many cases, extensive skeleton arguments, supported by a great many authorities, will pass unremarked if the court considers them necessary to a proper appreciation of the issues in the case[12].

17. The aim must therefore be to ensure that the length of the skeleton arguments is justified in the circumstances of the particular case. In no event should a skeleton argument be a purely gratuitous exhibition of the depth of the advocate's learning.

Skeleton arguments and oral advocacy

18. In the passage from his judgment quoted above, Mummery LJ was anxious to make the point that skeleton arguments are aids to, rather than substitutes for, oral advocacy[13]. However, case management judges (particularly in the Court of Appeal), in assigning time to counsel for oral submissions at the hearing, now routinely take into account the fact that detailed skeleton arguments have already been or will be provided. And, as has already been noted, written submissions are now often required in lieu of closing addresses in civil cases. Thus, even if written advocacy is not likely to completely supplant oral advocacy in the near future, it is clear that it is already having the wholly beneficial effect of reducing the length of actual hearings in court.

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[11] In the **Tombstone** case, counsel observed (at para. [123]) that the case, "while unusual, was not unduly complex", while, in the **Midgulf** case, Toulson LJ described the central issue in the case (at para. [73]) as á very short one".

[12] In appeals to the Caribbean Court of Justice, for instance, there is no restriction on the length of skeleton arguments and in the recent case of **Shanique Myrie v The State of Barbados** [2013] CCJ 3 (OJ), original and supplementary written submissions were filed on behalf of the claimant and the defendant, as well as written submissions on behalf of the intervenor.

[13] See para. 13 above. Toulson LJ also made a similar point in the **Midgulf** case (at para. [75])

19. But there nevertheless remains one - yet unresolved - question for the advocate: how, having filed your skeleton arguments, or, in some cases, detailed written submissions, do you structure your oral presentation to the court?

20. An obvious temptation is simply to read your own limpid prose to the court, a captive audience if ever there was one. Avoid it at all costs. No matter how good a reader you are, you will in short order find the attention of the court wandering. The court will (hopefully) have already read your arguments and require from you, not a repetition of them, but elucidation and perhaps further development of particular points. So it is of critical importance to plan your oral presentation meticulously, with clear objectives in mind:

> "An oral presentation is only as good as its organizational structure. Counsel must decide which points will be advanced and how they fit together to form an integrated whole. Counsel may choose to follow the sequence of arguments as they appear in the factum [skeleton argument]. But even the best facta warrant critical appraisal when deciding how best to prepare for oral argument. There is much to be said for stepping back, taking a long hard look at the case, and examining whether there is a more compact and compelling way of packaging counsel's submissions. There usually is, particularly when the argument is complicated and counsel bound by strict time limits. The idea is to reduce a mass of material into a logical, cohesive structure that allows argument to unfold in a concise and orderly way, while avoiding unnecessary repetition."[14]

[14] Renee Pomerance, Appellate Advocacy: Presenting the Oral Argument, page 7 – www.scai-ipcs.ca (Supreme Court Advocacy Institute of Canada)

21. Then, once on your feet, as a distinguished Canadian judge famously advised: "Be brief. Be clear. Be gone."[15]

Constructing the skeleton argument – some basic rules

22. So how does one actually go about putting together a compelling skeleton argument? The aim is to transfer your many profound thoughts and bright ideas about the case onto the page. It is an act of writing, not entirely dissimilar to a law school assignment (albeit with real, not hypothetical, facts and personalities). And, as with all writing projects, there are certain fairly well-established canons that have weathered exposure to a wide range of subject areas.

23. Bryan Garner, the foremost modern Anglo-American expert on legal writing and the use of language[16], urges us to think of writing as a process in four steps or phases[17]. In the first (the creative phase), you think of the things you want to say – as many as possible as quickly as possible. In the second (the outline or planning phase), you figure out a sensible order for those thoughts. In the third (the drafting phase), you write a first draft. And in the fourth (the editing or refinement phase), after setting the draft aside for a matter of minutes or days, you come back to it and edit it. Each

[15] The late Justice Willard Z. Estey, quoted in Stuesser, page 99

[16] Bryan Garner is an American lawyer, lexicographer and teacher, who has written several books about English usage and style. He is the editor-in-chief of all current editions of Black's Law Dictionary and has co-authored two books with Justice Antonin Scalia (Making Your Case: The Art of Persuading Judges (2008), and Reading Law: The Interpretation of Legal Texts (2012)).

[17] Bryan Garner, Legal Writing in Plain English (University of Chicago Press, 2001), page 5

phase is as important as the other, although the actual time spent on each will vary according to the precise nature of the assignment being undertaken.

24. The first phase will often overlap with the thorough review of all the material in the case that you must undertake in order to prepare it properly and it will invariably be helpful to list your thoughts, in no particular order, as they come to you. The second phase is often overlooked in practice, a victim of the press of time and other pressures, but it is critically important: an unplanned or unstructured skeleton will convey the impression that "your writing has been dictated off the cuff and makes your argument difficult to follow, frequently repetitious, often internally inconsistent, and always unpersuasive"[18]. The third phase is the toughest, but potentially the most rewarding, as you transform your swirling and sometimes incoherent thoughts into typescript (or, if this is still your preference, manuscript). For some, it is best done all at once, literally as the thoughts flow, while, for others, it is a painstaking and time-consuming exercise. Whatever works best for you is best. Write your argument consecutively and strive for a natural progression that flows logically. It is in the fourth phase that you curb the verbal exuberance of the third, fill the inevitable gaps in your draft and make your product fit for the purpose. No matter how imminent the filing deadline, do not neglect it.

25. In building your skeleton, always remember the importance of the first impression. An introduction which is at once comprehensive and arresting will provide an unforgettable frame for the discussion. Consider the following opening paragraph of a

[18] Goodman, page 41

U.S. Court of Appeals opinion, which in a few short sentences tells the entire story of the litigation with which it is concerned and sets the stage for all that is to follow[19]:

> "This litigation arises out of an instalment contract for the sale of quantities of battery lead by a Canadian seller to a Pennsylvania buyer. The seller sued for the price of a carload of lead delivered but not paid for. The buyer counter-claimed for damages caused by the seller's failure to deliver the remaining instalments covered by the contract. The District Court, sitting without a jury, allowed recovery on both claim and counterclaim. This is an appeal by the seller from the judgment against him on the counterclaim. The ultimate question is whether the buyer had committed such a breach of contract as constituted repudiation justifying [a] decision for the seller."

26. Naturally, it takes time, experience and considerable skill to achieve an opening paragraph of this simple perfection. But it is possible to attract the court's interest equally well in a few brief paragraphs, in which you identify the parties and the issues; summarise the facts of the case (in chronological order, cross referenced to the separate chronology filed and the record); briefly rehearse its recent procedural history; and give a brief overview of your client's position. As Goodman observes, "[i]f you state the nature of the case and outline its prior history it brings what is to follow into immediate focus for the judge"[20].

27. Having set the stage, the longer middle section of your skeleton argument is where you develop the reasoning that underpins the position that you have stated in

[19] Quoted in Elliott L. Biskind, Simplify Legal Writing (Arco Publishing Co, 1975), page 4
[20] Goodman, page 43

your introduction[21]. This is the heart of the argument, so take time to organise it properly, breaking it down into headings and sub-headings as appropriate (we will come back to this[22]). Here is a suggested (not prescriptive) running order:

- Start with the legal premises that you contend to be relevant, elaborating them if necessary by reference to the authorities upon which you rely.
- Then show how the facts of the case fit into the legal premises. This is where you posit the basis for the resolution of the case in your favour, so think about it carefully, always making sure to marshal the facts accurately.
- Next, remember to deal with the counter-arguments (they won't go away, so there's no point in pretending they don't exist).
- Then demolish them comprehensively (hopefully), but, if not, as best you can.

28. A strong conclusion is equally important. In it, you should briefly sum up the argument that you have been making, recapitulating your main points concisely. As with the introduction, it takes a lot of work to create a forceful conclusion. The formulaic "For all of the foregoing reasons, there should be judgment for the claimant", is safe, but unexciting. But, as Garner reminds us, quoting Samuel Johnson, the great English critic and dictionary writer, "What is written without effort is in general read without pleasure"[23].

[21] Garner, page 56
[22] At para. 37 below
[23] Garner, page 57

The matter of technique

29. In preparing a skeleton argument, a feel for modern writing technique, which emphasises clarity through simplicity, is as important as the actual content of the document. The aim of all legal argument, whether oral or written, is ultimately to persuade. Thus, an argument that cannot be understood, either because of its use of arcane or archaic formulations or by its sheer complexity is unlikely to be effective. What follows is a highly selective list of some of the basics.

(i) Keep your sentences short

30. Most experts suggest an average sentence length of 20-25 words[24]. As Associate Justice Ginsburg of the U.S. Supreme Court once observed, judges "simply don't have time to ferret out one bright idea buried in too long a sentence"[25]. And short sentences are apt to convey the same meaning more pithily. For instance, why write "The law reports are replete with precedents that support the position contended for by the appellant in this case", when you could just as effectively write, "This is not the first case like this to be tried"[26].

31. But variety is also important: "What makes prose sing, after all, is variety in sentence length and structure, not adhering to strict medium-sentence-only rules."[27] Balance a longer sentence of, say, 35 words with a short one of three. Mix it up. The

[24] See, e.g., Goodman, page 48 and Garner, pages 20-22;
[25] Ruth Bader Ginsburg, Remarks on Appellate Advocacy, quoted in Guberman, page 279
[26] Guberman, page 163
[27] Guberman, page 177

opening paragraph of the judgment of Lord Denning MR in **Lloyds Bank v Bundy**[28], a case about undue influence, is generally regarded as a classic of the genre (in addition to providing another example of a perfect introduction):

> "Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy 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. He was granted legal aid. His lawyers put in a defence. They said that, when he executed the charge to the bank he did not know what he was doing: or at any rate not the circumstances were such that he ought not to be bound by it. At the trial his plight was plain. The Judge was sorry for him. He said he was a 'poor old gentleman'. He was so obviously incapacitated that the Judge admitted his proof in evidence. He had a heart attack in the witness-box. Yet the Judge felt he could do nothing for him. There is nothing, he said, 'which takes this out of the vast range of commercial transactions'. He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank. Now there is an appeal to this Court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound."

32. Which is not to say that, occasionally, the long, elegant and perfectly balanced sentence will not work equally well. Take the final sentence of a passage from a brief (prepared by Mrs Ruth Bader Ginsburg, then a leading advocate for the advancement of

[28] [1975] QB 326, 334

women's rights) in an appeal having to do with gender inequality in legal beer drinking ages in Oklahoma[29]:

> "Upon deeper inspection, the gender line drawn by Oklahoma is revealed as a manifestation of traditional attitudes about the expected behavior of males and females, part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions."

33. Not everyone can conceive, far less write, a coherent, even poetic, 48 word sentence of this quality. Most of us should not even try. But, if you can, go for it . The result will be memorable.

(ii) Prefer the active voice over the passive

34. Have the subject of your sentences do something ("The court awarded exemplary damages"), rather than have something done to the subject ("Exemplary damages were awarded by the court"). The active voice uses fewer words and speaks more naturally. It makes your written product less lawyerly and more interesting.

(iii) Stick to common parlance[30]

35. Avoid dull old legalisms that do not match how people really speak today. Put the following on your hit list immediately: bring an action against (sue); herein (in this [contract, etc.]); inasmuch as (since, because); instant case (here, this case); in the

[29] Quoted in Guberman, page 185
[30] The examples in paras 35 and 36 are taken from Garner, pages 34-35, and 39 -40

event that (if); not less than (at least); prior to (before); pursuant to (under, by, in accordance with); subsequent to (after); such (that, this, those, the); thereafter (later, after that); and therein (in it, in them, inside). Add others to the list as they come to you.

36. Next, attack the bloated, wordy phrases that persist in common usage: an adequate, or sufficient, number of (enough); a number of (many, several); at the present time (now); at the time when (when); at this point in time (now); conduct an examination of (examine); during such time as (while); during the course of (during); for the reason that (because); in the event that (if); in the near future (soon); is able to (can); make accommodation for (accommodate); make provision for (provide); notwithstanding the fact that (although); on a daily basis (daily); on the ground that (because); provide a description of (describe); submit an application (apply); take into consideration (consider); the majority of (most); and until such time as (until).

37. And while you are at it, don't leave out the Latin. I am not, of course, referring to those Latin words and phrases that have come to denote specific concepts or terms of art that are more trouble to render in English than the effort is worth. So we are probably stuck with *actus reus*, *habeas corpus*, *mandamus*, *mens rea*, *res ipsa loquitur*, *volenti non fit injuria* and, I regret to say, a host of others too numerous to mention. But what about the Latin words and phrases that have an everyday English equivalent? Do we really need to burden our writing with *audi alteram partem*, *ex abundanti*

cautela, *ex gratia*, *ex parte*, *ex post facto*, *inter alia*, *ipso facto*, *mutatis mutandis*, *quare*, *quid pro quo*, and other such delights? A matter for you.

(iv) Stay close to your dictionary

38. Get a good dictionary of modern English and consult it frequently, particularly when in doubt. Wrong usages abound, even in the most exalted circles. Take the much abused word 'fulsome', an adjective which is commonly used to mean 'detailed' or 'extensive' (as in, "I will deal with my learned friend's argument in a more *fulsome* way in due course."). Then consider the dictionary meanings of the word: "Sickeningly obsequious; nauseatingly affectionate, admiring or praiseful; loosely, copious or lavish; excessive; (e.g. of a voice or a woman's figure) well-developed, well-rounded."[31]

(iv) Divide the document into sections

39. Use appropriate headings and sub-headings to break up your text into separate, contained parts. In addition to giving the reader a break from the monotony of a seamless stream of information, this has many positive advantages, by (a) helping you to organise your thoughts; (b) increasing the clarity of your argument; (c) making navigation of the document easy for the reader; (d) signalling transitions from one part of the argument to another; and (e) making the text easily "skimmable"[32].

[31] The Chambers Dictionary, 12th edn, page 615
[32] Garner, page 14

(v) Keep your paragraphs short

40. The recommended average paragraph length is five sentences or 100 words[33], to eight sentences or 150 words[34]. But again, variety is helpful. Link your paragraphs by an express or implied reference at the beginning of each to the previous – or an even earlier – one, and so "build a 'word bridge' to ensure that the narrative flows easily from one paragraph to the next"[35].

(vi) Use block quotations sparingly

41. Views on the use of long, indented quotations differ. Many judges feel, with some justification, that they are an unnecessary – and boring - diversion in the skeleton argument, given that they can be read at source from the authorities cited by the advocate. Most would prefer the advocate to paraphrase the particular passage to which it is sought to draw attention, rather than to reproduce lengthy excerpts from the judgment in which it appears.

42. But, that having been said, it is also accepted that, "[i]f used with discretion…pertinent quotations from judicial opinions give a brief force and emphasis"[36]. If it is thought necessary to set out a block of quoted text in the skeleton argument, avoid the time-worn verbal formulae for introducing such material, such as "The learned judge said as follows", or "The court held". Rather, introduce the

[33] Goodman, page 48
[34] Garner, page 72
[35] Goodman, page 48
[36] U.S. Federal Circuit Judge Dan Friedman, Winning on Appeal, 9 Litig. 15, 17 (Spring 1983); quoted in Guberman, page 143

quotation by explaining how it fits into the structure of your argument as a whole, so that when it is read it appears to be an integral part of it. Otherwise, a string of seemingly un-integrated quotations can give the impression of a document slapped together without careful thought.

(vii) Use footnotes

43. Judges have traditionally been as suspicious of footnotes as the great Noel Coward apparently was. According to him, "Having to read a footnote resembles having to go downstairs to answer the door while in the midst of making love".[37] But much has changed in the 40 years since Coward passed on. The modern experts are all agreed that it is best to "[d]e-clutter the text by moving citations into footnotes"[38] (perhaps they need to have a word with the judges, who remain firmly wedded to the past in this and so many other things). So feel free to put your citations in the footnotes to your skeleton arguments. But not much else: footnotes in a skeleton are not the place to develop your substantive argument further than you have done in the main text or to display general erudition. The aim of the skeleton argument is not to distract the judge, but to help her to focus on the issue under consideration.

The question of style

44. All advocates who take their craft seriously spend a lot of time – sometimes their entire professional lifetimes – honing their style to enhance their effectiveness. In oral

[37] Quoted by Guberman, at page 146
[38] Goodman, page 49

advocacy, this question of style is a function of many things – experience, personality, physical attributes, the gift of vocal articulation, imagination, people skills, and so much more. Ultimately, although there will be recognisable commonalities, each person's style will be uniquely her own.

45. The search for style in written advocacy is an essentially similar exercise, a reaching for that manner of expression that is best suited to one-self and can best carry the burden of persuasion. Spend time developing your own style, by reading around the subject area of written advocacy, as well as by reading generally. Although most of us will never produce anything that will qualify as a literary masterpiece, the quest for that style will never abate. With effort, each of us can in time achieve in our written work a measure of that style that defines an advocate:

> "But the ideal style is a style that is clear, - that cannot be misunderstood; that is forcible, - that holds the attention; and that is elegant, - that is so exquisitely adapted to its purpose that you are conscious of its elegance only by [subtly] feeling the wonderful ease of habitual mastery."[39]

Quality control

46. Ask others to read and comment on your draft skeleton argument and listen carefully to and embrace their criticisms: after all, it is others who will need to be persuaded by your arguments, not you. Re-read the draft carefully yourself and do not be afraid to edit it, brutally if necessary. Do a spelling and grammar check. Proof read (more than once, if possible). Before filing, check the completed document for length,

[39] Barrett Wendell, English Composition (1891), quoted in Biskind, page 2

accuracy of quotations and of citations. Make sure that you are referring to current, un-amended legislation and double-check your authorities to satisfy yourself that they have not been criticised or overruled. Last, but hardly least, ensure that, when filed, your document is in an attractive, reader-friendly format[40].

Conclusion

47. This has been no more than a primer. There is much more that can and no doubt should be said on the topic of written advocacy. But if this modest beginning engages your imagination even a little bit, that is reward enough for me.

Dennis Morrison

18 October 2013

[40] And remember to have the document available for the judge in electronic form, if needed. Offer to provide it, even if it is not requested.