Modern Advocacy: Issue Framing in Oral and Written Submissions

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This is supposed to be a talk about modern advocacy. Let me talk, instead, about ancient advocacy. Not Cicero. This is about the 1980s when I was started in practice. Written outlines were rare, even in appeals. They were short. I still have an outline from an appeal in the late 1980s when I was junior to Miss Kiefel QC in the Full Federal Court. It was three pages long.

Unreported cases were rarely cited: doing so suggested a weak case. Although the photocopier had been invented long before, bound volumes of the reports often were handed from the Bar table to the judge to read and then return to counsel.

Since then, written submissions have generally improved in quality and certainly increased in quantity. They are no longer voluntary. They are mandatory. There are page limits and templates required by some Court's practice directions. In any court, written submissions are the raw material for an *ex tempore* or reserved judgment.

The increasing importance of written advocacy in all courts may suggest a decreased role for oral advocacy. I do not agree. Oral advocacy is as important as ever. The compression in time for oral advocacy makes it more important for it to be effective.

Written and oral submissions have to cover the same general territory. Oral submissions cannot introduce entirely new arguments, unless something entirely new comes up in a hearing. But this does not mean that oral advocacy consists simply of "speaking to" written submissions. Oral submissions need to be fresh.

Different skills are required for written and oral advocacy. But good advocacy in both its forms has certain common features. Previous speakers in this series have addressed many topics. I will try not to repeat what they have said. Instead, I want to concentrate on:

- The opening
- Issue framing
- The process of writing
- Structure and headings in written submissions
- Engaging with the other side's arguments and matters of concern to the Bench
- What judges want and expect
- Some dos and don'ts and where to find sources of guidance
- The last words

The opening words or the opening paragraph: valuable real estate

"It was the best of times, it was the worst of times…" I am not talking here about the early 1980's and the height of the Bjelke-Petersen era. I am quoting the opening words of Charles Dickens' *A Tale of two Cities*. Most people who have read, or even heard about, the novel can recall its opening words. How many of those people remember its concluding words?

The advocate's opening words are important. They should distil the essence of the case, and suggest the result. They should not be inaccurate. They should not be overblown. But they should not be boring.

Many advocates assume that, the judge having read a written outline, the task of the advocate is to commence along these lines:

> "If your Honour will turn to exhibit SJA 32 to the affidavit of Sandy Applegarth filed 6 August 2017, and go to the bottom of page 245, you will see clause 17.4 (g) which reads…."

There are two problems with this. First, if clause 17.4(g) is important, it, or a distillation of it, will be in an outline with reference to where its text can be found (SJA 32 etc). If the judge has had time before the hearing to read the submissions, the judge will have read it. Second, by being boring you have lost the opportunity to start with a crisp statement of your case. You may need to take the judge to SJA 32 at page 245 at some stage. What is wrong, however, with starting your oral advocacy:

> "The defendant promised to deliver 275 tungsten widgets to the plaintiff by April 17."

Those words will do for the moment. You do not need to start:

> "By clause 17.4(g) of a contract dated 2 September 2016, the plaintiff agreed to deliver …"

Why not continue:

> "The defendant failed to deliver on time. Widgets were delivered on August 3, but they were gravely defective. The plaintiff could not use the widgets to commission its new facility. The defendant's breaches caused the plaintiff great losses, quantified at $2.17 M."

This short statement of the facts comes in at 56 words. Some purists would say it is too long.

One thing missing is any reference to the defence, or the issue the judge has to decide.

That might be addressed briefly in the opening:

> "The only real defence is that the written promise to deliver on April 17 was varied. But that defence is feeble. The contemporaneous documents show the parties always proceeded on the basis of an April 17 delivery date. *When the contract was breached, the plaintiff immediately complained. The defendant did not respond at the time that the date had changed by an undocumented agreement. The alleged oral variation only came to be asserted months later, when the plaintiff threatened summary judgment."*

That summary of the defence may be too long too. But it fits in the first few paragraphs, or could be said in the first minute. The words in *italics* could be left to later.

Having stated the essential facts, the issue for the court can be framed like this:

> "Can the defendant prove, contrary to the contemporaneous documents, that there was a binding oral agreement to vary the delivery date?"

You might continue with a summary of your case:

> "The answer is "no":

1. The plaintiff would not agree to a change of date because an April 17 delivery date was essential to its commissioning of the new plant.
2. Such an important change would have been mentioned in writing, including in one of the many e-mails the parties exchanged at the time.
3. The defendant's documents show it knew it was going to miss the agreed date and was concerned about that fact, not that the agreed date had been varied.

Distilling the facts and framing the issue is important in both civil and criminal advocacy. For example, an applicant for bail might open:

> "The alleged offence is serious, but the Crown case has its problems. The applicant has past convictions for drugs, but those relatively minor offences were committed when he was an addict. He is now drug free and has a place at a residential rehabilitation facility. He has a *prima facie* entitlement to bail. Unless granted bail there is a real risk that the applicant will spend longer in custody waiting trial than the non-parole period of any sentence. Plus, there is a real prospect that he will be acquitted of the charge. The risk of reoffending is reduced to an acceptable level by strict residential, reporting and drug-testing conditions. "

This is better than opening with a lengthy discussion of the facts which starts:

> "The applicant is alleged to have trafficked in methamphetamine by supplying drugs to a small group of associates in small amounts over the period between 1 April 2016 and 28 July 2016. Police executed a search warrant on 27 July 2016 at the plaintiff's home, and seized a mobile phone…"

Those facts need to be addressed, but the detail does not need to occupy the opening words. They should be addressed later, with a preview of the problems for the Crown case:

> "Even if the Crown can prove that the text messages record supplies by the applicant, rather than by his former girlfriend who used the phone, the alleged supplies are few, and fall far short of proving that he *carried on a business* of selling drugs. At best for the Crown, he was an occasional, street-level supplier."

Issue Framing

- An ideal introduction concisely states the exact point at issue, stripped of all extraneous matter.
- Any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer.
- Any work has to open with a factually specific issue that captures the essence of the problem. This is called "issue-framing".

Any piece of legal writing should have an introduction, a main body and a conclusion. Yet the doyen of legal writing, Professor Bryan Garner, says very few lawyers write this way. All we write is "the middle". Garner says an ideal introduction concisely states the exact point at issue, stripped of all extraneous matter. Yet legal writers rarely do this. As a result, our written work is described by Garner as "often diffuse, repetitive and poorly organised". The reader has to work hard to find out the question the written work purports to answer.

Garner says that any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer. The aim is to lead the reader to have those things in mind within 60 seconds of picking up a document, whether it is an outline of submissions, an opinion or a judge's reasons for decision. In order to do this, the work has to open with a factually specific issue that captures the essence of the problem. This is called "issue-framing".

It may be possible to frame the issue in one sentence. But Garner says that typically this method ruins the chronology, forces the writer into over-long sentences and makes the issues unduly abstract. He offers the following tips:

- Put the issues first.
- Never – never – begin with "Whether" or any other interrogative word.
- Break each issue into separate sentences.
- Keep each issue under 75 words.
- Weave in enough facts, and arrange them chronologically, to show how the problem arises.
- Forget about whether the answer is yes or no.

Typically the format is: statement, statement, question.

- It nudges the judge in the direction favored by the advocate.
- A well framed statement of the issue or issues provides the roadmap for the presentation of the facts and argument.
- Clearly and concisely frame the issue.
- If the judge accepts the way you frame the issue, then the case is half won.

Justice Felix Frankfurter wrote:

> "the right answer depends on putting the right question" [1]

The great legal scholar, Karl Llewellyn, in a lecture on appellant advocacy, said that the *first* art is framing the issue so that, if your framing is accepted, you win. He goes on to say:

> "Second, you have to capture the issue, because your opponent will be framing an issue very differently… And third, you have to build a technique of phrasing your issue which not only will help you capture the Court but which will stick your capture into the Court's head so that it can't forget it." [2]

Garner points out that framing an issue is far more persuasive than a mere statement of the conclusion.

Deep and surface issues

Most of us frame issues in the abstract, or what Garner calls "surface issues". This requires a reader to know things about the case before the issue can be truly comprehended. An example of a "surface issue" is:

> "The issue is whether the applicant is entitled to compensation from the respondent for a contravention of s 18 of the *Australian Consumer Law*."

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1 *Estate of Rogers v Commissioner of Internal Review* 320 US 410, 413 (1943).
2 *A Lecture on Appellate Advocacy*, 29 U Chi L Rev 627, 630 (1962).

A similar surface issue is:

> "The issue is whether the respondent engaged in misleading or deceptive conduct, in contravention of s 18 of the *Australian Consumer Law*, arising from representations made when selling a fish and chip shop."

This issue is easy to frame, but not very helpful to the reader in a specific legal context.

The respondent might frame the issue in such a case:

> "The respondent told the applicant about the trading history of his shop. He said nothing about future earnings. What he said about the trading history was indisputably correct. The applicant made assumptions about the shop's turnover under his new management. These turned out to be too optimistic. Can the respondent be said to have engaged in misleading or deceptive conduct when everything he said was true?" [66 words]

This sums up the case (from the respondent's point of view) in a nutshell, and makes it easier to understand.

The longer version asks the reader to do much less work. The shorter version requires the reader to go elsewhere to learn what, precisely, the issue is. The "surface issue" says little about what the Court is being asked to decide. The "deep issue" explains it.

Persuasive and analytical issues

Some of our written work, like submissions, is intended to persuade. Other analytic works, such as opinions, have a different purpose. An analytic issue at the start of an opinion will have an open-ended question. The reader is not led to the answer upon reading the question. But the reader wants to know the answer. Therefore, an opinion that frames an analytical issue in its introduction ends with a question to which the reader does not know the answer.

The answer should immediately follow the question. In this way, the question and the answer constitute, in effect, an executive summary. The reader understands the upshot of the issue and the answer given to it by the writer.

Here are two examples of analytical issues that appear in the second edition of Garner's work *A Dictionary of Modern Legal Usage*:

> "Section 273 of the Immigration Act makes it a crime to bring an undocumented alien to the US. Meanwhile, section 2304 of the Maritime Act makes it a crime for the master of a vessel to fail to rescue persons aboard a vessel in distress. Does a master commit a crime under the Immigration Act when he

> rescues illegal aliens aboard a ship in distress and brings them to the US? If so, what are his defenses?" [75 words]
>
> "Mr and Mrs Zephyr were killed in a crash of an airplane negligently piloted by Mr Zephyr. Their daughter, Kate, has sued the estate of her deceased father for the wrongful death of her mother. Does the doctrine of inter-spousal immunity bar Kate's recovery when there is no marital harmony to preserve?" [52 words]

In an advice the issue is framed analytically, and does not suggest the answer. It still observes the basic rules for issue framing: concrete facts simply stated, and the last sentence is a question.

Such an advice will have a structure, and advocate a particular answer. However, it only does that after it has considered competing views about the facts and the law. It advances the client's interests by discussing matters that are both favourable and unfavourable. It carefully analyzes the issues objectively.

A piece of persuasive writing, such as a written submission, also must address points that both favour and hurt a client's case. It should never misstate facts or omit facts on which a case turns, including facts which hurt a client's case. However, a piece of persuasive writing will frame the issue is a way that, if the question is accepted, the answer will favour the writer's case. Garner and others go so far as to say that the persuasive deep issue can have only one answer.[3]

Harder on the writer: easier on the reader

Issue framing has the goal of summing up the case clearly and succinctly. Framing "deep issues" is harder for the writer than the alternatives: (1) making the reader find the issue buried somewhere later in the document; or (2) beginning with a "surface issue". Therefore, issue framing is the art of writing in a way which aids the comprehension of the reader. In the case of submissions, the reader is a judge.

From watching American courtroom dramas on the TV and from reading briefs and judicial opinions from the USA, it is easy to think that American lawyers are genetically engineered to perform "issue-framing" as a matter of course. But Garner says that very few American lawyers frame their issues well. Instead, like us, they tend to do one of two things.

They build up to the question with pages of facts and, in doing so, badly over-particularize the facts. Newspaper editors call a similar style of writing by journalists "burying the lead

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[3] Gerald Lebovits, '"Think You Have Issues?: The Art of Framing Issues in Legal Writing Part II" (2006) 78(5) *New York State Bar Association Journal*, May June 2006 <https://www.researchgate.net/publication/228205425_You_Think_You_Have_Issues_The_Art_of_Framing_Issues_in_Legal_Writing_-_Part_II>.

paragraph".

They assume that the reader knows about the facts, and, instead of referring to them, the writer goes straight to the "issue" with an abstract or "surface" issue like the one I mentioned previously.

Techniques of Issue Framing

I have provided a bibliography of some sources about issue framing. The fullest account is probably in Garner's book *The Winning Brief*. He writes a monthly column "Garner on Words" in the *American Bar Journal* which contains helpful tips about issue framing and other matters**.** I do not suggest that the following techniques are original suggestions or exhaustive.

Avoid one long sentence
It may be possible to frame the issue in one sentence. But Garner says that typically this method ruins the chronology, forces the writer into over-long sentences and makes the issues unduly abstract. In fact, he says the one sentence issue should be banned.

Include enough detail to tell a story
Naturally, the short concrete statements should be in a chronological order, and tell the story. Who did what? What happened?

Do not include unnecessary detail
The aim is to frame the issue in less than 100 words. Garner aims for 50-75, and says that more than this risks the reader losing interest. Dates, clause numbers, names of locations and other particulars that are not essential to frame the issue and should be omitted at this point.

Sound objective
The facts should be simply and honestly stated. Distortion or misstatement is unprofessional. It also is counterproductive, since your opponent or the judge will point out the error. The argument's foundations will collapse at that point.

Save the argument for later
The reason why the facts are as you state them to be, why the law is as stated and why the question should be answered in the way suggested will appear in the body of your argument.

End with a question mark
If an issue is well-framed in a piece of persuasive writing, then the question will suggest the answer. The reader is led to the conclusion.

Issue frame for each substantial issue

A case may present four issues (e.g. the terms of the contract; their interpretation; breach and measure of damages). The same rules of issue framing apply at each state: frame the issue in terms of a "deep issue".

Counter-framing

Issue framing is not simply a skill for the claimant/appellant. There will be more than one way to frame the issue for the court's determination. You should not let your opponent frame the issue in a way that, if the framing is accepted, means your client loses the case. As a respondent, you should try to re-frame the issue, if you can.

An example by Garner

> "In Missouri, a deaf person who is arrested is entitled to a licensed, certified interpreter. Joe Pearson, a deaf person, was arrested for DWI. Police retained an unlicensed, uncertified interpreter to talk to Pearson. She interpreted Pearson's words as refusing a breath test. Can this Court revoke Pearson's license based on the uncertified interpretation of an uncertified interpreter?"

Summary: spill the beans on the first page

When lawyers write submissions in applications for special leave to the High Court, they are *required* to frame the special leave issue at the start of our written submissions. In other courts, lawyers are not *required* by rules to frame the issue(s) at the start, and so they usually do not do so. Issue framing is a difficult skill to develop, and that is why so few do it at all, or do it well.

You may not master the skill, and produce a multi-sentence issue statement, ending in a question in under 75 words. That is, however, the goal.

In any event, the aim of any piece of persuasive writing and related piece of oral advocacy is to briefly and clearly identify the essential facts, the applicable legal rule and the question for decision in the first 90 seconds. The reader should understand the essential facts and the question by the end of the first page.

A well-written opening statement, which frames the issue persuasively, provides the reader with the answer, without really stating it. As readers or listeners, judges like to know the essential facts and the issue for decision as soon as possible. If you do not issue frame with the skill required, so that the question answers itself, at least identify the issue. The answer and the basic reasons for that answer should appear in the opening. The development of the argument comes later.

The writing process

Most of us do not frame issues in a helpful way. Instead, we build up to the question with pages of facts and, in doing so, badly over-particularise; or we begin with a "surface issue".

I suspect that the reasons for those writing crimes (and I am a serial offender) are that we are time poor, and that we imagine that we will discover the issues only by the process of writing out the facts and the law.

If I'd had more time, I would have written a shorter letter

To my discredit and regret, my judgments are far too long. One excuse is that I have to cover all the arguments in lengthy written submissions, and, as a trial judge, try to assist by summarizing the relevant evidence. But my judgments are too long. The statement "If I Had More Time, I Would Have Written a Shorter Letter" is wrongly attributed to Mark Twain. It seems to have its origins in a letter written by Blaise Pascal to a friend in 1657. He wrote:

> *"I have made this longer than usual because I have not had time to make it shorter."*[4]

In 1857 Henry David Thoreau wrote a letter to a friend about a story's length:

> *"Not that the story need be long, but it will take a long while to make it short."*[5]

So the problem is not a new one.

Due to time pressures, or bad habits, many of us embark upon the process of writing as if it is as a singular process, or at least a dual process of writing, then editing.

Four Writers in One

People who think about writing, or teach it, suggest that we should be four writers, and go through four stages.

The Madman

Your thoughts are reduced to paper in no particular order. It occurs after you have read the materials and the law.

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4 *If I Had More Time, I would Have Written a Shorter Letter* (28 April 2012) Quote Investigator <https://quoteinvestigator.com/2012/04/28/shorter-letter/> citing Fred R Shapiro, *The Yale Book of Quotations* (Yale University Press, 2006) 583.

5 Ibid citing Henry Thoreau, *Letters to Various Persons by Henry David Thoreau* (Riverside Press, 1879) 161, 165.

The Architect

- Where do the facts fit? In one section or under each issue?
- Only relevant facts
- Headings: framed as questions or as contentions?
- Sequence
- Conclusion
- Notes to the carpenter about where the materials (the facts and the law) are to be found.

The Carpenter

This is the pure process of writing, based on the architect's detailed plan.

The Judge

In the context of the writing process, not the judicial process, this is the stage at which you give fine attention to detail, punctuation, citations, etc.

Re-writing

Justice Louis Brandeis famously wrote:

> "There is no such thing as good legal writing…only re-writing".

This is undoubtedly true. But the time spent on re-writing is reduced if we plan to write before we write: the architect comes before the carpenter.

Some basic rules

Do not use a long word if a short one will do.

Garner helpfully offers 100 tips in his book, *The Winning Brief*. They include:

- Make issues concrete
- Write powerful intros
- Highlight reasons for conclusions
- Avoid unnecessary detail
- Quote sparingly
- Refute the counterarguments
- Close powerfully
- End sentence with a punch.

This last point follows Karl Llewellyn's advice that every sentence is arranged so that the punch word (or sometimes punch phrase) comes last. Pay close attention to phrasing and place strong words in emphatic positions.

Structure and headings in written submissions

Some courts require submissions to have a certain structure, with mandatory headings. However, subject to these requirements, and page limits, you should use headings and sub-headings. If the issues in the case are numbered, then the headings, following the same numbering, can state the answer: for example,

> "The parties agreed to an April 17 delivery date."
>
> "The widgets were delivered three months late."

The accompanying text can refer to the facts.

Here is a colourful and contemporary example of the effective use of headings in a defamation case between a West Virginian coal baron and comedian and commentator John Oliver.[6]

The issues should follow a logical sequence. As a claimant which needs to establish a number of elements of a cause of action, you need to build one room of the shack at a time. But do not waste too much space on unimportant issues, and lead with your best points.

If you are writing for a respondent, then you may choose to reframe the issue for determination. You may wish to join issue at a different point.

> "Even if the applicant is correct in contending X, its claim if flawed because of Y."

Y may be a matter of law (e.g. the absence of writing where required by statute; a clear time bar) or a complete defence on the facts. If Y is the respondent's strongest point, then it makes sense to go to Y first; and return later to contest X if it is open to dispute.

Engaging with the other side's arguments and matters of concern to the Bench

There is no golden rule about where in a written submission you first engage with the points made, or expected to be made, by your opponent. As President McMurdo noted in an earlier lecture in this series: "Most experienced advocates advise that it is generally better to develop your position in argument before dealing with your opponent's contentions."

Whilst your submissions must accentuate the positives of your own case, it is foolish not to engage with the apparent strengths of your opponent's case, and to explain, in a measured but effective way why they lack merit.

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[6] *ACLU-WV Fires Back Against Coal Baron Over John Oliver Lawsuit* (1 August 2017) ACLU <http://acluwv.org/aclu-wv-fires-back-coal-baron-john-oliver-lawsuit/>.

One tip from Garner: do not "resort to overheated, emotion-laden invective because it is thought to be the heart and soul of 'persuasion'".[7] A coolly written demolition of the other side's evidence and case is likely to be more effective than an emotional and personalised attack on the other party and its lawyers. Overheated prose is less effective because it suggests that the judge is required to make a character assessment, rather than decide a legal issue. The judge may think that unless he or she is satisfied that the other party is the cad who you describe in your emotion-laden submissions, you must lose the application.

Garner gives this example of the "vituperative agitator" and an alternative:

> "*Introduction*
> *Seeking once again to dupe this Court and to waste the time and money of OpusTV, thereby meriting the imposition of pre-trial sanctions by this Honourable Court, Rembrandt has submitted woefully deficient infringement contentions to OpusTV. Rembrandt's current violations, outrageous as they are, follow closely on the heels of its previous violations of the Joint Discovery Plan.*
>
> The rhetoric there spoils what was probably a good point. With the second and third words, one senses where it's headed; the fifth removes all doubt.
>
> By contrast, note how well it reads if we eliminate all the foaming at the mouth and use the deep-issue technique:
>
> *Introduction*
>
> *This motion for sanctions, filed regretfully but unremorsefully, presents a single issue:*
>
> *Last month, finding that Rembrandt had violated the Court's joint discovery plan 12 times, this Court sanctioned Rembrandt. Last Friday, Rembrandt submitted 10 deficient infringement contentions to OpusTV in direct violation of this Court's discovery orders of last month. Should the Court impose Rule 37 sanctions yet again, for each of the 10 fresh violations?*
>
> The tone is that of sorrow not anger (always the right tone with a motion for sanctions). It's much more concrete than the other one. That is, it gives the reader much more useful information, and it makes effective use of chronology. Most importantly, it has just the right tone."

A purely responsive piece of writing ("In reply to the applicant's case about the terms of the contract…") is boring and surrenders the valuable piece of real estate: the opening page.

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[7] Bryan Garner, *Make motions more powerful by writing openings that focus on 'deep issues'* (1 April 2017) ABA Journal <http://www.abajournal.com/magazine/article/litigation_deep_issue_motions>.

In general, and irrespective of whether you are acting for an applicant or a respondent, there should be a place in which the strengths of your case are summarised, and the opponent's key arguments are diminished. For example:

> "There are three reasons why the application for an interlocutory injunction should be [granted/refused]:
>
> 1. ….
> 2. ….
> 3. ….
>
> The [other side's] contentions lack merit because:
>
> 1. …
> 2. …

Do not overdo the put-down with phrases like "completely misconceived" "fundamentally flawed" or "unsupported by the evidence". Rarely will an opponent's case have these qualities. An assertion that they do may impair your credibility, and persuasiveness. Better to diminish the other side's case clinically, and in a more measured way, as with the example given at the start of this talk about the absence of support in contemporaneous documents, and the improbability of the other party's position.

It may be a good idea to damn the other side's argument with faint praise:

> "Whilst the applicant's argument about misleading conduct by silence may have a superficial appeal, it does not withstand careful scrutiny for three reasons:
>
> 1. …..
> 2. ….
> 3. …."

This form of advocacy does not invite (or require) the judge to reject the other side for bringing a fundamentally flawed case. It also subtly hints that any attraction which the judge has felt for the other side's case is the product of superficial thought or lack of familiarity with evidence and arguments which undermine other side's case.

Playing with emotions

President Kingham, in a previous talk in this series, referred to the three pillars of persuasion: logic, pathos and ethos.

> "Logos targets the brain; it is the logical, rational aspect of argument. Pathos is about the heart; moving the listener to want to accept your proposition. Ethos appeals to the gut – the instinctual response to a person – that sense of whether we can trust what we are being told."

Modern advocates may be very successful if they simply deploy the logic of a Dr Spock or an artificial intelligence program. However, a boring, logical presentation is unlikely to persuade a judge or a jury the same way as an engaging address with moves both the heart and the head. This does not mean that advocates should use overblown, emotional arguments.

One can read about great advocates of the past, their raw appeal to emotions and their use of colourful oratory. Books have been written about great jury advocates like Sir Marshall Hall KC and Sir Patrick Hastings KC. Most think it unlikely that the same kind of oratory would work on a modern jury, let alone a judge sitting without a jury.

Still, as recent academic studies have shown, judge are human beings. Their approaches to the task of fact finding may differ from those of a jury.[8] Unlike juries, they have to give reasons for their decisions. Arguments with an appeal to emotion, or more precisely a sense of justice, have their obvious place. However, over-egging matters is no use. It may make the judge think that you the law and the facts are not on your side. Your task is to persuade the judge that they are, sometimes despite first impressions.

If your client is a little old lady being made very sick by a neighbouring factory belching fumes into her lungs and making her life a misery, then you are occupying the high moral ground. Little need be said about your client's plight. Your task will be to explain why the law favours what you seek, such as an injunction which will halt or reduce the pollution.

Emotion has its part in advocacy. If the other party occupies the high moral ground, then little may be gained by trying to lower it to the level of your client. It may be a matter of frankly conceding:

> "Whilst the applicant's circumstances engage sympathy, the unavoidable fact is that the law gives her no remedy. She "came to the nuisance", and must accept the consequences of building her home beside a busy factory. The injunction she seeks would render hundreds of workers unemployed and cause irreparable harm to the respondent by putting it out of business."

Is the most effective advocacy invisible?

I cannot agree that the most effective advocacy is invisible. However, the most effective advocacy is rarely advocacy which simply puts on a dramatic show. Matthew Ryder QC of Matrix Chambers in London makes some telling points in this piece, which I quote in full:

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[8] Emma Cunliffe, "Judging, Fast and Slow: Using Decision –Making Theory to Explore Judicial Fact Determination" (2014) 18(2) *The International Journal of Evidence & Proof* 139. See also Daniel Kahneman, *Thinking Fast and Slow* (2011, Farrar, Straus and Giroux) explains how we all think. Additionally, Dr Kylie Burns, "Judges, 'common sense' and judicial cognition" (2016) 25(3) *Griffith Law Review* 319 is an excellent contribution to the literature.

"I only learned the most significant lesson about being an advocate after years in practice, paying close attention to what worked and what did not. It is something that no one is likely to teach you when you are studying to become a lawyer. In fact, I was taught the opposite.

What I wish I knew then, that I know now, is this: the most effective advocacy is invisible.

Some things about good advocacy are uncontroversial. For example, everyone will say that you must master your brief, work hard and try to be both fair and fearless. But some advocates are said to possess very special qualities that mark them out from the rest – you see them in films and you read about them in novels.

The great ones, we are led to believe, can mesmerise a court with the rich beauty of their language. They make submissions to judges, and speeches to juries, that overflow with passion and emotion. They compel the listener to accept the righteousness of their cause. Above all they can rely on charm and turn of phrase to persuade the court, without worrying that their client's position is not really borne out by the evidence or the law.

But contrary to that image of the mythical trial lawyer, my years at the Bar have taught me something different. Those qualities are not what makes outstanding or even effective advocacy.

Of course, someone with those attributes is entertaining. And an entertaining advocate is far better than a boring one. But while ostentatiously delivered rhetorical flourishes can be seductive, eventually they become an irritating distraction. What judges and juries want from an advocate is not showmanship but help. What is the right answer? And which of these lawyers is going to help us get there?

Judges and juries rarely reach their decision by feeling that clever advocacy persuaded them. This is because, if they are approaching their task as they should, they will consciously put the advocate and his or her rhetoric to one side; and they will work hard to focus on the evidence and the law.

An effective advocate realises this. Rather than leaving the judge or the jury to separate out the entertaining delivery from the genuinely important points, the best advocates do that task themselves. Their advocacy becomes invisible, and in delivering it they almost disappear. Instead, the critical issues that the advocate wants the court to focus on take centre stage.

> With judges this point is critical. Most have spent much of their professional lives as the cleverest person in the room. Few would ever accept that they would reach a decision merely because of advocacy; in their minds, it is the law and the evidence that takes them to the right result. **Judges value advocacy that helps them easily reach their own decision.**
>
> Although many advocates understand this point, they often take a different view about juries. The patronising view that many barristers have is that juries can be duped and confused into thinking night is day, and black is white, if the advocacy is smooth enough. I disagree.
>
> Modern jurors realise that the adversarial process can descend into theatre. They take that into account and they guard against it. When it is time to make their decision they will separate out their admiration for an entertaining show, or their enjoyment of courtroom theatrics, from the real business of giving 'a true verdict according to the evidence'. Ultimately, it is not the personality or style of the advocate that a jury will focus on. In fact, they will be deliberately trying to look past those things.
>
> Of course, old orthodoxies die hard. Some barristers will even say that the showmanship is important, if for no other reason than it is 'what the client wants'. But this response is really the final, desperate gasp of the advocate's ego. **Clients want you to win their cases and they rely on the advocate to explain to them what will be most effective in doing so. If they wrongly think that putting on a dramatic show is likely to do that, then it is also the advocate's job to disabuse them of this notion.**
>
> **What I have learned in practice is that the most effective advocacy is helpful, clear, brief, thorough, reliable, principled and compelling. Everything else is a distraction**."[9]

The most effective advocacy is not invisible. It has the features mentioned in the second last sentence in this passage. The most effective advocates I have heard, as an Associate, a lawyer and a judge, are those who are compelling, both in the logic of their argument and in the manner in which they deliver it. We tend to be persuaded by advocates who sound like they believe in what they are saying, and believe in it for good reasons.

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[9] Matthew Ryder QC, *A barrister's rhetorical flourishes can be seductive, but eventually they become an irritating distraction* (7 December 2012) Legal Cheek <https://www.legalcheek.com/2012/12/a-barristers-rhetorical-flourishes-can-be-seductive-but-eventually-they-become-an-irritating-distraction/>.

What judges want and expect

- They may hope for brilliance
- But they want (and expect) assistance
- They are time poor
- They want written (and oral) submissions which will help them do their job

They want to know:

- The essential facts
- The issue or issues
- The relevant rule or principle
- The result you contend for
- Why that result is justified by applying the rule to the facts
- Why you say the other side's arguments are not persuasive

Good written submissions are the raw material for an oral or written judgment.

- They should frame the issue
- Contain the relevant facts, including those that do not help your case
- State the rule or principle that allows or compels the result you seek
- Persuade why that result flows by application of the rule to the facts

In the course of doing so, they should explain why contested factual issues (e.g. about who said what at a meeting) should be resolved in your client's favour.[10] Having done so the submissions should identify the factual findings sought.[11]
Finally, and this is often overlooked, the submissions should identify the relief sought, in appropriate detail, particularly where injunctions or non-monetary orders are sought.

For oral submissions, judges do not want invisible advocacy. We want submissions which will engage with the real issues, and explain why your client's case should prevail.

The future for modern advocacy

In October 2015 I visited trial and appellate courts in the United States. One court was the Appellate Division of the First Judicial Department, situated in a beautiful building.

[10] This may be by reference to a variety of factors, including credibility, reliability, probability, support from independent witnesses, and support from contemporaneous documents.

[11] This may be in favour of the applicant, e.g. "At the meeting on 12 March 2016 the respondent represented…" By contrast the defendant will seek a finding that "The applicant has not proven that the alleged representation was made…", rather than the more extreme finding "The representation was not made."

The Judges hear cases from the Supreme Court of New York. There is a further appeal in the most important cases to the Court of Appeals in Albany. In the judicial hierarchy the Appellate Division of the First Judicial Department is the functional equivalent of our Court of Appeal or the Full Bench of our Federal Court. It had 20 appeals listed that afternoon starting at 2 pm. Many were very complex cases. The original time estimates of the parties were usually 10 or 15 minutes for each side. The presiding judge at 2 pm said that would take too long, and called for revised estimates, and counsel at the callover would say things like "Five minutes, with two minutes in rebuttal". The revised times were strictly enforced.

What is the essence of your case?

Suppose you had only five minutes to present your case, and two minutes to rebut the other side's. What **essential facts** and **persuasive points** would you present?

How would you persuasively **frame the issue** for decision so that, if the judge agrees that is the issue, your client wins?

In some very busy courts and tribunals, which decide important issues affecting individuals and their liberty, you may get five minutes or so to present your case. However, you should prepare any case as if you only had five minutes to present your case. That is your opening.

Boiling your case down to its essential legal and factual elements, so that it fits onto one A4 page, is much harder than writing 30 pages of prose which start, in effect, "Once upon a time …." and then explain the facts and the law at some length, so that, by about page ten, the issue for the judge to decide bubbles to the surface.

Putting the essence of your case at the start in a persuasive form is a critical skill in any form of advocacy.

The middle

The middle does not write itself. There is a need for structure, omitting unnecessarily lengthy reference to evidence, slabs of statutes and long passages from judgments. Look, for example, to the submissions in a factually dense and not simple appeal like *The Queen v Baden Clay*. The submissions in the appeal were 15 pages.

The last word: the closer

My principal topic of issue framing is about what comes at the start. This does not mean that your submissions end with a whimper.

If your opening and "the middle" are well-prepared, then you may think it sufficient to conclude briefly: "For these reasons, the application should be [granted /refused]" or otherwise simply specify the orders sought.

Repeating key points made in the course of the submissions may be better. Better still is to write a short ending, which does not simply repeat what has been said. It can re-word it, and, if appropriate, inject a slightly higher degree of emotion, but still keep things understated.[12] The closing of a written submission may benefit from a pithy statement which appeals to both the head and the heart. The opening submissions and the closing submissions need not be cast in exactly the same words. They cannot be inconsistent, but the closing statement can address the issue from a slightly different angle, based on the persuasion which has occurred in "the middle".

Sources of instruction

Getting into court

- You are not limited to going to Court only with your pupil master or when you are briefed to appear
- **Introduce yourself** to counsel and **offer to help**
- Ask to read the brief and submissions
- **See as many Counsel and Judges** in court as you can – you do not have to stay all day

Read the best submissions:

- The best written submissions accessible from the High Court's website on a special leave application or appeal can show you how the best advocates write
- Using the best style and technique you see from those and other sources can help you with whatever submissions you have to write

Other sources of guidance include books and online resources about legal writing.

People who teach about "legal writing" say that there is no difference between "good legal writing" and good writing.

Recently retired Justice Alan Wilson, who teaches judges how to improve their judgment writing, encourages lawyers to read good literature. In any event, when you see a piece of good legal writing, either in a judgment or someone else's submissions, keep a copy and think about what makes it good. You may even try to copy their style: just like Hunter S Thompson tried to capture the style of F Scott Fitzgerald by typing out parts of Fitzgerald's work.

Unfortunately, good writing is not a skill which is developed by copy-typing someone else's work. If it was, I would copy-type Lord Bingham's words.

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[12] Bryan Garner, *How to write powerful closers* (1 May 2017) ABA Journal <http://www.abajournal.com/magazine/article/conclusion_power_finishing_strong_garner>.

> "It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture."[13]

> "This is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade. The security services, as the Secretary of State has made clear, do not wish to imperil their relations with regimes where torture is practised. The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet."[14]

What is it about these passages that makes them read so well?

Signs of effort?

We may not have the time or the skill to write like a Bingham, and few do. However, thinking about what makes a set of submissions read so well is worth doing.

Few of us have the time to reduce our drafts down to their essentials. President Kingham was right to point out how hard it is to pare down your arguments to its essentials. This requires you to discard things that you spent a long time writing. Some professional writers call it being prepared to kill your babies. Many of us find we just can't do it.

Revising submissions in to a final shape and good length may require time you do not have. This is why it is better to plan in advance, and write only the essentials, rather than write too much, hoping the issues and arguments will come to you in the course of the writing process.

But any good writing, whether with a sharp pencil in a notebook or on a keyboard, requires effort.

> "… the cliché that 'Writing that appears effortless takes the most work' has been borne out through very unpleasant experience."

> "That's why people use terms like flow or effortless to describe writing that they regard as really superb. They're not saying effortless in terms of it didn't seem like the writer spent any work. It simply requires no effort to read it – the same way listening to an incredible storyteller talk out loud requires no effort to pay attention." – David Foster Wallace

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13 *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 [11].

14 Ibid at [59].

Effortless advocacy from careful writing

Anyone interested in advocacy should read the bestseller *Jeremey Hutchinson's Case Histories* about one of the UK's greatest criminal barristers. Look for example, at his well-chosen words before a very hard judge in the *Vassall* case. He was pleading on behalf of a spy at the height of the Cold War. I will not quote what he said, but as the author observes, Hutchinson's words to Lord Justice Parker emphasised the difficulty of the judge's task: "the greatness of the judicial process and the smallness of the man in its grip".[15] His words emphasised the difference between "the pathetic Vassal, the very embodiment of the amateur and the hardened professional spy, Blake".[16] The same judge had sentenced Blake to 42 years imprisonment not much earlier. Hutchinson's advocacy for Vassall used a rhetorical device: "the gentle belittlement of one's client as part of the process of reducing the significance of his conduct".[17]

This was oral advocacy, but I doubt if what was said was Jeremy Hutchinson QC had not been written, and re-written, so that every word was right, and set the right tone. It is effortless to read, but must have required effort to write.

I encourage you to read the article *A Man Against the Machine*[18] about Anthony Amsterdam, who did decades of pro bono work for people on death row in the US. As a very young lawyer he appeared in the US Supreme Court in 1967. His use of language is described as "so perfect and so powerful and so utterly logical", he could "take a pile of coal dust and make a diamond out of it". His advocacy in *Furman* (in which the US Supreme Court in 1972 abolished the death penalty by a 5:4 majority) swayed Justice White, who described Amsterdam's oral argument as possibly the best he had ever heard. Apart from appearing in cases, Amsterdam would edit, at the request of other death penalty lawyers, their briefs. He had the care of a poet for every word. He explained one particular amendment to the lead lawyer in the case: "I want [the Justices] to stop right there and think about it". The point, and the way it was expressed, proved to be a winning point. All of this involved effort, although the effort may not be apparent to the reader.

Have a look at the submissions of Leonard Hoffmann QC in *British Steel v Granada Television* [1981] AC 1096 at 1152-1153. As counsel for the respondent, he starts by telling the House of Lords "This case is not about freedom of the press". He then identifies issues that the appeal might have raised, but did not. He then frames, or reframes, the issue as follows:

> "In summary, therefore, this appeal raises the narrow issue of whether the public interest requires that a plaintiff should be denied redress against the person who

[15] Thomas Grant, *Jeremy Hutchinson's Case Histories* (John Murray Publishers, 2015) at 85.
[16] Ibid at 85-86
[17] At 86
[18] Nadya Labi, *A Man Against the Machine* (2007) NYU Law Magazine <http://blogs.law.nyu.edu/magazine/2007/a-man-against-the-machine/>.

> has violated his duty of confidence by giving secret information to the media when (a) the person who gave the information knew that he had no right to give it; (b) the journalist who received the information knew that he had no right to receive it; (c) no excuse is claimed on the ground that publication would have been justified in the public interest and (d) the absence of redress is causing the plaintiff serous and continuing damage."

I imagine that this effortless prose required quite an effort to write.

Conclusion

If there is one point I can leave you with it is this. Your available time and effort should be directed to producing a good opening. The opening few paragraphs of a piece of persuasive writing should distil the essence of the case.

Spend time on the opening. It may not necessarily be the first thing that you write. If it is the first thing that "the carpenter" builds, in accordance with the architect's plans, it may need to be re-built.

Try to write the opening in words that make it easy for the reader to understand the basic facts and the issue he or she has to decide. Put the effort in as a writer to ensure that the reader can quickly comprehend what the case is about.

Try to frame the issue in a way that means that, if the court accepts the question you have framed, the answer will favour your client's case. If the reader accepts the way you have framed the issue, the case is half won.

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