BARBADOS BAR ASSOCIATION CONTINUING LEGAL EDUCATION SEMINAR

Persuading the Judicial Mind by Skilful Written and Oral Advocacy

The Hon Mr Justice Alrick Scott, Judge of the High Court (Ag)

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*by The Hon Mr Justice Alrick Scott, High Court Judge (Acting)**

Introduction**

I want to thank the President of the Bar, Ms Liesel Weekes and the members of the Bar Council for granting me this privilege to participate in this discussion on the topic: 'Persuading the Judicial Mind by Skilful Written and Oral Advocacy'.

Advocacy is the vehicle by which counsel may persuade the judicial mind. It is a topic that is of importance to both the Bench and the Bar. Skilful advocacy makes it easier for the Bench to resolve legal disputes, it promotes confidence in the Bar, and furthers the ends of justice. As Lord Judge CJ observed in *R v Farooqi and others,*[1] "…… *the judge personally, and the administration of justice as a whole, are advantaged by the presence, assistance and professionalism of high quality advocates on both sides*."

This discussion was conceptualized with new attorneys of less than seven years' call in mind. Therefore, please forgive me if the ideas and principles discussed appear basic, and not the earthshattering ideas you may expect. If it only reinforces what you already know, hopefully, you would find some benefit in that purpose.

I require your further forgiveness. It is for this: I will just touch on many substantial topics in advocacy. But I do so to introduce the target audience to some of the key drivers of effective advocacy.

Objectives of Presentation

I am hoping that by this presentation, I can give an understanding of the place of both written and oral advocacy in civil litigation.[2] I will try to make a case for well-written, carefully thought-out, persuasive written submissions and skeleton arguments in litigation.[3] Also, I aim to give an appreciation of the matters that may influence the judicial mind in both written and oral advocacy. And, I am hoping that by the end of the presentation, I would have inspired and promoted effective and persuasive written and oral advocacy, to the benefit of the Bench, the Bar and the administration of justice.

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* Alrick Scott, QC, LLM, LLB, FCIArb, is an attorney-at-law and arbitrator. He has acted as a judge of the High Court since September 2017. His acting appointment is to end on 31st December 2018. He is one of Her Majesty's Counsel (Queen's Counsel) in Barbados.

** I was asked by some attendees of the seminar to provide them with a copy of my paper. I promised them to do so. I have adapted the paper presented at the seminar to make it suitable for publication to those who made the request, and other persons who may be interested in the subject-matter. I have added some material to the paper, given that I do not have the same time constraints which restrained the material which I could present at the seminar within the allotted time. I hope it has added to the benefit of the paper.

[1] [2013] EWCA Crim 1649, para [109].

[2] The ideas and principles are relevant too where written submissions and skeletal arguments are required in criminal proceedings.

[3] Even though at times I may refer only to written submissions or only to skeleton arguments, the principles are applicable to both.

The Place of Written Advocacy

Any discussion today about persuading the judicial mind begins with written advocacy. And that is because of the increasing and significant role written advocacy plays in both civil and criminal proceedings today. A significant difference from fifty years ago.

The English tradition of advocacy, for centuries, was one of orality. That continued up to the 1970s. The English attitude then is reflected in *Rondel v Worsley,*[4] where Lord Justice Danckwerts was not impressed with legal arguments set out in writing in some detail and length. He thought it wholly irregular, contrary to practice and not to be encouraged as a precedent for the future.[5] The English tradition of orality ran counter to the civil law tradition in continental Europe. Also, for over a century, written advocacy was a feature of the litigation process in the US courts with trial briefs and appellate briefs.

Several factors may be attributed to the change in attitude towards written advocacy in English legal proceedings. No doubt, the growth of civil litigation and its demands on scarce judicial time and resources, and the increasing recognition that written advocacy could play a role in improving the efficiency of civil litigation. Technology played its part too. Because of the increasingly large role written advocacy is playing in civil litigation today, teaching is necessary to equip advocates to be effective and persuasive writers.

Andrew Goodman[6] cites extracts from Mr Justice Lightman's address to the Chancery Bar Association Conference, 26th January 2004. These reflect the place of written advocacy in civil litigation today, and emphasize two important messages: first, that expertise is called for in brief writing, and secondly, that written submissions may be decisive to the outcome of a case. Justice Lightman is quoted as having said:

> "*advocacy.. today .. transcends its traditional form of oral presentation in court and includes and finds critical expression in written forms in which expertise is called for of the advocate and which can have a decisive effect on the outcome of a case.*"
>
> "*Skeletons can have a substantial if not decisive effect on the course and indeed the outcome of proceedings. Counsel now requires expertise at least as much as preparing skeletons as in making oral submissions.*"

Why is expertise called for in written advocacy? Why would written submissions have a decisive effect? There are compelling reasons for acquiring expertise in written advocacy. And there are self-evident and accepted reasons for written submissions having a decisive effect in the outcome of cases. I consider these as following.

First, written advocacy is now a requirement of civil procedure rules in Barbados as it is in the UK and several island-nations in the Commonwealth Caribbean. Skeleton arguments,

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[4] [1967] 1 QB 443.

[5] Ibid, Lord Justice Danckwerts wrote, at p 509: "*The solicitor acting for Rondel was allowed to present to us a typewritten document of 116 pages, in which he set out the legal arguments on behalf of the plaintiff's case, something in the style of the briefs which are allowed under the quite different procedure of the courts in the United States of America. Secondly, at the conclusion of the arguments by counsel on behalf of the defendant, Rondel was allowed to read nine typewritten pages, in the form of a reply which had obviously been prepared for him ……. Both these matters were wholly irregular and contrary to the practice of the court and in my opinion should not be allowed as a precedent for future proceedings ….*"

[6] Andrew Goodman, *Effective Written Advocacy, A Guide for Practitioners*, (2 edn, Wildy Simmonds and Hill Publishing, 2012) p 4.

written submissions and written briefs are now required or permitted under our CPR.[7] At the pre-trial review of a case, the court may give directions for filing skeleton arguments.[8] In most trials, if not all, except for the very basic and the shortest, the court will require either skeleton arguments or written submissions. My experience is that in most contested interim applications, the court will also require skeleton arguments or written submissions. At the close of the evidence for the parties at trial, the parties, with the consent of the court, may file written submissions instead of or in addition to closing speeches.[9] Rule 61.6(5) requires skeleton arguments in appeals by way of case stated. Rule 62.11 provides for skeleton arguments in the case of procedural appeals. That rule prescribes the content of the skeleton arguments. At the case management conference of an appeal, directions may be given for the filing of written briefs and as to the length of time allowed to each party for oral argument. These provisions of the CPR reveal that written advocacy is now an entrenched feature of civil litigation.

Secondly, cases are decided without oral arguments. Andrew Goodman reports that 40% of appeals heard between 2009 and 2010 in the UK were decided without calling on one or the other side, on the strength of the written arguments.[10] This is a staggering figure. Some courts may limit the time for oral arguments where an order has been made to file and exchange written submissions or skeleton arguments. In effect, oral argument is now expendable in some cases.[11]

Thirdly, written submissions are the first chance to persuade the court. Judges read and study written submissions and skeleton arguments before the trial or hearing. More likely than not, the judge will form a preliminary view of the case. A quintessential quality of a judge, going into a trial or hearing, is to have an open mind. Therefore, a preliminary view is not a final opinion of the case. A preliminary view could be altered by evidence, or argument, or clarification, amongst other things. The judge must have an open mind but not an empty mind. It is important to seek to persuade the judicial mind at the first chance given to do so. For one or the other party, it will be a battle to overcome the preliminary view formed by the judge.[12]

Fourthly, written submissions have a lingering effect. The judge has the written submissions when oral arguments are over. They play a role in the judge's reasoning and reaching a judgment. Therefore, written submissions give you the opportunity to present your case without interruption, before the hearing and after the hearing where the decision is reserved. Written submissions or skeleton arguments give you an enduring opportunity to present your case to the court, beyond the few hours in court. They shape the judge's preliminary view and aid the judge in writing his decision. Andrew Goodman puts it this way:[13]

> "*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*

[7] Supreme Court (Civil Procedure) Rules, 2008.
[8] Ibid, rule 38.6.
[9] Ibid, rule 39.3.
[10] Andrew Goodman, *op. cit*., p 5.
[11] I heard a constitutional motion, where the written submissions were comprehensive. The hearing lasted less than half of an hour. The parties were content to rely on their written arguments, and I was not inclined to hear a repeat of the written submissions. A reality of modern litigation is that oral argument is replaceable in some cases, with written submissions.
[12] Andrew Goodman, *op. cit*., p 5.
[13] Andrew Goodman, *op. cit*., p 28.

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, 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."

The most should be made of the chance to influence the judge before the trial or hearing and after. It is an opportunity the advocate should not squander.

Finally, communicating to the court by written advocacy has its benefits. Writing gives you the opportunity to evaluate and re-evaluate the content of the submissions, refine and recast the facts and the law, and to weave the facts and the law in a compelling, persuasive and winning way.[14] The advocate has the chance to consider the most impactful and persuasive way to convey an idea or make an argument. The advocate can achieve this through the discipline of preparation, drafting and redrafting. As Lord Justice Mummery states, think out your case on your seat, and not on your feet.[15]

The above reasons, I think, demonstrate the importance of written advocacy.

Written advocacy skills are to be acquired like oral advocacy skills. For the advocate, it means investing in relevant texts. These include *Effective Written Advocacy, A Guide for Practitioners*, by Andrew Goodman, which is a very useful summary of the key principles on effective written advocacy. Bryan A Garner is arguably the foremost author on legal writing. Amongst his texts are *The Winning Brief*, and *The RedBook, A Manual on Legal Style*. The text *Legal Writing*, by Margot Costarnzo is also useful. The judgments of Lord Denning provide the most extensive body of practical material for the study of plain and persuasive legal writing.

The various texts would provide the foundation for persuasive writing. These must be the advocate's companions. The advocate must implement the principles of persuasive writing through practice, time and again. It also requires being open to someone providing a critique of your submissions and writing. I still ask my former chamber master, Mr PKH Cheltenham, QC, to peruse written submissions I have drafted.

Written submissions or skeleton arguments?

In England, the tradition is more towards skeleton arguments. In Barbados, the tradition seems to trend towards written submissions.[16] Our CPR provide for skeleton arguments. For appeals, the court could give directions for filing written briefs, which I interpret as written submissions. In his text, Andrew Goodman reproduced several skeleton arguments prepared

[14] See the value of writing given by Justice Jennifer Davies, Judge of the Federal Court of Australia, 'Effective and Persuasive Written Advocacy: Conducting a Commercial Trial' (Victoria Bar CLE, Victoria, 7th August 2013). Available: http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-davies/davies-j-20130807. Last accessed: 23 November 2018.

[15] Lord Justice Mummery, 'Persuasion By Written Advocacy' (ICSL Worldwide Advocacy Conference, 1 July 1998). Reproduced as part of Gray's Inn Advocacy Teacher-Training Materials, 14-16 May 2004.

[16] This is my observation.

by English barristers. Some are not skeletal at all.[17] Whether described as written submissions, or skeleton arguments, the judge wants to be informed about the issues, the relevant facts and law and justification for making the decision the particular party wants the court to make. For a judge to be able to make an *ex tempore* decision, the judge must come to the hearing informed about the facts and the law. Adequate and informative written submissions or skeleton arguments play an important role in informing the judge and enabling the judge to make an oral decision at the end of the hearing or soon after that. They also aid the judge in making a timely reserved decision.

What is an appropriate length?[18] It depends. It is more about relevance than length. A judge is unlikely to complain about length where the written submissions or skeleton arguments are lengthy, but relevant and informative.

The touchstone of relevance should moderate the length of the written submissions or skeleton arguments. Lord Justice Mummery states that: "*A FOX knows many things, a HEDGEHOG knows one big thing. The Hedgehog wins in the end IF he knows the one big thing which can win the case – the dispositive point. BUT you have to be foxy in searching for that one big thing and in anticipating and answering the points of your foxy (learned) friend*."[19] In a case, there may be several issues, but it is important to know the big issue(s) that may dispose of the matter, and focus on the same. The advocate must develop the art of stripping away irrelevant facts.[20] The advocate should use written submissions or skeleton arguments wisely to hone in on the issue or issues that is or are likely to be dispositive of the case. If the main focus is on the big issue(s) and the key fact(s), there is no reason why the advocate cannot attain the appropriate length of written submissions or skeleton arguments for the case.

Appearance

Is appearance important? Opinion on this is divided. Appearance certainly is not everything, but it is important.[21] Written submissions should make a good visual impression to the reader. The following are regarded important to attaining a good appearance.[22]

(a) Comfortable readability for most judges means line space of 1.5, Times New Roman or Arial typefaces.[23] There seems to be a general move from double line spacing, and

[17] See 'Example O' of the worked examples, prepared by Jonathan Sumption, QC, now Lord Sumption, with Rhodri Williams, QC, December 2010, reproduced by Andrew Goodman, *op. cit*., pp 255-278. In a complex matter, the submissions may necessarily be lengthy. Brevity should always be a guiding factor.

[18] Some jurisdictions restrict the length of skeleton arguments. Some judges have criticized lengthy skeleton arguments. See Justice Dennis Morrison, 'Effective Appellate Advocacy – Written Advocacy' 16 November 2013, paras 13-17, and the cases cited therein, namely, *Tombstone v Raja (representing the estate of the late Raja) and another* [2008] EWCA Civ 1444, paras [126]-[128], and *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66, paras [71]-[75], where lengthy skeleton arguments were criticized by the court. Judges are concerned about the length of skeleton arguments and written submissions. It cannot be overemphasized that written submissions or skeleton arguments are to be concise but comprehensive, and not excessive in length.

[19] Lord Justice Mummery, *op. cit*.

[20] Lord Sumption is reported to have said that in most cases, 99 per cent of the facts are irrelevant, either factually or legally, and the art of advocacy is to strip the irrelevant facts away (Interview for the Lawyer, 18 December 2000): see Andrew Goodman, op. cit., p 35, where the author quotes Lord Sumption.

[21] Lord Justice Mummery, *op. cit.*

[22] See Andrew Goodman, *op. cit.,* pp 31-35, where several of these are discussed.

[23] Andrew Goodman, *op. cit*., p 31.

Andrew Goodman writes that many judges do not like line spacing set too wide, as it is unnecessary.[24] I too agree that double line spacing is unnecessary.

(b) Paragraphs and pages should be numbered. This may surprise you, but at times pages and paragraphs in well-written submissions are not numbered.

(c) Should identify the party on whose behalf the submissions have been filed.

(d) Headings and sub-headings are useful guides to judges.

(e) Textual enhancements such as bold typeface and italics should be used sparingly.

(f) Leave space in the margins for the judge to make notes.[25]

The Goal of Written Submissions

What is the goal of written submissions? This was answered by Lord Justice Mummery[26] as follows:

> "*What is the purpose of written advocacy?*
>
> *A statement of the purpose is essential. It controls the form, content, style and length of the submission.*
>
> *Answer: it is a carefully crafted instrument of persuasion designed to inform, educate, elucidate and persuade the court of the advocate's case both in advance of and in conjunction with oral argument. The court, not the client or solicitor or your opponent or you, is the "consumer". It can be used as an implement of decision by the court.*
>
> *To be effective the submission should ideally provide the court with a reasoned justification for finding in your favour. The judgment of the court will have to do that, if it is in your favour. Why not perform that task for the court by producing a persuasive paper with the qualities of a good judgment*."

It is universally agreed, as Lord Justice Mummery observed in his statement above, that the fundamental purpose of written submissions is to persuade the court of something. The advocate must keep in mind that the court is the "consumer". Therefore, the advocate must draft the submissions with the court in mind. The advocate is writing to assist the court in making a particular decision, and to assist the court in rationalizing or justifying that decision.

The advocate must anticipate what the judge needs, and must give the judge what he or she needs to make a judgment in the advocate's favour. Essentially, the advocate is putting himself or herself in the place of the judge. Giving the judge what he or she wants for a judgement requires that the written submissions should be a template or implement for the judge's decision in your favour.[27]

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[24] Ibid.

[25] Lord Justice Mummery, *op. cit*., and Andrew Goodman, *op. cit.*, p 31. I do not think that the margins need to be any more than 1.5 inches in width to the left.

[26] Ibid.

[27] I have had the experience where counsel's written submissions were a useful implement for an oral decision. The submissions were clear, concise and accurate. I was able to give an oral decision in the matter, adopting the law as set out in the written submissions and was able to draw the relevant facts from the brief. The opposite is where, ever too often, attorneys throw matters at the court without any authorities and without assisting the court. The first decision

To achieve the goal of persuading the court, written submissions should be clear. They should also be accurate. The facts, the law, the issues for the court and the order(s) sought should be accurately stated. Written submissions should be simple in style, language, presentation and concept. Difficult arguments are to be reduced to simple dimensions.[28] Another obvious requirement is that written submissions should be concise but comprehensive. Written submissions should be to the point, stating what needs to be said without unnecessary law, facts or words. Avoid prolixity and needless repetition. Finally, written submissions should be a logical exposition of the facts and the law. The submissions should provide a rational explanation or interpretation of the facts, the law and the orders sought. The facts should be applied to the law and any conclusions drawn.[29]

Structure of Written Submissions

I do not think that a single mechanical style can be prescribed for written submissions or skeleton arguments. Style and order may differ.[30] The focus should be on simplicity, accuracy, clarity and logical exposition as just discussed. Most writers agree that well-written submissions should include the following.

*An Introduction***:** There is broad consensus that written submissions and skeleton arguments should have an introduction and that it should be brief. The introduction should tell the court what the case is about, that is, the nature of the action or application before the court. It should state your position with brevity. It essentially informs the court of the content of your submissions, where you intend to lead the court. The introduction should make its primary point(s) very early.[31]

Issues: These are what you are asking the court to decide. Written submissions should be specific in identifying the issues. Frame the issue in terms of what you are asking the court to decide. Be clear and concise in framing the issues. Both Andrew Goodman and Bryan A Garner advise against stating the question with 'whether' 'why', 'where', 'how' or 'what'. They recommend framing the question with 'can' 'is' 'should' 'must' 'was'.[32] Limit stating an issue to 75 words.[33] The issues may be identified in the introduction or separately. Style and the nature of the dispute may determine the place of the issues in the written submissions.

Both Andrew Goodman and Bryan A Garner suggest that you should weave some facts into the issue for impact.[34]

I wrote was *Went and others v Cable & Wireless (Barbados) Ltd and others* (2018) 91 WIR 86. I heard it days before Christmas 2017, and gave a written decision in mid-January 2018. I was able to do so because of the quality of the written submissions. A court is able to make a decision faster where written submissions are an implement or template for the court's decision.

[28] Andrew Goodman, *op. cit*., p 35, attributes the following comment to Lord Sumption: "*Reduce difficult argument to its simplest dimensions – ultimately law is just common sense with knobs on.*" "*In most cases, 99 per cent of the facts are irrelevant, either legally or factually or both*." "*The art of advocacy is to strip those away. When you're down to the last 1 per cent, the answer should be obvious*."

[29] Margot Costanzo, *Legal Writing*, (Cavendish, 1993), para 7.4.1.

[30] In the worked examples reproduced by Andrew Goodman, one would observe that skeleton arguments are organized differently by different authors.

[31] Bryan A Garner, *The Winning Brief*, (2 edn, Oxford University Press, 2004), p 55, says that: "*Every brief should make its primary point within 90 seconds*."

[32] Ibid, p 74 and Andrew Goodman, *op. cit*., p 58.

[33] *The Winning Brief, op. cit.,* p 80.

[34] Andrew Goodman, *op. cit.,* p 58; *The Winning Brief*, *op. cit.,* pp 92-97.

The Facts: The basic rule is that facts should be set out chronologically, not all over the place. The facts should tell an easy flowing story. The facts should be stated clearly, accurately, concisely and candidly. The written submissions should not embellish facts, nor should they omit (hide) relevant facts. The credibility of the written submissions could be damaged if omitted facts which are significant, are found by the judge or highlighted by the opposing party. If the advocate is convinced that certain facts can derail the trial for his client, and must be hidden or omitted, then the advocate should seriously consider whether the case should be in court. The written submissions or skeleton arguments should address and explain difficult facts, and assist the court in overcoming facts which may appear to weaken your case. But tell the court only what the court needs to know. Exclude irrelevant facts. Indicate any conflicts in the facts.

Legal disputes arise out of a given factual matrix. The facts must be established in a legal dispute. The facts are important in identifying the relevant legal issue(s) and will determine the relevance of any legal principle. Therefore, careful attention must be paid to the facts.

The Law: Propositions of law should be stated clearly and concisely. Legal authorities, such as decided cases and learned treatises in support of each proposition of law should be stated accurately. Extract relevant principles from cases and identify key statements in judgments. With lengthy quotes, make the introduction to any quotation informative, that is, tell the reader why you are extracting the statement. Make the assertion first, then let the quotation support the assertion.[35] In other words, explain the relevance of the quote. The judge should not have to figure out the significance of the quote. Identify the page or paragraph of the case where the relevant extract or principle is to be found. Cite the leading cases. Do not burden the court with irrelevant legal authorities or with every legal authority that can be found on the point. Always recheck citations and extracts.

The Submissions/Arguments: This is the stage at which the advocate applies the law to the facts, point by point. He argues the case, by weaving the facts into the law. Weak arguments should be excluded. Lead with your strongest points, that is, your strongest points should feature first. Confront difficult issues or questions. Explain and distinguish decided cases which may appear to be against you. The advocate cannot ignore the central question(s), though difficult.

Importantly, the submissions should answer the questions posed or address the issues raised.

Address the case for the other side after presenting your case.[36] Do not interrupt your case by addressing the opponent's arguments. Let the court absorb your case without interruption. There will be time to address your opponent's case.

Remember, the aim is to persuade the judge.

Conclusion: This is a summary of 2 to 3 paragraphs, of the case. It should not include anything new. Importantly, it must tell the court the order(s) you want made. The court should not have to guess or ask about the orders or reliefs you are seeking.

[35] *The Winning Brief*, *op. cit.,* pp 353-356.
[36] Lord Justice Mummery, *op. cit*.

Tips on Persuasive Legal Writing

The tips I will mention are generally agreed to by commentators on legal writing. I mention seven only.[37] Bryan A Garner mentions one hundred tips on persuasive brief writing.[38]

(1) The cornerstone of plain English is the short sentence.[39] This, I was first taught by my chamber master, Mr PKH Cheltenham, QC, when I joined chambers at Charlton House. He has always been a slave to the rule. The sentence should comprise, on average, no more than 20 words, occasionally up to 25 words. Long sentences should be broken up. The sentence should have one major thought or idea. The short sentence promotes clarity and makes the argument more forceful.

One of the earliest and greatest exponents of plain English in legal writing is Lord Denning. He used the short sentence to great effect. We can benefit from a study of the following two paragraphs from two of Lord Denning's judgments where he employed the short sentence: first *Jones v National Coal Board* [1957] 2 All ER 155, 156, and secondly, *Lloyds Bank Ltd v Bundy* [1975] QB 326, 334, respectively:

> "*The case gave rise to complicated issues of fact and law which I will try to state in outline. The deceased was working at a coal face over half a mile below ground. The seam was five feet six inches think. The face was 125 yards long. It was worked by mechanical cutters, and the coal was taken away on a conveyor belt. There were two roads leading to the face, one at each end. As the face moved forward, the space behind (from which coal had been taken) was filled in which packing, but the roadways were of course kept clear. These roadways had to be made higher than the five feet six inches (the thickness of the seam) and accordingly, as they moved forward, men ripped down the material from the roof above the roadway so as to increase the height. The procedure was for one shift of men to get out the coal from the seam for about eight feet, and for the next shift to rip down the material from above. The place where these rippers worked was called the "ripping". The edge of the material at that place was called the "ripping lip". The roadway up to a point ten yards from the face was called the "road". The last ten yards was called the "roadhead"*."
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> "*Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. 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 that the circumstances were such that he ought not to be bound by it. At the trial his plight was plain.*

[37] The seven tips are taken from the *The Winning Brief op. cit.,* and/or Andrew Goodman, *op. cit.,* and/or Margot Costanzo, *op. cit*.
[38] *The Winning Brief*, *op. cit*.
[39] Margot Costanzo, *op. cit*., p 77.

> *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*."

This is not to say that the advocate must write in all short sentences. Far from it. Variety is acceptable. One would observe that Lord Denning also wrote long sentences. But with the long sentence, punctuation is key to achieve clarity and impact.[40] This will also be seen in the judgments of Lord Denning. Mastering the rules of punctuation is vital, when writing the long sentence. The long sentence should be used occasionally.

(2) Use plain English; avoid legalese where possible.

(3) Short paragraphs, related to one subject-matter are recommended.[41] Preferably, less than 100 words or five sentences in a paragraph, but the rule is not inflexible. It is useful to vary the length, but at all times the advocate should aim to keep the paragraphs short, with more than one paragraph on a page. One paragraph on a page is unappealing in appearance.

(4) Citations should be placed in footnotes. This practice de-clutters the sentence and the paragraph. This is employed to good effect in the judgments of the CCJ.

(5) The active voice is to be preferred to the passive voice.

(6) Never use a long word where a short one will do.

(7) Cut unnecessary words from the sentence. If the sentence reads clearly without the words, cut the words. It is a discipline my former chamber master, Mr PKH Cheltenham, QC, sought to force upon me immediately on joining chambers.

Out-of-Court Advocacy Finds Its Way in Court

Sometimes, letters written out-of-court make their way into court when the matter is contentious. These can send a positive or negative message to the court. The touchstone for out-of-court correspondence is, be reasonable and always act in a legally justifiable manner. Out-of-court correspondence should be courteous. Persons should be addressed with proper titles.

I also remember when I first joined chambers at Charlton Chambers, Sir Richard Cheltenham, KA, QC, counselled me never to write sharp or offensive or condescending letters to fellow counsel or opposing parties. When tempted to do so, delay the response until you are able to do so calmly and rationally. Unhelpful combat and emotive language are to be avoided. If you are strong on the facts and the law, why use emotive language? Argue the facts and law rationally out-of-court. It will impress the court.

[40] *The Winning Brief*, *op. cit*., pp 273-295.
[41] Ibid, pp 115-125.

Justice White in *Rinehart v Rinehart* [2015] NSWSC 205, 108 ACSR 415, 425 [27]-[28], addressed the place and importance of civility in the profession, the lack of which is at times manifested in correspondence. He warned that discourteous behavior should be condemned by the court. Justice White was addressing a letter from one law firm to another. He wrote:

> "*One of the fundamental ethical duties of a solicitor is to be courteous in all dealings in the course of legal practice … If the practice of law is to be regarded as a profession it should go without saying that courtesy should be shown as a mark of respect in dealing with professional colleagues. Discourteous conduct is likely to increase tensions, inflame disputes and bring the administration of justice, in its wider sense, into disrepute. As has been said:*
>
> > *Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society … Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice.*
>
> *When such uncivil behaviour comes to the attention of the Court it should be noticed and condemned*."

Oral Advocacy: It Still Matters

The rise of written advocacy has not diminished the value, importance and need for skilful oral advocacy, despite that oral argument may be dispensed with in some cases and limited in others.

There are different components to oral advocacy, such as examination-in-chief, cross-examination, re-examination, making objections and oral arguments. With the rise of witness statements, the use of examination-in-chief is reduced in civil trials. However, oral argument, which is one of the focuses of this paper, is not to be ignored. Oral advocacy is as important today as it ever was. The skilful advocate masters both written and oral advocacy.

Oral advocacy skills, like written advocacy skills, are to be acquired. The young attorney would have had structured advocacy training at law school. Acquiring oral advocacy skills is a continuing process. They could be acquired through example and observation. With so many new attorneys, and so few senior advocates, there are few opportunities to learn through pupillage. Like written advocacy, there are some useful texts which the young practitioner, and the old alike, can benefit from. These include, John A Olah, *The Art and Science of Advocacy*, which boasts of being one of the most comprehensive texts on pre-trial and trial advocacy, and Geoffrey DE Adair, *On Trial, Advocacy Skills Law and Practice.* These can help you avoid some of the pitfalls that await even the diligent young advocate.[42]

[42] The Court of Appeal was less than impressed with the style of cross-examination in *R v Farooqi and others* [2013] EWCA 1649. At para [113], Lord Judge CJ wrote: "*We do not suggest that the principle of fairness to the witness requires the somewhat dated formulaic use of the word "put" as integral to the process. Assuming that there is material to justify the allegation, "Were you driving at 120 mph?" is more effective than, "I put it you, that you were driving at 120 mph?" What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate. We withhold criticism of Mr McNulty on this particular aspect of his cross-examination because he was following a developing habit of practice which even the most experienced judges are beginning to tolerate, perhaps because to interfere might create difficulties for the*

And of course, practice makes perfect, and experiential learning is an important part of acquiring good oral advocacy skills. The young advocate must be brave enough to embrace trial and error as part of the process of acquiring good forensic skills in oral advocacy.

The place of oral argument, in relation to written advocacy is this: oral argument continues the story, it is the sequel to the written submissions.[43] It is not to be a repeat of written submissions. Otherwise, the value of written submissions, such as saving of judicial time, would be lost. The goal of oral argument is the same as written advocacy: to persuade the court. It is an important opportunity to emphasize the strong points of your case, or to amplify any point insufficiently dealt with in the written submissions, or to deal with any new matter, or to address matters raised by the court, or to respond to arguments made by the opposing party. If the preliminary view which the judge has formed is against you, it may just be the opportunity you need to create a turning point in the case.[44] If the preliminary view formed is in your favour, it is your opportunity to cement that view in the mind of the judge.

Persuasive Oral Advocacy Skills

The profession is centuries old. The profession boasts many time-honoured traditions, practices and ethics. It is an honourable profession. The court expects the advocate to adhere to the fine traditions, practices and ethics of the profession which distinguish legal practice amongst the professions. I discuss a few, in brief, which are sure to impress the court.

Paramount Duty: Oral advocacy must be conducted within the scope of the advocate's duty to the court. This is paramount. The advocate's duties to the court should moderate his conduct of the litigation. Mason CJ succinctly expressed the duties of the advocate to the court in *Giannarelli v Wraith* [1988] HCA 52, 65 CLR 543, paras 11-12, as follows:

> "*The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.*
>
> *It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of*

advocate who has been nurtured in this way of cross-examination. Nevertheless we deprecate the increasing habit of comment or assertion whether in examination in chief, but more particularly in cross-examination. The place for comment or assertion, provided a proper foundation has been laid or fairly arises from the evidence, is during closing submissions to the jury."

[43] Lord Justice Mummery, *op. cit.,* where he described oral argument as the sequel to written submissions.

[44] In my brief tenure on the Bench I have learnt that the judge should be openminded. In one case I heard, I held a preliminary view of the case, which continued throughout the hearing until the last five minutes, when there was a turning point in the case. It is important that the advocate's efforts be sustained throughout the trial or hearing, once he has confidence in his case.

litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel ……"

Preparation: This is a critical first step to effective oral advocacy. One of the keys to oral advocacy is to know your case and that of your opponent, and anticipate and prepare for any likely question or issue which may arise at the hearing.

Judicial Interventions: The advocate should be prepared for judicial interventions. It is an important part of the hearing. Before, a judge was told to take a sip of water before going onto the bench and to do his or her best to hold it until he or she rises. That has long changed. The Privy Council, in *Demarco v Opportunity Equity Partner,*[45] approved the dicta of the court in *Galea v Galea* (1990) 19 NSWLR 263, accepting that a judge does not have to maintain a "ladylike serenity". There is growing recognition that " ..... *a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party affected then has no opportunity to correct or modify*."[46] The court approved a more robust approach on the part of the judge in making judicial interventions in civil proceedings.[47]

Judicial interaction helps the judge to understand, appreciate and weigh the case before the court. It gives the party affected an opportunity to correct or modify the judge's preliminary view or thinking or understanding of the facts, the law and the arguments. Judicial intervention may be the result of the court being interested in your point, or the court probing the strength of your argument. If it is the former, you have the chance to strengthen your point. Either way, pay attention to it. Judicial intervention should be welcomed. Address the questions, comments and concerns of the court with candour. Never seek to mislead the court. The last thing you want to do is to lose the trust of the court.

Be punctual: Its importance seems to be on the decline in every sphere of endeavour and at every level. But tardiness shows a lack of respect for the court and wastes the court's time, which is at a premium. Keeping time is an important aspect of professionalism. Therefore, be punctual. You can earn the goodwill of the court. A court would not decide a case based on the punctuality of a lawyer, but it is important for the lawyer's professional image.

Court Etiquette: Needless to say, the advocate should pay attention to court etiquette. Justice Elneth Kentish addressed this earlier today. I cannot usefully add to her presentation.

Good manners and respect: These are the quintessential qualities of the advocate. The advocate should not display anger or irritation in court. He should treat witnesses with respect

[45] [2006] UKPC 44
[46] Ibid, para [94], Lord Walker, citing the dicta in *Galea v Galea*.
[47] Ibid, para [103].

and dignity, including when cross-examining witnesses. Speak to the court or through the court to fellow counsel. Talking over the table to fellow counsel should be avoided. Asides should be avoided. Fellow counsel should be permitted to address the court without interruption or distraction, except where counsel is objecting.

R v Farooqi and others[48] is a reminder that the administration of justice relies on respectful relations between the judge and advocates, and between advocates themselves. The conduct of Mr McNulty, a barrister for Mr Farooqi in the criminal trial, did not impress the Court of Appeal, but rather attracted its criticism. Lord Judge CJ noted, at para [109], the fundamental role respect plays in the administration of justice thus: "*In general terms, the administration of ….. justice is best served when the relationship between the judge and the advocates on all sides is marked by mutual respect, each of them fully attuned to their respective responsibilities. This indeed is at the heart of our forensic processes*." Personal attacks on the judge and other counsel have no place in advocacy, written or oral. These principles must be adhered to notwithstanding the strain of litigation, which at times can be great and almost overwhelming.

Listening is an important discipline of the advocate and part of good manners. Good advocates listen to the court's questions and comments as well as the arguments of the opposing counsel, and do not speak while the court or the other party is speaking. The court is not the fish market.

Body language: The body language of the advocate is important. He should be calm and engaging. He should not look disinterested. Make eye contact with the judge when addressing the judge and when the judge is addressing counsel. Counsel's hands should be somewhere other than in his pocket.

There is no need for showmanship, or theatre or to be loud or to be interruptive with asides and comments. The judge is the "consumer". The judge has to make a decision. More so, the judge has to rationalize and justify that decision. The judge wants counsel, and indeed it is counsel's role, to assist the court in making the decision, and rationalizing and justifying that decision. The advocate does that by his rational explanation and interpretation of the facts and the law, and weaving the facts into the law. That can be done without unnecessary noise and interruption. The court is impressed with, and the ear of the judge is inclined to, the advocate who is calmly and competently assisting the court to make a decision and to rationalize and justify the decision. Unnecessary asides, condescending remarks and uncalled for interruptions can be irritating and disruptive to the judge who wants to concentrate on and understand the arguments of the advocate who is speaking.

The arguments, not the advocate, should take centre stage.

Be courageous: One of the finest qualities of the advocate is his fearlessness. Again, as Lord Judge CJ remarked, "*Neither the judge nor the administration of justice is advantaged if the advocates are pusillanimous*."[49]

The advocate is to present his case without fear or favour. He is entitled to make every argument, pose every question and raise every issue he considers may advance his client's case. This is subject to his overriding duties to the court, to be honest and respectful, to act in a manner that is legal and professional, and always to act with integrity. It is also subject

[48] Op. cit.
[49] *R V Farooqi and Others, op. cit.*, para [109].

to the court's permission. The judge is responsible for the proceedings and the advocate must abide by the rulings of the judge.[50] The advocate should evaluate his case, but once the advocate has judged his cases as likely to succeed, he should prosecute the claim or defence with courage, confidence and fearlessness, subject only to his overring duty to the court and the court's indulgence, which is itself subject to rules. Courageous advocacy is at its best when counsel is tactful, respectful, and paying homage to his duty to the court.

I hope this presentation has been of some benefit.

[50] Ibid, para [109].

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