WRITTEN ADVOCACY
LECTURE 2 – GENERAL PRINCIPLES OF LEGAL WRITING[1]

A. INTRODUCTION

1. In Lecture 1, we considered the general principles of good writing. This lecture examines the general principles that should apply to and guide your legal writing and written advocacy.

2. Before you embark on any legal writing, you should ask yourself the following questions, the answers to which will dictate how you ought to write and what you should put into your writing:

    a. Who is your audience? Is it your client, your partner that you are assisting on a matter, a registrar hearing an interlocutory application, a High Court Judge, or the Court of Appeal;

    b. What is the aim or objective of your writing? Is it to render an opinion to your client on issues that afflict your client, is it a memorandum setting out your research and analysis on a legal issue for your partner, or is it to set out the submissions and arguments that you wish a court to consider and accept in an application, at or after a trial, or on appeal?

    c. What special or specific rules govern how and what you can write in any document to be submitted to the audience you are addressing? and

    d. What should be set out in your writing to achieve your aim or objective, and how should it be presented in style, sequence, words, sentences, and paragraphs?

3. We consider each of these matters below.

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B. WHO IS YOUR AUDIENCE – CLIENT, PARTNER, OR A TRIBUNAL

4. All legal writing aims to persuade the intended audience to come to a particular view or decision. That requires careful consideration of who is your intended audience and what would be persuasive to such an audience.

5. The seriousness of the task, given that fortunes and personal liberty are often at risk, should inform the writing's tone, style and content. It would not serve the cause to be flippant, and neither would a stab at humour be appropriate.

6. As pointed out in the earlier lecture, the logic of the writing should be the primary driver of persuasion. The logic must be clear and conveyed in succinct and simple language.

7. Strive for brevity. It is hard work and takes time. As has been variously stated by authors and statesmen, "***I have made this longer than usual because I have not had time to make it shorter***".[2]

8. A short written work, tightly reasoned, in language that is direct and simple, is more likely to be understood and, consequently, more likely to persuade. Consider and, where possible and appropriate, apply the principle of Occam's Razor, i.e., the simplest explanation is preferable to a more complex one.[3]

9. If you are writing an opinion or advice for a client, wherever possible, avoid legalese. The temptation to appear wise and knowledgeable through esoteric legal terminology is seductive, but resist it with all your might.

10. You have to explain to your client, not make a show of appearing sage and erudite.

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[22] See the following article for a review of when such a statement was made by, and can with certainty be attributed to, various personages: If I Had More Time, I Would Have Written a Shorter Letter | Quote Investigator (uscourts.gov)

[3] For an explanation of Occam's Razor, see: What is Occam's razor? | New Scientist

11. When preparing an opinion or advice for a client, set out in the body of your written work or an appendix the information and documents made available to you, which you reviewed and relied on. Make it clear that you relied on such information and documents and that your opinion or advice may change if further information and documents become available.

12. At the outset of your opinion or advice, set out succinctly the relevant facts you have ascertained from the information, documents and instructions made available to you and the issues on which your opinion or advice has been sought.

13. Use headings and subheadings appropriately and in a manner that intuitively guides the reader seamlessly from one topic to another.

14. If your opinion or advice is lengthy, provide an executive summary at the start, setting out the key points and conclusion of your advice or opinion. Busy clients may not have the time or inclination to plough through a lengthy opinion or written advice and will appreciate a summary that captures the essential points. The executive summary will also signpost for the reader what lies ahead in the document and make for an easier read.

15. Similar considerations will apply if your opinion is a research memorandum that you are preparing for your senior colleague or partner. In such a situation, avoiding technical legal language would be less of a concern. However, check with your colleagues or partner if there is a preferred format for such an opinion or memorandum, as the requirements may vary from firm to firm and partner to partner.

16. Suppose your written work is for use before a tribunal. Be it a court, an arbitral tribunal, a statutory or other tribunal, be aware of the requirements and practice of that tribunal as to the form, content and style of the documents to be submitted to it.

17. If you know who the judge, registrar, or arbitrator you are appearing before, ask about their preferences and dislikes from colleagues who have appeared before them. Tailor your written

work to their requirements. Remember that you are seeking to persuade, which will require you to meet the needs of your audience.

C. WHAT IS THE AIM OR OBJECTIVE OF YOUR WRITING

18. To write effectively, whether it be an opinion or advice, a written submission on an interlocutory application, a written closing argument after trial, or a written submission for an appeal, you first must have a clear understanding of where you wish to take your audience and what you want your audience to accept or decide.

19. Put differently, you must know your and your audience's intended destination.

20. You will only be able to decide on what that destination would be after you have analysed the relevant facts, documents, and information available against the backdrop of the applicable substantive and procedural law.

21. With every piece of writing, before you begin to write, you must do some form of case analysis to ascertain what is a realistic destination to take your audience to or what is the order or decision that you wish to persuade your tribunal to make.

22. A possible approach to undertaking your case analysis would be to:

    a. Begin with the end in mind, i.e., start with setting the ideal objective or result that you wish to achieve (the "Goal");

    b. Analyse the documents and instructions that you have received to ascertain what are the known facts that are relevant to achieving the Goal;

    c. Identify the facts or information that you lack that may be relevant to achieving the Goal;

d. When analysing known facts, distinguish between facts, opinions, assumptions, conjectures, and inferences;

e. Research and analyse the statutes and case law that are relevant to achieving the Goal;

f. Identify the causes of action or the defences that may be available on the documents and information available;

g. Identify the further information or facts required to establish the causes of action or defences relevant to achieving the Goal;

h. Identify what are the assumptions, conjectures and inferences that you have made in setting and achieving the Goal and their reasonableness;

i. Take a step back and assess against the known and unknown facts, the applicable law (statutory and case law), the assumptions, conjectures, and inferences you have made, what your chances of succeeding in establishing the Goal; and

j. Refine, recalibrate, and, if necessary, alter the Goal to take into account any hindrances or difficulties in achieving it.

23. There are several tools and techniques that you could use to carry out an analysis of the facts of your case and applicable law to determine your intended destination, aim or objective. At its most basic, you could carry out a "Good Fact, Bad Fact and Neutral Fact" analysis of the documents and instructions you received.

24. A Good Fact would be a fact that would assist in establishing the intended aim or objective, cause of action or defence. A Bad Fact, on the other hand, would do the opposite, whilst a Neutral Fact does neither. The significance of the Bad Fact is that you must consider it and find a way to address it to achieve your intended Goal.

25. A more nuanced and detailed tool for case analysis is the DOTER method which is an acronym for the following steps of the method:

D - Dispute: Ascertain what are the facts in dispute;

O - Onus: Determine who has the onus of proving the facts in dispute;

T - Test: What is the legal test to be satisfied in establishing the Goal, i.e. the cause of action or defence;

E - Evidence: What evidence is available and required to establish the Goal? This will involve identifying the relevant documents, considering how these documents are to be formally proved and adduced in evidence, who are the available, relevant and material witnesses, etc.; and

R - Reliefs: The specific remedies you seek to achieve the Goal.

26. The above are but two commonly used tools for case analysis. There are many others, and depending on the task, whether it be an opinion for clients, a research memorandum for a colleague, or written submissions for a court or tribunal, your choice of tool to conduct your case analysis may vary.

27. Regardless of your chosen tool, any case analysis aims to develop a case theory that will guide and inform what and how you communicate to your audience. Your case theory will determine the story that you will tell your audience and how you tell it.

28. At its heart, all advocacy, whether oral or written, is about telling a compelling and persuasive story that emphasises and relies on the facts in your favour and takes into account and provides a credible explanation for the facts against you.

D. RULES GOVERNING WHAT AND HOW TO WRITE

29. With any written work you undertake, you must be aware of any special rules governing such writing.

30. If you are drafting correspondence with a fellow advocate and solicitor, be mindful of and adhere to the applicable professional conduct rules that apply.[4] If you prepare a letter of demand, you must not demand anything that is not recoverable by due process of law.[5]

31. If you are preparing a pleading, affidavit, or some other document to be filed in court or with a tribunal, be mindful of and comply with any applicable legislation, subsidiary legislation, rules of court or practice directions that may apply to such a document.

32. For example, with any pleading that you prepare, you must not knowingly make a false or misleading statement or assertion.[6] If you prepare a legal submission, you must not knowingly or recklessly cite authorities or law out of context or interpret the law in a manner calculated to mislead.[7] When you prepare an affidavit of evidence in chief, you should not include in the affidavit any matter that is not within the personal knowledge of a witness of fact or which infringes any applicable rule of evidence.

33. A thicket of rules, directives and guidelines govern what you can and ought not to do in the written work you will carry out as an advocate and solicitor. It is, therefore, essential to identify the same before you embark on any written work. In this regard, you should consider the following:

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[4] See s 7(1)(a) and (b) and s 9(1)(c) and s9(2) of the Legal Profession (Professional Conduct) Rules 2015 (the "**LPR**")
[5] See s 8(4) of the LPR.
[6] See s 9(2)(b) and (c) of the LPR.
[7] See s 9(2)(f) of the LPR.

a. Any legislation, for example, the Evidence Act, that may apply to and dictate what you can and ought not to include in the document that you are preparing;

b. Any subsidiary legislation, for example, the Rules of Court or the LPR, that may apply to the document that you are preparing and stipulates what you should and ought not to do;

c. Any practice directions issued by the court or tribunal that set out the format, style, content, and page limits of the document that you are preparing and the time period within which it is to be submitted; and

d. Any practice guidelines issued by a professional body, such as the Law Society, that may provide helpful guidance on what is acceptable practice.

34. It is important to know and adhere to the rules that govern the document you are preparing for the following reasons:

a. It will demonstrate to the reader that you are familiar with the task at hand and know what you are doing;

b. Your reader is likely to be aware of the applicable rules, practice directions and guidelines, and your compliance with them is likely to make his or her job of reading what you have submitted easier;

c. The reader is less likely to be distracted by any non-compliance with these rules, practice directions and guidelines, which, to a fastidious reader, may not only be annoying but also impair the persuasiveness of your written work; and

d. Your document is less likely to be rejected by a court or tribunal for non-compliance with any mandatory requirements.

35. Remember, one of the three elements of persuasion is *ethos*, i.e. the credibility of the advocate. Compliance with applicable rules builds up your credibility. Non-compliance detracts from it.

E. STYLE, STRUCTURE AND PERSUASIVE WRITING

36. After you have done your case analysis, developed your case theory and decided the aim or objective of your written work, you will have to reduce to writing the story that you wish to present to achieve your aim or objective.

37. When drafting, consider and, where appropriate, apply the following principles:

    a. Start strong. Based on your case theory, which you would have developed from your case analysis, formulate a high-level introductory statement at most one or two paragraphs long that encapsulates your case theory. This introduction should contain the essence of the tale you wish to tell, considering any adverse facts you must address.

    b. Signpost for your reader the various stages of the journey that you will be taking them on. Providing such a road map or outline will tell your readers what they can expect on their reading journey.

    c. Each signpost should be a discrete topic you wish to elaborate on, which segues seamlessly from the preceding topic.

    d. With each topic, provide sub-headings which neatly break up the topic into manageable chunks.

    e. Limit each paragraph to one idea.

    f. Number your paragraphs and sub-paragraphs in a consistent and sensible way.

g. Vary the length of your sentences. If your sentence occupies more than three lines on the printed page, it is more likely than not to be unnecessarily long. Shorter sentences are easier to read and more likely to be understood.

h. Consider the principles of primacy[8] and recency[9] when drafting.

i. Consider what are your strongest points and place them upfront.

j. Have the courage to abandon weak or unarguable points. If you are not going to succeed on your strongest points, you are not likely to succeed on your weaker ones. Further, including weaker points in your writing may detract from the overall persuasiveness of your written work.

k. Avoid emotive language, embellishment, and exaggeration. In legal writing, it is the logic of the argument, conveyed objectively and clearly, that will be most persuasive.

l. End strong. Provide a clear summary of why your reader should accept or grant what you are asking for.

F. CONCLUSION

38. In the following lectures, we will consider specific types of written work that you are likely to undertake in your early years in practice. We will consider the specific rules that apply to such written work and how you can apply some of the principles outlined in this and the earlier lecture when drafting such work.

[8] The Rule of Primacy dictates that an audience tends to remember what it hears first.
[9] The Rule of Recency dictates that an audience tends to remember what it hears last.

39. Effective legal writing is a skill and art that takes a lifetime to perfect. Your journey has just begun.
