Law Society of Ontario | Barreau de l'Ontario

TAB 7

THE SIX-MINUTE Criminal Court Judge 2018

Making Written Submissions

The Honourable Nancy Kastner, *Ontario Court of Justice*

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cpd Continuing Professional Development

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6 MINUTE CRIMINAL JUDGE

Making Written Submissions[1]

"The pen is mightier than the sword."

This old adage is often quite true in the context of legal proceedings. A well-composed set of written submissions can illustrate one's points in a clear, concise and well organized manner, and become an effective permanent submission that is capable of persuasion.

Many criminal lawyers, at least of a certain vintage, claim they chose the field of criminal law because there was no paperwork involved. If true at one time, it certainly is not the case today in the advent of the Charter and its myriad applications, disclosure requests, correspondence, written instructions, proliferation of appellate advocacy, and numerous assorted motions and other legal applications.

How to overcome this natural resistance of preparing written submissions?

First, one needs to overcome the fear or procrastination, of putting pen to paper, voice to dictation, or fingers to keyboard.

Counsel should now be accustomed to written work in criminal law since the advent of the Canadian Charter of Rights and Freedoms, and the materials that must be filed on a Charter application, including the required notice and response. Success on either side of an application can often turn on well drafted written materials.

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[1] Making Written Submissions, by Justice Nancy S. Kastner, Ontario Court of Justice, Brampton. The following is updated from the CPD presentation on Jan. 18, 2014.

Many thanks to the thoughtful remarks on this topic by Justice Janet Simmons, Ontario Court of Appeal in *2006 -6 Minute Criminal Judge* (LSUC); the erudite paper by Justice John Laskin, *infra*; and the comments of my colleague Justice James Stribopoulos.

I understand some counsel also use technology to enhance their courtroom submissions, for example, by employing PowerPoint.

The benefits of written submissions far outweigh the disadvantages.

In order to be of some assistance to you today, I will briefly tell you, from my perspective, some of the advantages, the possible disincentives; and some pointers on how to do them.

I. POSITIVE ADVANTAGES

9 main points:

1. Cost effective

You will of course charge your client, whether as part of a block fee, or as an added fee. However, it may save hours or days of court time, so it can be more cost effective for the client, who can also have a copy.

2. Organized

Forces you to organize your thoughts and better identify the issues in dispute.

The Court will be impressed by submissions that are clearer and more focused than what you would provide off the top of your head.

3. Persuasive

Allows one to apply skills of persuasion by both the way it is presented, and the content.

Affords you an opportunity to see and then realize your stronger and weaker arguments, so that you may want to focus on the stronger ones.

Allows you to meet your adversary's arguments head-on and answer them before you step foot into the courtroom.

4. Visual acuity

There are various forms of learning - auditory, visual etc.-the Court may well “get it” better in having it right in front of them; and being able to read it again in preparing its judgment.

5. Facilitates Understanding

Clear simple language makes it simpler for the reader.

Less likely to be misunderstood, including by your client and the Court.

6. Easier Communication with Client

Client can better understand what their case involves and have something tangible to digest.

7. Civility

Law Society of Ontario (Upper Canada) - “when representing a client in a contentious matter where oral communications between opposing sides may or has become difficult, lawyers may wish to consider their client’s instructions to use written communications to limit hostility, misunderstanding and cost.”

When this is transposed to judicial or courtroom context, if one is at loggerheads with the presiding judge or your opposing counsel, cooler heads prevail this way. It is harder to lose one’s temper in writing.

See *Groia v. Law Society of Upper Canada*, 2016 ONCA 471.

8. Quotability

“Nothing gives an author so much pleasure as to find his works respectfully quoted by other learned authors”---Benjamin Franklin

If your product is quality work, it may easily and seamlessly be incorporated into a judgment.

9. Lasting

Permanent record and should become part of trial record.

It remains with the Judge after you have left, and perhaps when he/she no longer would have a clear idea of your oral argument. It is a “silent advocate”.

If the result is unfavourable to the party, one can file written submissions with SCJ or OCA with Notice of Appeal, especially to assist with Motions for Stay of Prohibitions, Stay of Sentence or bail pending appeal.

DISADVANTAGES;

1. Cost

Some retainers are small and it is not cost effective.

2. Simplicity

If the issues are simple, one may not need written submissions.

3. Time

Other commitments and volume.

HOW TO:

I have 7 points to make as to how to effectively do written submissions:

1. The Format

a. Traditional written document
b. Hard copy with DVD/CD

c. Electronic transfer
d. PowerPoint

Note: Consider this especially with submissions in matters of great complexity, to enhance your oral submissions.

Make it readable and accessible. A highly readable font is imperative.

2. Structure

ORGANIZE!

Think and plan before you write.

Allow for headings.
Make clear transitions between paragraphs.
Make clear when changing topic or issue.

Make use of spacing, for easier readability.

May have a central theme to the case, and can structure the relevant facts and legal issues around that theme.

Try to avoid long sentences and subordinate clauses.
Try to avoid passive construction.

Avoid huge excerpts of transcript!

Use lists. They stand out and persuade.
Use charts, if applicable (for example for *Charter* s.11 (b), dates where delays alleged; or similar act applications)

3. Brevity

"You become a good writer just as you become a good joiner: by planning down your sentences:--Anatole France

"The fewer the words, the better the prayer"—Martin Luther

Limitations on length, for example:

•Ontario Court of Appeal -shall not exceed 30 pages in length "unless ordered by the Registrar or a judge" *Criminal Appeal Rules* (SI/93-169), s.16 (5)
•Superior Court of Justice –shall not exceed 20 pages in length (Appellant) or 15 pages in length (Respondent) *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)* (SI/2012-7), ss. 40.11(4) and 40.11(6)
•any direction by a Court restricting length of written materials.

Be Reasonable -Please

Less is often more; enough said about that!

4. Language

"Language is the dress of thought"—Samuel Johnson

Many times simple expression is the best argument.
The idea may be complex, but can be expressed in a clear and focused manner.

Content cannot be divorced from language and style. Language and style persuade. See excellent paper by Justice John Laskin, *How to Write a Persuasive Factum* (2009), Advocates' Society Journal.

As much as possible, eliminate legalese, and avoid formulaic phrases or qualifiers: "respectfully submitted"; "for all the foregoing reasons".

Avoid absolutes, such as "always", "clearly", "undoubtedly".
Avoid clichés.
Active verbs are better to persuade.

Avoid turning colourful language into inappropriate language: See *R. v. Gamble*, [2013] ONSC 7615, at paragraph 148, wherein Durno J. noted:

> Third, factum writing allows for some leeway. There is nothing wrong, and perhaps quite a bit right about colourful language. However, the respondent's factum in addition to "giving evidence" crossed the line into inappropriate language and unfounded allegations. For example, he noted that trial Crown had "placed" the Regional Crown in the courtroom in a blatant attempt to intimidate the trial judge. The factum repeatedly referred to the "junior" Crown Attorney when there is no evidence regarding the trial Crown's experience. I have already

> referred to other comments in the factum. That is not the type of advocacy expected of counsel in any court. [2]

Use of words can be bold and colourful, yet convey thoughts simply and economically at the same time.

5. Refine

"The best argument is that which persuades the adjudicator that, if given the opportunity, he would have thought of the same 'common sense' result or conclusion". See Leslie Dizgun & Gary Caplan, *Eight Steps to Better Written and Oral Submissions*-Advocates' Society Program 2006.

Always state your position, point or proposition first and then develop it in the paragraph. Never start with the details and then conclude with your position.
That way the Judge knows right away what point you intend to make.

Justice Laskin recommends mentally trading places with the judge: -- appreciate the audience.
Anticipate the Court's concerns, and then try to provide an effective answer. Justice Simmons refers to this as "viewed from the perspective of a neutral decision-maker, why should the decision be in your client's favour?"

EDIT- for conciseness, sentence structure, sentence length, readability.

Try to leave time to revise and review, and read your submissions with a fresh set of eyes.

6. Facts

Mark Twain said "Get your facts first, and then you can distort them as you please."
He was a great writer, but not the best advice for the lawyer…

[2] More "colourful language" in that case including at paragraph 131, "The presence of Senior Crown Attorney … in the courtroom on Friday, November 5, 2010, was a woefully pathetic Hail Mary effort at post offence ratification of A. K.'s [name redacted] illegal exercise of discretion and was a flagrant and blatant attempt to intimidate the Justice and is therefore to be deplored."

Remember that the facts generally dictate the outcome of most cases.[3]

There is an art to persuasively presenting the facts without distorting them.

Put your client's position first, and deal with the opposing party's position in response.

Don't ignore the facts unfavourable to your position.

Themes may tell the story more persuasively than a chronological presentation.[4]

Stick to the Evidence. Do not attempt to supplement the record with information not before the trial judge: see *R v. Gamble, supra,* at paragraphs 143 to 147.

Be both fair and reasonable, as well as interesting!

7. Law

You need not do a treatise on the point. Don't cite more cases than you need to.

State your legal proposition, and then show how it relates to the case at hand.

If a particular citation says it all, put that citation directly into the submissions with emphasis. The Judge is more likely to read and appreciate the excerpt that way.

Keep quotes short.

[3] Justice Simmons, *supra, 2006 Six Minute Criminal Judge*, p. 8-2.
[4] *Ibid.*

CONCLUSION

In this brief talk, I hope I have removed a little of the trepidation of writing written submissions in a criminal case.

Your judge will thank you.