

If you are satisfied with your product turn to the practice note. You now know how little of the record is relevant. (Recently, on a point of law, counsel said that all 19 volumes had to be read. When asked why, he had a change of heart and, all of a sudden, nothing had to be read.) Answer the question honestly. If you think that if you make the court read the whole record unnecessarily – in the hope that it might find a point that you have missed – think again.

With this knowledge consider or reconsider a case bundle. You should preferably agree on one with your opponent after both sets of heads have been prepared.

Since you are in the process of buffing up the court, remember to prepare a separate volume of authorities of those that are not readily available. And while you are busy prepare a photocopy or a printout from an electronic database of those provisions of any statute, regulation, rule, ordinance or by-law that are at issue. Bind them separately with plastic comb binders and do not use the same colour binding as your opponent has used. It helps if some pages are not bound upside down or in a wrong sequence.

If you also file a CD with your heads and authorities, the court

may simply copy and paste your argument and references into the judgment.

Finale

Your attorney or client may not be impressed with the resulting document. They may think that the value of heads is measured in kilograms or in reams. You ought to know that it takes more effort and time to be brief, as Oscar Golgot I was wont to say, and that your time-based fee will be higher.

You have to choose: who do you wish to satisfy foremost? If winning the case is important consider the views expressed. If another brief from the attorney is foremost in your mind, bear in mind that attorneys do not as a rule rebrief successful counsel in the belief that cases win themselves.

Before the hearing ensure that there is no new law (especially case law) on the issue. If there is, give the court due notice. "Due" in this context does not mean "at the hearing."

And if you lose the appeal in spite of all consider that statistically you can only win fifty percent of your cases if you are good. ☐



By Carole Lewis,
Judge of the Supreme
Court of Appeal

Good legal writing

Let me start with a disclaimer. I do not hold myself out as an expert on legal writing. I do, however, have views on improving written work that comes before courts, and these views gain strength the longer I sit on the Supreme Court of Appeal.

There is nothing special about legal writing: lawyers should simply write well. This paper is general and addresses the writing of legal opinions, papers, affidavits, pleadings, heads of argument and any other written work. It is a plea for simplicity and clarity; for jettisoning jargon and legalese and above all, for brevity and clarity.

Brevity is not the same as shortness. It is about being direct and giving the reader information in the most accessible way. Verbiage disguises thought rather than expressing it. In the famous little book *The Elements of Style* (Third Edition, 1979) written by Professor William Strunk in 1929, and updated by his former student, E B White, Strunk said:¹

"Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his

subjects only in outline, but that every word tell."

One cannot write clearly and well unless one's thoughts are clear. That entails thinking before writing. This may seem obvious, but the impression often gained when reading heads of argument and even judgments is that the writer has started at the keyboard (or put pen to paper) before being sure what is to be written, in the hope that the pen will lead to the answer. Invariably that approach will lead to an excess of words and to muddled writing.

Lack of thought is particularly apparent in affidavits in motion proceedings. Affidavits are supposed to be about fact. Very often now they contain legal argument and opinion, the deponent explaining that the legal views advanced have been made by legal advisers. A little thought in advance of drafting affidavits (and indeed heads of argument) would save reams of paper and burden those who have to read less.

Think first about the purpose and nature of the document, argument or opinion and its logic: the logic should inform the content. If the ideas are clear then the points will be clear and writing them directly is more likely to make the reader understand what is written. In Strunk and White's words "The first principle of composition ... is to foresee or determine the shape of what is to come and pursue that shape."²

Although the structure of heads of argument warrants separate

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Jonathan Kozol



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