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The write way to success: Barristers' top tips for winning written submissions

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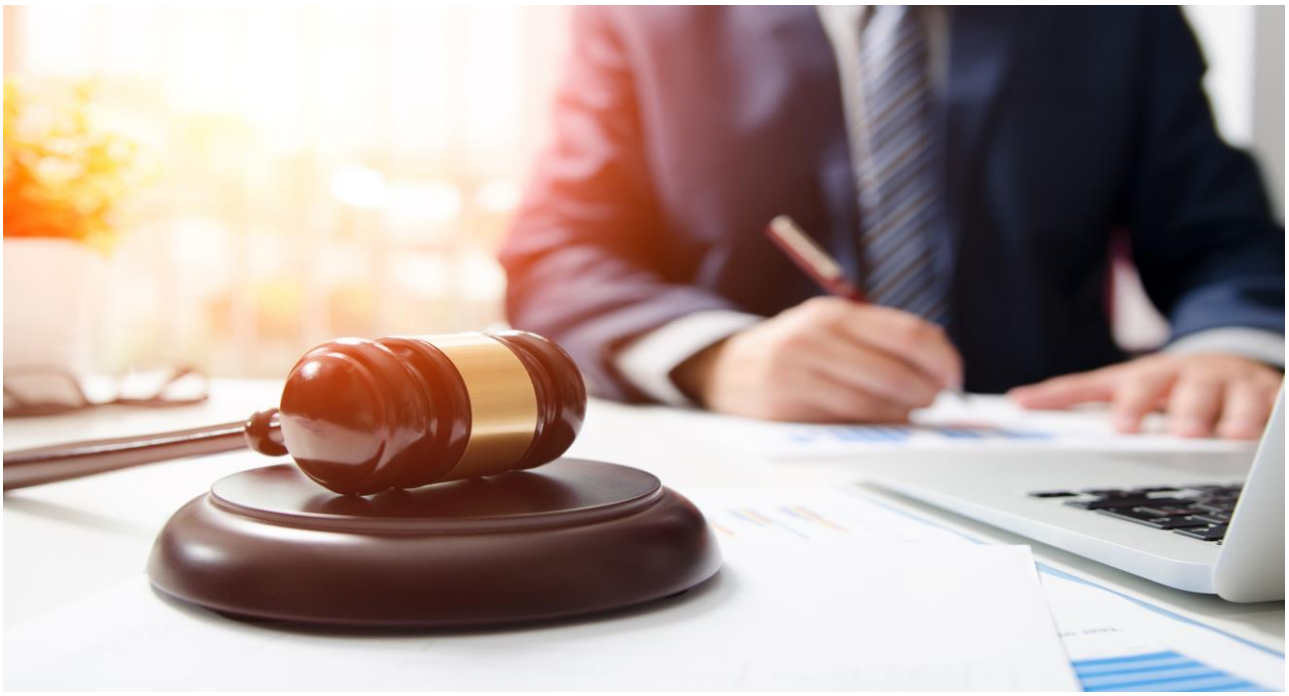

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With COVID-19 forcing courts to deal with more matters on the papers, written submissions are more important than ever and must be carefully crafted to assist the court while offering clients the best chance of success, barristers told Lawyerly.

Lawyerly gleaned tips from a number of top barristers for how to whip up winning written submissions that will give you an edge over your courtroom opponent.

Carefully lay out your path

David Larish of 5 Wentworth said that while the structure of the written submissions depends on whether they are for a lengthy trial or an interlocutory hearing, starting with a "skeleton document" is helpful.

"Usually, before drafting submissions, I prepare a skeleton document which has the major headings, followed by various levels of sub-headings. That allows me to put various points in the relevant section without having to draft the submissions sequentially. And it also means that, if necessary, different members of the team can work on different parts of the document at the same time."

Cynthia Cochrane of 5 Wentworth said that at the outset, she lays out the key factual and legal issues for determination by the judge.

"Then, in respect of each issue, I explain why the issue should be resolved in my client's favour as opposed to in my opponent's favour, including by addressing my opponent's points. I also spend a lot of time reducing the number of words I use to explain my points."

Cochrane said that guidance on how the submission should be laid out could also be found from prior judgments published by the presiding judge.

"I also check reasons for judgment previously published by the judge in similar circumstances, e.g., trial judgments or judgments dealing with similar interlocutory issues, and adopt a similar structure."

Clare Cunliffe of Owen Dixon Chambers West recommended a two-step process when writing submissions.

"The first thing is to work out what it is you need to prove and the order in which you need to prove it. The second thing is to adopt a logical structure that signals where you're going to go in your submissions. So obviously that includes having an introduction section and a summary section, but make sure you think about how the argument will flow so that the reader has the information they need for each point," she said.

Aim for the key points

Christian Dimitriadis SC of Nigel Bowen Chambers said it was important to hit the key points early on while keeping the submissions concise.

"Don't assume that the judge will have time to read the whole of a long document before the hearing, particularly on an interlocutory application. Often, an outline will be sufficient."

Sometimes, a propositional style of submissions could provide more assistance to the judge as opposed to a narrative style, he said.

Cochrane said she applied a rule of fives when crafting her written submissions.

"I work out my five best points and my answers to each of my opponent's five best points. I then plan a structure that highlights each of those points."

Devising this sort of structure avoided two types of unpersuasive submissions, Cochrane said.

"The first type is the 'stream of consciousness'. The second is submissions in answer or reply that simply seek to answer each of the paragraphs in the other side's submissions *seriatim* without drawing the threads together to put the case squarely and persuasively. A reply needs to sell a simple story by affirmatively stating the client's case rather than being defensive and lost in the detail."

If submissions were lengthy, burying a winning point was also a risk that had to be addressed, Larish said.

"Often, there is so much material that needs to be included that there is a danger in failing to give appropriate emphasis to the winning, main or best points."

Stay objective

Cunliffe advised barristers not to be too emotive in their written submissions as this would detract from the strength of their case.

"That’s something that barristers are taught not to do anyway, but I think strong language or adjectives tend to be bad advocacy. You should let the facts speak for themselves and the law speak for itself. Put your case as clearly and dispassionately as possible. I tend to think that is more persuasive."

Judges were intelligent and were well-versed in both the law and evaluating witnesses and would not be assisted by emotive language, Cunliffe said.

"You need to tell them how you think the law applies to the facts to reach a certain conclusion, but I don’t think there’s much point in badmouthing your opponents or badmouthing the witnesses. Obviously sometimes you will need to say, for example, the evidence of witness X should not be accepted for the following reasons but I think typically the more dispassionate submissions are, the more effective they are."

Take a brand new perspective

When writing submissions, Dimitriadis recommended considering them from the judge's viewpoint.

"Try to imagine what would persuade you as a judge reading the submissions for the first time from an impartial perspective."

Cunliffe advised barristers to read over their written submissions and imagine they knew nothing about the subject matter within.

"It’s often the case that by the time you come to trial, you are far more versed in a matter then you were at the outset. It’s important to remember that the judge doesn’t have anything like the time you do to get immersed and so it’s important to look at your drafting in a way that asks the question, if I knew nothing about the subject matter, would I understand it based on this explanation?"

One way of testing the clarity of your submissions was to explain them to someone else, taking care to avoid divulging anything confidential, Cunliffe said.

"To the extent that the submissions don’t traverse any areas of confidentiality, try and explain what they're about to somebody and if they're not following you, you're not doing your job properly. And in that respect, I propose that if you can't capture an argument clearly for somebody who knows nothing about it, then you've got a problem and you'd better rethink it."

Be smart with cross-referencing

Larish said that while cross-references of affidavits and evidence should be included, the written submissions should go further than mere referencing.

"My focus is on explaining what the evidence shows and how it supports my client's case or contradicts the other side's case, rather than just quoting or cross-referencing slabs of evidence."

Where particular pieces of evidence were important -- such as unchallenged parts of client affidavits or concessions made by the other side -- direct quotes could be included in the submissions, Larish added.

"It’s also very important not to mischaracterise the evidence -- if this occurs, the judge will lose trust in relying on other aspects of the written submissions," he said.

Dimitriadis said that he generally avoided quoting at length from evidence when it came to submissions for shorter hearings or interlocutory applications.

"Instead, set out propositions that encapsulate the effect of the evidence and give supporting references, and only quote key passages if necessary. The court can refer to the evidence itself, and will do so where necessary."

When referring to evidence, Cochrane said it was important to make it clear that the judge was being asked to make a particular finding from that evidence.

"I do this by stating the factual proposition and then setting out the evidence that supports that factual proposition, and whether it is direct evidence or sets up an inference. If I am asking the judge to make a lot of factual findings based upon the evidence I create a separate document entitled 'Statement of Facts and Inferences' that contains an analysis of the evidence to avoid interrupting the flow of submissions."

Partition off potential issues

Confidential information could be addressed by either making the entirety of the written submissions confidential or placing any confidential portions in a confidential annexure while the remainder of the submissions remained open, Dimitriadis said.

"The latter is preferable, where practicable, so that the main part of the submissions can be filed and served without restriction. Alternatively, avoid referring to the substance of the confidential information in the submissions, and instead direct the court to the documents (e.g., evidence) in which it is contained."

Cochrane also backed using a confidential schedule attached to the main submissions.

"Ideally, confidential or privileged information is set out in a confidential schedule to the submissions, to avoid a situation where the whole of a party's written submissions must be treated as confidential, which would be contrary to the principles of open justice."

The way in which confidential information partitioned in annexures and schedules was summarised in the submissions would either help or hinder the court in making a judgment, Cunliffe said.

"To the extent that your submissions deal only with confidential information and don’t take it to a level of generality that allows the court to reach a conclusion, that’s going to be very difficult for the court to write a judgment," she said.