Written Submissions

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Purpose

1. The purpose of written submissions is to save court time and to assist the judge. Written submissions must be factually accurate, and contain references to the evidence so that the judge can return to the source (the evidence) readily (for example, tr. 36.22 or page 4 of Exhibit D). They must contain a correct statement of the applicable law. If the submissions are lengthy, include a table of contents at the outset so that the judge can follow the structure of your submissions. If you are in doubt, try to put yourself in the position of the judge and decide what you would want by way of assistance from counsel if you had to decide the case.

Form

2. Written submissions must be in correct English, well set-out and arranged in a way that will make them as comprehensible, and as persuasive, as possible. Any spelling or grammatical errors will distract the judge from the substance of your submissions, and make the Court lose confidence in you.

3. Use headings to guide the Court.

4. If a case has been reported in an authorized report, make sure that the citation is to the authorized report (e.g. do not cite, ALJR if the case has already been reported in the CLRs; do not cite the unreported version, if the case has been reported in the NSWLRs).

5. Usually written submissions are signed by their author. Make sure that you are satisfied with your written submissions, since they bear your name and help to establish (or destroy) your reputation. Never allow sub-standard work to go out, particularly if it bears your name. You are mistaken if you suppose that judges are oblivious to your identity. Although Courts make some allowances for inexperience (particularly if it is youthful), no allowance is made for sloppiness, or carelessness.

6. It is desirable that you can type your own submissions, since, in particularly in a lengthy case, there will be much to-ing and fro-ing as you ensure that all evidentiary references are included. This can be cumbersome to do by dictaphone. Furthermore, written submissions are often required to be produced over the weekend, when secretarial assistance may not be readily available.

7. In a lengthy case, it is desirable to do an audit of all the evidence to make sure that all the points you need to make have been made, and that the evidence has been referred to exhaustively. An efficient way of doing this is to start at the beginning of the transcript and highlight all the passages that support you, and those that detract from your case, so that you can deal with them adequately in your submissions.

Substance

8. As with other parts of the trial (opening, examination, cross-examination etc), submissions are designed to persuade the Court that the party for whom you appear ought succeed. Submissions ought be convincing. In highlighting the strengths of your case, you must not forget to address the weakness in your own case, as well as those of your opponent's. If you simply side-step a strong argument, or an uncontroverted piece of evidence which is against you, then, in saying nothing, you run the risk of persuading the judge that there is nothing you can say against it.

9. The art of advocacy requires that you try to work out what actually happened (even if it is not apparent from the evidence). This means that you must be conscious of the position each of the witnesses plays in the story, and attribute weight to his or her evidence accordingly. The best, most reliable, evidence is usually given by witnesses who are disinterested, particularly where it is part of their occupations to record what has occurred. Accordingly, a nurse's clinical notes, taken in the course of a consultation, will be regarded as more weighty than the observations of a party who stands to benefit from a will made in circumstances where testamentary capacity is in issue. If you fail to take account of the relative value of pieces of evidence to which you refer in your submissions, you will not be putting your case as well as it might be put.

10. If the credibility of a witness is in dispute, address credibility separately. Matters which are relevant are:

    a. motive (what does the witness stand to gain or lose if his or her evidence is accepted);

    b. consistency (has the witness made a statement consistent or inconsistent with the sworn evidence, and in what circumstances);

    c. consistency with objective probabilities including contemporaneous documents (is the witness's version inconsistent with clinical notes etc);

    d. demeanour (unwillingness to answer questions, recall of helpful details but forgetfulness of matters contrary to the witness's interests).

11. It is desirable that you prepare an outline of your written submission before you start cross-examining your opponent's witnesses. The rule in *Browne v. Dunn* which prevents you from putting a case to the Court in submission that you have not put to the other side's witnesses (or otherwise made clear that you are relying on) requires you to work out what submission you want to put, before you start cross-examining.

12. With each submission you are to make, work out in advance who is the most appropriate witness to put it to. You may choose not to cross-examine a particular witness, because his or her evidence does not harm your case. But such a witness may help your case and you may wish to require him or her for cross-examination so that you can fortify your case. If you have prepared an outline of submissions in advance it may be easier for you to make this decision.

The Chronology

13. Whenever you read a brief for the first time make sure you prepare a good, detailed chronology for your own purposes. Your own chronology will be much more detailed than the one you will hand up to the Court. Sometimes, you may want to edit your own chronology and hand it up to the court as part of your written submissions, with the date in the left hand column, the event or document in the central column and the evidentiary reference in the right hand column.