

HOW TO HELP THE JUDGE

Written Submissions from the judge's perspective

CPD on written submissions presented with Nikolai Christrup SC for the Law Society in March 2020

1. This CPD is in two parts. The first part consists of useful hints from an experienced senior counsel about how to write effective written submissions. (That part is not included in this brief paper.)
2. The second part (which is the subject of this paper) is written, essentially, from a consumer's point of view: the role that written submissions can play in assisting the judge. This part of the CPD:
 - briefly outlines the judge's **needs**;
 - discusses how the **structure** and format of written submissions can help the judge write a decision;
 - discusses how the **content** of written submissions can help the judge come to a decision and write reasons; and
 - finally applies these matters to the special case of **sentencing submissions**.

Needs

3. The judge needs to make a decision about the case – whatever it is – an application, a voir dire, a civil trial, a bail application or an appeal.
4. Ideally it should be the correct decision.
5. Finally, the judge needs to write reasons explaining why she reached that decision.

Structure

6. How can your written submissions be **structured** to help fulfil these needs, specifically to help the judge write reasons for the decision? (This part of the presentation is directed at my personal preferences, although the general principles are of more general application.)
7. My judgments/ other decisions are usually structured along the following lines.
 - Background (including who is who)
 - Issues/ pleadings

- Evidence and findings of fact (issue by issue)
- Legal Principles
- Application of principles to the facts (which will usually include reference to the submissions of the winning party)
- Dealing with losing party's submissions
- Conclusions

(This is obviously susceptible to variation on a case by case basis. Also different judges have different judgment styles – though most will deal with those same topics as a matter of necessity. It can pay to check out how the judge structures his or her reasons beforehand by reading a few judgments by the particular judge you are appearing before if you have time.)

8. Why help? Receiving submissions in a format which helps meet the judge's needs in writing a decision, tends to put the judge in a receptive frame of mind for the arguments contained therein.
9. How can the structure of your submissions help the judge write the decision?

Headings

10. If the submissions contain headings similar to those under which I order my judgment – that helps me do my job. They do not necessarily need to be in the order set out above. (You will have your own reasons for adopting a particular structure.) However, it does help if the submissions contain those headings – or similar headings. The headings can direct the judge quickly and easily to what you say the **issues** are or the relevant **legal principles** or the **findings of fact** you are contend should be made etc.

Identifying the issues

11. It is helpful – indeed essential – for the submissions to identify the live issues for decision. There may be many issues identified on the pleadings but these are often refined during the trial process so that only a small number remain (a similar process can happen on appeals). It helps if the remaining live issues are clearly identified so that the judge does not waste time sifting through the pleadings trying to work out what is in issue. (This is especially important if the pleadings are less than ideal which is often the case - or if there is a prolix, hastily drafted notice of appeal – again, not uncommon.)

Submissions on findings of facts

12. In the section of the submissions dealing with findings of fact (and credit where applicable), it is helpful to state the findings you contend should be made, followed by the evidence relied upon for each relevant fact (or suite of facts if they are related).

13. If the case is one in which issues of credit will play a large role, then a separate section dealing solely with credit is also helpful – using the same format. It may be best to leave detailed submissions about credit to oral submissions in the usual run of cases where credit will be relevant only incidentally to one or two findings of fact. However, if the case turns on findings of credit – or largely turns on findings of credit - then credit is a major issue and needs to be dealt with in written submissions like all the other critical issues in the case – preferably in a separate section under its own heading.

14. When referring to the evidence, it helps to provide paragraph numbers in affidavits and references to pages of transcript where the evidence can be found. An assertion of the kind, “Witness X said Y”, without saying where this can be found leaves the judge with a very frustrating and time consuming job.

15. It is best to put the references to where the evidence can be found in footnotes. That makes it easy for the judge to quickly find that evidence without intruding into the text/ break the flow of the written submissions.

Submissions on legal principles

16. I find it “user friendly” for the section on legal principles to set out the principles contended for (succinctly) in the body of the submissions and (generally) to put the references to the authorities in footnotes.

17. It is unhelpful for written submissions to set out lengthy quotes from the authorities. However, if there is a key quote from the principal authority relied on for a particular point – especially one which sets out the point particularly well and is apt for inclusion in the judgment - it assists the judge to have that quote included in the body of the submissions.

18. Using schedules:

- If it’s long and boring – put it in a schedule.

- If credit is a big issue and there are differing accounts from a number of witnesses, a comparative table with footnoted references to the evidence can be helpful.
- A chronology appended to submissions as a schedule is usually helpful.

Content:

- **How the content of written submissions can help the judge come to a decision**

19. It is trite to say that written submissions should state what you contend the result should be, and why it should be made, by reference to the facts and applicable legal principles.

20. However, sometimes, instead of submissions saying what the party wants and why they should get it, written submissions more closely resemble an essay on the law of negligence/ restitution or what have you, which is not very helpful to the judge – or to counsel’s case.

- **How the content of written submissions can help the judge come to a correct decision**

21. The reference here is not to **the** correct decision, but to a correct decision.

- It is the judge’s job to try to determine what **the** correct decision is – aided by the Appeal Courts where necessary.
 - Counsel’s job (of course) is to advocate for her client, not to provide the judge with independent advice on what the result should be.
 - However, presumably your client has an arguable case or you wouldn’t be arguing it. (You certainly shouldn’t be arguing it.)
 - Written submissions should point to **a correct way** of finding in your client’s favour.
22. Submissions should provide a clear pathway to a decision in your client’s favour.
23. The following advice on how to achieve this may sound trite – but in my experience, these basic principles are not always followed.
- (a) The findings of fact you contend should be made must be justified by reference to the evidence. (It is not much use submitting, for example, that the judge should find that the parties entered into a contract, without pointing to the evidence that this is the case. Also, as stated in the discussion on **structure** above, a reference in footnotes as to where to find that evidence is useful – indeed essential.)

- (b) The legal principles relied on should be the relevant ones, and should be justified by reference to the most recent binding authorities.
- (c) The authorities you refer to should actually be authority for the propositions stated.
- Sometimes a case is cited as authority for a particular proposition and when the case is read, it falls short of establishing that proposition, or it turns out to be about something similar but not on point.
 - If the authority is not on point but you want to argue that it is applicable (for example) by analogy – then you need to make this explicit in the written submissions. You will probably want to reserve full discussion of the point until oral submissions, but you should at least acknowledge that the case is not directly on point and flag the argument – even if only in a footnote - or you will lose the trust of the reader.
- (d) The causal relationship between the facts and principles and the desired result needs to be spelled out – and it needs to be logical.

How can the content of written submissions help the judge write reasons for the decision?

24. The judge's final "need" is to write reasons for the decision. I have set out above some ways in which the structure of written submissions can help with this. So far as content is concerned: it is important to avoid prolixity. It is also important to summon up the courage to abandon weak arguments and stick to your strong points. These things make it easier for the judge make use of your submissions when setting out the relevant evidence on which to base findings of fact and the relevant legal principles to apply.
25. However, submissions can also be too short. The contentions you make on behalf of your client need to be fully analysed and supported - as well as being clearly articulated. Submissions consisting of vague generalisations, appealing to emotion rather than logic, not properly analysing or dealing with the issues are not helpful to the judge or to the client's case.

A special case: sentencing submissions

(a) Defence submissions

26. For defence counsel, the aim of sentencing submissions is the same as for any other set of submissions – to state the result you want (for example a partly suspended sentence – though not the precise term), and why you should get it, by reference to the facts (ie

objective facts and subjective circumstances) and applicable legal principles.

27. As with any other submissions, including headings which follow the structure of the judge's decision is helpful.

28. In my case sentences generally take the following format.

Part A: What happened

- the charge/s and maximum penalty
- the facts (agreed or found)
- effect on the victim by reference to the victim impact statement

Part B: About the offender

- prior criminal history (if any) – or note first offence
- background information as provided by defence {usually family - early life and education - work history – history of drug/ alcohol abuse (if any)} and circumstances surrounding the offending

- references/ other defence material;

Part C: The Result

- discussion and application of relevant sentencing principles
- sentence.

29. Submissions on the facts

- (a) Where the offender has been found guilty at trial – submissions on what findings of fact should be made should be made by reference to the evidence (preferably including transcript pages) and must be consistent with the jury’s verdict.
- (b) Where there has been a guilty plea, any explanation of the circumstances of the offending or other matters in mitigation must be consistent with the agreed facts.

30. Submissions on applicable principles:

All of the advice offered re written submissions in general apply.

31. Submissions on appropriate result:

Comparatives are helpful – in a schedule if there are a lot of them.

(b) Prosecution submissions

32. Sentencing submissions by the prosecution are something of a special case in that the prosecutor is not necessarily contending for a particular result (other than a just sentence) and in any case is precluded from proffering a statement of the specific result which prosecuting counsel (or the Director of Public Prosecutions) considers should be reached or a statement of the bounds within which that result should fall.¹

33. A just sentence means a sentence commensurate with:

- the objective seriousness of the offence;
- a correct appreciation of the facts (objective and subjective);
and
- correct application of relevant sentencing principles.

¹ *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 (12 February 2014)

34. It is therefore helpful to have submissions on:

- the factors which make the offence more or less objectively serious;
- the characterisation of the offender's subjective circumstances;
- identification of relevant sentencing principles; and
- submissions on how these relate, logically to the facts (objective and subjective).

35. Relevant sentencing principles include those found in the *Sentencing Act*, but some selectivity is required.

- (a) Setting out every single heading under s 5 of the *Sentencing Act* is not helpful unless there is something in the case which requires comment by reference to particular headings.
- (b) Setting out basic propositions such as: "Under s 40 of the *Sentencing Act*, a court which sentences an offender to a term of imprisonment of not more than 5 years may make an order suspending the sentence where it is satisfied that it is desirable to do so in the circumstances," is not only unhelpful, it can be annoying. What the sentencing judge

needs is submissions about whether a partly suspended sentence would be appropriate given the objective seriousness of the particular offending and/ or the subjective circumstances of the particular offender.

- (c) Comparatives are helpful (in a schedule if numerous). Discussion about the objective seriousness and subjective circumstances of the comparatives as compared with the offender can usually be left to oral submissions.

Justice Judith Kelly
Northern Territory Supreme Court
3rd March 2020