OECS BAR ASSOCIATION

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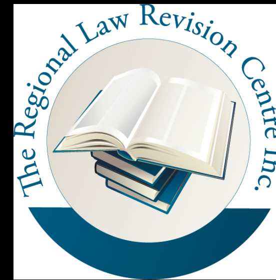
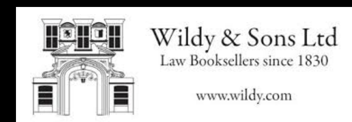
16th REGIONAL LAW CONFERENCE





DON’T LOSE YOUR APPEAL
Effective Appellate Advocacy

OECS Law Conference 14 September 2019

Tana’ania Small Davis, Partner Livingston, Alexander & Levy

Catching the Court Attention – Writing the Skeleton Arguments/Written Submissions

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- The Skeleton arguments is very important. You should always proceed on the basis that the court will read your skeleton argument. It is therefore your first opportunity to begin to shape the courts' thinking in a direction that is favourable to your case.

- The best written submissions are straightforward and to the point.
- Develop a clear writing style.
- Clarity of the written argument is the goal. Muddled sentences signify muddled thinking.
- Clarity of the argument demonstrates to the court that you have given careful consideration to the facts and issues in the case and have distilled them to assist the court.
- Lengthy sentences or paragraphs to make the point signify uncertainty of your own argument or lack of full reasoning before putting pen to paper.

- The skeleton is your script for the oral arguments so make sure that every point that you want to make in oral argument is contained in the skeleton.
- Your skeleton argument should state clear what the issues are, the legal proposition you are making and the argument in favour of your contention. The best and most direct route to persuading the court is demonstrating that the finding that you are urging them to make is required by precedent cases. Make your argument seem to be the most logical, rational common sensible that the court has heard.
- Write clearly and concisely, presenting the law and facts that favour your case in an easily digestible format. It takes a lot of discipline to present your arguments briefly and yet crystal clear.
- Resist the temptation to pad. Abandon any feeble arguments.

Practice Direction 62D

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- 1.1 A point not taken or advance in a party's skeleton argument may not be pursued at the hearing of the appeal without the leave of the Court.
- 1.4 Skeleton Argument should commence with a brief statement of the nature of the proceedings below; a similarly brief statement of the facts material to the resolution of the issues which is said to arise on the appeal; and a concise statement of those issues. The skeleton argument should then outline the points which the appellant intends to take and a brief statemen of the appellant's argument on each of those points.
- 1.5 Skeleton arguments should not normally exceed 10 pages I the case of an appeal on law and 15 pages in the case of an appeal on fact, printed on A4 paper. Legal practitioners should not, however, assume that longer cases justify proportionate longer skeleton arguments' and in the case of interlocutory and shorter final appeals, it should normally be possible to do justice to the relevant points in a skeleton argument of considerably less than 10 pages.

Practice Direction 62D

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- A skeleton argument must contain:-practitioner
- (a) a numbered list of the points which the legal practitioner wishes to make. The should both define and confine the areas of controversy. Each point should be stated as concisely as the nature of the case allows.
- (b) in respect of each authority cited –
  - the proposition of law that the authority demonstrates; and
  - the part of the authority (identified by page or paragraph references) that support the proposition.
- (c) if more than one authority is cited in support of a given proposition, a brief statement as to the reasons for taking that course. The statement should not materially add to the length of the skeleton argument but should be sufficient to demonstrate, in the context of the argument –
  - (i) the relevance of the authority or authorities to that argument; and
  - (ii) that the citation is necessary for a proper presentation of the argument.
- 1.7 In the case of points of law, the skeleton argument should sate the point and cite the principal authority or authorities in support, with references to the particular page(s) where the principle concerned is enunciated.
- 1.8 In the case o questions of fact, the skeleton argument should briefly state the basis on which it is contended that the court can interfere wit the finding of fact concerned, with cross-references to passages in the transcript or notes of evidence which bear on the point.

- Lead with the issues before getting into the facts. Reading the facts first will often be meaningless until the court knows what the issues are. The court's time will be better spent having been primed to what the principal issue is, then viewing facts through that prism.

- That said, the statement of the issue(s) should contain enough of the facts to make it informative.

- The facts are important so ensure that they are accurately stated. If the appeal turns on the findings of facts, you must point out the evidence that demonstrates that the finding is wrong. If it is a fact drawn from inference, then you must demonstrate that the facts from which the inference is drawn is mistaken or why the inference is a bad one. Although you will likely be primarily arguing law on appeal, the law that applies will be dependent on the facts of the case.
- Ensure that your facts lie up with the legal arguments you intend to make.
- If there is a challenge to the sufficiency of the evidence, go heavy on the citations of evidence and tie it to a legal issue.

- The PD's guideline as to the length of the skeleton argument should be observed. If you cannot distil your arguments into 10 pages, you are surely rambling. According to Antonin Scalia, " a brief that is verbose and repetitious will only be skimmed. A brief that is terse and to the point will likely be read with full attention."
- You can often correlate the brevity of the arguments with the quality of the lawyer. it requires ruthless discipline in cutting out everything that does not substantially further your case: weak points paragraphs or sentences that are unnecessary elaborations; words and phrases that add nothing but length.

Content

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- Pay attention to the standard of decision. By this I mean the presumption and burdens of proof on appeal. For example:
  - If the issue is statutory interpretation, then you must show the best reading favours reversal.
  - In criminal appeals - Erroneous jury direction requires not merely showing error but plain error such that affected the outcome of the deliberation.
  - Exercise of discretion - decision is plainly wrong and one which no judge properly directing himself could have come to. If you are a respondent, remind the court that the appellant is seeking the court to substitute its own decision without demonstrating that the impugned decision is on that no reasonable court could have come to.

Citations

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- If possible, refer to a single governing case, statute of respected treatise to support a point. Cite authorities with scrupulous accuracy. If citing a case that is not completely on point, say so and go on to explain why it is still useful. You should clearly state if you are relying on a case as an analogous authority. IF even one of your authorities does not hold up to scrutiny as bearing the point it is cited for, this will affect your credibility and reliability.

- Do not cite more than one authority to support the point as per PD62D 1.7. If you are citing more than one authority for the point you are required to explain why the additional citation is necessary. The number of authorities cited are not what is impressive; it is how well you analyse them and apply them to your case. A single citation of the most recent governing authority is all that is needed, especially if it is one that refers to all the cases that came before and which developed or refined the legal principle or rule.

- Consider carefully before making long quotations from authorities. The court will probably be more impressed with you reasoning of the case. Long citations can convey lack of self-assurance in your own ability to articulate the principles.

- Substantive points should not be in your footnotes. There is no certainty that footnotes are read by the judges.

- Be sure to shortly state what the other side's argument is and address it in your skeleton argument. It is unhelpful to the court in reading your argument which makes no reference to the point being made or taken by the other side since the court will not know if your argument addresses it. The key to overturning a decision on appeal is identifying the error in reasoning.
- If you are for the respondent, rely on the trial judge's reasoning
- **Conclude with the principal points encapsulating the case and why the court should rule in our favour.**

Oral Arguments

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- Your oral argument can make the difference in persuading a bench that may be undecided having read the written arguments. This is your final opportunity to convey to the court that you are a highly capable well-prepared attorney, knowledgeable on the facts and the law of the case and that you are there to assist the court in coming to the correct decision.

- The objectives of your oral arguments are to:
  - satisfy any doubts or uncertainty that may dwell in the judges' minds after reading the arguments [and hearing the arguments of the appellant].
  - reinforce the substantive points made in the written submissions.
  - Demonstrate your capability and that your arguments are well researched and presented; you are familiar with the case and have carefully considered all the points and can assist them in ruling in your favour

- Quickly and precisely zoom in on the heart of the appeal. Open with a clear and persuasive statement explaining the essence of the case.

- Give a roadmap to your argument/ Identify two or three issues that you will address. Select the arguments after careful thorough consideration.

- Lead with your strongest point. The reason for this is self-evident: you will have the highest degree of the court's attention at the start of your presentation. It is the point at which you have the greatest degree of control; later down, you may start to get peppered with questions and have to divert from your speaking plan. Starting with your weaker point will also likely cause the court to assume that his must be your best point and lose interest rapidly if you are not persuading them. Of course, exceptional situations may arise where you need to address a point that is not your strongest early; for example, a jurisdictional point or a procedural point.

Bergan v Evans (St Christopher and Nevis) hearing date 9 May 2019.

- Jcpc.uk/watch/jcpc-2018-0044/090519-am.html

- Notwithstanding, if you are the appellant, start with your strongest point regardless of the logical progression of issues.
- It is better to argue why your contentions are correct, rather than approaching it to show why your opponent is wrong.

- A rule of thumb that is observed more often in its breach is if you are the first to argue, make your own case first then rebut the opponent’s case in the middle, not at the beginning or end.
- Rebutting at the end as most lawyers do, leaves the court focussed on the other side’s argument rather than yours.

- If you are the respondent, your argument has to be more flexible. It will depend on what has been said by the appellant and how well the bench appeared to receive it.
- If the appellant has stated the facts do not repeat them unless you have to correct errors in the statement of facts. Any of the appellant's arguments that have been well received should be dealt with right away.
- After that, you may continue with your strong points.

DO's AND DON'Ts

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- **Do not read from your skeleton argument**.
- **Make eye contact** with the judges throughout your presentation.
- **Know your case.** Know it from every angle. Become an expert of the facts and the law. Know the record. All citations and cross reference should be pinpoint accurate.
- Be absolutely clear on the theory of your case. Think about how to explain your case in the most compelling way.
- Get to the point as quickly as possible.

DO's and DON'Ts

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- Be absolutely clear on the theory of your case.
- Get to the point as quickly as possible.

- **Know your Opponent's Case** Take into account the points that the other side is likely to make. If you are the Appellant, you should deal with the respondent's strong points in your skeleton argument. Some can be left to oral argument or rebuttal.
- Consider what you would be arguing if you were on the other side. Anticipate the opposing side's argument and deflect them.
- You will have greater impact if you raise the opponent's counterargument.
- **Make the court aware that you understand the other side's argument** as well as the judgment of the court below. You are there to show why it is wrong (or right) You can only do that if you understand their argument so you can point out the error in reasoning.

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- **Be candid.** Concede when you need to concede. Do so ostentatiously. Do not leave it up to your opponent to bring up your weak or indefensible points. Concede them on the basis that in any event they are not dispositive of the issues in the case. Alternatively, show why there are other factors outweigh the conceded point.

- **Don't beat a dead horse**. When it becomes clear that the court will not be persuaded, move on. That is not to say that you should not be tenacious; but use judgment as to when there is no value to pressing the point further and you are near the point of antagonising the court.

- **Do not speak fast**. Most people can only process information at a moderate pace therefore you will be ineffective, even I your points are good. Adjust the volume of our voice as appropriate. Lower the pitch of your voice. Speak distinctly.

- **Change up the pace** and cadence of your speech to maintain attention. Master the use of the pause. It is effective in perking back up attention, especially if you have just made a long speech. Pause for emphasis and pause to ensure the court is following.

- **Stop speaking when the judge** (or anyone else) interrupts you.

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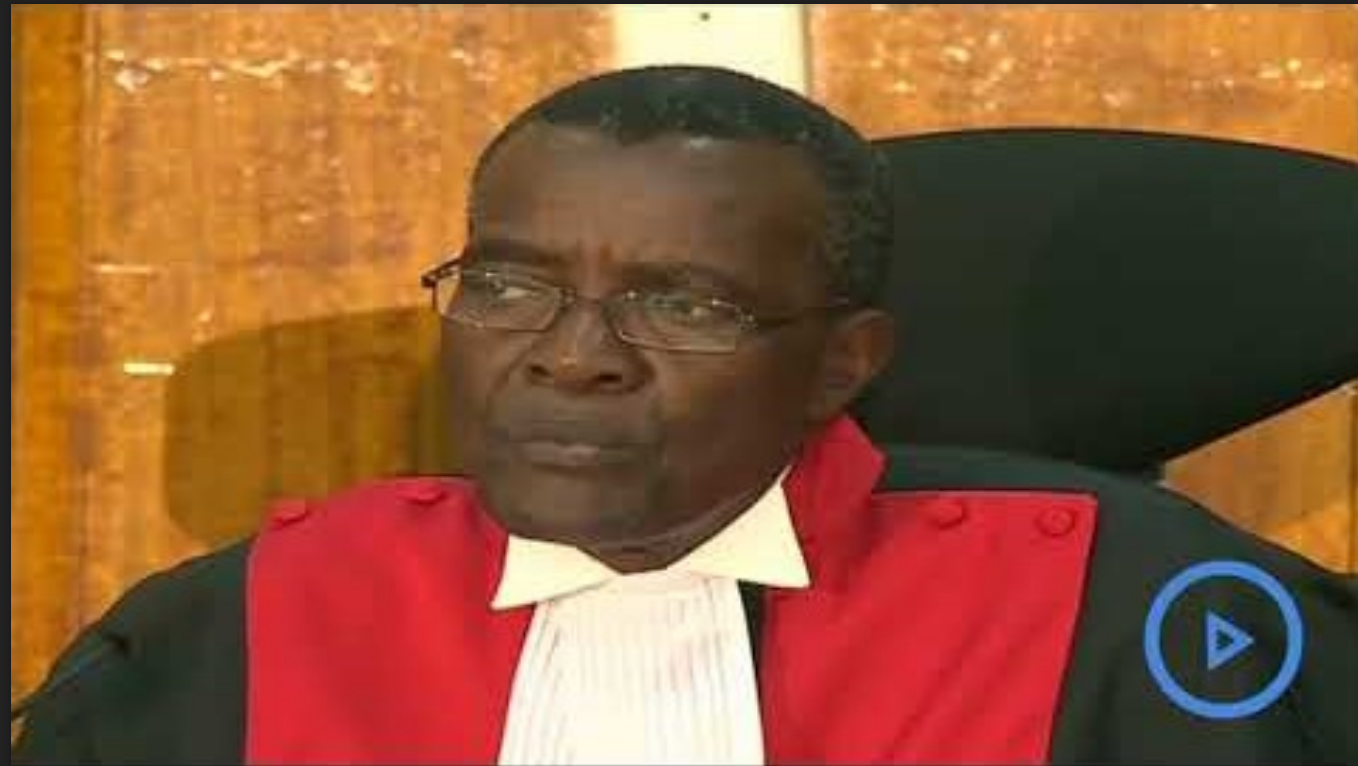
- **Show respect for the court's intelligence**. They are trained and experienced lawyers themselves.

- Your oral argument should not come across as a lecture to the judges. The judges know the law better that you. Despite the description oral "arguments" you are not there to argue with the judges. You are there to persuade them.

- **Listen to the judges**. Do not talk over them. Answer their questions directly. Engage them. The judges' questions help you to know how they're thinking and where they may need assistance in accepting your submissions. Fully answer the judges' questions and answer directly. Don't say you will answer later. Go where the court leads even if that means not following your plan. You must adapt to the judges' direction.



- Display collegiate attitude towards opposing counsel.
- Do not shuffle papers, fidget or other distracting practices

FINALLY……

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- **Close powerfully.** Recall the principal arguments Do not fall back on "for all the foregoing reasons…." try to say something forceful and vivid to sum up the case. State exactly what you are asking the court to do.

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