

Legal Writing Seminar

Prologue

I agreed to speak at this seminar because I think that this subject is important. I hear a lot of complaints by judges about the quality of lawyers' written work, and of the lawyers' complaints about the judges' complaints. I am speaking today, not as a judge, but more as a writer who has a lifelong fascination with the written word.

The Greeks were the first to invent a new way of writing based on an alphabet system. The Arcadian alphabet enabled the ancient Greeks to venture into almost every field of knowledge, from science to storytelling, and to philosophy. The *Iliad* of Homer is a fascinating subject of study, not only for its fine verse and amazing epic story, but also of the written Greek language by which the story (originally only in the oral form) was recorded. We might have assumed that the Greeks were the strongest promoters of the written word and that once writing was invented, it would dominate language and communication over the oral traditions.

That, in fact, was not the case. Socrates was one of the most vocal (pardon the pun) opponents of literacy. He believed that the written word would erode the fine process of thinking that only oratory can develop. His views were not far-fetched then, and they are not entirely out-of-date today. There are always dangers and problems when man moves from one form of communication to another. Just as the Greeks in the days of Socrates moved from the oral traditions to the written word, we are now on the cusp of a similar move from traditional writing to digital writing. And so, the warnings of Socrates and his reasons are worth studying, but that interesting subject has to be left for another occasion.

One of Socrates' criticisms of the written language is that writing is dead and inflexible, it is unable to engage its reader in discourse, or to answer back or to tussle with its reader until, slowly, bit by bit, new layers of understanding and wisdom emerge. Another of his criticisms is that writing destroys the necessity for memory. We can similarly ask, what is there to remember when Google can be summoned at any time to answer our every question? This is truly, a scourge of the times because I have seen how helpless lawyers become when they do not have their notes. They are unable to speak because they seem only able to read. When they cross-examine their witnesses they appear, instead, to be cross-examining the lectern because they fix their gaze only on the notes where they have left them.

There is at least one virtue of writing that Socrates had not given sufficient credit. Writing enables us to linger on a thought and revisit it as we please long after it had first crossed our mind. That is the power of writing. Writing, of course, assumes reading; and the writer writes for

his readers. There are innumerable books on grammar and good writing. They are always helpful because the technical rules of grammar are essential to good writing. There are even specialist books like Stanley Fish's *How to Write a Sentence* and I can imagine that one can even write hundreds of pages on esoteric aspects of writing like *The Uses of the Comma*, perhaps. What I want to do in this seminar is to talk about the foundation of legal writing, and how we can acquire the skills for it.

Every writer and thus, every writing, has a purpose; a motive. The purpose of legal writing is founded on the art of persuasion, and the strongest means of persuasion is the argument. Argument is the essence of the advocate's work. It is also an integral part of the work of non-litigation lawyers – lawyers who engage in commercial negotiation, or even just advising clients. And yet, when I read the letters and email in the bundles of documents, opening statements and closing submissions, I rarely find a well-composed argument. Legal writing and argument are intertwined, and to understand legal writing, we must begin with an examination of the argument. Argument is a structure built on facts; on an appeal to the sense of fairness and justice; on application; and on consequences. An argument is not formed merely by throwing words and passages randomly like the eclectic furnishings of a hipster café.

The function of the argument in the court is to make tracks into the mind of one's adversary. In the parlance of sport, this is known as 'psyching the opponent' – getting into his head. Making your opponent do more than he is capable of is just as important as doing what you are capable of. In the law courts, the advocate's work, ultimately, is to persuade the judge to his cause. Persuading the judge is the function of argument. And by that, I mean finding ways to reinforce the views of the court by guiding him through unfamiliar territory and convincing him that they are all already in the judge's mental map. Of course, a lawyer may come across a judge who holds a clear and opposing view to his case. The lawyer can try to change the judge's mind, but that is a desperate act, and often ends in failure and an appeal. What the lawyer needs to do when he finds himself in that situation, is to change his argument, and not hope to change the judge's mind – let the judge change his own mind afterwards.

This is not clever semantics. It is an important difference. When we are preoccupied with changing the judge's mind, we are really saying to him, 'You are wrong. Look at it this way. My Way'. Of course, you know the judge's answer – 'No way'. So, you start again, and say, 'We're getting there, but there is something else we should examine.' You should also remember that advocacy is not a debate. You don't have to reply to every point that your opponent makes. This is especially so when it comes to written submissions. We have lawyers who feel that they need to have the last word lest an unanswered remark by their opponent spells doom for them. This is a groundless fear if one's argument is well made. The strength of your case is in the strength

of your argument, not in the weakness of your opposing counsel's. You should focus on your own argument and not on responding to your opponent. You can, of course, point out the fallacy of your opponent's argument, and a jibe here and there might be good, but in the end, if your argument is sound, it wins, regardless of what your opponent may say.

Every case compels its own arguments but there are some ways that can fortify any argument. First, let us see what we can avoid. You must not begin your closing submission with a lecture on the law, or splashing precedent after precedent, especially with no argument. Words like 'obviously' or 'clearly' or 'this court must' are best avoided. The understated style is usually more persuasive than the forceful, belligerent rhetoric that appears to draw attention to the lawyer and not the client and his case.

So how should we begin? Usually with the facts, but here's the catch: You cannot put every fact into the submission or affidavit. In every case, the client will give his lawyer more facts than are necessary. The good advocate must also be a good editor, and in the case of the final submission, you just can't narrate the facts unless you are clear what your argument is going to be. Don't fool yourself into thinking that more is good. You will not be able to find a book on writing or advocacy that teaches you to do that. Nor will you find a book or expert who tells you to write long statements and submissions. They all advocate the contrary — keep it short; keep it simple.

After the introductory paragraph in which you must be able to tell the court what the fight is about, go straight for your strongest argument. Find the arguments that will win you the case. If they do, the rest are unnecessary. If they don't, anything else is futile. Don't be a slave to chronology. Plan the order of your arguments in a way that makes a clear, persuasive, short story, and you can start your story in any order that fits your plan. It will help the reader (the judge) to focus on your argument if you trim unnecessary descriptions. If your story requires you only to tell the court that the plaintiff drove to the defendant's house in the middle of the night, it is not necessary to tell the court the licence plate of the car. Reciting unnecessary dates is a common habit of lawyers. It may have sprung from a desire to account for every minute and every day in the history of his client's dispute with the other party. Many dates can be omitted, and so too are irrelevant events. One need not say, 'P met D on 1.4.2018. They met again on 14.4.2018, and they met a third time on 16.4.2018'. Just say, 'In April 2018, P met D a total of three times.'

Facts are facts – some of them are in your favour and some against you. You cannot pretend that troublesome facts do not exist, but dealing with them does not require you to dwell on them. Identify them, isolate them, and inoculate your argument. Then move on. When you continue, do not include arguments. It is the narration of the facts, remember? You want to keep the

judge's attention fully on one segment of the submission so that he can follow your submissions fluently when it comes to the next segment. Lawyers often mix the two. They say, for instance, 'The defendant wrote three letters to the plaintiff. These letters are full of self-serving statements and written after the event to deflect blame from himself'. Break that up. Just say that the defendant wrote three letters after the event of breach. Make your comments later. This means that you should also avoid conclusions in the fact section. Digressions into the law in this section is also terribly distracting; they dilute the force of a well-told story. People do not realise how the court's mind can be swayed just from a well-told story alone even before reaching the argument stage. A well-told story is one that will lead the reader (or listener) to the very conclusion you want him to draw at the end of your submission.

A good story is one in which the lawyer describes what happened without trying too hard to impose his own conclusions onto the court. Which sounds better: 'The plaintiff spun into deep depression and was clearly unable to make the right decision at the time' or 'The plaintiff ate only plain bread for the entire week. She ignored the telephone when it rang. She sat on the floor in the living room throughout the week and her 8-year-old cat that she brought up as a kitten was not fed. She looked out the window constantly, and yet, as the court has heard, she could not remember a thing she saw.'

State the facts without exaggeration and hype. There is one rule that lawyers must remember when reciting the facts: Do not use adjectives and adverbs unnecessarily, especially in the opening statement. Adjectives and adverbs are opinions, not facts, and every adjective that you use, every adverb that accompanies an act, merely increases the burden of proof. You may use them only after a credible witness has given his evidence to justify it. When you say he walked across the road, you just need to prove that, but if you say he walked quickly across the road, you have to prove two things. Lawyers often do not realise that they are stating opinions in their submissions that they cannot make themselves. 'The defendant was devastated'. This is an opinion and should certainly not be stated in the fact section. Only the defendant herself can say that she was devastated because that was how she felt. The most that the lawyer can say is, 'The defendant said that she was devastated.'

Use quotations, but not excessively. Quote short statements or just a passage or two. Lengthy quotations lose the effect they are intended to have. Quotations, especially from the witnesses have a ring of authenticity. Why say, 'The defendant had no intention of paying maintenance and is claiming custody just so that he need not pay' when you can quote the defendant: 'The defendant told the plaintiff, "I am going to get the children so that you will not get even a cent in maintenance.'" The rule to remember is that short quotes are better than long ones, and no quotes are probably better than short quotes.

Choose your words to reflect a calm, non-emotional statement. It is better to say ‘The defendant claims that the plaintiff did not reply to his letters’. Avoid the usual lawyers’ favourite, ‘The defendant’s bald assertions that the plaintiff did not reply to his letters are simply not true’. When you have told a good story, don’t detract from it by over-arguing.

That also means that you should not dilute strong facts with law. If the law is not relevant, raising it weakens your case. If the law is on your side, you may not need it except to explain to the judge that your opponent had misunderstood the law. Sometimes it is so trite that even that is not necessary beyond saying, ‘My learned friend’s statement that a prenuptial agreement is never relevant in our law, is obviously incorrect, and I just need to point out that it was considered in several cases including AB v CD. The rationale is obvious; the court needs to know what the parties themselves thought about how their assets should be divided at a time when their minds had not yet been affected by rage.’

When you’re done with the facts, begin your argument. Law students are taught to identify the issues in a case, then introduce precedents to support their position in the case, and then conclude by asking for a ruling in your favour. When those students graduate, they continue to write final submissions the way they write a submission for a moot problem, that is, by backing their way to the conclusion.

Experienced advocates will tell you to do it the other way around. Start with your conclusion, give your reasons why that should be so, and then, if needed, tell the court what other courts have done in similar situations. Citing cases is an art in itself. Look at your opposing counsel’s submissions. Chances are that it will say: ‘The issues in this case are 1...2...3...’ And they, abruptly continue with: ‘In the case of XYZ Justice Wad held...’, and that counsel will have set out passage after passage as to what Justice Wad had said. There is no connection between the issues and the cited authorities. There is no argument. Why can’t it be written simply as: ‘The man who pays for the renovation of a house has a legal interest in that house sufficient for him to lodge a caveat on it, as Justice Wad recently held in DEF v GHI’.

There are many more points on writing good closing submissions, and I have just set out the main ones to give you an understanding of what the writing process is like in this aspect of legal writing. I want now to spend a little time on a few other areas. I will talk about the pleadings and the affidavit of evidence-in-chief together.

The trial process is purposeful and has staggered stages for the filing of documents. It begins with the writ and statement of claim, then discovery, interrogatories, the affidavit of evidence-in-chief, the opening statement, and finally, the closing submission (unless the court

prefers oral submissions). The statement of claim sets out the claims your client is making against your opponent (and likewise, the defence is his response if he were the defendant). The rule, that is now almost invariably breached, is that you should only state your client's cause of action (or defence) and such facts as are needed to back it up. In a case breach of contract case, this means stating who the parties are, what they do, when the contract was made, whether it was oral or written, the essential terms of the contract, the critical terms, the proper interpretation of them, how the defendant breached it, what damage the plaintiff had suffered as a result of that breach, and finally, what the plaintiff is claiming from the defendant.

Furthermore, judges get a feel of the case gradually, first, by seeing what the case is all about – contract or tort, and what type of wrongdoing is being alleged, and also to see what the defendant's response is. Then they read the opening statement to see how counsel intends to prove his case, and when he reads the affidavits of evidence-in-chief, he will have a good idea what the relevant issues are, and can then conduct the trial efficaciously by stopping irrelevant skirmishes.

If you read the most recent statement of claim that you have drafted or received if you are acting for the defendant, you can probably see splotches of evidence infused with submissions, and topped off with a dash of insult or derision, depending on the poison of one's choice. Why is a breach of this rule bad advocacy? In advocacy as in war, one has to make himself as small a target as possible. Expanding your statement of claim to give a preview of your evidence-in-chief risks getting your client discredited under cross-examination because by the time the affidavit of evidence-in-chief is filed, you may have forgotten that the statement of claim had included a fact that your client now recalls is wrong or has taken a position inconsistent with what he had previously stated.

In the days before affidavits of evidence-in-chief, other than the counsel who calls the witnesses, no one else knows beforehand what the witnesses will say. Evidence-in-chief was led orally and the story is usually concise and to the point, and all in the witnesses' own words. Today, lawyers, and often junior ones, prepare the affidavits of evidence-in-chief. The result is an incongruity between the affidavit and the witness. We get a witness' affidavit with big words or phrases such as, 'The defendant and I regard the discussions as covering only the penumbral issues...' only to find that when that witness takes the stand, he promptly calls for a *Hokkien* interpreter.

Is it ethical for lawyers to choose words for the witness? Would the affidavit sound credible? These are matters that the lawyer must consider when drafting the affidavit. The lawyer can ask questions eliciting the witness' narrative and record the answers from him clearly and as

accurately. You will find that the answers are usually short and simple. That is what you need to transpose into the affidavit. Whenever the witness says something absurd or unclear, get him to clarify what he meant. Should you face a blustery witness, you should control him and get him used to giving shorter and more straightforward answers.

Evidence-in-chief needs only cover what you think is sufficient to prove what that witness needs to prove. You don't have to squeeze every recollection however trivial he has of the matter. That is the erroneous practice of inexperienced lawyers who vainly believe in anticipating the entire cross-examination. Here again, legal writing blends into advocacy. Learn to leave out facts that are non-essential, but might enhance the quality of the evidence-in-chief when they are elicited through cross-examination. When you are sufficiently skilled, you may set baits to trap the curious cross-examiner.

Q: You said after April 2016 you stopped seeing the defendant. Why?

A: Because by then I realised that the defendant was not an honest person.

Enough of the advocacy and legal writing blend. I will now talk about the most common form of legal writing – the letter and email. Before the writ is filed, many letters might already have been exchanged between the lawyers. Those letters and how you write them are far more important than you may think. With just a few separate comments, what I say about letter-writing applies to the email (and to internal memoranda to colleagues).

One of the peculiar changes in practice, illustrating the change in trial practice is the conspicuous absence of the letter-before-action. I often get bundles of documents so thick and heavy my arms feel like falling off just holding them. And yet, either I do not see the letter-before-action in the bundles, or if there, they are not referred to in cross-examination or closing submission. The letter-before-action is the more appropriate description of the more commonly used term, letter of demand.

Expertly written, the letter-before-action may help you win your case even before you make your opening speech (whether orally or in writing). Let me give you a capsule example of a few lines of a 'letter of demand' and what a letter-before-action should be.

Letter of Demand:

We act for King Kong and are instructed that on 1 April 2017 he entered into a contract with you for the transfer of all your shares in Monkey Pte Ltd to our client for \$2,000,000. By the said agreement you were to effect the transfer by 1 May 2017.

We are instructed that you have failed to do so, and we hereby demand that you effect the transfer within 2 days from today failing which we have instructions to commence proceedings against you.

Letters of demand are usually very terse and demanding. Some are full of vile and vitriolic, and I am sure you have come across many such letters. A letter-before-action is to put your opponent on notice of what your client wants. It should be written to elicit an amicable settlement without going to war. An unrestrained, angry, hurtful arrogant letter will not achieve that. Instead, it is tantamount to firing the first shot in long, expensive war all the way to the court.

If the problem is not amicably settled after this letter, the second function of the letter is to state clearly and concisely, what the dispute is about, and to show the reader, and ultimately, the judge, how reasonable your client is, and how unreasonable the opposing party is.

Our client, Sun Wu Kong, tells us that you were a co-owner of Monkey Business and that, regretfully, you are planning to devote your time to another business that is not compatible with that of the company's. He tells us that after discussions with you, the two of you had decided to go your separate ways and for him to sell his shares to my client for \$2,000,000.

Mr Sun tells us that you both agreed to complete this sale by 1 May 2017. Mr Sun has not been able to reach you for some weeks despite many attempts. He trusts that all is well, but is naturally concerned not having heard from you. Although the deadline passed a few days ago, Mr Sun still wants to complete the transfer. We have been handed our client's cheque for the full amount and will hand that to you in exchange for the transfer documents.

You can be sweet in your first letter, but not sugary sweet. Gradually increase the sternness and resolve of your client should the matter as the dispute is prolonged or gets complicated by the opposing party's reluctance, but do not in any event write fierce, arrogant, and angry letters. If the matter cannot be resolved other than by litigation, your last letter should be like your first – showing that you had been reasonable and are going to court as the last resort. When you have written letters that have set out the salient facts, identified the problems, and offered reasonable solutions, you would want the judge to read them; and compare them to the less reasonable letters of your opposing counsel.

So, just a few closing points on the letter-before-action. Do not tell the opposing party that he had breached the law or was wrong – some lawyers love to write, 'Your client is wrong on the facts and in law'. That client's lawyer is not very likely to react well to such unnecessary provocation.

The letter should be short and concise because you do not want them to distract the opposite party or make him nervous. He may not see some detail, usually unimportant ones, the

same way you do. That will lead to a long and protracted correspondence with the two sides trying to write their own history. Secondly, the letter should be used at trial to show the court what the situation was before the writ was filed. Judges love to read concise and accurate accounts even though they sometimes do not return counsel the favour.

The examples above are just to give you an idea of the tone and style of writing a letter-before-action. There are many variations, and depending on the complexity of the matter, you should adjust the letter accordingly. If you have a strong point, be sure to state it – but always politely.

In all letters, remember that you should write with the reader in mind. Write so that your reader understands why you are writing to him, and he must also know what you want him to do, otherwise, he will have difficulty responding to your letter.

We write so much more nowadays because of the email and mobile chats that we forget that our social writing habits should not show in our professional writing. Be wary of lapsing into shorthand and ellipses. When you write an email, remember this: the ‘e’ in email stands for ‘eternal evidence’. The email is the first document your opposing party will likely see nowadays, and is likely to start a long thread of email responses. It will get copied to many parties including the clients on both sides. That means that you must pay attention to grammar and maintain the same discipline that is demanded in writing a postal letter. People you do not know who may get hold of a copy of the email will assess you from the way you write. As a professional, you should appear, from your writing to be: Polite, firm, well-informed, and fair.

This is the age of twitter, remember to keep your email short. You can find the appropriate length yourself by looking at long email and see at which point they tire you. You can send documents by PDF and that means you need not quote passages – certainly not the law. Opposing lawyers (and often, judges) don’t like to be lectured on the law. Just give them the citation and they will read the case themselves if they need to. You can make use of the subject heading to add an extra line. Learning to exploit the subject heading is an art. The perfect heading is one that tells almost the entire story. Short email shows that the professional is not a long-winded person incapable of expressing himself concisely and precisely.

Finally, there is something about the email that is like being enclosed in a car – normally placid people get inexplicably angry in a car – and write terrible things when they are looking at a computer screen. Therefore, count to ten before you press ‘send’. That is cue for editing. Some famous author once said that there are no good writers, only good editors.

Writing is a difficult thing to do; it is not like, say, running. Anyone can run well, but not everyone can write well. If you set Rottweilers on my back, I will run very well, but you won't be able to write at all. Good writing comes from reading well, thinking deeply, and from constant practice. It is a part of the intellectual life. Writing has survived the condemnation of Socrates, and today, we ride on the knowledge and wisdom of the ancients only because the thoughts of Socrates and others were preserved by Socrates' pupil, Plato, and Plato's pupil, Aristotle – in writing.

Choo Han Teck
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