Closing submissions, effective oral and written advocacy

Justice Robert H. Jackson, former US Attorney General, the chief US prosecutor at the Nuremberg Trials and later US Supreme Court Justice, once said that when he was the Solicitor General, he made 3 addresses in every case: *'First came the one I planned... logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night'*.[1]

In contrast to the opening, the purpose of closing submissions is to argue the case. It is the final opportunity to influence the court. It is usually the only opportunity to expose your logic as a weapon in argument to damage your opponent's case.

As the title to this paper discloses, it is directed to both oral and written closing submissions. I propose to address the drafting and development of written closing submissions first. The discussion is particularly apposite to closing submissions in commercial trials, but most of the points are likely to be relevant to all civil litigation.

The increasing importance of written submissions

Over the last century, the Supreme Court of the United States and many other US Courts at an appellate level have limited the time available to the parties for oral submission. The majority of cases decided by appal courts in the US are decided on written submissions (known as a 'brief') without oral submissions.[2]

That trend has had the consequence that US trial and appellate lawyers have closely studied and significantly refined techniques in drafting written submissions to a degree of sophistication well in advance of Australian lawyers. We can learn something from the work our US colleagues have done. The number of US texts and articles on the subject are legion.

Two US texts which I have found both informative and helpful in preparation of written submissions both at trial and appellate levels are *The Winning Brief, 100 tips for Persuasive*

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1 *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A Journal 801 (1951)

2 *Supreme Court and Appellate Advocacy, Mastering Oral Argument*, by David C Frederick 2002 p. 2

Briefing in Trial and Appellate Courts by Brian Garner 2nd ed., Oxford University Press and *Beyond The Basics, a Text for Advanced Legal Writing*, 2nd ed., by Mary Barnard Ray and Barbara J Cox.

Garner's book in particular repays reading. It received favourable recognition from Justice Hayne some years ago in the context of a paper he delivered relating to written argument before the High Court. I have attached to this paper the list of 100 tips contained in Garner's book. The book provides a more comprehensive discussion of each tip supported by examples. Many of them are useful. Some may be inappropriate to the judicial audience in Australia. However, in each case the commentary is worth consideration.

Australian Courts are increasingly following the US trend and placing greater emphasis on written submissions. In that context, Justice Kirby has observed that 'Australian Courts have changed, probably forever, the precise skills of advocacy that they enlist'.[3]

Drafting written closing submissions

You heard from Justice Ken Martin on the first day of this course that case analysis, both at the macro and micro levels, is critical to the preparation of a case before trial. I suggest that process should extend to preparation of an advanced draft of the written closing submissions. There are at least two good reasons for this: first, once the trial has commenced there are obviously significant demands upon the barrister's time. As a practical matter, this severely limits his or her the ability to prepare comprehensive, coherent and closely reasoned written submissions during the course of the trial.

Texts and articles which provide advice for writing submissions invariably focus upon the end product, but remember that the process determines the product. Written submissions dashed off at the close of the evidence are invariably deficient and potentially do harm to your case. Inaccuracies and inelegant language resulting from insufficient time devoted to the preparation of final written submissions are apt to seriously undermine the credibility which you have sought to develop with the Court during the course of the trial.

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3 *Persuading Judges in Writing: Tips for Lawyers (and how technology can help)* by Troy Simpson, 2007 LLRX.Com citing Kirby J *Appellate Advocacy—New Challenges*, the Dame Ann Ebsworth memorial lecture, London, Tuesday, 21 February 2006, 15.

Preparation of a comprehensive and well advanced draft of the final address before the trial starts allows more time to refine and polish the final version of the submissions, and more time to focus on and develop what you are going to say in your oral address.

Secondly, the discipline of drafting a closely reasoned document as part of your case preparation and analysis, which analyses the pleadings, identifies the critical questions in issue and what is and is not uncontroversial, identifies factual findings which need to be made for your client to succeed at trial, and identifies what the applicable legal principles are, is not only valuable aid in preparation of the opening, but also in focussing both the evidence you intend to adduce in chief and in identifying what evidence needs to be displaced or challenged in cross examination: it is a roadmap.

How to start

The genesis of the first draft of the written closing submissions should be the pleadings and particulars. However, early consideration needs to be given to the structure of the document. One approach is to adopt a structure that follows the usual form of reasons for judgment: written reasons for judgment are typically constructed in the following order:

- A statement of the issues;
- Identification the facts which need to be found for your client to succeed;
- An analysis of the evidence available to establish those facts;
- The legal propositions necessary to resolve the issues and the application of propositions;
- The orders which should be made.

The construction of a written address in that order may have the benefit of making it easier for the judge to adopt your submissions in the reasons for judgment.

Generally, the case should be conducted on the basis of what you propose to argue in the closing address. However, the initial draft written closing address should not be treated as something sacrosanct. Obviously it needs to remain flexible because the trial may take an

unexpected turn or witnesses may fail to come up to proof on some issues, but the important point is that most of the steps outlined above should be substantially completed before the trial commences. This is particularly so where the evidence in chief is to be given by statements and there is an agreed trial bundle. It then becomes a matter of refining the draft as the trial progresses, adding in references to the relevant evidence each day as witnesses are examined and any additional documents are tendered.

In my experience, although it does sometimes happen, it is rare for trials to take an entirely dramatic and unpredicted turn which requires you to entirely throw out the work and research which has been done before the trial commenced and to start over again.

What should be included in the written closing submissions?

In an Australia article entitled *Persuading Judges in writing: Tips for Lawyers (and how technology can help)*[4], Simpson argues that written persuasion provides the best opportunity to persuade a judge.

One essential difference between a civil trial before a judge and a trial before a jury is that, in the former, particularly in more complex cases, the judge will reserve judgment and may not come back to preparing reasons for judgment until sometime after the case has been closed. The judge often has to commence and hear other cases in the interim. This elevates the importance of written closing submissions. The impact of points made orally may fade with the passage of time and the impact lost when an oral submission is read later in a transcript. Your written closing submissions should therefore address everything you want to put before Court by way of submissions, and I suggest that the oral closing address before a judge without a jury now assumes a different role to the oral address to a jury.

Having said that the written submissions should address everything you want to put before Court, there are a number of specific substantive drafting points worth emphasis.

- **Identify all the findings of fact which the Court is being asked to make.**

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4 2007 LLRX.Com.

In a paper delivered by David Jackson QC on 8 May 2008 (the full text of which is set out in Hearsay) the following observation was made: "In civil trials, I think there is a common error which is frequently made. It is the failure of an advocate to identify all the findings of fact which they want the court to make or not to make."

The same author further observed that identifying the findings of fact which should be made has the added importance of ensuring that the findings of fact critical to any potential appeal point have been addressed by the trial judge.

- **Identify the uncontentious facts necessary for success in the case separately from the contentious facts, assisting the judge to focus on what is in dispute.**

- **Address your case theory.**

- **Deal with the contradictory evidence.**

- **Deal with your opponent's best arguments**

  It is essential to address your opponent's arguments. If you are addressing first, you should pre-empt and seek to undermine or destroy those arguments. A comparative analysis of the evidence of your witnesses and witnesses of the opponent, anchored in logic and common sense can be an effective method of dealing with contradictory evidence.

- **Address the onus of proof**

- **Citation of authority**

  As a general proposition, reference to authority should be limited to that which is necessary and no more. The cases which should be cited for a legal proposition should be the most recent or leading High Court decision on the point, or if there is no High Court decision, the most recent authoritative intermediate Appellate Court decision.

- **Extract <u>brief</u> passages from authorities which are critical.**

- **Draw to the Court's attention any authority against the submission and seek to distinguish it.**

  This is your obligation as an officer of the Court and is critically important to maintaining credibility with the judge. Sir Owen Dixon said: *'Candor is not merely an obligation, but .... in advocacy it is a weapon ...'*

- **Provide an indexed bundle of seminal authorities with your written submissions**

  Tag and highlight the critical passages, and provide an identically marked up bundle to the judge and your opponent.

- **Provide a Chronology**

Some of the drafting tips offered by Simpson and others[5] include:

- eliminate repetition.
- avoid clichés.
- avoid epithets like "clearly", "obviously", and conclusory legal statements like "in clear breach of its contractual obligations". Expressions like "clearly" and "obviously" signal weakness rather than strength, and convey lack of candour and fairness.
- understate rather than overstate. An argument that can be understated will tend to be sound, and 'an understated argument has a unique, if intangible, power of persuasion'. Remove expressions which tend to overstate: words like "very" and "many", substituting the precise number.
- use short words, short sentences and short paragraphs. I would add, number your paragraphs and prepare an index by reference to the numbered paragraphs. This will assist the judge but, importantly, it will also assist you during oral submissions to

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5 See also Garner; *Advocacy in Practice* by JL Glissan QC, LexisNexus Butterworths 2005; *Advanced Legal Writing, Theories and Strategies in Persuasive Writing* 2nd ed., Michael R Smith, Wolters Kluwer

quickly take the judge to the relevant paragraphs of your written submissions where issues, evidence or points of law have been addressed.

The oral address

Views may reasonably differ about this, but I suggest that the greater emphasis on the importance of comprehensive well-drafted written closing submissions requires a more focused approach to oral submissions. I see an important function of the oral address as the opportunity to engage with the judge on what you have identified and addressed in the written closing submissions as the pivotal issues.

By the expression "*engage* with the judge", I am referring to an exchange between the barrister and the judge where the purpose of the barrister is to:

- identify whether you and the judge have the same views about the significance of the issues you have identified as critical;
- identify whether the judge has overlooked, misunderstood or failed to attribute significance to evidence which you have evaluated as being significant;
- seek to persuade the judge to your view or at the very least to ensure that when the judge leaves the court having reserved his or her judgment, your arguments on the pivotal issues are understood and there no misunderstanding or misapprehension about the importance of some critical aspects of the evidence or the law.

In short, this is the opportunity to identify whether the judge is on the same page.

The oral address also provides an opportunity for the judge to test your arguments on the facts and the law. What wider implications might acceptance of your submissions have.

Against the background of a comprehensive and well-drafted set of written submissions, your oral address can be much more specifically focused.

This opportunity to engage with the judge should not be wasted by reading from the written submissions or by reading long passages from the evidence or from the authorities. It should be directed to persuading the Court on the significant issues and ensuring that your

judge does not reserve the decision and leave the trial under any misunderstanding as to your case and the evidence on which it depends.

Let me take an example from the current exercise:

You are appearing on behalf of the applicant. You may have identified the conversation between Mr Eiffel and Mr Lafayette as a critical piece of evidence. Do not necessarily assume that the judge has placed as much significance on that conversation as you do. Indeed, the microanalysis sessions in which I participated revealed a variety of views about the significance of this conversation.

An exchange with the judge in oral closing address might involve you saying:

> *"There are five significant issues in this case. They are identified and discussed in my written submissions where I have collected the relevant evidential references. May I develop my submissions in relation to each of those critical issues and then I propose to take Your Honour to the relevant legal principles.*
>
> *The first critical issue is the conversation between Mr Eiffel and Mr Lafayette ...."*

At this point the judge intervenes:

> *"But Mr Thompson, what is the relevance of what was said in the conversation? The case is about whether use of the name "Medie" is misleading or deceptive or likely to mislead or deceive the relevant audience, and whether that has resulted in loss or damage to your client?"*

This is the very kind of engagement you are seeking to obtain. You must engage and deal with the judge's question. Do not seek to avoid the engagement. If you do not address the judge's perception that your significant point is not important, he or she will leave the court at the end of submissions under a misapprehension as to your client's case and without understanding your case theory.

I have seen barristers respond to such a question by saying something to the effect *"I propose to come to that, Your Honour"*, no doubt hoping that the point will be lost or forgotten and that they will not have to confront a potentially intimidating debate with someone they may perceive to be intellectually superior or to suffer the embarrassment of their feeble abilities being exposed.

It is better to engage in the debate badly than not to engage at all.

You don't, of course, need to necessarily disagree with the Bench. You may choose to engage in a way which accommodates the judge's view:

> *"Yes, your Honour, those matters are central to a determination of the case. However, the significance of the conversation is this: if Your Honour rejects the evidence of Mr Lafayette that he informed Mr Eiffel that he was going to change the name of his company to Medie and that he sought and obtained some approval from Mr Eiffel, that finding goes to the credit of Mr Lafayette with respect to his evidence on other points that are material to your Honour's determination.*
>
> *The respondent's case is that the business it conducts is directed to a different market. It says it only supplies services to lawyers. That contention depends upon an acceptance of the evidence of Mr Lafayette, and an adverse finding of credit in relation to the conversation with Mr Eiffel as implications for the reliability of Mr Lafayette's evidence as to the nature of the respondent's business and the identity of customers. It also has implications for Mr Lafayette's evidence that use of the name "Medie" has not created confusion amongst customers and potential customers.*
>
> *So, may I deal then with why Mr Lafayette's account of the conversation with Mr Eiffel is not credible. ... ."*

A coherent final oral address requires the application of logic and careful reasoning. The relevant audience will usually be a person of at least equal intelligence to you. Often a Socratic approach can be utilised as a means of engaging with the judge. That approach, of course, requires you to have mastery of the evidence, but it can be a sure method of identifying what the judge is thinking and whether he or she has overlooked evidence or misunderstood its significance.

The exchange may also reveal that *you* have overlooked or misunderstood some aspect of the evidence which the judge has picked up. It is better to know so that you can put emphasis on other points which also support or corroborate your case theory.

Books and journal articles discussing what should and should not be said or done during a closing oral address are also legion. Chapter 8 of "Advocacy in Practice" by JL Glissin QC, provides a useful collection of tips. I have set out some of them below.

- **At the outset give the Court an itinerary of your oral address.**
- **Avoid reading**. Try to maintain eye contact.

- **Remain courteous.** Do not alienate the judge or express anger or frustration if he or she does not accept some argument. There is no advantage to your client or to you in alienating the referee. Having a fight with the judge is generally not particularly persuasive. However, that does not mean you should make concessions. Just because the trial judge does not accept the point you are seeking to make, does not mean that an Appeal Court will come to the same view. In my experience, if a concession is made on a critical issue in the course of the address, invariably it will turn up in the reasons for judgment: "*There was an issue about X and Y; however, Mr Thompson conceded during the trial ...*" That becomes very difficult to displace on an appeal.

  As mentioned by Nick Green QC in his paper, it is important to know what you can concede and what you can't concede consistently with success for the client's case. You should not too readily assent to a proposition advanced by the judge.

  Also be courteous to the opponent's client and witnesses. That is not to say that the address should not contain robust criticism of the evidence of an opponent's witness where that is appropriate.

- **Use the oral address to attack your opponent's best points.** The same Socratic approach can be employed effectively in doing this. Try to engage the judge in the same way as you do in making your own points.

- **Deal with the contrary evidence.** Confront any serious weaknesses in your case. Do not leave that to your opponent.

- **Deal with your opponent's best arguments.** It is better to poison the well for your opponent before he or she gets to address.

- **Do not attempt to conceal the strength of the case against you.**

- **Avoid reading long passages from cases.** Take the court to critical passages. Provide a folder of cases in which the critical passages are tagged and highlighted.

- **Take the judge to <u>select</u> critical documents.** This gives the judge something to do besides simply listening to the spoken word of the advocate. 'By taking the court to a document you are using two senses of the judge to seek to persuade: hearing and sight. Stopping while you ask the judge to read a brief passage creates a natural break in the flow of the advocate's words. When the judge has finished reading the passage and turns his or her attention again to listen to the advocate, there is a re-focusing. The same applies to appropriate use of case law. ... Don't forget to allow the judge enough time to read the relevant bit, and don't over do it so that it becomes a chore, rather than a helpful tool.'

  An example of taking the judge to documents might be the letters from the applicant's solicitor to the respondent and the respondent's response.

- **The golden rule: maintain creditability.** *Credibility* may be defined as 'the quality of being believable or trustworthy'. This has many facets: Don't overstate the case, misstate the evidence or misquote the law. If the judge asks the question and you are not sure of the answer, don't speculate. Say: *"can I check that and give Your Honour a precise answer?"* Come back to the judge after you have checked and provide a precise response. Throughout the course of the trial you want to create the perception that the Court can rely upon what you say as being accurate and reliable. This can also be an effective weapon: if your opponent gives some loose or inaccurate response to a question from the bench, do not miss the opportunity: *"Yesterday, Your Honour asked for a reference to X and Y. The precise reference is at Transcript page 172, line 47."* You don't have to say *"what my learned friend told your Honour was unreliable"* – the message will get through.

G A Thompson

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The Winning Brief: Tips 1–50

A. COMPOSING IN AN ORDERLY, SENSIBLE WAY

1 Plan every writing project by breaking it up—and carry it out in stages.

2 When first working on a writing project, let the madman run loose for a while.

3 Begin the architectural planning by stating the issues. Before writing in earnest, figure out how many issues there are—and what they are.

4 Once you've drafted issue statements, read more law and take plenty of notes. Tweak or even rewrite the issues as you continue researching. Then organize the issues from most important to least important.

5 Outline your brief, but start with nonlinear outlining.

6 Write a draft straight through, without stopping to edit. Let it sit awhile before editing.

7 Proof carefully; have several others proof carefully; learn and use standard editing marks.

B. CONVEYING THE BIG PICTURE

8 Frame the deep issues at the outset so that you meet the 90-second test.

9 Phrase your issues in separate sentences. Don't start with *whether* or any other interrogative word.

10 Limit your issues to 75 words apiece.

11 Write fair but persuasive issues that have only one answer. Cast each issue as a syllogism. If you have several issues, give each one with a concise, neutral heading.

12 Weave facts into your issues to make them concrete.

13 If you don't open with explicit issue statements, sum up the issues and your theme in a short introduction.

14 Highlight the reasons for the conclusion you're urging.

15 Make your points as simple as possible, but no simpler.

C. MARCHING FORWARD THROUGH SOUND PARAGRAPHS

16 Begin a paragraph with a topic sentence. Don't end the preceding paragraph with what should be the next paragraph's topic sentence.

17 Bridge from one paragraph to another.

18 Connect your sentences smoothly to one another. Avoid "bumps" in the prose.

19 Ease your readers' way by providing signposts.

20 Break up long, complex sentences. Shoot for an average sentence length of 20 words.

21 Avoid tiresome repetitions that hurt the mind's ear.

22 Put all your citations in footnotes, while saying in the text what authority you're relying on. But ban substantive footnotes.

23 If you must cite in text, make the citations unobtrusive.

24 Say something about the critical cases you cite: show how and why they apply. For other cases, be satisfied with a simple citation.

25 Use parenthetical case explanations merely to show why you're citing the cases—not to present your argument.

D. EDITING FOR BRISK, UNCLUTTERED SENTENCES

26 Relax the tone: eliminate the jargon known as "legalese."

27 Avoid overparticularization.

28 Populate your sentences. Use real names (not procedural labels) for parties.

29 Work hard to replace *be*-verbs with action verbs.

30 Know what the passive voice is, and minimize it.

31 Uncover buried verbs—especially words ending in *-tion*.

32 When given the choice between a passive-voice verb and a buried verb, choose the passive voice.

33 Eliminate unnecessary prepositional phrases—especially those beginning with *of*.

34 Don't separate a short subject from its verb with a modifying phrase. Instead, start the sentence with the modifier.

35 Don't separate a verb from its object.

36 To write forcefully, end your sentences with punch.

37 Cut filler phrases such as *there is* and *there are*.

38 Eliminate throat-clearing phrases.

39 Ruthlessly cut unnecessary words.

40 Keep your sentences to one main thought, but combine related sentences if doing so will minimize choppiness.

41 Use parallel constructions whenever you can—but make sure the ideas are really parallel.

E. CHOOSING THE BEST WORDS

42 Replace humdrum phrases with snappy ones that spark interest.

43 State your ideas freshly; use clichés only when you can turn them to good advantage.

44 Strive for distinctive nouns and verbs—minimizing adjectives and adverbs.

45 Save syllables. Shoot for one-syllable words when possible; failing that, aim for two-syllable words.

46 Avoid heavy connectors.

47 Simplify wordy prepositions: *with respect to, as to, in order to, in connection with,* etc.

48 Don't use *However* to start a sentence: use *But* instead, move *however* inside the sentence, or collapse the preceding sentence into an *Although*-clause.

49 Strike *pursuant to* from your vocabulary.

50 Use *that* restrictively, *which* nonrestrictively.

The Winning Brief: Tips 51–100

51 Fix every remote relative pronoun—that is, ensure that *that* or *which* immediately follows the noun it refers to.

52 Resist rabid deletions of *that*. Even so, prefer [verb +*-ing*] over *that* [+ verb].

53 Don't use *such* as a pronoun <rejected such> or demonstrative adjective <such property>.

54 Use well-recognized symbols and abbreviations, but avoid uncommon ones.

55 Generally, dispense with *Mr.*, *Mrs.*, and *Ms.*; use last names alone after the first mention of a party's or witness's name.

56 Shun sexist language, but do it invisibly.

F. PUNCTUATING FOR CLARITY AND IMPACT

57 Use dashes—not parentheses—to highlight interruptive phrases.

58 Hyphenate your phrasal adjectives.

59 Otherwise, be stingy with hyphens—especially after prefixes.

60 Avoid gratuitous quotation marks and other typographic oddities.

61 Use bullets for lists.

62 Use the serial comma.

G. BECOMING PROFICIENT IN DESIGNING TEXT

63 In the argument section, use argumentative headings.

64 Format headings with an Arabic-numbered outline system in this sequence: boldface large; boldface; boldface italic; italic. Position all headings flush left.

65 Put a little more white space above a heading than below.

66 Use the power of your computer. Set sensible defaults, and use macros to make writing easier.

67 Indent your paragraphs only a quarter of an inch or so. Avoid the puzzlingly common double-indent.

68 Avoid all-caps and initial-caps text. But if you do use initial caps, don't capitalize any word shorter than five letters if it's an article, a preposition, or a conjunction.

69 Generally, spell out numbers one to ten, and use numerals for numbers 11 and above.

70 Use charts, diagrams, and other visual aids when you can.

H. SIDESTEPPING SOME COMMON QUIRKS

71 Never distort the facts or the law. Avoid hyperbole and personality attacks.

72 Counter the Rambo writer with the deflating opener.

73 Swear off the hence-the-title principle.

74 Describe actions, not filings, when possible. And refer to filings generically—not with titles of court papers.

75 Avoid voluminous quotations.

76 When you have a lengthy quotation, supply an informative lead-in. Assert first, and then let the quotation support your assertion.

77 If you can improve on the language of a statute, contract, or case, then paraphrase.

78 Abbreviate words as appropriate in case names. Know the other elements of correct citation form.

79 Shun *clearly* and its allies.

80 State the facts powerfully—in chronological order. Never give a witness-by-witness account.

81 Narrate chronological events using relative times—not a series of dates.

82 Present important ideas in lists.

83 Rid yourself of the common superstitions that will handicap you as a writer.

I. CAPITALIZING ON LITTLE-USED PERSUASIVE STRATEGIES

84 Show, don't tell.

85 If you're the appellant or petitioner, choose your grounds of complaint carefully. If you're the appellee or respondent opposing a party who hasn't chosen carefully, rephrase and consolidate the issues.

86 If you're the appellee or respondent, draft your brief before seeing your opponent's effort.

87 Say it well and say it emphatically. But reject the idea that you should first tell the reader what you're going to say, then say it, then remind the reader of what you just said.

88 Organize the argument section as a dialectic, so that you deal effectively with counterarguments.

89 Conclude powerfully. Avoid weak phrases such as "Wherefore, premises considered," "For the foregoing reasons," and "For the reasons stated."

90 Make clean, crisp photocopies of the one or two most important cases, highlight up to two inches of text, and bind the cases with your brief.

J. HITTING YOUR STRIDE AS A BRIEF-WRITER

91 Visualize the reader. Assume an intelligent, impatient reader who knows nothing about your case—assume neither an idiot nor a genius.

92 Watch out for potential miscues.

93 Never write a sentence that you couldn't easily speak.

94 Try to come in well under the relevant page limit.

95 In an appellate brief, always state the standard of review.

96 State squarely what you want the court to do.

97 If you've shown that the caselaw is on your side, don't stop there: show that the ruling you seek is fair and right under the circumstances.

98 Show concern for the court's valuable time—but with more than just lip service.

99 Use focus groups to evaluate draft briefs, with mock judicial readings. Do it professionally and objectively.

100 Remember the importance of ethos.