WRITING A PERSUASIVE APPELLATE BRIEF

Writing an appellate brief is a momentous task – this may be the last chance to convince a court of law of your client's case, or you are defending a favourable verdict in the court below after months, if not years, of hard work. Yet, it is not often appreciated just how specialised appellate advocacy is. This article focuses on the written dimension of appellate advocacy and attempts to articulate significant but frequently overlooked aspects unique to writing a persuasive appellate brief.

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I. Introduction

1 A by-product of the dramatisation of courtroom litigation in the media is that many believe that legal battles are won and lost in the courtroom. While this may be true to an extent, the influence of written advocacy on judicial decision-making should not to be underestimated. There are at least three reasons to believe that particularly in appeals it is the written submission that exercises a disproportionate effect on the outcome. First, appellate judges here usually read the written submissions before oral argument. A weak or unpersuasive brief creates doubts about one's case. A strong brief, on the other hand, may have the effect of pre-empting the concerns of the judges, making one's job at the hearing easier.[1] Second, time allocated to parties to present their oral arguments

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1 A study of the United States Supreme Court justices showed that the hostility of the judges' questioning during oral submissions tended to reflect their final vote: Sarah Levien Shullman, "The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow their Decisions During Oral Argument" 6 J App Prac & Process 271 (2004). This indicates that the judges carry tentative, if not strong views, to the hearing, and they are seldom persuaded to change their views after oral argument. This emphasises the importance of the written brief. The Singapore Court

on appeal is limited. Even if, as in Singapore, time constraints are more relaxed,[2] it is usually still not possible to argue each and every issue or sub-issue on appeal without having to seek leave from the bench for an extension of time.[3] This invariably means that on certain issues, even those that are very important, counsel will have to rely on their written briefs to "do the talking". Third, it is not uncommon for the Court of Appeal to reserve judgment. This diminishes the impact of the oral submission relative to the written brief on the final decision. As Justice Thurgood Marshall of the United States Supreme Court once remarked:

> Regardless of the panel you get, the questions you get, or the answers you give, I maintain it is the brief that does the final job, if for no other reason than that opinions are often written several weeks and sometimes months after the argument. The arguments, great as they may have been, are forgotten. In the seclusion of his chambers the judge has only his briefs and the law books. At that time your brief is your only spokesman.[4]

2 Even where decisions are not reserved or where they are arrived at fairly quickly in judicial conferences after oral submissions are made, well-written briefs would still be important in supplying the foundation for the grounds of decision.

3 Complaints by appellate judges about the quality of written submissions are not infrequent.[5] Beyond the obvious point that an

of Appeal has also been known, on occasion, not to call on a party to submit orally where it is obvious what the outcome should be. At least one reason must have been that the written brief was so persuasive (or the other side's so weak) that any questioning would have been unnecessary.

2 The United States Supreme Court, for instance, is well-known to be very strict for adhering to the time allocated, which is itself limited to half an hour for each side: Rule 28 of the Rules of the Supreme Court of the United States, available online at <http://www.law.cornell.edu/rules/supct/> (accessed 30 August 2007). In Singapore, parties write in to indicate the amount of time that they likely to require and the Court of Appeal decides the time limit based on these indications and its own estimation of the complexity of the appeal.

3 The present Court of Appeal bench is somewhat more accommodating towards such requests but unless the need for an extension of time is in part the result of extensive questioning from the bench, counsel should always strive to finish within the time allocated.

4 Thurgood Marshall, "The Federal Appeal", in *Counsel on Appeal* (Arthur Charpentier and Charles Breitel eds.) (McGraw-Hill, 1968) at 146, reproduced in Edward D Re and Joseph R Re, *Brief Writing and Oral Argument* (Oceana Publications, 8th ed, 1999) at 89.

5 See *eg*, E Barry Prettyman, "Some Observations Concerning Appellate Advocacy" 39 Va L Rev 285 (1953); David Lewis, "Common Knowledge about Appellate Briefs: True or False?" 6 J App Prac & Process 331 (2004).

effective brief is instrumental to one's success on appeal, there are other benefits to taking the time and effort to write well. The first is reputation: lawyers are recognised, first and foremost, by their work product.[6] In extreme cases, a judge may even criticise a lawyer in the judgment.[7] Second, and more selflessly, a well-researched and well-written brief actively contributes to the development of the law.[8] Where written submissions are duplicitous, meandering, incomprehensible, incomplete or inaccurate, the judge wastes time making sense of the submissions, or checking the accuracy of propositions relied on, and less time thinking about the issues at hand. But where points of law are argued with their implications fully analysed, explained and substantiated, the judge would have a solid basis to work from. There can be no doubt of the important role that counsel's submissions play in judicial decision-making, as evidenced by the numerous occasions on which judges have credited counsel for their arguments.[9]

4 Notwithstanding their importance, is it possible to impart the skills necessary to write a persuasive appellate brief? In other words, is an article such as this relevant or useful? The successful introduction of the National University of Singapore's Legal Writing Programme suggests that legal writing skills can (and should) be imparted.[10] As with all skills, practice, experience and perhaps talent will separate the good from the best. In the majority of cases, however, a competent, informative and

6 Choo Han Teck J puts it vividly in the following terms: "the advocate...is engaged in a long campaign...to establish his credibility before the courts, and prove that [he] does not talk more bravely than he lives." See "Overview from the Bench," soon to be published as a chapter (Academy Publishing, forthcoming) (on file).

7 For example, the Chief Justice John Roberts Jr of the US Supreme Court displayed dismay that a lawyer had attempted to "smuggle" new issues into the appeal after having been granted review: see, Tony Mauro, "Smuggler's Cove" *Legal Times* (15 January 2007), available at <http://www.law.com/jsp/dc/ PubArticleDC.jsp?id=1168423325627&Legal+Business+News>(accessed 12 February 2007).

8 This was one of the reasons that steps were taken to improve the quality of brief writing in the office of the Attorney General, Maryland: see Andrew H Baida, "Writing a Better Brief: The Civil Appeals Style Manual of the Office of the Maryland Attorney General" 3 J App Prac & Process 685 (2001). In Singapore, the Attorney-General's Chambers also has a specialist appellate team handling criminal appeals to the High Court and Court of Appeal.

9 See also, "Overview from the Bench" *supra* n 6 ("[Judicial decisions are] rarely due to the sole effort of the judge without contribution from counsel").

10 See generally, Eleanor Wong, "Designing a Legal Skills Curriculum for an Asian Law School: Lessons in Adaptation" (2006) 1 (1) AsJCL: Article 5. The new law school at the Singapore Management University will also introduce a legal research and writing module: see <http://www.law.smu.edu.sg/blaw/detailed_curriculum_and_courses.asp> (accessed 29 August 2007).

reasoned submission is all that is necessary or required. The aim of this article is therefore a humble one: it merely attempts to sensitise the reader to aspects of written appellate advocacy that may not always be apparent and to provide a framework within which one's practical experience may be studied.

5 In writing this article, two limitations were faced. First, it was not feasible, given space constraints, to exhaust in detail each and every point that could be said about writing a persuasive appellate brief. Instead, the intention is to focus on a number of fundamental, yet frequently overlooked, areas. As stated, the article is intended to provide a basis or framework for reflection; it is not a substitute for experience or training or further research. Second, many of the illustrations in this article are borrowed from American and occasionally English sources. This is due to an abundance of literature on appellate advocacy in these jurisdictions; but it also reflects the relative lack of such material in Singapore.[11] The general point to be made here is that while principles of good writing are largely universal, some adaptation may be necessary to take into account differences in how our appellate judges read submissions and view their roles.[12] This will be addressed at the appropriate junctures.

6 This article proceeds in the following way. First, the article introduces features unique to appellate advocacy in the context of our appellate courts and system. These are vital in orientating oneself to the specialised nature of appellate advocacy. Second, the article examines the process of writing: what are the important considerations when writing the different parts of the appellate brief, such as the statement of issues, the statement of facts, and the arguments? Finally, a list of short suggestions is made, which may assist in fine-tuning the brief so that it is tighter and more forceful.

11 For example, while written submissions to American courts are freely available on the Internet, that is not the case in Singapore. Similarly, appellate advocacy is highly specialised in the United States and has generated vast literature. This, again, is not the situation here. It is nevertheless important to encourage indigenous literature on legal skills because, as Eleanor Wong points out, legal skills are an integral part of legal education (and presumably practice) today: *supra* n 10. In this regard, there is a forthcoming local publication by Academy Publishing on advocacy skills written by local senior practitioners that will go a long way in furthering analysis of legal skills in the Singaporean context.

12 The need to "localise" the teaching of legal skills is well made in Eleanor Wong, *supra* n 10.

II. Orientation

7 An appellate brief is a form of communication. As with all forms of communication, its attraction and persuasiveness depends on ensuring that it speaks to its intended audience: the appellate judge. While almost elemental, it is probably the one reason why many appellate briefs are not always effective or persuasive.[13]

8 One way to be consciously aware of how appellate judges think is to reflect on how one would like the judgment to look like (or, if one were prescient, how the judgment *would* look like). Thinking about how the judgment might come out is useful not because we can dictate how a judgment will be written but because it trains one's mind on the concerns of the appellate court. If we cannot imagine our arguments being accepted and published in a judgment, it is not an argument that should be submitted. Put another way, when we understand how judges think and write their grounds of decision, we are better able to engage them more positively towards our point of view. As Professor Llewellyn says:

> [An advocate's] task is to persuade the court to his view of the law and of the facts of his case. What he is up against is therefore the court and *its* way of doing *its* work, *its* way of seeing the law and the facts of *any* case.[14] [emphasis in original]

9 To this end, the following discussion seeks to articulate the unique concerns of appellate courts and judges. It should be added that they are by no means exhaustive and, as alluded to previously, ought to be read in the light of one's own study of and experience with the courts and

13 The NUS Legal Writing Programme sensitises students to this in a systematic way by having them assume different roles in its moot court programme: see Eleanor Wong *supra* n 10. In a different context, the concept of "audience" is also explained in Helena Whalen Bridge, "Towards a Comparative Rhetoric of Argument: Using the Concept of "Audience" as a Means of Educating Students about Comparative Argument" 2006 1(1) AsJCL: Article 3.

14 Karl N Llewellyn, "The Modern Approach to Counselling and Advocacy" 46 Colum L Rev 167 (1946) at 179. Howard Basham makes the same point: "One essential trait that an appellate lawyer must possess is the ability to think about legal issues from the perspective of judges who serve on appellate courts." See "What do Appellate Attorneys Actually Do?" Law.com (7 August 2006), available at <http://www.law.com/jsp/article.jsp?id=1154595935941> (accessed 29 August 2007). Choo J also observes that there is an existing gap in how judges and counsel view their roles: *supra* n 6. I should add a general disclaimer that in citing the work of authors such as Prof Llewellyn, who was also an influential jurisprudential scholar, I do not intend to endorse their personal philosophical inclinations apart from what they have said about appellate advocacy specifically.

judges one appears before because these observations may assume greater or lesser relevance depending on the constitution of a particular appellate court.[15]

A. Function of appellate courts and judges

10 The function of appellate courts in the hierarchy of the judicial system differs in kind from that of trial courts. Primarily, appeals are not the forum to complain (only) about how one's client should have won, or how the result is simply unfair and harsh. One's client may feel hard done by the decision of the court below, but that is seldom a reason to bring an appeal, and much less a basis for an appellate court to reverse.[16] The place to win a lawsuit is in the trial court.[17] Appeals, on the other hand, are solely an occasion for the *correction of errors*.[18] Even so, not just any error will suffice to move an appellate court. For the most part, errors of law rather than fact are more likely to gain traction with an appellate court. This is only sensible because it is only the trial judge who has been able to assess the witnesses first-hand.[19] Indeed, even when an error of law can be

15 Again, Professor Llewellyn says it best in "From the Library: A Lecture on Appellate Advocacy" 7 J App Prac & Process 173 at pp 175-176:

> You begin before you get your case. Not only with a fundamental understanding of the language, but with an understanding of the appellate tribunals in your jurisdiction before whom you are about to argue…The job of an appellate argument is to win a particular case before a particular tribunal, for a particular client. And, since that is so, it begins with the tribunal. Long before the case comes into your office, you should have been studying that tribunal, indeed any appellate tribunal before whom you may have a case to argue. It is that tribunal's view of the facts which will control. It is that tribunal's view of the authorities which will control. It isn't yours. And there is nothing out there - as Holmes put it once, there is no "brooding omnipresence in the sky" - that's going to work for your client or for you.

16 Choo J correctly notes that a lawyer also performs for his client: *supra* n 6. But one's chances of success on appeal are not enhanced by focussing on how the client wants his case to be run. To that extent, it may be necessary to counsel clients as to why a different approach may prove more compelling. If this fails, there are subtle means of directing the court's attention to the parts it would be persuaded by and downplaying parts that it would not but had to be included for the client's sake. This could be achieved by highlighting the more persuasive elements in one's brief in the introductory paragraphs. This is certainly one of the functions of this article's suggestion to include an executive summary at the start of one's written submissions.

17 In the area of sentencing, for instance, it is often said that the fact that an appellate court may have arrived at a different result is not, in itself, sufficient reason to substitute its own judgment for that of the trial judge: see *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR 653 ("*Angliss*") at [14].

18 See E Barry Prettyman, *supra* n 5 at 286.

19 See *MK (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1995] 1 SLR 36 at 44; and more recently, *Clarke Quay Pte Ltd v Tan Hun Ling* [2006] 3 SLR 626 ("*Tan*

identified, an appellate court may not intervene if actual prejudice has not been caused.[20]

11 Consistent with their function, appellate courts have developed a set of principles governing the *standard of review*. Appellate courts do not, in general, hear an appeal *de novo* – the only exception perhaps being an appeal from a registrar to a judge in chambers.[21] This is particularly true in two areas: findings of primary facts such as the credibility of witnesses,[22] and decisions made pursuant to the discretion of the trial judge.[23] Other rules abound regulating the adduction of fresh evidence[24]

Hun Ling") at [40]. See also, *Leong Siew Chor v PP* [2006] SGCA 38 ("*Leong Siew Chor*") at [10]:

> The appeal court has the transcript of the evidence, but the trial judge has more. He has the facial expressions and body movements, the nuances, the timing, and the direct view of how the evidence was being adduced. All that is as important as the silence between musical notes – that silence is part of the music. Irrespective of how many statements had been recorded or how many of such statements were contradictory, or incriminating, the ultimate test is the performance of the accused person in the witness stand. If he can explain the contradictions and the incriminating parts, and convinces the trial judge to accept his oral testimony, then the statements would be inconsequential.

20 For example, in criminal revisions, the court will not intervene unless its failure to do so will invoke serious injustice: *Ng Kim Han v PP* [2001] 2 SLR 293; *Ang Poh Chuan v PP* [1996] 1 SLR 326.

21 *Herbs and Spices Trading Post v Deo Silver* [1990] SLR 1234.

22 In the civil context, the Court of Appeal in *Tan Hun Ling supra* n 19 observed that "an appellate court's deference to a trial judge's findings of fact is at its apogee whenever they are based on the credibility of witnesses." The same principle applies in the criminal context: *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR 45 at [39]-[43].

23 By definition, there is no right or wrong answer when a judge exercises his discretion. Therefore, there is no point in an appellate court substituting its own discretion for that of the trial judge. One "mistake" is simply substituted for another. As Steven Burton explains, "A judge who is under a legal duty has no discretion because only one outcome is lawful, whereas discretion is the situation where multiple outcomes are lawful." See *Judging in Good Faith* (Cambridge University Press, 1992) at p 43. Among the examples where wide discretion is conferred on trial judges, the division of matrimonial assets comes to mind as an obvious one: see, for example, *Tay Ivy v Tay Joyce* [1992] 1 SLR 893 at [12] where the High Court held that "in an appeal from the decision of a trial judge, the presumption is that the decision appealed against is right". This was followed in *Lee Bee Kim Jennifer v Lim Yew Khang Cecil* [2005] SGHC 209 at [14]. See also, *MZ v NA* [2006] SGHC 95 at [5]; and *Koh Bee Choo v Choo Chai Huah* [2007] SGCA 21 at [46]. In the latter case, Judith Prakash J added:

> To succeed on her appeal, it was not sufficient for the Wife merely to repeat her assertion that she was entitled to a greater share of the assets. In our judgment, the Wife was unable to point to any concrete evidence showing that the trial judge had erred in not giving her a larger share of the matrimonial assets (at [47]).

Appellate courts are also wary of intervening in a trial judge's assessment of damages: see, for instance, *Chow Khai Hong v Tham Sek Khow* [1992] 1 SLR 4; *Lim Hwee Meng v Citadel Investment* [1998] 3 SLR 601; *Peh Eng Leng v Pek Eng Leong* [1996]

and arguments[25] and even more basically, the application for leave to appeal itself in certain cases.[26]

12 Bearing these in mind is especially beneficial in three interrelated ways. First, it helps one decide *whether* to appeal. It is wrong to labour under the belief that there is "no harm" in appealing if one has lost at trial. Not only does it waste the court's precious resources to hear unmeritorious appeals, it is likely that, over time, one will gain a reputation for bringing frivolous appeals, which one will invariably lose.[27] In turn, this will have a detrimental impact on the prospects of success for one's future clients. As one judge remarks, "clients may come and go but lawyers who frequently appear before the courts should never mortgage their standing".

2 SLR 305 and *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 4 SLR 593. The latter case, however, also established that a judge in chambers hearing an appeal from a registrar's decision need not always be deferential to the decision of the registrar. Criminal sentencing is yet another sphere of the law where appellate courts seldom intervene in the decisions of the courts below: see *Angliss* (*supra* n 17), where, at [13], V K Rajah J (as he then was) observed that "because sentencing is very much a matter of discretion", there is "only a limited scope for appellate intervention apropos sentences meted out by a lower court". Citing *Tan Koon Swan v PP* [1986] SLR 86, Rajah J held that appellate interference in sentencing is justified only where (a) the sentencing judge has erred as to the proper factual basis for the sentence; (b) the sentencing judge has failed to appreciate the material placed before him; (c) the sentence imposed is wrong in principle and/or law; and (d) the sentence imposed is manifestly excessive. The same principle of deference applies to cost orders: *Teh Guek Ngor Engelin nee Tan v Chia Ee Lin Evelyn* [2005] 3 SLR 22 ("Costs orders were matters in the court's unfettered discretion. The appellate court would only interfere in the rare cases in which costs were awarded to a party who was not entitled to costs").

24 With the exception of interlocutory appeals (*Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427), fresh evidence must meet the test of *Ladd v Marshall* [1954] 1 WLR 1489 before it may be adduced. This does not apply to appeals from a registrar to a judge in chambers: *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233; *Standard Chartered Bank v Korea Exchange Bank* [2005] SGHC 71. However, fresh evidence in relation to the assessment of damages from a registrar to the High Court attracts another set of rules: *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392, which should be read with *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR 1133.

25 *A-G Pang Ah Yew* [1934] MLJ 184, adopting *The Tasmania* (1890) 15 App Cas 223 at 225; see also, *Cheong Kim Hock v Lin Securities* [1992] 2 SLR 349 at 357 and more recently, in *Ng Bok Eng Holdings v Wong Ser Wan* [2005] 4 SLR 561 at [34] and [35].

26 *Lee Kuan Yew v Tang Liang Hong* [1997] 3 SLR 489; *Essar Steel Ltd v Bayerische Landesbank* [2004] 3 SLR 25 ("Essar Steel"); and the more recent refinement in *IW v IX* [2006] 1 SLR 135 at [22]-[24]. The courts take it seriously when attempts to introduce new evidence are unwarranted: see, generally, *Tan Sia Boo v Ong Chiang Kwong* [2007] SGHC 131 (observing that unmeritorious applications spoke ill of the lawyer's professionalism and ethics).

27 All the more so when a judge expressly states as much: see, for instance, *Exxonmobil Asia Pacific Pte Ltd v Bombay Dyeing & Manufacturing Co Ltd* [2007] SGHC 137 at [1].

13 Second, appreciating that certain challenges attract stricter scrutiny allows one to discern *which* issues to dispute on appeal.[28] The selection of issues to submit on appeal is one of the most important exercises, and yet often underestimated. Nothing is achieved by distracting appellate judges from strong arguments by submitting on issues that are likely to receive only a lukewarm (even cold) reception.[29]

14 Third, familiarity with the standards of review assists in *how* one crafts the brief. Typically, a brief will recite a litany of things gone wrong without tying it to the relevant standard of review. For instance, a criminal defence lawyer may submit, on an appeal against sentence, that his client deserves a lighter sentence because he is a first-time offender, has a family to take care of and is genuinely repentant. Yet, these may not be relevant *unless* it can be demonstrated that the sentencing judge was not cognisant of these facts, placed too much emphasis on other factors or thought (wrongly) that these were considerations he could not take into account. A persuasive appellate brief will avoid these pitfalls and attempt to convince the appellate court that the facts presented meet and exceed the standard of review, justifying appellate intervention. Having said that, it is not often necessary to recite *ad nauseaum* cases reiterating the applicable standard of review (save, perhaps, for a very short reminder) because appellate judges would already be familiar with them. Of course, this suggestion would not apply where, in a particular context, the standard of review is not yet settled.

15 In similar vein, it should not be forgotten that appeals are, by definition, complaints against a lower court's decision. It is therefore insufficient, indeed inappropriate, to approach an appeal as if it were being heard for first time. What is crucial, but frequently missing, is a detailed and systematic analysis of the parts of the *lower court's judgment* that are being disputed, why they are being disputed and a step-by-step analysis of the reasons the appellant's position is superior to that adopted by the lower court.

16 Conversely, respondents should rely on and support the judgment of the lower court. Rather than raise new arguments, take

28 See generally, Laurel Currie Oats and Anne Enquist, *Just Briefs* (Aspen Publishers, 2003) especially at § 2.4.2. A similar remark was also made by Choo Han Teck J, *supra* n 6.

29 See below, section III(C)(3).

advantage of the fact that there is a natural presumption (if not a legal presumption in the form of the applicable standards of review) in favour of the correctness of a judgment at first instance. This means avoiding criticism of the first instance judgment even if the court held against your client's position on several issues, unless they are or become critical.[30] Very rarely, a court at first instance may hold in favour of your client but support that holding with weak or indefensible findings of fact or propositions of law. In such cases, it would still be advisable to support the judgment as far as it is possible, while supplementing the analysis with an alternative route to the same conclusion.

B. The nature of appellate courts and judges

17 Because there are no specialist appellate courts in Singapore, appellate judges here tend to be generalists.[31] Unlike trial judges who may sit in specialist courts[32] or who would usually have the time to acquaint and familiarise themselves with the complexities of a case (especially in lengthy trials), appellate judges do not have that luxury. They hear many cases across many different issues at one sitting.[33] As such, they are squeezed for time to get up to speed on what are frequently very daunting legal and factual issues.

18 This makes it incumbent on counsel to write in a way that the background facts, legal issues and implications of the appeal come to the fore quickly, easily and clearly.[34] Additionally, facts or references pertinent to understanding the context of the appeal and relevant to the determination of the appeal should not be assumed. This applies equally

30 It is not likely that if one is defending a favourable judgment that the points on which the trial judge disagreed were pivotal.

31 By way of contrast, the Court of Appeal in England has several divisions: commercial, family, criminal, admiralty, among others. The highest appellate court, the House of Lords, however, is not specialised.

32 Even at first instance, the High Court of Singapore does not have institutionalised specialist courts, although the Subordinate Court does (such as, for instance, the Community Court specialising in juvenile offenders or offenders with special needs; the Family Court, which specialises in matrimonial issues; and the recently-announced Bail court). The High Court does, however, have a system of allocating cases to certain judges who have expertise in specific areas (admiralty, arbitration and criminal law are the main areas).

33 The Singapore Court of Appeal sits once every three weeks, with the exception of court vacations in June and December. At each sitting, approximately ten to fifteen appeals are heard within the space of five working days, many of which are usually substantive in nature.

34 "Clarity is the hallmark of a good advocate": "Overview from the Bench", *supra* n 6.

when explaining legal principles – one should approach the task of explaining the applicable principles as though the judge, while intelligent, has no special expertise in the area. The goal is this: written submissions should be self-contained. If a judge only reads your submissions, he should be able to grasp the decision below,[35] the issues on appeal, the differences between your position and your opponent's, as well as the facts and the law necessary to resolve the dispute. The more the judge has to wander outside your brief, the more distracted he is and the less persuasive the brief becomes.

19 The corollary is that unnecessary detail and clutter should be avoided. It is usually in respect of this point where appellate briefs falter, especially if one was also counsel at the trial stage. In such cases, it is only natural that one's intimate knowledge of the facts may lead to paradoxical effects: the tendency to assume that others know what one knows, and the temptation to re-state and re-argue facts and issues submitted at trial, even though these may no longer be necessary to explicate or have fallen out of contention on appeal.

20 This is easily remediable. One method is to pass the written submission to a colleague who knows nothing about the trial or the issues and to find out whether that person was able to understand the brief without difficulty and without resort to extraneous material.[36] Appellate judges would be in precisely that situation. It may also be helpful for the brief writer to draft a note to his client explaining how the case will be argued and the difficulties that he anticipates. Not only does this fulfill a lawyer's obligation to keep his client updated,[37] it provides an opportunity for the lawyer to discipline himself to present his case in the simplest, most direct manner.

35 Although anecdotal evidence suggests that judges read the judgment of the court below before proceeding to the written briefs, this may not always be the case. Written submissions should, therefore, set out succinctly what the court below held – but only to the extent necessary to understand the appeal.

36 Time permitting, this has proven immeasurably beneficial to both my colleagues and I.

37 "[T]he advocate and solicitor is expected to be diligent and competent throughout the course of his professional relationship with his client": Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solcitor* (Academy Publishing, 2007) at para 14-014.

C. Judicial decision-making in appellate courts

21 Judgments constitute public acts in creating or policing (depending on one's jurisprudential outlook) rights and obligations between parties for which reasons are usually given.[38] The higher the court, the more public the judgment becomes because it binds the future decisions of the courts below (and, to a lesser extent, itself). It is in this context that it is often suggested that the nearer the appellate court to the apex, the less it tends to be concerned about the substantive justice of the case before it; instead, emphasis is placed on the implications of particular rules adopted or extended or renounced.

22 This generalisation may require some modification in the Singaporean context. This is because unlike larger jurisdictions where there are several tiers of appeal, and where appeals (particularly at the highest level) are granted only on issues of law,[39] parties here usually have, as of right and in practice,[40] only one tier of appeal. Appellate courts here must therefore balance the instinctive if not legal imperative to ensure substantive justice between the parties,[41] and the equally important task of divorcing themselves from the idiosyncratic peculiarities of the instant case in order to develop the law for future cases.[42] Nevertheless, appreciating that appellate courts care about the evolution of legal principles, one should, where relevant, highlight that a decision in one's client's favour would be advantageous to the advancement of our jurisprudence. This would be especially relevant where the questions presented in the instant case are likely to recur (such as, for example, an interpretation of a standard term contract). Conversely, where a decision in one's favour has the potential to set the law down a "slippery slope", it

38 Dennis Mahoney AO QC, "Judgment Writing: Form and Function" in "*A Matter of Judgment: Judicial Decision-making and Judgment Writing*" (Judicial Commission of New South Wales, 2003) at 104. See also, "Overview from the Bench", *supra* n 6 ("the opinions of judges are primarily concerned with meaning").

39 For example, leave is required to appeal to the House of Lords and only in cases involving a point of law of public importance is leave granted. Similarly, the Supreme Court of the United States must grant certiorari for an appeal to be heard and it is usually only if there are controversial issues of law or where the lower courts are divided (so-called "circuit splits" in American parlance) that certiorari is granted.

40 Decisions of the High Court can only be appealed once to the Court of Appeal, which is our highest court.

41 K C Vijayan, "Fewer Criminal Cases, but Appeals Are Up: Courts Ready To Look At Each Case's Unique Circumstances," *The Straits Times* (28 June 2007) (LexisNexis).

42 The maxim, hard cases make bad law, attests to the difficulties involved in striking this balance.

would be advisable to explain how the court may confine the effects of a favourable decision; and if it is true, emphasise how the case may be regarded as an exception rather than the norm.[43]

23 As part of their obligation to clarify the law for the lower courts, appellate courts occasionally have to choose whether, in the absence of direct (or divergent) authority, to adopt a "blockbuster"[44] or "minimalist"[45] approach to resolving the question presented. The

43 These were points also made by Michael Brindle QC in his talk at a Singapore Academy of Law's Continuing Legal Education lecture. See the report in Mohamed Faizal and Paul Tan, "Taking a Leaf: Appellate Advocacy" Inter Se (November-December 2006) at pp 20-21. Appellate courts are always aware that their decisions may have unintended implications. Thus, in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891, the Court of Appeal, in explaining why a hospital could not rely on its final bill when its estimate was vastly lower, took pains to stress the factual matrix of that particular case. Similarly, the High Court in a Magistrate's Appeal explained that judicial mercy would only be exercised in "exceptional circumstances", and with the "utmost care" and "circumspection": *Chng Yew Chin v PP* [2006] 4 SLR 124 ("*Chng Yew Chin*") at [50] and [52]. And again, the Court of Appeal in *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR 637, where it relaxed the requirements relating to the adduction of fresh evidence, highlighted (at [45]) that the case was "very exceptional".

44 The pro-abortion case of *Roe v Wade*, 410 US 113 (1973) is sometimes regarded as a decision that distorted the concept of privacy which had, until *Roe*, been used to deny state intervention in the private affairs of individuals within the confines of one's home. Critics posit that abortions are not purely private acts because they involve third parties (the doctor and nurse) in public spaces (such as clinics and hospitals). See, Patricia Boling, *Privacy and the Politics of Intimate Life* (Cornell University Press 1996) at pp 85-111. The recent Court of Appeal decision in *Spandeck Engineering (S) Pte Ltd v China Construction (South Pacific) Development Co Pte Ltd* [2005] SGCA 59 ("*Spandeck*") may be regarded as a "blockbuster" decision. Even though the court did not need to (because, as the trial judge pointed out, the same result would have been obtained applying either test), it resolved the ongoing debate between the two or three part test in tortious claims for pure economic loss and/or physical damage.

45 Even though *Brown v Board of Education* 347 US 483 (1954) attracted trenchant criticism and controversy, this was probably a more modest decision than *Roe*, and resulted from a culmination of smaller decisions granting blacks more and equal access to education. Judicial minimalism may also be seen in cases where the court expressly refuses to pronounce on issues not directly raised by the appeal: see, for example, *Pertamina Energy Trading Pte Ltd v Credit Suisse* [2006] 4 SLR 273 where the court declined to decide on the legality of conclusive evidence clauses if invoked against a non-corporate consumer. Or take *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 where the Court of Appeal refrained from adopting a wider rule that would have introduced contributory negligence to contract, preferring instead to find a concurrent tortious duty by implying a term of reasonableness into the contract. Along similar lines is *Tan Hun Ling*, *supra* n 19. See also, *Lee Hsien Loong v Review Publishing Company Ltd* [2007] SGHC at [123], where the court ruled on the validity of service out of jurisdiction on the narrow ground of whether the plaintiffs had discharged their burden of proof.

approach an appellate judge adopts depends ultimately on the personal judicial philosophy of that judge, but it may be useful to appreciate the basic concerns of those on either side:

> Those who favour a theoretically ambitious judiciary often emphasize the need to ensure that individual rights are respected and that our society is just. Why – it is asked – should people whose rights are being violated have to wait? On what account should judges allow injustice to continue? Isn't this a form of weakness or cowardice? It would be harder to answer these questions if judges were in a position to make accurate decisions about what justice requires. But if judges make mistakes, and if error costs will be higher if judges favour width and depth, minimalism may be justified as a way of increasing rather than decreasing justice, and of increasing rather than decreasing the recognition of rights, properly understood.[46]

24 The advantage of judicial minimalism is that it allows the court to test the underlying principle against specific factual scenarios – and in this way avoid having to back-peddle in future cases if it discovers that the principle is being applied in a manner that was not intended. On the other hand, appellate courts do bear the responsibility of providing guidance to lower courts; and to this end, it may not always be beneficial to decide cases on narrow grounds, especially where lower courts are in conflict.

25 Only an assiduous study of the court's (or judge's) recent decisions will reveal the approach that an appellate court or judge prefers.[47] This knowledge is, in turn, useful in deciding how broadly or

46 Cass Sunstein, *One Case at a Time* (Harvard University Press, 1999) at p 49.

47 Most (Singapore) judges tend to be minimalist more than blockbuster in their approach, preferring instead to wait for a suitable case (see *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR 884, where the Court of Appeal refrained from overruling a prior decision until the issue was raised directly by the facts). As the court in *Leong Siew Chor*, *supra* n 19, observed at [9]:

> Counsel was inviting this court to make an important ruling on a constitutional point without sufficient material in law and evidence to sustain any cogent question of law... It is too thinly supported on the facts; this is not the right case for the points of law alluded to. Perhaps counsel sensed that a major legal point needed to be expounded by this court, but unless the issues arise clearly from the evidence, and are fully argued, this court would not engage in issues of purely academic interest – that is not the function of this, or any court.

In the Court of Appeal decision of *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] SGCA 36 ("*Sunny Metal*"), the court did not wade into applicable test for duty of care. At [43], the court said: "for the purposes of the present appeal, we see no need to determinatively resolve the test to be applied. In our view, it

narrowly to frame the questions on appeal, an issue that this article addresses below.

26 Regardless of a court's judicial philosophy, it is always grateful when counsel can offer a clear, narrow path to resolving the dispute in one's favour.[48] If a court is ambitious, it can always make decisions on principles broader than one has advocated.[49] On the other hand, if a court is more modest, it may resist finding in one's favour if it thinks that there is no way to do so without an extensive excursion.[50]

suffices to note that the crux of any imposition of a duty of care must be premised on there being sufficient proximity between the parties. Whether or not there are other factors to be considered in addition to the requirement of proximity is an issue which we will address on a more appropriate occasion." Instead, our courts occasionally rely on "observations" that may be later applied in more relevant factual paradigms. See, for example, the observation by Andrew Phang Boon Leong J (as he then was) on the possibly "outmoded" concept of consideration: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 at [28] and [29]. Judicial minimalism should not be confused with sparse judgment. On the contrary, the Court of Appeal has, in recent terms, issued comprehensive, leading decisions on issues raised by the facts.

48 This is what Eleanor Wong describes as the "middle position" between conflicting authorities: *supra* n 10. In an article, United States Solicitor-General Paul Clement was praised in the following terms:

> [Clement] has a knack for offering the Court a clear, if narrow, path toward seeing a case his way. "I am so glad he is solicitor general, because he makes my job easier," Justice Antonin Scalia said during a Georgetown Supreme Court Institute tribute for Clement in April.

See Tony Mauro, "Paul Clement Stays Cool in High Court Hot Seat" available at <http: // www.law.com/jsp/ article. jsp?id= 1167991332225> (accessed 9 February 2007).

49 The Court of Appeal has the power to decide on matters not raised by counsel: O 57 r 13(4) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

50 An excellent illustration of this principle is found in the *amicus* brief written by professors of the Harvard Law School against the Solomon Amendment, which threatened the withdrawal of federal funding from universities which departments denied military recruiters access to job fairs. Usually, it would be the law schools that would deny such access because of the discriminatory practices of the military towards homosexuals. Instead of taking the wider, more controversial path of arguing the Amendment's constitutionality, the brief adopted the position that the law schools were in fact in compliance with the literal reading of the Amendment itself. See Walter Dellinger *et al*., Brief of Professors William Alford *et al*., *Rumsfeld v. Forum for Academic & Institutional Rights*, 2005 U.S S Ct. Briefs Lexis 630 (21 September 2005). The brief won the Greenbag Almanac and Reader 2006 of Good Legal Writing from the Past Year under the Briefs and Motions category. The full list of exemplars of good writing may be found at <http://www.greenbag.org> (accessed 11 March 2007) and is worth examining. It may also be fruitful to refer to the summaries of argument found in reported English cases. Although these are summaries of oral arguments, the basic principles of framing issues are common to written submissions.

27 This point is especially true in the context of Singapore's Court of Appeal, where decisions are, in almost all cases, made consensually. In other words, the Court of Appeal bench strives to arrive at decisions unanimously. Concurring or separate opinions are unheard of and dissents very rare.[51] Hence, unlike in jurisdictions where appellate courts are frequently splintered or divided strongly along ideological or philosophical lines, and where counsel often attempt to tailor their submissions to the "swing judges", such a strategy would not work here. Counsel in Singapore have a harder task of appealing to the entire appellate bench. As such, even if it may appear likely that the court will accept a broad ground to resolve an appeal, it is recommended that counsel propose a narrower alternative, where one exists.

D. Use of precedent in appellate courts

28 Appellate courts – and in particular, the highest appellate courts – are not bound by prior case law, including previous decisions of its own.[52] Much less are they bound by the decisions of foreign courts. Although common, citing a string of English cases (sometimes in addition to or in substitution of more persuasive local decisions[53]) expecting that the Court of Appeal will accept them without question is futile.

29 This is not to say that one should never cite these cases to an appellate court; only that they should not be treated as though they were *mandatory authority*. Instead, cases should be employed for their reasoning and to demonstrate how the legal propositions relied on may be sensibly applied to factual scenarios similar to the one on appeal. This is because judges find it easier to succumb to logic than to a name.[54]

51 Notable exceptions include: *PP v Hla Win* [1995] 2 SLR 424; *The "Sunrise Crane"* [2004] 4 SLR 715; *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR 661; *Tan King Hiang v United Engineers (Singapore) Pte Ltd* [2005] 3 SLR 529.

52 One commentator states correctly, "the lower you are in the court system, the more you should rely on precedent to make the argument." See, Steven D Stark, *Writing to Win: The Legal Writer* (Doubleday, 2000) at p 153.

53 Janice Heng, "Cite local court rulings first: CJ urges lawyers; other cases can be used for comparison or criticism," *The Business Times* (19 May 2007) (LexisNexis).

54 Lai Kew Chai J opined that:

> If the decisions of foreign jurisdictions are to be rejected (including the English position), it must be because of their incompatibility with our own legislation or their unsuitability to our local circumstances or their inherent insensibility

Whether or not an appellate court ultimately accepts a proposition laid down in an English or Australian or Canadian case depends not on its genetic heritage but on whether it is persuasive on principle.[55] This, in turn, requires counsel to explain why it would be advantageous to adopt that particular rule in Singapore.

E. The promotion of Singapore law as the region's lex mercatoria

30 It is no secret that there is presently a drive to promote the use of Singapore law in international contracts and transactions, especially in the region.[56] But contracting parties will only do so if our jurisprudence is sophisticated, progressive and to an extent in accord with general global trends and norms.[57] This raises two implications for counsel.

31 First, recent judgments suggest that our Court of Appeal is keenly aware of the need to take into account the jurisprudence of major Commonwealth countries and is now regularly turning to jurisdictions such as Australia, New Zealand, Canada and even the United States. Therefore, where the position in Singapore on a specific legal issue is not settled, or where the instant case requires that the contexts in which a certain proposition has been applied in local cases be extended, it would assist the courts to highlight relevant decisions of major common law jurisdictions.[58] But, as stated earlier, where decisions of local courts are sufficient to dispose of an argument, those should always be counsel's first port of call.

32 Second, the Court of Appeal is increasingly vigorous in its examination of the legal principles it adopts. One consequence of this is

or unsoundness". *The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd* [2005] 4 SLR 816 at [14].

55 Cases where the Singapore courts have departed from English jurisprudence include: *Cheong Wai Keong v Public Prosecutor* [2005] 3 SLR 570; *Mercator & Noordstar NV v Velstra Pte Ltd* [2003] 4 SLR 667; *Lim Weng Kee v Public Prosecutor* [2002] 4 SLR 327; *APL Co Pte Ltd v Voss Peer* [2002] 4 SLR 481 (which has now been accepted as correct by the House of Lord); and to some extent, the same is true of *Spandeck, supra* n 44.

56 This was announced by Chan Sek Keong CJ at his welcome reference on 22 April 2006, available at <http://www.supcourt.gov.sg>(accessed 30 August 2007) at [19].

57 "The quality of our laws, especially our commercial laws, written and unwritten, and the existence of an independent and competent legal profession are other factors that have contributed to the inflow of foreign investments to Singapore...The Judiciary will play its part in developing the principles of commercial law": *id,* at [19] and [21].

58 In recent cases, even the position in civil law principles was referred to: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86 ("*Fairmount*") at [42]; *Sunny Metal*, *supra* n 47.

that the distinction between case law as "primary authority" and academic work as well as other editorials as "secondary material" is fast becoming illusive. The idea that secondary material should be cited with "with caution"[59] no longer holds true in Singapore. This is for good reason. Academic literature brings to the court's attention areas that require clarification and the potential conceptual and practical ramifications of endorsing certain rules and principles. As Chan Sek Keong CJ remarked recently, the courts are examining and adopting academic literature on difficult points of law.[60]

F. Summary

33 Writing an appellate brief requires a close study of the way in which the appellate court works. To this end, this section of the article has been an attempt to "orientate" counsel to the differences between a trial brief and an appellate brief, and to the unique challenges facing counsel in writing for the Singapore Court of Appeal. These include the generalist nature of the court, the difficult balance it has to strike between ensuring substantive justice and the proper development of the law, the consensual nature of its decision-making process, its views on the use of precedent and its ambition to promote Singapore law as the preferred choice of law in regional commercial transactions. In cases raising important or novel issues, our appellate courts are demanding more of counsel and we should respond if our briefs are to be persuasive.

III. The process of writing

34 The foregoing discussion focused on appreciating the way in which appellate courts in Singapore work, which in turn, influences what they demand of appellate briefs. The process of drafting an appellate brief itself involves consideration of several key elements, which the article now seeks to articulate.

59 Low Siew Ling, "Citing Legal Authorities in Court" (2004) 16 SAcLJ 168. This is not to suggest that academic literature (as with other authorities) should be cited with abandon. On this point, the gist of the author's article – that counsel should exercise judgment on the authorities cited – is still applicable.

60 Melissa Sim, "Write On Local Law, CJ Tells Academics" *The Sunday Times* (2 September, 2007) (LexisNexis). Even magazine commentaries in *The Economist* are cited: see *PP v Law Aik Meng* [2007] 2 SLR 814 at [84].

35 Before that, it may perhaps be useful to begin with a remarkable illustration of the importance of persuasive writing. The case is *United States v Ramirez Lopez*[61] and it begins with the arrest of Mr Lopez, together with fifteen others, who were crossing the border through the mountains in eastern San Diego in early March 2000. Two implicated Mr Lopez as a smuggler responsible for their crossing the border. The others told the police that he was not the leader of their group. Mr Lopez himself denied being a smuggler. Still, he was eventually charged for smuggling. His arraignment, however, was delayed for two days while the police continued to interrogate him and the other members of the group. Nine of the members (all of whom later exculpated Mr Lopez) were returned to Mexico. Of the five remaining, three exculpated him and two incriminated him. At trial, the trial court did not admit the exculpatory statements of the witnesses who had been sent back to Mexico, on the ground that they were hearsay. Mr Lopez was convicted and sentenced to seventy eight months' imprisonment.

36 On appeal, the majority upheld the trial court's decision in respect of whether the exculpatory statements should have been admitted. Those familiar with hearsay rules will know that the majority's decision could not be faulted technically.

37 Judge Alex Kozinski, regarded as one of the best appellate judges and an incredible writer, knew that the majority's legal reasoning was unassailable. What did he do? He reached for justice and commonsense, and conveyed his argument by setting up an imaginary dialogue between Mr Lopez and his lawyer. An abridged excerpt follows:

> Ramirez-Lopez: [T]here's one thing that still confuses me. …You see, the government took all those great notes to help me, just so we'd know what all those guys said.
>
> Lawyer: Right, I saw them and they were very good notes. Clear, specific, detailed. Good grammar and syntax. All told, I'd say those were some great notes.
>
> Ramirez-Lopez: And 12 of those guys all said I wasn't the guide.
>
> Lawyer: Those notes were hearsay, and in this country we don't admit hearsay.

61 315 F 3d 1143, opinion withdrawn and appeal dismissed, 327 F 3d 829 (9th Cir 2003).

> Ramirez-Lopez: How come?
>
> Lawyer: The guys writing down what the witnesses said could have made a mistake.
>
> Ramirez-Lopez: You mean, like maybe one of those 12 guys said, "Juan was the guide," and the guy from Immigration made a mistake and wrote down, "Juan was not the guide"?
>
> Lawyer: Exactly.

38 At the end of this dialogue, we are all but convinced that Mr Lopez should have been acquitted. Indeed, not only did Judge Kozinski's dissent achieve its intended purpose of showing that a relentless adherence to judicial rules and case law may end up sacrificing nobler principles, the government, in an unprecedented move, ordered Mr Lopez's immediate release and return to Mexico after the judgment was handed down.[62]

A. Language and style

39 The illustration in the preceding paragraphs is a useful starting point to discuss style and language in writing a persuasive brief. Judge Kozinski's analysis is arresting because of *how* it was written. Style is integrated with substance, and has become part of the message itself. The absence of irony in the imaginary dialogue exposes how ordinarily fair legal principles may be applied extraordinarily unfairly. Two caveats, however, are appropriate at this juncture. First, this illustration, and a few below, are from judicial opinions. They have been reproduced because they serve as (dramatic) examples of the larger point being canvassed, which is that style is a component of persuasion. But it should be acknowledged that while judicial opinions can afford to be less restrained in their tone or register, submissions to court should always remain respectful. Another caveat is that while Americans (and possibly the English) would not treat strongly-worded criticism as skin off their noses, the same may not be true of all Singaporeans or Singaporean judges. They may view unnecessarily harsh criticism (even when directed against

62 See further, Gregory S Fisher, "The Greatest Dissent? A Brief Essay on Language, Law, Rule and Reason" The Federal Lawyer (October 2003) at p 30; David Houston, "The Power of Judge Kozinski's Pen", *L A Daily Journal*, 18 April 2003, at p 1.

judgments of the court below[63]) as demonstrative of a lack of professionalism or decorum.

40 These caveats do not detract from the point being urged: style and language, when coupled with substance, persuades.[64] Anecdotal evidence suggests that many written submissions today have ditched the bad habit of invoking unnecessary legalese.[65] Nonetheless, it is not uncommon that briefs, whether by choice or apathy, remain somewhat uninspired affairs. This is regrettable because a brief that is able to capture attention is also likely to be memorable and hence persuasive. Indeed, it should come as no surprise that legal philosophers often liken law to literature.[66]

41 An illuminating master of the language is none other than Lord Denning himself. Explaining legal concepts in his characteristic Attic style, he wrote:[67]

> To-day we go into a room described as estoppel *per rem judicatam*: in which there is an alcove which has sometimes passed unnoticed. It is

63 At certain points in the Court of Appeal's history, the third seat of the court would be rotated among the High Court judges. In such a system, it is highly unlikely that the permanent members of the Court of Appeal (*ie*, the Chief Justice and the Judges of Appeal) would take too kindly to unreasonable criticism of the lower court's decisions because they would have to work with the authors of those decisions in subsequent cases. Although the Court of Appeal presently has three permanent members, rotations do occur occasionally. In any event, being *professionals*, it should *never* be considered acceptable to express disagreement (even with other lawyers) in a personal, condescending or destructive manner. See Jeffrey Pinsler, *supra* n 37 at para 20-004 ("Advocates and solicitors are expected to be courteous to each other because this is the standard of behaviour expected of such members of an honourable profession who respect each other as such"). In relation to the court, advocates and solicitors must maintain an attitude of "unqualified respect"; *id*, at para 07-001.

64 See also, "Overview from the Bench", *supra* n 6.

65 On the vices of inconveniently lengthy and difficult sentences, see "James C Raymond, "Writing to be Read or Why Can't Lawyers Write like Katherine Mansfield?" presented at the New Zealand Law Conference: The Law and Politics, Conference Pap 1993, vol 2, pp 210-216; and reprinted in (1997) 3 The Judicial Review 153-161. The article is available at <http://www.benchandbarinternational.com/writing_to_be_read.htm> (accessed 21 March 2007).

66 Choo Han Teck J, "Judgment Writing" speech delivered to the Subordinate Courts on 26 August 2006 (on file); Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) at 146; Kenji Yoshino, "The City and the Poet" 114 Yale L J 1835 (2005).

67 *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283 at 322 (emphasis in original).

> called issue estoppel. In this room there are several chairs to sit on. One is called the doctrine of privity. The other is the doctrine of mutuality. The two look all right but they are both a bit rickety.
>
> The doctrine of *privity* says that the only persons who can take advantage of the estoppel or be bound by it are the two parties to the previous proceedings themselves or their privies. No third person can take advantage of it or be bound by it; because he was no party to the previous proceedings. Those proceedings, so far as the third person is concerned, were *res inter alios acta*. The doctrine of *mutuality* says that, in order that there should be an estoppel, it must be such that both of the two parties and their privies must be bound by the estoppel, whichever way it goes. Win or lose, each party must be bound. It is said that, in any contest, that is the only fair thing.
>
> Now although those two chairs look all right to start with, you will soon find that they are quite unsafe…

42 Another exponent of persuasive legal writing is Cardozo, who before he became a judge on the US Supreme Court, was a respected advocate. It is worth reproducing Professor Llewellyn's blow-by-blow tutorial of how Cardozo approached the facts in *Wood v Lucy, Lady Duff-Gordon*:[68]

> "The defendant styles herself"-now watch the way in which she is subtly made into a nasty person-"The defendant styles herself" 'a creator of fashions.' Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her turn this vogue into money.
>
> Does this sound-this is an interposition-does this sound like a business deal? Does a business deal sound like a legally enforceable view? Nothing is being said about that. But watch it grow on you. And if I hadn't stopped to tell you about it, it would have grown until you just took it, without a word.
>
> "He was to have the exclusive right"-watch this language-"exclusive right"-what wonderful legal language, to make it legally enforceable – "He was to have the exclusive right" ... to place her own designs on sale, or to license others to market them. In return, she was to have one-half of 'all profits and revenues' derived from any contracts he might make.

68 222 N Y 88, 118 N E 214 (1917).

> The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of ninety days.
>
> My heavens, isn't this legal?
>
> The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.
>
> The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs.
>
> Now, is there any way to bring that case out, except one? Isn't it obvious that we are going to imply a promise on the part of the plaintiff which will satisfy the requirement of consideration and the decency of the situation?[69]

43 These illustrations are memorable and persuasive because they create images that correspond with our ordinary experiences. The essence of the argument is conveyed in a way that is immediately accessible, familiar and natural. The reader can *make sense* of the argument. Singapore courts also employ this technique through, for example, the use of metaphor. In the context of an application for amendment of pleadings, Choo J wrote:

> If a gladiator, having arrived at the coliseum with just a sword, and finding his opponent more heavily armed, asks for leave to increase his with a shield, or an extra blade, should his request be allowed? Should he be told that he was a professional, and ought therefore, stand by his choice of weapons; and if his predicament was of his own making, that is, in forgetfulness, ought he be assisted? To arm him better might have made it a more even fight, but would that have been fair to the other warrior who had come prepared? On the other hand, should we be so absorbed in the examination of the gladiators' weapons that we forget

69 Karl N Llewellyn, *supra* n 15 at 187. One should compare this with the less engaging version found in the same article at 187-188.

> the fight, or misdirect ourselves as to the issue – fairly armed or fairly fought?[70]

44 In extra-judicial comment, Choo J urges as follows:

> [T]hree aspects of rhetoric that Aristotle propounded ought, perhaps, be given more thought by lawyers:
>
> > Of the modes of persuasion furnished by the spoken word there are three kinds. The first depends on the character of the speaker; the second on putting the audience into a certain frame of mind; the third on proof, or apparent proof, provided by the words of the speech itself.[71]

45 Substitute "spoken word" for "written word" and the same message applies to written advocacy.

46 Style is personal to each writer. It cannot be dictated nor should it be imitated. But it is something we should pay attention to – whether we write in an Asiatic or Attic style, whether we prefer longer or shorter sentences, whether we eschew adverbs and adjectives.

47 There is only one possible misconception that should be addressed. A stylish writer is not necessarily a verbose one. Style is not simply a matter of the gratuitous use of adjectives. In fact, these strategies are not only likely to be distracting, they are likely to lead to inaccuracies in description. Take, for example, a lawyer who alleges that a particular witness is "vile, untrustworthy, evil, incredible, deceitful and devious." Does the lawyer mean to submit that the witness's *testimony* is unreliable, or is he implying that her *character* is such-and-such, or both? Is trustworthy the same as evil? Is incredible the same as vile? The reader is none the wiser. Or take an even more common illustration: the lawyer who accuses the other side's submission as being "baseless, without evidence, illogical, frivolous, disingenuous, contrived, misguided,

70 *Wishing Star Ltd v Jurong Town Corp* [2006] SGHC 82 at [4]. See also, *Cheah Geok Tuan v Lie Khin Sin* [2006] 1 SLR 340, where, in deciding whether an agreement was for a loan or for a sale and purchase, Choo J asked, at [1], "When is an elephant a bird?" and later, at [23], he answers it saying, "An elephant is a bird when it has feathers and can fly". This judgment spawned an article by Hans Tjio also entitled, "When is an elephant a bird?" [2006] 18 SAcLJ 473. In a Magistrate's Appeal, V K Rajah JA analogised credit card fraud to the "slow drip of a subtle but potent poison": *PP v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR 334 at [88].

71 "Overview from the Bench" *supra* n 6 (citation omitted).

misconceived and an abuse of process." Again, courtesy aside, each description carries their own definitions and nuances and it is not likely that any lawyer's submission is all of these at the same time. The moral is this: style should not be a substitute of substance.

B. Using the first pages

48 The impression that a judge forms of one's case starts with the first line on the first page. As it has been said, the first page (or pages) is "prime real estate" and a well-constructed submission should say it all in those pages so as to set the foundation for the rest of the brief.[72] On reflection, this is only commonsensical: our attention frequently wanes as the pages go on.

49 Most written submissions, however, begin with some combination of a statement of the case or issues, a statement of facts and the procedural history. While these are necessary ingredients of any written brief,[73] a better use of "prime real estate" may be to set out in the briefest of terms a summation of one's position on appeal. This is especially advisable for appellate briefs, because as explained above, appellate judges have to study many briefs within a very short amount of time.[74] Effective summaries allow the judge to assess whether there are any merits to the appeal and to home in on parts of the brief that he thinks are important to the disposal of the appeal.[75] As one judge puts it in vivid terms, an executive summary would provide a "helicopter view" of the dispute so that "if one gets lost in the jungle, it is easier to extricate oneself".[76]

72 Said in the context of judicial opinions but equally relevant to written submissions: see The Honourable Justice Linda Dessau and His Honour Judge Tom Wodak, "Seven Steps to Clearer Judgment Writing" in *A Matter of Judgment: Judicial Decision-making and Judgment Writing*, *supra* n 38 at 119.

73 Order 57 r 9A(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

74 Especially in longer submissions, an executive summary may be usefully accompanied by an index of arguments, or a table of contents, aggregating the heads of argument and their page references. This also allows the reader, with a quick scan, to appreciate the general structure of one's arguments and allows him or her the opportunity to zoom in on specific arguments if they choose to.

75 Many appellate briefs do begin with some form of an introduction but this is usually not sufficient for the judge to appreciate the context of the entire case as well as the position being advocated.

76 One judge recounted how, when he was counsel, he pasted a picture of the damage caused by the opposing party instead of starting out with the usual submissions. This effective use of prime real estate ensured that the case settled quickly.

50 If the purpose of an executive summary is to introduce the case, it should contain information on: (a) the parties; (b) their relationship; (c) the dispute before the court and/or the questions presented; (d) the relief prayed for; (e) how the lower court ruled and (f) the central reasons why the lower court's judgment should be affirmed or reversed. The precise details to include must depend on the nature of the case. For instance, while background details are seldom necessary at this stage, they may be important in a case involving the division of matrimonial assets because the ages and occupations of the husband and wife, the length of their marriage, the number of children they had and who has custody and/or care and control of them are all relevant considerations.

51 Persuasive summaries should, however, go beyond the simple aggregation of arguments. While informative, they will merely repeat and take the punch out of the main submissions. Instead, the summation should highlight and string together the most salient points so that the judge is able to see the interrelationship of one point to another, and then to the entire submission.[77] In this way, the executive summary adds value by providing an overarching framework within which individual points may be viewed. If, for example, there is a common thread underlying the different arguments, it should be highlighted in the summary. This ensures that the executive summary will not only provide a plenary view of one's position, it will interest the reader in studying the rest of the brief and analysing the individual arguments made.

C. Statement of the case/issue

(1) Organising the appellate brief

52 It is generally important to state as early as possible – even in the executive summary – what the issues on appeal are. In some jurisdictions, the relevant rules even provide that these should be set out ahead of any other portion[78] or at least in the earlier parts of the submission.[79] It is not difficult to appreciate why this should be so. A clear statement of the issues is always useful in framing a judge's mind so that he or she knows exactly what to look out for in the statement of facts. It also helps to focus the writer's own mind on the relevant issues, and provides a reference

77 Edward D Re and Joseph R Re, *supra* n 4 at 112-114.
78 United States District of Columbia Circuit, Rules 17(b)(1); Third Circuit, Rule 24(2)(b); Sixth Circuit, Rule 16(2)(a).
79 United States Supreme Court Rules 15(1)(c)(1), 23(1)(c), 40(1)(d)(1).

point to check whether the submissions are veering off tangent. Judges, too, find it helpful to articulate the issues that their judgments will address at the outset. In *Angliss*,[80] Rajah J wrote:

> Is there a distinct and autonomous sentencing principle known as "public interest"? What are the procedural formalities that must be observed before a court takes into account misconduct that extends beyond the immediate charges that confront an accused? What is the true rationale that courts in Singapore should adopt in assessing whether an appropriate sentencing discount ought to be accorded to an accused's plea of guilt? In what circumstances can the maximum prescribed sentence be meted out? These important sentencing considerations and principles are considered and explained in these grounds of decision.

53 This is not an immutable principle. Our rules of court do not prescribe the order in which various sections of the appellate brief should proceed.[81] This flexibility is occasionally useful. While, as stated, the statement of issues should usually precede other sections of the brief, there are circumstances where the questions presented are incomprehensible without a prior narration of the facts.[82] Indeed, in cases involving complex statutory interpretation – tax cases come to mind – it may even be beneficial to present a short tutorial on the applicable statutory scheme since it might otherwise be impossible to grasp the import of the questions presented.

(2) Framing of issues

54 Regardless whether the statement of issues comes before the statement of facts, or *vice versa*, a persuasively written statement of the issues is crucial; and particularly in applications for leave to appeal where

80 *Supra* n 17 at [1]; see also, *Fairmount, supra* n 58 at [4].

81 Order 57 r 9A only states that the submissions should explain (i) the circumstances out of which the appeal arises; (ii) the issues arising in the appeal; (iii) the contentions to be urged by the party filing it and the authorities in support thereof; and (iv) the reasons for or against the appeal, as the case may be.

82 Take, for example, the facts in *Econ Piling Pte Ltd v NCC International AB* [2007] SGHC 17, which involved the interpretation of seemingly inconsistent arbitration clauses. In such an event, counsel may find that it would follow more logically to describe these clauses and the background facts before proceeding to address the legal issues. The court did as well.

the question(s) presented critical to the determination of whether the court will even visit the merits of the case.[83]

55 Different writers approach the statement of issues differently. One common formulation is to use a sentence beginning with "whether" followed by the issue.[84] For instance: "Whether the accused was entitled to legal counsel within ten days from his arrest". Another formulation sometimes seen, and particularly appropriate in cases where the factual matrix is highly complex, is to state the salient facts followed by: "The question presented is whether, in these circumstances, the second proceeding is *res judicata*."[85] Occasionally, one's opponent may have been confused or imprecise in their formulation of the issues. In such cases, it would also be necessary to explain that one's statement of the issues is more accurate and relevant; or to highlight precisely what grounds are agreed on, and where you part company with the other side.

56 Beyond this basic point, some authors advocate constructing the statement of issues in an "appealing" manner, which implies phrasing it so to "impel the reader to answer the question posed in the way the writer wants him to answer it."[86] There is merit in such a view. Certainly, one should not write the statement such that the natural answer favours the opposite party! Examples abound of how good appellate lawyers are able to frame their cases in a compelling way.[87] Perhaps the most vivid illustration is given by Professor Llewellyn, who derived the example from the most unlikely source: the Bible. The case in point is this:

> The case was this: There was woman, caught in adultery, and she was dragged in. And she was put into the center of the circle. And the accusers said, "taken in the very act" - that takes care of the facts, doesn't it? And they said, "Moses in the law said" - in the law (and they were quite right) - "such shall be stoned."

83 It must usually be shown that a "serious and important issue of law" was involved: *Abdul Rahman bin Shariff v Abdul Salim bin Syed* [1999] 4 SLR 716 at [31]. However, in *Essar Steel* (*supra* [26]), Kan Ting Chiu J suggested that leave to appeal may be granted on errors of *fact*: at [25] to [28].

84 Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* (The Lawbook Exchange Ltd and New York: William S Hein and Company, 2001) at 73.

85 *Ibid*.

86 *Id*, at 72.

87 S*upra* n 84 at 72-79; Laurel Currie Oats and Anne Enquist, *supra* n 28 at § 2.11; Edward D Re and Joseph R Re, *supra* n 4 at 99-104.

> The report says that at this point Jesus stooped and wrote upon the ground, and John adds a very interesting additional observation, "as if he had not heard" - and I think he was fighting for time.
>
> At the same time I call your attention to the trial lawyer tactics: He not only got time, but he also got complete concentration of attention. Then he rose up, surrounded with complete and utter silence, and he said (you remember this one, too, don't you? - no law, no fact, but we're posing the issue just the same; we're posing it so that it's going to be accepted, and we've chosen it so that it's going to win the case). "He that is without sin among you, let him first cast a stone." And our report is that they slunk away. You can't stone unless somebody starts.[88]

57 Had the issue been cast as whether the defendant was guilty of adultery, the lawyer would have lost the case for his client. But having framed the proper question to be whether those calling for her punishment deserved to punish her, the lawyer forced the only conclusion that would save his client. Perhaps a more real-life example may be found in *Morse v Frederick* (No. 06-278), a case involving the decision of a school principal to punish a student for displaying a banner that alluded to the desirability of taking drugs at a school event. In the face of prior precedent that there is a baseline of political speech that students have a presumptive right to engage in, counsel for the school cast the case as one involving the glorification of a drug culture, rather than any sincere political speech.[89]

58 There is however danger in taking too seriously the suggestion to frame issues in an appealing way. The accuracy of the statement of issues must not be sacrificed just so that the issues are "attractively" presented.[90] It will not take long to discover the manipulation at work. In fact, some judges counsel *against* trying to write obviously weighted statements of

88 Karl N Llewellyn, *supra* n 15 at 179.

89 Linda Greenhouse, "Court Hears Whether A Drug Statement Is Protected Free Speech For Students" *New York Times* (20 March 2007) available at <http://www.nytimes.com/2007/03/20/washington/20scotus.html?_r=2&adxnnl=1&oref=slogin&adxnnlx=1174409080-NUf9y0QbyocO15x5VN+vRw&oref=slogin> (accessed 21 March 2007). The framing of issues is also a linguistic effort. See, for example, how the minority in the consolidated cases of *Gonzales v Carhart* (05-380) and *Gonzales v Planned Parenthood* (05-1382) took issue with the majority opinion for its use of "abortion doctor" to describe doctors performing gynecological services, "unborn child" and "baby" to describe a foetus, and "preferences" based on "mere convenience" to describe the judgments of medical physicians.

90 Wiener himself accepts that the statement of issues should be fairly stated: *supra* n 84 at 73.

issues, presumably because the practice has become so widespread that judges almost always treat such statements with suspicion.[91]

59 Ultimately, the statement of issues should be drafted to bring to the judge's attention precisely what questions are in play *and* within what factual context those questions are to be answered. To do that, the statement should be complete, self-contained, succinct and, importantly, ground the legal question in the facts. An abstract legal poser ("was the appellant negligent") is seldom helpful or persuasive. Providing context to the legal question ("by speeding and weaving through rush-hour traffic despite having drunk five cans of beer just minutes before, was the appellant negligent") gives it life, relevance, substance and appeal. Indeed, judges do not pronounce on abstract questions of law; they decide *disputes*.[92]

(3) Selection of issues

60 Selecting the issues to present on appeal is a vital exercise. The careful distillation of key issues is a signal to the appellate court that one has applied experience and judgment. Anecdotal evidence indicates that petitions of appeal (particularly in criminal cases) often allege an excessively lengthy list of errors that supposedly warrants reversal on appeal. It is rare enough for a trial judge to commit an error; it is almost inconceivable that he or she would commit a litany of them. To suggest that a trial judge was in error in so many respects is more likely to raise an appellate judge's eyebrows than gain his or her sympathy.

61 Even if a trial judge had erred in multiple ways, little good is done spelling out these errors one after the other. One pivotal error may be sufficient to reverse the decision or have the case remitted.

62 A dramatic illustration of the need to judiciously select issues is the case of *Bin Hee Heng v Management Corp Strata Title No 647*, where former Chief Justice Yong Pung How expressed dismay at the sixty eight points of appeal raised by the appellant's counsel:[93]

> Before this court, the appellant submitted 68 grounds of appeal, and his counsel argued doggedly through each one of them, with a 181-page

91 See *eg*, E Barry Prettyman, *supra* n 5 at 288.
92 *Ainsbury v Millington* [1987] 1 WLR 379 at 381.
93 [1991] SLR 661 at 666.

> written submission, laced with footnote authorities. Solicitors are also officers of the court and, in preparing an appeal, must remember that they have a responsibility not only to their clients but also to the court. This dual responsibility extends to their ensuring at all times that their case is presented in a manner which contributes towards an early determination of the real issues. The preparation of the petition of appeal, in particular, should have regard to O 54 r 5 which provides that it 'shall contain concisely and under distinct heads, without argument or narrative' the matters of law or of fact in regard to which the court appealed from is alleged to have erred. In the present case, with 68 grounds, there was considerable overlapping and grounds of substance and minor points became inextricably mixed.

63 Not surprisingly, the court was able to reduce the sixty eight points to four. Kan Ting Chiu J was also recently reported as advising counsel in the following terms:

> By all means, take your instructions, but they shouldn't be reported without some judgment on your part.[94]

64 At trial, one may be forgiven for deploying every conceivable line of attack. This is because the nature of trials is that they can change course rapidly and unexpectedly due largely to the unpredictability of witnesses. But once these issues have been ventilated, and after a trial judge has reasoned through the evidence and delivered his or her grounds of decision, it should be clear that some arguments will not be sustainable given the evidence that has emerged and the findings of fact by the trial judge.

65 The selection of issues is intensely fact-bound. It depends also on the current state of the law (how far must one extend the present legal principles to fit the appeal), one's risk appetite (how far one is willing to

94 This was in the context of cross-examination but it applies with equal (if not more) force to appeals. See, "Victims Could Have Died From Wounds," *The New Paper* (8 August 8 2007) at 15. These principles are universal. Former US Supreme Court Associate Justice Robert Jackson has lectured that "legal contentions like currency depreciate through over-issue...multiplying assignments of error will dilute and weaken a good case and will not save a bad one": see "Advocacy Before U.S. Supreme Court," 37 Cornell L Q 1 (1951-52) at p 5. The same point was made in *Jones v Barnes* 463 U S 745 (1983) involving an accused who filed a writ of habeas corpus on the basis that his counsel, in refusing to present certain arguments that he (the accused) wanted, had rendered ineffective assistance. The US Supreme Court held that a lawyer was entitled to exercise his professional judgment as to which arguments to present and, in the process, acknowledged the importance of that skill.

criticise the lower court or previous judgments), and the constitution of the appellate bench (whether they are judicial minimalists). But there is one suggestion that may be offered. Put the shoe on the other foot and objectively assess what conclusions or results the court would be most receptive to. Then find the straightest road to those findings, bearing in mind the foregoing discussion on the applicable standards of review. The fewer criticisms one has to make of the trial judge's decision, established precedents (especially of those the appellate court itself), and findings of fact by the court below, the better.

D. Statement of Facts

(1) Selecting the facts

66 The statement of issues and the statement of facts are inseparable. In writing the statement of issues, one must consider the facts; and in writing the statement of facts, one must have regard to the issues presented. They should reinforce and support each other. A brilliantly constructed question will yield little if the statement of facts does not support the conclusion that one urges, and *vice versa*. While appeals are often against errors of law, legal principles are never analysed in a vacuum; whether they apply and the extent of their applicability in any case always depends on context.[95]

67 In this regard, *appellate* lawyers must be able to *select* the facts necessary to support the issues on appeal.[96] Sometimes, however, counsel make the mistake of replaying every excruciating detail that was discovered at trial when these facts may be unnecessary and distracting or no longer relevant to the *issues* on appeal.[97] As Prof Llewellyn puts it:

> the pattern of the facts as stated must be a simple pattern, with its lines of simplicity never lost under detail; else attention wanders or (which is bad) the effect is drowned in the court's effort to follow the presentation or to organize the material for itself.[98]

95 See also *supra* n 42 and 43 and the accompanying text.

96 "Every experienced advocate will tell you that mastering the facts of a case is the most difficult part of his work…Knowing all of the facts, he must confine his presentation to those which are most cogent and persuasive. His power of selection, of arrangement and of emphasis will be the measure of his genius." Vanderbilt, "Forensic Persuasion," 7 Wash & Lee L Rev 123 (1950) at 126-7.

97 See the discussion at Part II(B) above; and also, E Barry Prettyman, *supra* n 5 at 291.

98 Karl N Llewellyn, *supra* n 14 at 183-184.

68 On occasion, an appeal may turn on a single fact. Take, for instance, Mr Lopez's story detailed above. The crucial fact that probably persuaded Judge Kozinski that the hearsay rule, based on assuring the reliability of evidence given in court, should not have applied was that it made no sense that the *government* would have inaccurately recorded the *exculpatory* statements made by the nine witnesses whom were sent back to Mexico.[99] In such cases, it would serve one well to focus on the key facts. Thus, for example, even where the trial judge may have ruled against you on several factual issues, there is no need to rehearse them as long as they are not critical to the issues on appeal, save perhaps for a specific demurrer.

69 As a general rule, therefore, only facts essential to support one's reasoning and those crucial to provide context[100] should be included. It may not always be possible to gauge at the start what should be left in or out, which makes the editing phase an imperative. Once all the arguments have been finalised, check back to see if the facts can be further pruned to make it as concise as possible. Conversely, do include every fact that is relevant to the appeal and which are necessary to support your position. As stated, the statements of facts and issues should be written with reference to each other.

70 Once the facts have been selected, they must be written and presented coherently. While it may not be possible to present a formula for writing the statement of facts, the following general pointers may help.

(2) Organising the facts

71 In writing the statement of facts, one is attempting to "reach another person's mind" and persuade him or her to one's characterisation

99 See also, Karl N Llewellyn, *supra* n 15 at 185-186, which provides another example. In this case, the defendant company supported an underpass it had built using steel pillars but it also built a concrete mound on each side of the underpass in between two traffic lanes so that if a car was in trouble, it would climb the mount instead of hitting the pillars straight on. A drunken driver lost control of his vehicle, climbed the mound, damaged the front of his car but escaped alive. The driver sued, characterizing the mounds as wantonly and wilfully dangerous. He won because the "idiotic" defence counsel failed to mention that the mounds were safety devices that had, in fact, saved the driver's life.

100 Including those necessary to construct an atmospheric context: see below at Section III(D)(3).

of the facts.[101] Part of the skill of a good lawyer is his ability to present the facts in way that is organised and structured. As Choo J explains:

> The persuasiveness of one's case depends in part on how well the story is told. When facts are randomly presented the judge would have to sort them out before he can understand the story clearly. Counsel runs the risk that the judge may misapprehend the full story or fail to understand it fully because of the distraction of having to work out the story for himself.[102]

72 Therefore, organise the facts so that they are easily accessible and understood and flows naturally and consecutively, bearing in mind that a person's acquisition of knowledge is a cumulative process.[103] Write the statement as you – a busy appellate judge with no initial inkling as to what the facts are – would like to read it, without having to trawl through the notes of evidence and the record. And, as stated above, it is frequently useful to distinguish facts that are agreed and those that are challenged; which may be accepted as true and which continue to be the subject of debate on appeal. This assists the appellate judge in knowing the facts to focus on.

(3) Writing the facts to tell a story

73 Dull, lazy summaries of facts-especially those that go on *ad nauseum* about what each witness said or did[104]-are unpersuasive. It does not assist the court or to your own case, and almost certainly is not the best way to present the evidence. As Choo J implicitly suggests in the quotation above, facts should be written to tell a story.

74 In this regard, a chronological narration of the facts is possibly the most intuitive and easy to grasp, but it may not *always* be the most effective. Instead, lead with your strongest facts and create as far as possible, a favourable context in which to start the story.[105] Thus, while a prosecutor is likely to begin his story in a murder case with the gruesome details, painting the accused as a cold-blooded assassin, the defence is likely to begin with more ambivalent and benign facts such as the

101 Frederick Bernays Wiener, *supra* n 84 at 45.
102 "Overview from the Bench," *supra* n 6.
103 Frederick Bernays Wiener, *supra* n 84 at 45.
104 *Id*, at 46.
105 Steven D Stark, *supra* n 52 at 97-101; and generally, Laurel Currie Oats and Anne Enquist, *supra* n 28 at § 2.12.5.

relationship between the accused and the victim. An illustration of this technique may be found in a judgment of Rajah J, who while ultimately convicting the accused of the offence of importing heroin, displayed a measure of sympathy for the circumstances of the accused in the following way:

> Life, it may seem at first blush, has dealt a poor hand to the accused, Tan Kiam Peng ("Tan"). 46 years of age, he is unmarried and lived alone in a HDB flat until his arrest. Known to his friends as "*Pui Kia*" ("Fatty" in colloquial Hokkien) because he is on the heavy side, he held a job as a tipper truck driver until he met with an accident. Because he lost that job, he was unable to repay debts that had accumulated. His utility bills and housing loan instalments also fell into arrears. By August 2005, these debts exceeded $8,000. Tan repeatedly attempted to seek full-time employment but only managed to secure a temporary, part-time job delivering noodles. He decided to join a gambling syndicate sometime around May 2005. His assigned role was to rent an apartment that would be used as a gambling den. However, this scheme promptly fell through and the apartment was used only once. As a consequence of this failed endeavour, Tan became even further indebted as he was personally liable for the rent.[106]

75 Or consider another judgment of Lord Denning's:[107]

> It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.
>
> On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs.

106 *Public Prosecutor v Tan Kiam Peng* [2006] SGHC 207 at [1].
107 *Hinz v Berry* [1970] 2 QB 40 at 42.

> Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.
>
> An action has been brought on her behalf and on behalf of the children for damages against Mr. Berry, the defendant. The injuries to the children have been settled by various sums being paid. The pecuniary loss to Mrs. Hinz by reason of the loss of her husband has been found by the judge to be some £ 15,000; but there remains the question of the damages payable to her for her nervous shock - the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about.

By the end of this passage, we have no doubt that Mrs Hinz will prevail.

76 The same skill in writing facts was also put to expert use in a recent family law case concerning custody, where the High Court had to decide which parent was the better role model. Weaving small and innocuous facts together with the requisite subtlety, the court said:

> The evidence adduced showed that the respondent had, as early as February 2003 (some time before the petitioner left him), engaged in internet correspondence with a view of establishing "discreet relations" and finding "occasional lovers". He signed up under the first name of his son, and left a series of correspondence and telephone conversations with females in various countries. He had also made various inconsistent descriptions of himself, sometimes stating that he was 5 foot 7 inches tall, sometimes, 5 foot 8 inches, and sometimes 5 foot 9 inches and his weight varied between 80 lbs to 150 lbs. [It was] explained on the respondent's behalf that he was "merely looking for love". It is not the court's business to express its approval or even attempt to regulate what an adult could or should do with his private romantic life. The respondent's amorous correspondence in the internet may not be illegal, and may not be harmful to the children if they were kept out of it. The relationships he sought did not appear to be for long term or of a deep nature as the recorded conversations showed that they were of a superficial rather than an intellectual nature. It is uncertain what the ages of the women were, but from the conversations, they were not very mature ones. That there might be a wide age gap between the respondent and the women he corresponded with is not an adverse factor in itself otherwise it would be an unfair condemnation of all the couples who have found a deep and lasting intimate relationship in spite of a wide age gap. I have no criticism for the respondent even if he prefers a physical rather than a metaphysical relationship with women. However, the question I have to determine is that as between him and the petitioner, which of the two would be more suitable for providing the care and attention that is best for their three young children. Hence, it is only in that specific context that I would take the respondent's

> internet activities into account and on the balance between them, the petitioner appears to be a better role model.[108]

The selection of facts, the juxtaposition of contradictions, the appropriate placement of quotations and even the tone of the passage came together to convey a story of the father's life that made it clear, without condemnation, that the mother in that case was more suited to have custody over the children.

77 The idea in writing the facts to tell a story, as these illustrations show, is to enable to facts, taken together, to come "alive", to make them more persuasive, and even to give more substance to one's position than each fact standing alone would have.

78 Persuasive statements of facts are written not just to provide context or support legal conclusions. They should convince the judge that your client *deserves* to win. While judges must work within the framework of the law, judges are also keen to ensure that the verdict is substantively fair and just.[109] Counsel's job in constructing and building the facts is to ensure that the court believes that your client *should* win, notwithstanding an otherwise "technically perfect" case.[110] But it is important that this should be done with a measure of subtlety. A lawyer who harps on the justice of the case is likely to invite scepticism as to whether his case has a strong legal basis.

(4) Accuracy of facts

79 Creating a "story" out of the facts is not, however, a licence to write fiction. The accuracy of the facts presented is paramount. Do not editorialise. Do not add adjectives that colour what happened – leave the argumentation to later. Do not cut and paste parts of transcripts such that it misrepresents what transpired in the court below. Do not purposefully delete references to unfavourable portions of documents. Do not impliedly misrepresent facts as undisputed by omitting to mention that they are being contested.[111] Learning the bad facts from the

108 *TQ v TR* [2006] SGHC 106 at [7].

109 "Judges are...committed to fairness and will extend and develop the law to that end": "Overview from the Bench", *supra* n 6.

110 Karl N. Llewellyn, *supra* n 14 at 180.

111 See generally, Edward D Re and Joseph R Re, *supra* n 4 at 108.

other side will almost always harm the credibility of one's case.[112] If a case cannot be won without deceiving the court, it is better not to appeal.

80 Having said that, it does not mean that favourable facts cannot be highlighted or adverse facts downplayed. How this may be achieved may be by apportioning the amount of airtime[113] and detail relative to the prominence one wishes to accord to certain facts. Placing key facts in positions of emphasis (such as the start and end of long paragraphs), using shorter sentences, adopting the active voice are all other ways in which to spotlight favourable facts.[114] Yet another way to underscore positive facts is to point out that the court below accepted that fact.[115] Highlighting this lends weight to the rendition of facts because it signals to the appellate judge that these facts have already been accepted as true and accurate by the one judge who had the opportunity to assess the witnesses first hand.

E. Argumentation

81 Lawyers know that good arguments should come first, subsidiary points later, and that as far as possible, they should be focused on proving and substantiating the issues identified and presented on appeal.[116] There are, perhaps, three additional points that should be made.

(1) Leading with the conclusion

82 A well-constructed argument must be easily followed from start to end. A brilliant argument exerts no influence useless the reader comprehends it. One common reason that written submissions are less persuasive than they should be is because the punch-line is not made quickly enough. The reader has to wade through several pages before it strikes him or her what is being proved.

112 *Ibid*; Myra A Harris, *Legal Writing: Principles of Juriography* (Prentice Hall Inc, 1997) at § 7.5. It is also a breach of professional ethics to misrepresent facts. See, rr 55 and 56 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed). Some court rules even specify the requirement to cite legally significant facts, good and bad: Laurel Currie Oats and Anne Enquist, *supra* n 28 at § 2.12.3.

113 Some authors counsel against this, believing that it will desensitise the reader: See Steven D Stark, *supra* n 52 at 109-110. The basic point is not to overplay one's favourable facts but some emphasis can only help.

114 See generally, Laurel Currie Oats and Anne Enquist, *supra* n 28 at § 2.12.5.

115 Frederick Bernays Wiener, *supra* n 84 at 46.

116 On these points, see further, Frederick Bernays Wiener, *supra* n 84 at 82-96.

83 It is more effective and persuasive to lead with the conclusion; after which, elaboration on the principle and case law may follow. Doing so makes it a lot easier, even for a busy reader who is scanning through the brief.[117] The reader knows immediately what the position is. He does not have to worry about being led down the garden path, only to be disappointed with the relevance or cogency of the conclusion. There is another advantage: by committing to a conclusion at the outset, it forces the writer to think about the pith of his argument. Otherwise, the tendency is simply to tag on a meandering conclusion (or none at all) after a lengthy excursion through the case law.

(2) Anticipate opposing arguments

84 Argumentation is always strengthened when it anticipates and engages contrary views. In fact, the stronger the argument on the other side, the less you can *afford* to ignore it.[118] This is especially important in appellate briefs because an appellate judge reads the brief days in advance of the oral argument. Doubts created sit longer in the minds of appellate judges, making it more difficult to dispel them later on. This is unlike trial judges who, when faced with uncertainty during the trial, is at liberty to seek clarification immediately.

85 Even when writing the appellant's case, it is possible to anticipate most of the respondent's arguments simply by fully engaging the trial judge's decision since it is likely that the respondent will rely heavily on that decision. The challenge is in anticipating the appellate court's questions. This is, again, where a close study of the court's decisions will be useful. By identifying trends in the court's jurisprudential thinking, one is able to address the court's likely concerns even before the hearing.[119]

117 The NUS Legal Writing Programme teaches the CRuPAC framework of presenting argumentation, *viz*, Conclusion, Rule, Proof, Application, Conclusion. See further, Eleanor Wong, *supra* n 10 at n 25 and the accompanying text.

118 For illustrations, see Frederick Bernays Wiener, *supra* n 84 at 104-107.

119 In the area of criminal sentencing, for instance, the High Court has shown willingness to depart from "benchmark sentences" in justifiable circumstances: see *K C Vijayan, supra* n 41; and recent cases such as, *Lim Pei Ni Charissa v Public Prosecutor* [2006] 4 SLR 31; *Tan Kay Beng v PP* [2006] 4 SLR 10; *Angliss, supra* n 17; *PP v Lim Ah Seng* [2007] 2 SLR 957; *PP v UI* [2007] SGHC 139. Therefore, a bare insistence that the court should follow benchmark sentences is unlikely to gain much traction.

86 Having successfully rebutted or pre-empted the other side's arguments, one should not allow the court to forget that you have addressed your opponent's case even at its highest. Similarly, expose and then emphasise the weakest aspects of your opponent's submissions.

(3) An argument that appeals

87 Finally, it is always necessary but seldom sufficient to have a strong, technically sound legal argument. The argument, taken together with the facts and cases, must accord with commonsense and intuition. Why? Because judges like to do the "right" and "just" thing.[120] As Choo J says:

> There are two things the advocate knows he can rely on to persuade the judge to his cause, namely, reason and sentiment. If judges rarely admit that their decisions had been influenced by personal sentiment it may be because that word is in need of amplification…If the advocate can keep the distance between the loftiness of law and modest facts narrow, he will more likely see the humanity in the judgments of the court.[121]

88 Therefore, as Professor Llewellyn put it:

> [T]he real and vital central job is to satisfy the court that sense and decency and justice require (a) the rule which you contend for in this *type* of situation; and (b) the result which you contend for between these parties. Your whole case, on law and facts, must make *sense*, must appeal as being *obvious* sense, inescapable sense, sense in simple terms of life and justice. If that is done, a technically sound case on the law then gets rid of all further difficulty: it shows the court that its duty to the Law not only does not conflict with its duty to Justice but urges along the exact same line.[122] [emphasis in original]

89 As such, it is seldom wise, unless absolutely necessary, to advocate a position that is unduly harsh to the opposite party or which has the potential to engender long-term complications. Push comes to shove, however, all that an advocate can do is to finesse the point, suggest how and why the result in the present appeal may be contained, and why the court should resist the temptation to make bad law. This is, perhaps, where the stylistic and linguistic skill of the writer will prove useful.

120 Andrew Phang Boon Leong, "A Passion for Justice: The Natural Law Foundations of Lord Denning's Thought and Work" [1999] Denning Law Journal 159.
121 "Overview from the Bench", *supra* n 6.
122 Karl N Llewellyn, *supra* n 14 at 183.

90 Apart from these principles, strong argumentation will come with a mastery of the facts, a scrupulous examination of the cases, a shrewd understanding of underlying policies and principles, and the discipline to sieve, select, edit, construct and structure one's submissions.

F. Dealing with cases

(1) Selecting cases

91 The common law develops by analogy: like cases are decided alike. It is therefore important to bring to the court's attention cases that *are* alike – whether in so doing the cases cited are favourable or adverse.[123] But there is no rule declaring that for one simple point, ten cases must be cited. With growing electronic databases and sophisticated search engines, it is no longer unusual to find counsel submitting voluminous bundles of authorities. Tragically, anecdotal evidence suggests that it is not uncommon to find that many of the authorities cited are repetitive and unhelpful; or worse, detrimental to one's own case (but cited as though they supported one's case). That our appellate courts are increasingly demanding submissions of higher quality or references to the position in other jurisdictions, does not imply that counsel can be indiscriminate in their citation of authorities. Indeed, para 34(4)(*b*) of the Supreme Court Practice Directions[124] states that "only authorities which are relevant or necessary" should be cited; and even provides that costs wasted by excessive cited may be ordered against counsel.[125]

92 Having scoured the globe's legal databases and textbooks, two questions may assist in deciding the quantity of cases to cite and the specific cases to rely on. First, decide how settled the legal proposition being supported is. Generally, the number of authorities necessary should be inversely proportional to the degree to which the legal issue may be considered controversial.[126] Thus, as stated above, it is not usually

123 The rationale for not hiding or ignoring adverse arguments and facts is also relevant here. See also *Sutanto Henni v Suriana Tani* [2004] SGHC 7, where Belinda Ang Saw Ean J remarked that it was "unsatisfactory" for counsel not to have drawn attention to the fact that a case relied on had been overruled.

124 1997 Ed.

125 On this, see *Low Siew Ling*, *supra* n 59 at [7] to [20]. Eleanor Wong also notes that students find it difficult to judge the level of proof appropriate to each situation*:* *supra* n 10 at n 27 and the accompanying text.

126 Eleanor Wong, *id*; citing Richard K Neumann, Jr, *Legal Reasoning and Legal Writing* (Aspen Publishers, 5th Ed, 2005) at ch 11.

necessary to cite many cases just on the court's appellate powers or standards of review. Second, identify the best and most persuasive case supporting your position, as well as the best and most persuasive case supporting the other side's position.[127] Once these cases have been identified, additional authorities would usually be superfluous, subject to two exceptions.[128]

93 The first exception is if it is vital to establish that a case is of great and unquestioned vintage, and if this is not apparent on the face of the case that you have selected by the process just described. The same applies if one finds it necessary to highlight the position in other jurisdictions. However, if the legal proposition in the additional cases cited are treated similarly, and it does not add value to the submissions to analyse the cases in detail, it would be sufficient simply to pinpoint precisely which parts of those cases are being relied on without extensive discussion.[129] The second exception is if you are trying to develop a comprehensive theory or framework from the cases; in which case, a detailed survey of various judicial opinions would be, in fact, advisable.[130] However many cases one decides to cite, the key is knowing what it is in those cases that is being relied on.

(2) Analysing cases

94 A successful study of a case will recognise that it comprises four components: the facts, the questions raised, the decision and the reasoning.[131] Judges therefore appreciate: (a) a succinct summary of the facts as they relate to the point for which the case is cited; (b) the holding of the case; and (c) the reasoning or principles relied on by the court in arriving at the decision.[132]

127 Edward D Re and Joseph R Re, *supra* n 4 at 119.

128 *Id*, at 124-125, quoting Mario Pittoni, *Suggestions on Brief Writing and Argumentation* (Foundation Press, 1951) at 39 that string citing is "one of the greatest vices of brief writing." If I have overdone the citations in this article, my mitigation plea is that an article should provide references for further research, an aim that is different from an appellate brief.

129 This technique is employed in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR 367 at [50].

130 For recent examples of where the courts have surveyed cases extensively in order to establish a framework, see Fairmount, *supra* n 58, *Chng Yew Chin*, *supra* n 43; *PP v Law Aik Meng* [2007] 2 SLR 814.

131 E Barry Prettyman, *supra* n 5 at 295.

132 Unless, of course, a case is cited for a universal proposition and the context in which the proposition was coined or accepted does not matter.

95 Furthermore, unless the case is "on all fours" with the instant appeal, it is desirable – necessary – to include reasons why that case should apply.[133] This is particularly so where, as suggested in Part II, the case relied on is from a foreign jurisdiction, or indeed from a lower court. A case is *binding* only if it results from a decision of a higher court within the same jurisdiction and is in all respects similar to the case currently being decided. Where an authority is not strictly binding, it should be employed as support for important propositions and not as substitutes of first-principles analysis. Conversely, an adverse authority should be distinguished not only by alleging that the factual situation is not similar, but by examining why the *rationale* of the adverse authority would not make sense as applied to the appeal.

96 On a related point, it should be observed that even though appellate courts may overrule previous decisions of lower courts and its own, they are frequently reluctant to.[134] Therefore, when faced with an adverse precedent, distinguish it rather than seek an out-and-out overruling.[135]

(3) Citing authorities accurately

97 Finally, just as one should be accurate with the facts, always be accurate with the authorities cited. Do not misrepresent what they stand for. The pressure to cite authorities in support of one's position is the result of a misconception that an appellate court will never find in favour of a position that is not already covered by authority. But it is inherent in the work of an appellate court's work that it may have to do so. If there is no case authority on point, look for facts to advance commonsense arguments, examine academic commentary, use history. Do anything but misrepresent.

133 This is a process known as "analogising". See generally, Richard K Neumann, *supra* n 126 at ch 15.

134 Frederick Bernays Wiener, *supra* n 84 at 110; Edward D Re and Joseph R Re, *supra* n 4 at 121.

135 In *Planned Parenthood of Southeastern PA v Casey*, 505 US 833 (1992), the US Supreme Court articulated that precedents would be likely to be overruled if they had proven to be unworkable as a practical matter; if there had not been general social reliance on the rule; if there had been subsequent changes in doctrine; and if there had been subsequent changes in fact.

G. The Respondent's case

98 All that has been said above applies equally to the writing of the respondent's case. The only additional point to be made is this: do not let the appellant dictate the terms of the appeal, whether they are the questions presented, the facts, the arguments, the order of the arguments or the authorities cited. Even where the appellant has been scrupulously fair-minded, the respondent will usually have arguments that are stronger and deserving of emphasis more than others. Therefore, write the respondent's brief affirmatively. Advance your client's position aggressively. As US Supreme Court Associate Justice Ruth Bader Ginsburg once lectured:

> Respondents or appellees do well to lead from strength. Telling their side of a case affirmatively, instead of in a series of 'not so's' keyed to appellant's presentation and provoking the court to wonder: 'Doth this appellee protest too much?'[136]

99 This applies to briefs submitted to our Court of Appeal as well. As Choo J characterises it, opposing parties are engaged in a "narrative competition".[137]

100 This is not an immutable or inflexible rule. There are occasions where a direct clash is more effective and efficient. For instance, it is not uncommon that in construction cases, the dispute will be over many individual items. Here, it may assist the judge if the respondent's brief corresponded to or mirrored the appellant's at least in so far as the order of the items being disputed is concerned.

Summary

101 Unlike a trial where the primary sources of evidence are witnesses or witness statements, the primary materials before an appellate court are the written briefs. Therefore, the brief must be attractive to read. Style is important in this regard. Additionally, the uniqueness of appellate courts also influences various considerations in the process of writing the brief. For instance, the generalist nature of appellate judges and the high turnover of their caseload make it imperative that counsel presents the issues, facts and arguments in a coherent and straight-forward manner;

136 Steven D Stark, *supra* n 52 at 126. See also, Myra A Harris, *supra* n 112 at § 7.10.
137 "Overview from the Bench", *supra* n 6.

and that do not over-burden appellate judges with excessive citations to authorities. It is hoped that the suggestions in this section have assisted in appreciating these concerns.

IV. The finer points

102 Once the planning and writing is done, there are little but significant things that can be done to polish the final product. What follows is a non-exhaustive list of short suggestions that may assist in fine-tuning a written brief so as to enhance its persuasiveness.

103 *First*, realise that first impressions count. Therefore, ensure that the formatting of the brief is easily readable and properly bound. In addition, always proofread your brief to ensure that at the very least there are no glaring grammatical, punctuation or syntactical errors.

104 *Second*, edit – over and over again, or as many times as the deadline will allow.[138] According to one professor, he goes through at least ten complete edits before sending an article to any law journal, and twenty to thirty substantive edits before he submitted anything to Judge Kozinski as a law clerk.[139] Although editing is tedious and time-consuming, it is a necessity for any polished piece of work. One tip that this professor offers is to catch yourself whenever you find yourself re-reading a sentence or a paragraph because you did not understand it at first glance. If you do, re-write that sentence or paragraph. Everything should be clear on the first reading, no matter how complex the idea is.[140] If time permits, repeat this exercise after putting the draft away for a day or two. This will allow you to criticise your draft with "new eyes".[141]

105 Remember that appellate judges have to familiarise themselves with many cases in a short time. It will test their patience if they have to constantly re-read passages just to comprehend what was said. Not only that, they also may misunderstand what was intended.

138 David Lewis reports that many appellate judges do find that that the briefs submitted are not sufficiently edited or proofread: see, *supra* n 5 at 339-340.

139 Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* (Foundation Press, 2005) at 73-74.

140 Eugene Volokh, *supra* n 139 at 74.

141 *Id*, at 75.

106 *Third*, keep things short.[142] In philosophy, there is a rule called the Occam's Razor, which postulates that "entities should not be multiplied unnecessarily". If it is not necessary to say it, it is necessary not to say it. The rule is, of course, not an excuse for slipshod work; it also carries a positive injunction that what is necessary to be said, should also be said. The dividing line may not always be obvious. This is not an indictment of the principle itself but rather, an occasion when one's experience and judgment will have to be exercised.[143]

107 A couple of suggestions may help. One, avoid lengthy quotations unless they are so well-written that paraphrasing the substance of what was said would detract from their forcefulness,[144] or if it is necessary to set out the passages for illustrative or analytical purposes. Long quotations, in general, distract readers from *your* words. In fact, there is a tendency among readers to skip or race through extended quotations.[145] Two, ensure that every sentence makes a contribution to your case and is substantiated.[146] This way, excessive verbiage is reduced.

108 *Fourth*, every assertion of fact should have a precise reference to the core bundle and/or the record of appeal. If a reference cannot be found, it should not be asserted. Similarly, every statement or quotation in a case relied on must have a pinpoint reference.[147] Importantly, check these citations for accuracy and for any typographical errors. Nothing is more frustrating than being directed to a particular page in vain.

109 *Fifth*, do not feel compelled to stick with prose. Comparisons (of, say, the amounts being claimed for different items) are more easily comprehended when summarised in a table. Where the relationships between the parties are particularly complex, an organisational tree or chart may be an effective means of bringing the facts across. Where these

142 David Lewis reports that many appellate judges do find that that the briefs submitted are unusually lengthier than they should be given the complexity of the case: see, *supra* n 5 at 338.

143 See also, Choo Han Teck J, *supra* n 66.

144 Edward D Re and Joseph R Re, *supra* n 4 at 121.

145 There is a concomitant preference for short quotes and paraphrases among appellate judges, at least those surveyed in David Lewis, *supra* n 5 at 337-338. If my quotes in this article are too lengthy, it is only because they serve an illustrative purpose and need to be reproduced in full.

146 Eugene Volokh, *supra* n 139 at 75-76.

147 Judges are suspicious of case cites that lack a specific page reference: see, David Lewis, *supra* n 5 at 344-346.

alternative methods of presentation are able to convey a point more quickly and effectively, their use is encouraged.[148]

110 *Sixth*, organise your material.[149] Ensure there is a clear, coherent path from start to finish. Arguments that belong together should not be found straying in different corners of the brief. Also, it assists in the organisation of a brief to use headings to signal the beginning of each new section[150]

111 *Seventh*, when dealing with arguments that you do not agree with, whether they are from your opponent or the lower court, always show respect no matter how vehemently you think those arguments were wrong.[151] Do not descend into personal attacks or vituperative. A disagreeable lawyer is a lawyer no one will agree with.

112 *Finally*, close strongly. As much as the first pages are prime real estate, the conclusion is also one part of the brief that is often studied. Conclusions in written briefs should achieve two purposes. First, it should encapsulate the main reasons supporting your position.[152] Second, it should aim to create a lasting impression on the judge (who will soon turn to other cases and briefs). To this end, select an attractive point to end on, and choose the appropriate style and words to convey it. Once written, read through the conclusion and ensure that it is equal to the introduction.

V. Conclusion

113 Persuasive appellate briefs combine the rigours of effective legal writing with a keen appreciation of the unique customs and roles of the appellate court. The pointers raised in this article may be reduced to one simple guiding objective: a persuasively-written appellate brief should

148 This technique was used in two recent cases: *NK v NF* [2007] SGCA 35 at [67] and *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] SGCA 39 at[113].

149 Steven D Stark, *supra* n 52 at 11-18.

150 These headings should be as informative as possible. Avoid generalisations or empty statements like "the appellant deserves a shorter sentence." Instead, assert that "the appellant deserves a shorter sentence on account of his being a first-time offender." See generally, Frederick Bernays Wiener, *supra* n 84 at 67-72.

151 Steven D Stark, *supra* n 52 at 161.

152 Order 57 r 9A(9) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) states that "every Case must conclude with a numbered summary of the reasons upon which the argument is founded."

always strive to ensure that no one is left in doubt or with curiosity unsatisfied after reading that brief alone.[153] As a former judge has written:

> [A] properly prepared brief will be so meticulously prepared, so complete, that the judge will be neither forced nor tempted to do his own research, either through the record for facts or through the library for cases.[154]

114 One final point has not yet been canvassed. The foregoing has been an exposition on writing appellate briefs in a persuasive manner. It is important, however, to appreciate that the written submission is only one dimension of a successful appeal. The other is the oral submission. Planning the written brief should be done with one eye on the oral submission as well. In this way, instead of the written and oral submissions being different modes of presenting the same material, they form a two-pronged attack. To put it another way, since briefs are read before the hearing, they should be written with the objective of setting up the foundation for the oral submission. They should not simply be the written form of the oral arguments. This avoids repetition so that when both oral and written submissions are viewed together, they will be stronger than each submission standing alone. This strategy also exploits the unique advantages of the written and spoken forms of communication. After all, some things are better written than said; and *vice versa*. Complex calculations or analyses with references to multiple statutory provisions are probably better appreciated on paper than recited in court. On the other hand, an attractive parable or a striking analogy that encapsulates the case aptly may be more effective when delivered orally (at the right moment). Viewing the written submission in this context, one is able to put forward an appeal more persuasively, and hopefully, successfully.

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153 Frederick Bernays Wiener, *supra* n 84 at 122–123.
154 E Barry Prettyman, *supra* n 5 at 290–291.