Auckland District Law Society

WINNING TODAY IN THE COURT OF APPEAL

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INTRODUCTION

Two years ago a new appellate system came into force. After years of following England's appellate regime, the Court of Appeal [the "Court"] instead elected to use a modified version of America's.

Many practitioners still consider the change to be insignificant and that the present appellate procedure is basically the same as before. They justify their belief on the fact that they drafted submissions both before and after the Court introduced the "change". Consequently, they continue practising appeals the same way as before. This paper's purpose is to share information with New Zealand practitioners to help them adjust to the new system.

The writer has specialised for 22 years under the same appellate scheme that the Court of Appeal has now adopted. He has come to believe over the last two years that many practitioners here have little understanding of how it is intended to operate.

At least one member of the Court shares this opinion. Recently he opined that now essentially less than a hand-full of New Zealand lawyers practice competently in his Court. [Wellington District Law Society Seminar (June 1998)].

His Honour attributes this low standard of appellate practice principally on two causes: (1) practitioners simply do not understand how the present appellate process is supposed to work; and (2) they are unfamiliar with the meaning of the term "appellate issue" as used in the new appellate system, do not know how to frame one, nor what to do with it after that. Once one learns more about these issues he or she will appreciate why some recent judicial comment has been critical of the current standard of appellate advocacy.

That is not to say though that it is fair to blame the Bar for its inadequacies. It has reasonable justification for not knowing how to operate in this new appellate arena. While it is comparatively simple to amend rules and hope the system will change, it is a far different matter to educate the "players" to practise competently under them.

Law schools in New Zealand do not seem to offer any help to advance the standard of appellate competence. This is not the case though in America, where appellate advocates have practised in this "new" system for at least the last fifty years. Most law schools there compel first-year students to take a year-long course on writing appellate submissions. This teaches them early in their legal education how to research and analyse case authorities. Even more importantly, it shows them how to meaningfully organise a case's facts, examine them in a legal context, develop appellate issues and then draft succinct and compelling appellate submissions. In other words, the course quickly educates students how to think like lawyers.

To reiterate, the goal of this paper is to better acquaint the reader with our present appellate scheme. It is also to help him or her to understand the purpose of appellate issues, how to pinpoint them and what to do with them once they are drafted. This will assist the appellate

advocate to improve his or her skills. Consequently, the better standard of advocacy will contribute to a more efficient appellate system, result in a saving of resources, to the benefit of all New Zealanders.

THE CATALYST FOR OUR PRESENT APPELLATE SYSTEM

In 1987 an American law professor named Robert Martineau visited England. For thirty years Professor Martineau had been a "student" of the U. S. appellate system. [New Law Journal, p. 491 (12 April 1991)] His mission was to study the English appellate system so that he could take back ideas to improve the American one. After returning to the U.S. he wrote a book on his experiences called Appellate Justice in England and the United States, William Hein. Buffalo. [New Law Journal, p. 491 (12 April 1991)]

In it he highlighted the difference between the two systems' oral argument as follows:

> *"[English oral argument] took an inordinate amount of time for counsel to identify what their appeals were about, what the issues were and what were their contentions. Most appeals begin at 10:30 am. 'It was often 2:30 or 3:00 before [the author] could ascertain what the key issues were.' By contrast, typically in the US, it required 15 minutes to ascertain the key issues and some 30 minutes to come to a conclusion. 'Getting to the point of the appeal for an English barrister seems to be avoided, not achieved.'. . . The principal difference between the two systems, he argues, 'is the length of time it takes to reach that point.'*
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> . . .
>
> *[Mr Martineau's] conversation with the Judges revealed that they 'felt restrained by the oral tradition from forcing counsel by their questions, to get quickly to the heart of the appeal before counsel was prepared to do so.'"*[1]
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> New Law Journal p. 491, 492 [12 April 1991] Emphasis added.

Understanding Mr Martineau's point is essential in comprehending why our Court introduced an "issue based" system. One must understand that quickly getting to the point (both in written and oral submissions) is now the main feature of New Zealand's new scheme. As Mr Martineau observed this was not true in the "oral tradition" system.

Here are some facts, according to the Court's data, that justify why it adopted the "issue based" over the "oral tradition" procedure: over the past five years the Court of Appeal has decided an average of 172 civil and 529 criminal appeals. This averages almost 700 appeals a year. Moreover, this figure does not include hundreds of miscellaneous motions, applications, and requests for legal aid.

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1 The article from New Times notes that after Mr. Martineau carried out his research, English Courts took 'significant moves' to reduce oral argument's time. For example in [1989 Practice Note (1989) 1 WLR 281] counsel were instructed not to open with a recital of the facts. Instead they were told to 'go immediately' to the ground of appeal. [New Law Journal, ibid, at p. 492]. This is exactly the way it is done in America and the way New Zealand lawyers should be doing it now.

The Court of Appeal presently has seven permanent members, excluding the Chief Justice. They now share between them three law clerks. (Next year though each Justice is supposed to have his own clerk.) Contrast that with the High Court of Australia. It has 7 Judges, each with two law clerks per Judge. Moreover, in 1997 it heard only 56 cases including seven matters heard by a single Judge.

It is the Court of Appeal's practice to write an opinion in every case. In addition, the Justices must: (i) prepare for oral argument, (ii) research the law, (iii) review other Justice's opinions, (iv) confer with other Judges about cases presently being considered by the Court, (v) study draft opinions from other Justices, (vi) keep up with the law, (vi) prepare and present papers to the Bar and other organisations concerning legal matters, and (vii) deal with various and sundry problems such as its Registrar's Office, budgeting, etc.

After reading these facts, it is apparent why the Court changed its procedure. Certainly they had a direct bearing on the Court's decision to abandon the "traditional oral" scheme. The Court most probably concluded that with Governmental budget cuts and its case load it had no option but to gain the assistance from those who practise before it. Otherwise it would be difficult (if not impossible) to secure the just, efficient and effective dispatch of Court business.

THE PRESENT PROBLEM AND THE COURT'S SOLUTION

The Judge mentioned above identified the essence of the Bar's difficulty in implementing the new scheme as being its failure to understand how to practice in it. Consequently it is fair to say that with few exceptions, practitioners still practice as in the "oral tradition" scheme. This may explain, to those who have recently argued at the Court, why they may have felt they were harshly treated there. They simply may have not appreciated that: (i) the Court no longer can give them unlimited time to run on at oral argument, (ii) it also lacks time now to help them develop precise appellate issues during oral argument, and (iii) it may have been "turned off" to their oral arguments by what it read in their written submissions.

The Court's adoption of the "issue based" procedure has placed the burden squarely on the Bar's shoulders. Before writing their written submissions, lawyers must now: (i) analyse the case's facts, the applicable law and the appealed judgment; (ii) pinpoint the appellate issue or issues; then (iii) draft submissions that are extraordinarily concise, tightly focused, and compelling without the spoken word. Furthermore the advocate must now do all of this to a much more stringent standard than before.

The most significant impact on appellate advocacy arising here from the "issue based" scheme is that now written submissions are the most important vehicle for persuasion. As Justice Thomas stated:

> *"The written submissions must . . . be compelling. At the very least, counsel must aim to ensure that the Judges' minds remain open for the oral argument. No*

amount of brilliant advocacy is likely to offset a poorly drafted written submission that is seemingly lacking in substance"

Thomas J, **Advocacy in the Court of Appeal Having Particular Regard to the New Procedures**, NZ Bar Association Conference papers pg 18 (27 July 1996)

In "issue based" advocacy, courts usually pose questions during oral argument to test the parties' arguments and to further probe them and the surrounding policy issues. (For example see Rt Hon Sir Ivor Richardson, Law and Economics, New Zealand Business Quarterly, vol. 4, p 64 [May 1998]). That is not to say though that lawyers there cannot expand upon and enhance their written submissions. However, if counsel's written submissions failed to persuade the Court before then, generally he or she might have a very rough road in oral argument trying to change the Court's preliminary unfavourable opinion.

In order for oral argument to work in the "issue based" scheme, the Court needs to know, in the written submissions and again at the beginning of oral argument, the exact issue which it must answer. One Judge stated the importance to him of counsel reaffirming the issue at the start of oral argument. He said that this was to assure himself that he was "on the same page" as counsel concerning the issue. If he was not, he believes the argument would be meaningless to him. [NZ Bar Association Seminar (June 1997)].

After reviewing the written submissions the Court may, if it finds that no party has correctly pinpointed the issue, discern its own issue. The problem with this is threefold. First, counsel may have to ad lib his or her oral argument. Second, the Court may formulate its own issue after oral argument. If this happens and counsel disagrees with the resolution of the issue, the only recourse now available is to fly to London (if leave is granted) and visit the Privy Council. Third, counsel has lost a tremendous opportunity to win the case by keeping attention on his or her issue and the "path" it created.

The Court may also think that it is preferable that it learns the parties' issues and arguments before oral argument rather than during it. The reason for this is that it allows it time before oral argument to: (1) analyse the positions, (2) redraft appellate issues if necessary, (3) discuss the case with other Justices (and possibly academics), (4) research case authorities, and (5) meaningfully prepare questions to test the arguments during oral submissions.

Finally on this point, New Zealand's trial courts realised long ago that "trial by ambush" neither furthered justice nor enhanced pre-trial settlements. Accordingly, they adopted pre-trial discovery rules. Similarly, the Court of Appeal, by introducing "issue based" appeals, has apparently concluded that "first impression" oral arguments neither necessarily enhance a just opinion nor further settlements before hearing. Additionally, the Court has no doubt recognised that if it reaches a just result through "traditional oral" methods, it comes at great cost to the litigants and an inordinate expenditure of judicial resources.

This appears to be the main reason why the Court has adopted a different procedural system and why greater emphasis is now placed on the written submissions. By doing this, the Court expects counsel to state their positions fully, succinctly and precisely in writing. If counsel considers himself or herself to be unqualified to write proper submissions, they should brief

someone who is. Otherwise, they should be prepared at oral argument to face a very unhappy Court.

To the writer's knowledge, to date, four Judges have publicly expressed the significance they give to written, over oral, submissions. One has said that he does not like written submissions and relies only on oral argument to decide a case. [NZ Bar Seminar on Appellate Advocacy (31 July 1998)] Others though have different positions on this. A second Justice has given 60% importance to written submissions over oral argument. [A Consumer's Perspective, NZLS Appellate Advocacy Seminar Papers, Blanchard J (June 1997), p.2] A third placed even a higher percentage weight on the influence written submissions have on him. [NZ Bar Seminar on Appellate Advocacy (31 July 1998)] Finally a fourth Judge, without disclosing percentages, acknowledged that the "primary focus [now is on] written submissions". [Thomas J Ibid, p. 18]

It is interesting to compare how American appellate judges view written contrasted with oral submissions. After all, they have lived with the "issue based" scheme for over a half century. The American appellate judges that the writer has spoken to generally give written arguments approximately 90% advantage over oral arguments. Why? For the same reasons expressed above.

An aside to the practise of American appellate judges is the Privy Council's Law Lords. The writer's understanding is that they expect counsel to practice in the same mode as in the U. S. Thus the Privy Council, American and Canadian appellate courts and now New Zealand's Court of Appeal are all "issue based" courts. Accordingly they only want to read and hear (other than their questions) the issue and its clear-cut answer. Nothing more.

CAVEAT CONCERNING THE PRESENT STANDARD OF APPELLATE ADVOCACY

In many U. S. jurisdictions (with the number of appeals far exceeding those in New Zealand) oral argument is no longer a "right". If a lawyer believes his or her written submissions cannot adequately state the case, he or she must file an Application for Oral Argument explaining the specific reasons why. The Chief U S Judge for the 9th Circuit of Court of Appeal (covering all Federal Trial Courts in the western portion of America) last year explained why this is so. He found that approximately one third of the appeals lodged in his Court are groundless, or are so "run of the mill" that it would be a waste of the client's money to argue them. In these cases, he also believed that it would also not justify the Court's time to entertain oral argument. Accordingly his Court denies approximately one third of the Applications for Oral Argument that it receives.

Some may be stunned to learn that we in New Zealand may now be close to that situation. The level of appellate advocacy has not improved since the arrival of the new scheme. Recently, as a result, the Court during oral argument has been openly critical of counsel who bring groundless appeals.

This is exemplified in *Ebert Construction (Taranaki) v New Plymouth District Council*, CA 292/97, p. 8 [30 September 1998]. Thomas J suggested there that the Court will start awarding costs personally against the lawyers:

> *"This appeal represents, in our view, nothing more than an attempt by a disgruntled litigant, seemingly lacking objectivity and an appreciation of the strength of the case against it, to reverse well-founded and well-reasoned factual findings. [The lawyer] seemed oblivious to the difficulties facing an appeal against the findings of facts. If such appeals are to persist this Court must be prepared to entertain the course I [Thomas J] referred to in [Rae and Race v International Insurance Brokers (Nelson Marlborough Ltd) and Anor, CA 258/95, 11 August 1997] of awarding costs direct against the appellant's solicitors or counsel rather than the appellant personally (at p 6)".*

If hitting lawyers personally with costs fails to stop the filing of baseless appeals, the next step the Court of Appeal might take is to adopt the American procedure of predetermining the necessity of having oral argument. If that does not stop practitioners from doing so, the Court might then follow the practice of the United States Supreme Court. There lawyers must first file an application with the Court explaining the merits of their cases and requesting permission to even file their appeal.

DIE-HARD ORAL TRADITIONALISTS

The die-hard oral traditionalist, who still believes that the old and new appellate schemes are alike because he or she has drafted written submissions in both, should perhaps consider the following:

1. The purpose of the written submission in "oral tradition" appeals is to support the oral argument. Under that scheme, lawyers won or lost cases in oral argument. However in present practice, the purpose of written submissions is to WIN the appeal before oral argument. Or, "at the very least . . . to ensure that the Judges' minds remain open for oral argument." [Thomas J, ibid at p. 18]. Another Justice put it this way: "[I]f the written submissions have failed to impress the Court, the advocate is in serious danger of losing the battle before entering the Court room." [Blanchard J, ibid at p. 2].

2. Written submissions in the two systems neither resembles one another nor are they written in a like fashion. To reiterate, the purpose of written submissions in "oral traditional" schemes is to help the Court understand oral arguments. Essentially then, counsel write them as a guide to help the Court through their oral argument. Thus, it is fair to say that lawyers do not draft them to persuade the Court only by reading them. Also, in the "oral tradition" system the Court does not impose any length requirement on written submissions. This is probably because lawyers write them in support of their oral argument that could go on for days. Consequently, some are hundreds of pages long.

The writer suggests then that counsel draft "issue based" written submissions as though there would not be an oral argument. Do not write them as though they were notes for a speech. Instead, write them so that the Court can easily understand, on first reading, the issue and the position regarding it. Also, draft the submissions to persuade the Court to agree with them. Accordingly the written submissions should logically lead the Justices and the opposition "along a path of reasoning without surprises, retracing of steps or side excursions." [Blanchard J, ibid, at p.3]. This means that they must be:

- powerful
- reader friendly
- written to avoid any breaks in logic or analysis
- persuasive solely through the written word
- strategically organised, and
- short and clear (even to a layperson)

In addition to this, the writer suggests that appeals should not be a "veiled" rehash of your closing argument at trial. In "issue based" appeals, an appeal is not a "rehearing" (even though the present rules suggest it is). To the contrary, he believes it should be a tightly focused argument based upon a finely developed issue.

Regarding the length of written submissions, one Judge opined that an excellent submission should ordinarily be between 15 to 20 pages. When he picks up a submission longer than that (especially one 40 pages long) the "hairs on the back of his neck rise". This is because he knows that most likely its writer does not know what he or she is doing. In these cases, his Honour says that he skims the submission as opposed to carefully considering it. [Appellate Advocacy, NZLS Seminar Papers (June 1997)].

The reader should now appreciate that our appellate battlefield's tactics and strategies have changed. If this is understood and acted upon the chances of winning appeals in the "issue based" system will be substantially enhanced.

"APPELLATE ISSUES" - WHAT ARE THEY UNDER THE NEW SCHEME? WHY ARE THEY SO IMPORTANT?

One definition that captures the essence of "appellate issue" is that it is the ultimate question the Court must answer before it can finally decide the appeal. Either a lawyer or the Court requires enormous time and energy to refine it down to this degree. Identifying it is like playing a game of chess by oneself with the goal of identifying the "checkmate" move.

What does an "issue based" appellate issue look like? Well, contrary to popular belief it is **not** an argument. Instead it is usually nothing more than a one-line, easily read question. If possible, it helps to identify the basis of the issue, e.g. it addresses a question of law or fact, a mixed question of law and fact, or an abuse of discretion. Here are two examples:

- Whether in allocating the Appellant's damages, the High Court abused its discretion by overlooking and/or misapprehending material parts of the evidence?

- Whether, as a matter of law, the ACC Acts 1972 and 1982 cover personal injuries arising after Parliament repealed them?

Why does the Bar now have the burden to develop appellate issues? Because in the "issue based" appeals system that is how it is done. If counsel perform their duties in this scheme, the Court will have more time to do what it is supposed to do - resolve (rather than formulate) issues and write judgments.

How important is it for the Bar to develop appellate issues? In the view of at least one Justice - critical:

> *"The most important substantive requirement [in drafting submissions] is to define the question in issue with precision, and to define it at the outset of the submission"*. Emphasis supplied by Thomas J, ibid., at p.19

Thomas J. explains his reasoning for this:

> *"In many, if not most, cases the definition of the issue will dictate the outcome of the appeal. In my view this is the most important aspect of the advocate's task. It can truly make the difference between winning and losing. Properly executed, it means that the counsel who can most successfully identify the question in issue will have captured the ground on which the battle will be fought"*. Emphasis supplied Thomas J, ibid, p. 8

Justice Thomas' above opinion applies in New Zealand and in America. The writer understands the same to be true in the Privy Council and in Canada.

Another point to remember is that trial issues are not usually the same as appellate issues. That would be like comparing apples to oranges. Trial issues are questions the Trial Court must consider in resolving the case before it. They usually involve first instance issues related to evidentiary matters, liability, affirmative defences or damages. On the other hand, appellate issues only pertain to the correctness of the trial court's judgment.

Under the new scheme, the number of appellate issues counsel finally sends to the Court will depend on many factors. Unlike the past, the "shotgun approach" is repugnant both to competent opposing counsel and seemingly to the Court. "Shotgun approach" means submitting several issues in the hope that one of them will attract the Court's attention. This only causes needless expenditure of time and irritation of the Court. Furthermore, weak issues distract the Court and "water down" stronger ones. [As John Fogarty QC said: "Even the most complicated cases usually turn on only a few points." [John Fogarty QC, *A Practitioner's Perspective*, Appellate Advocacy, NZLS Seminar Papers, (June 1997), p. 10.]".]

Usually, counsel can feel fortunate to have even 1 or 2 issues worthy of presenting to the Court. That is not to say however that there is a "magic" number of issues that one should

advance and no more. At the end of the day, the number of issues submitted will depend on their strength and the appellate strategy. Basically, it is a judgement call primarily based on experience and intuition.

A USEFUL TECHNIQUE TO ASSIST IN DEFINING APPELLATE ISSUES:

With a better understanding of appellate issues and their importance in "issue based" advocacy, counsel should consider a technique that may help them to develop issues. In "issue based" appeals by far the majority of time is spent preparing and drafting written submissions. The most challenging aspect of this task is to identify *the* appellate issue. This requires a logical and meaningful review of all of the case's facts and the law applicable to them.

In the "oral based" scheme, thumbing through the file and reading only what was considered then to be the key documents may have sufficed. In the writer's opinion, the reason for this was that in this scheme the Court neither required nor expected the precise appellate issue from counsel before oral argument. However, this in not true in the "issue based" scheme. Piecemeal preparation will simply not do the job.

Under the "issue based" system, the Court expects counsel to do all of the pre-written submission "homework" before pen touches paper. Essentially then under the new system the work is "front-loaded". As explained below, once the draft issue is determined, the rest of the work is "downhill".

Not all pre-written submission techniques apply in all cases. Nor can one expect all lawyers to always use one over another. However, to provide some direction in analysing appellate issues, the writer will review the system that he has generally employed over the last quarter century. This is in hope that at the very least it may be of benefit in thinking about alternatives, even if the reader chooses not to use them.

1. First, read all pleadings and interrogatories. This means thoroughly read them and take notes. Pay attention to the following: (i) the cause or causes of action, (ii) the defences and affirmative defences, (iii) admissions either in the pleadings or in interrogatories, (iv) trial issues, and (v) the exact damages or relief sought. If important, copy from the papers the actual words used to frame these items. By taking notes on this information, counsel will begin to build a written history of the case. Later on it can easily be referred to when one chisels out the issue and again during argument.

2. The judgment is the next document to read. There are several reasons for this. In an appeal, a litigant asks the Court to review the lower court's judgment. The appellate Court's primary duty then is to resolve whether the lower court's judgment "got it right" or "got it wrong". Furthermore, it wants to know the exact point in the judgment which is being attacked and why (or not) the trial court "went off the rails" there.

   Consequently, while reviewing the judgment, underline all findings of fact and law. During this review also note: (i) how the trial court dealt with the issues presented in

the pleadings, (ii) if it left out any relevant facts or legal issues, (iii) the "logic" used therein, and (iv) the legal principles used to resolve the case.

3. Next, review all substantive legal authorities cited by the parties below or in the judgment. This provides a legal framework for counsel to consider the remainder of the information he or she will store in memory. At this stage, conducting extensive additional substantive research is usually unnecessary.

4. It might then be helpful to review appellate material. This helps put the case in an appellate perspective. To reiterate, the writer believes it essential to identify appellate issues by the type of question they pose, e.g. is it an issue of law (or fact)?; is it an issue of abuse of discretion?; is it a mixed question of law and fact?, etc.

   This aids the Court by narrowing down the tests that it must use to analyse the case. For example, if the issue concerns an issue of fact, the Court will be reluctant to engage in a general factual retrial. (See *Rae and Race v International Insurance Brokers (Nelson Marlborough Ltd) and Anor*, CA 258/95, 11 August 1997). If the issue pertains to an abuse of discretion, the Court will use an appellate test to decide the issue.

5. The next step involves an inordinate expenditure of time. Some consider (erroneously in the writer's view) that they can skip over this part because, after all, they participated in the trial. This step is reading and creating a written digest of the entire record. "Record" here means every piece of paper introduced at trial and every trial transcript. "Digest" means writing down every fact in a chronological order that might tangentially be relevant to the appeal. Appended to this paper is a sample digest, which shows the digest is merely a "beefed up" version of a time line.

   The usual starting point for preparing a digest is the documents produced after the action begins. The digest identifies the document by time, people associated with it, and a brief statement as to its contents. Then, if a fact such as a prior meeting is mentioned in a document, this is also included in the digest according to its date, people involved in it and its substance. The facts admitted in the pleadings and in the interrogatories are included next. Furthermore, additions to the digest are made while reading the transcripts.

   This process results in four benefits:

   (i) It forces counsel to "boil down" the case's facts. Initially, this happens by just reading the documents closely enough to summarise them. When the process is completed, one can read in one short sitting the case's entire "story" from beginning to end. This further helps to understand the facts that finally led to the commencement of the action.

   (ii) The digest also serves as a vehicle to share an understanding of the case's factual history. It allows all involved to get "on the same page" quickly and easily. This becomes especially significant when appellate counsel is working with the lawyer who tried the case and/or who will orally argue it.

Over the years the writer has learned that no matter how confident he may feel about appellate matters, it is essential to seek others' ideas concerning the parties' strengths and weaknesses. "Others" here means not only lawyers but also lay persons. Their views on the case's merits have proved to be invaluable. Of course, the more clearly they can understand the case, the more valuable their opinions become.

(iii) The digest allows one to draw reasonable inferences by tying two or more facts together. Often these inferences would be impossible to draw without seeing the facts' relationship to each other according to the date they occurred.

(iv) The digest should provide a meaningful and complete understanding of the case's story line at any time. This is especially helpful in formulating the issue, drafting the submission and preparing for and conducting oral argument. It is the best way that the writer knows to put facts into perspective, both in trials and at appeal.

6. After the digest is completed, counsel should conduct further substantive research on the issues that seem to be candidates for the written submission. This should also be done in relation to issues that may be harmful to him or her.

7. Then, and only then, should counsel feel capable of beginning to draft the appellate issue or issues. The reason for this is that the subconscious must first have "downloaded" sufficient information to help it meaningfully conjure them up. To start earlier would only be detrimental to the case by "short circuiting" one's thought processes.

8. After the initial draft of the issue or issues is written, begin to compose the written submission. The writer strongly believes that any attempt to do so before then is simply a waste of his or her time and of the client's money. In "issue based" appeals, everything in the submission (both written and oral) must be critical to the issue. If it is not, it should be left out. How then, before one determines at least preliminarily the issue or issues, can one know what to include in the submission?

Often the initial assessment of the issue or issues will change while drafting the written submission. Usually as the argument develops, it will become more concise. Sometimes counsel may decide to merge two or more issues. Other times he or she will completely abandon an issue after it becomes apparent that it is not as strong as was first thought, or that including it would only distract from the thrust of the other issues.

The final issue or issues counsel travels with in the written submissions must generally be no longer than one sentence, easily understood by the reader on first reading and hopefully one that can be answered only by the answer counsel provides. After reading the issues, the reader should have a complete understanding of the question he or she must resolve. If the issue accomplishes this, it will be a natural "lead in" to the supporting argument.

WHAT TO DO WITH THE APPELLATE ISSUE OR ISSUES

An appellate issue forms the backbone of written submissions. Therefore it is the first thing counsel should put down in the written submission. To reiterate, the reason for this is that everything in the submission must essentially relate to it. Because of this, once the issue is down in writing, the submission becomes far easier to draft. Furthermore, writing a submission before figuring out the issue is like being a "bull in a china shop". In both cases, neither the author nor the bull have any idea what they are charging at.

In oral argument, issues should also be used as a foundation to build upon. Thomas J succinctly stated the role they are now intended to play there:

> *"The first point in counsel's oral submission, yet again, is to move directly to the question in issue...My preferred format for oral argument is for counsel to identify and crystallise the issue; next [to] state the conclusion contended for and then to list and deal with the reasons in support of that conclusion."* Emphasis Supplied Thomas, ibid, p. 8

Thus, from experience and listening to appellate judges both in New Zealand and the U S, the writer suggests that oral arguments should, in most appeals, begin like this:

1. My name is _____.
2. The issue (or issues) in this appeal is (or are) this.
3. Based upon it (them) we submit that the appeal should (be allowed) (dismissed).
4. The reason(s) for this (are) as follows.

Another benefit of the appellate issue during oral argument is that one can use it to keep the Court, and an adversary, on the "path" his or her issue has helped to lay before them. This path consists of the issue, the conclusion counsel submits the Court should make at the end of its analysis, and the grounds that the Court could accept to achieve it. If either the Court or the opponent travels from counsel's path during oral argument, counsel's job is to gently but compellingly bring them back to it. Through techniques that can accomplish this, one is in effect "controlling" the course of the appeal.

When representing the Respondent in the appeal, please do not fall into the trap of perfunctorily assuming that the Appellant's issue or issues, in either its written or oral submissions, are right. They are not carved in stone. If, on analysis, they prove to be incorrect, counsel must alert the Court of this as soon as possible. Then the Court must be shown that his or her issue, and not the opponent's, is the correct one that the Court should address during the appellate process. Counsel should usually be able to demonstrate in a short paragraph or in a few sentences why the Appellant's issue is irrelevant to the appeal.

CONCLUSION

The purpose of this paper is not to suggest that one will be unsuccessful if he or she continues litigating under the "oral tradition" scheme. According to at least one Justice, 99% of appellate advocates still do. Yet, in every one of their appeals, at least one advocate will win no matter how poorly they present their case. Instead, it is the writer's intention is to warn those who continue practising in the "oral tradition" that their chances of winning appeals, will drop precipitously as more of their peers give it up.

SAMPLE DIGEST

Jones v *Smith*
Case No – 99/62

Date	Document	Information	Reference
21/08/75		Acme International Ltd formed	Final Judgment, Pg 1
28/11/75		It rents an office from John Smith	Docket No. (DN) 109; Transcript [TR 642]
07/09/84	Defendant [D] to Acme	Here is the Deed of Lease re: Smith's property. Please note our comments. If you are happy with its terms, sign it and return it to us. Please have the guarantors sign the guarantee in the presence of an independent witness who should write his name, occupation and address on it.	DN 97
14/11/84	D to Acme	Here's Smith's Deed of Modification. Please sign it. Specifically, sign the guarantee in the presence of an independent witness who should also sign and write his occupation and address.	DN 94
15/11/84		Acme signed the Deed and put a copy in its safety deposit box.	TR 646