

## SAHCA Advocacy Tips

### **Citation of Authorities in the High Court and Court of Appeal**

The written and unwritten rules governing the citation of authorities are sometimes overlooked by even the most experienced higher court advocates from both sides of the profession. Yet in recent years, as the number of reported and unreported cases crossing the advocate's desk have seemed to multiply exponentially, these rules have grown in number and in importance (see *Governor and Company of the Bank of Scotland v. Henry Butcher & Co.*, CA, Gazette [2003] 3 April, p. 29). The key requirements are summarised in the following paragraphs.

Q. What restrictions are there on an advocate's ability to cite authorities in written and oral argument?

A. The courts have recognised that the current weight of available material causes problems both for advocates and for courts in properly limiting the nature and amount of material used in the preparation and argument of subsequent cases. Efforts to increase the efficiency, and reduce the cost, of litigation will be threatened if courts are burdened with a weight of inappropriate and unnecessary authority.

Of course, an advocate is likely to do himself no favours if he cites several authorities which are not in point or which merely recite the same proposition of law and the selection of authority is largely a matter of legal acumen and common sense. But the Courts have laid down the following rules, which advocates must apply when preparing written or oral submissions (see *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001).

Judgments falling within the following categories may be cited only if they clearly purport to establish a new principle or to extend the present law. For decisions after 9 April 2001, that indication must take the form of an express statement.

- Applications attended by one party only.
- Applications for permission to appeal.
- Decisions that an application is arguable.
- County Court judgments (subject to limited exceptions).

Further, in addition to stating the proposition of law that the authority demonstrates:

- Advocates must be able to justify their decision to cite any other judgment which contains an indication by the court that it was only applying decided law to the facts of the particular case; or otherwise was not extending or adding to the existing law. (Citation may, for example, be justified if the court has taken the opportunity to summarise existing authority in a helpful form.)
- Advocates must be able to justify a decision to cite more than one authority in support of a given proposition (see further below).
- Advocates must be able to justify a decision to cite overseas authority (see further below).

Q. What is the status of unreported authorities?

Permission to cite unreported cases in transcript form will not usually be granted by the High Court or the Court of Appeal unless the advocate is able to assure the court that the transcript contains a relevant statement of legal principle not found in reported authority and that the authority is not cited because of the phraseology used or as an illustration of the application of an established legal principle (see *Practice Statement (Supreme Court: Judgments)* [1998] 1 WLR 825, para. 8).

Q. How should authorities be cited in written argument?

A. Reports should be cited initially using their full title and report reference, although subsequent references can of course be abbreviated. Since 14 January 2002, all judgments of the High Court in London have been given a unique "neutral" reference (the same system has applied to Administrative Court, Court of Appeal and House of Lords judgments since early 2001). To assist the court, this neutral reference should be given alongside the report reference on the first occasion that a judgment is cited (see [2001] 1 WLR 194; [2002] 1 WLR 346). If the authority does not have a neutral reference, it would be helpful to identify the relevant court or judge.

The *Practice Direction (Citation of Authorities)* (see above) also requires that any skeleton argument or appellant's or respondent's notice should contain for each authority cited, the following information:

- The proposition of law that the authority demonstrates, and the parts of the judgment that support that proposition.

- If more than one authority is cited in support of a given proposition, the reason for taking that course.
- In the case of overseas authority, (a) an indication of what that authority adds to the law of England and Wales and the justification (if any) for adding to domestic authority, and (b) a certification that there is no authority of the English Courts which precludes the court from accepting the proposition that the overseas authority is said to establish.

These statements should, while not adding materially to the length of the document, be sufficient to demonstrate the relevance of the authority and the necessity of citing that authority.

Any bundle or list of authorities must bear a certificate by the responsible advocate that these requirements have been satisfied.

Q. What if an authority is reported in more than one place?

A. If a case is reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales (e.g. A.C., Q.B., Ch., P.), that report should be cited. If a case is not so reported, but is reported in the Weekly Law Reports or the All England Law Reports, that report should be cited. Otherwise, a report in any of the authoritative specialist series of reports (e.g. Lloyd's Reports, Fleet Street Reports) may be cited (see *Practice Statement (Supreme Court: Judgments)* [1998] 1 WLR 825, para. 8).

Q. How should authorities be cited in oral argument?

A. When referring to a case for the first time, an advocate should state (without using abbreviations) the full title of the case, its reference and the identity of the court or judge concerned. For example:

"My Lady, the first authority on which I rely is the decision of the Vice-Chancellor, Sir Robert Megarry, in the matter of Gibson's Settlement Trusts, reported in the Chancery reports for 1981 at page 179."

Note that, although the High Court and the Court of Appeal hand down judgments, the members of the House of Lords deliver speeches and the Privy Council gives opinions.

The requirements of the *Practice Direction (Citation of Authorities)* (see above) apply equally to oral submissions.