

LEGAL RESEARCH—2012
PAPER 3.1

Tactics for Written and Oral Advocacy: “Be Prepared, Be Brief, Be Gone”

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TACTICS FOR WRITTEN AND ORAL ADVOCACY: “BE PREPARED, BE BRIEF, BE GONE”¹

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I. Introduction

Easy reading is hard writing. Clarity and persuasiveness are difficult to wring out of complex legal issues. The task is more daunting when those issues are merged with complicated facts. A prominent counsel once said that legal writing and presentation was about leading the judge down a path to a destination of your choosing. However, taking the “shortest road home”² through the law and the facts to your theory of the case can be a rocky process of refinement and re-refinement. Much has been written about that process, so I will leave those comments to the end. I will start by looking at how legal writing is received and digested by the courts, giving some suggestions for how to take advantage of that process. As I am not a judge, I do not presume to speak on behalf of the Court of Appeal or any other court. These are my own views.

II. A Focus on Written or Oral Advocacy?

While legal writing is always important, a common question is whether it supersedes oral advocacy in importance. Justice La Forest famously proposed to do away with oral argument altogether. In a 1998 speech, Justice Binnie took a more temperate view:

When you start your submission at 9:45 in the morning, remember that the judges are probably going to want to reach a tentative decision on the appeal before the sun goes down. ... Courts of this size require the judges to prepare and think in advance of the hearing. Once oral argument is heard, the court wants to capitalize on some of the adrenalin pumping around the courtroom to, as Justice [Willard Zebedee] Estey used to say, “get this baby airborne.”³

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- 1 I owe this sub-title to Justice Joel Fichaud of the Nova Scotia Court of Appeal, “How to Catch the Judge’s Wave,” online: <http://www.courts.ns.ca/bench/judges_wave_fichaud.htm>.
 - 2 Irwin G. Nathanson, QC, “Conceptualising and Presenting at Trial and On Appeal” delivered at CLEBC, *A Litigator’s Arsenal* (September, 2011) at 5.1.3.
 - 3 Justice Ian Binnie, “A Survivor’s Guide to Advocacy in the Supreme Court of Canada,” edited text, delivered at John Sopinka Advocacy Lecture (November 27, 1998), online: <<http://www.scai-ipc.ca/pdf/Binnie-SurvivorsGuidetoAdvocacy.pdf>>.

3.1.2

How much time you devote to writing should be roughly proportional to the time the court has to review your writing before it renders a decision. You might think of this in terms of “lead” time the court has to consider your argument before a hearing and the “lag” time it considers it after a hearing, but before rendering judgment. The longer the court’s judgment has time to “get airborne,” the more the court may come to depend on what you write.

All courts strive for full compliance with the Canadian Judicial Council’s guidelines for pronouncement of reserve judgments, requiring that all reserves be pronounced within six months from the date of hearing. In 2011, 94% of criminal appeals and 87% of civil appeals were pronounced within that guideline.⁴ When authoring a reserve judgment, the court may take at least six months to review and develop its disposition and reasons, giving it plenty of time to consider what you have written after a hearing concludes.

A hearing where a disposition is given quickly without reserving is much different. In the Court of Appeal, only 20% of applications in Chambers were reserved in 2011.⁵ One would expect Supreme Court statistics to show even fewer reserves. Where there is no reserve judgment to give, the court may have only a few days of lead time to review your argument and no “lag” time to consider its decision. The court’s emphasis in these situations is on receiving information quickly, given minimal preparation time. This need to receive and digest information quickly may shift the emphasis onto your oral argument.

Consider *Filing Written Argument in Court of Appeal Chambers* (Civil Practice Note, 1 March 2012) issued by the Court of Appeal, capping written argument in civil chambers to three pages. In the Supreme Court, written argument cannot be submitted unless an application is longer than two hours.⁶ Why do these limitations exist? The limits placed on written argument in Chambers by both courts signal the importance of your oral presentation over your written submission in these forums. Three pages give you one page each to sketch out Master Donaldson’s three requirements: 1) what you want, 2) why you should get it and 3) why I have the authority to give it to you.⁷

Consider also how the proceeding is scheduled. Spending hours perfecting a written argument when that argument gets bounced from one judge to another the morning of a hearing serves little purpose when a reserve is unlikely. A busy docket in the Supreme Court means this happens more than it used to—long chambers applications and even long trials can get moved around hours before hearing. Where there is high scheduling volatility, giving the court a rapid “entry point” or summary of your position to facilitate quick comprehension of your case is advantageous. This “entry point” could be similar to the one page “opening statement” required in a Court of Appeal factum.

III. How the Court Works Up a Case vs. How You Present Yours

How a court works up a case may affect how you present that yours. How a case is received is really no mystery, as judges work up a case in a similarly critical style to how lawyers evaluate an opponent’s factum or chambers brief.

4 Court of Appeal for British Columbia, *B.C. Court of Appeal 2011 Annual Report* (Vancouver: Court of Appeal, 2012) at 14, online: <http://courts.gov.bc.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2011%20annual%20report.pdf>.

5 *Ibid.* at Appendix 3.

6 Supreme Court Civil Rules at Rule 8-1(16).

7 Master Douglas C. Baker, “A View from the Bench — Chambers Practice” delivered at CLEBC, Family Practice Fundamentals: Part 1 - The Business and Practice of Family Law (January 1999) at 8.2.2., online: <http://online.cle.bc.ca/CourseMaterial/pdfs/2007/089_8_2.pdf>.

3.1.3

Just like articling students in private law firms, judicial law clerks play a large role in initially working up a case. Why is their role important to consider? To assist busy judges, law clerks prepare bench memorandums that may recast your submissions into digestible form. They may even suggest a disposition. Think carefully about what you knew when you graduated law school. More often than not, that is your initial audience. While it may be unnecessary to craft your submissions at a level easily understandable to a newly minted lawyer, it cannot hurt. J. Edward Gouge, QC put it this way:

The most common failing among opening statements is that counsel forget that the judge is new to the case ... A good opening statement proceeds on the premise that the trial judge knows nothing.⁸

Without going into specific detail, it has been revealed that Court of Appeal justices are given weeks of lead time to examine the clerk's bench memorandum and your factum and authorities on an appeal.⁹ A recent change in the Court of Appeal Rules has modified lead time for applications to five business days from two days, giving judges more time to reflect on chambers material as well.¹⁰ During that time, they will review their law clerk's bench memorandum and will undoubtedly develop their own theory of the case. They will discuss the issues raised in the appeal with their law clerks and colleagues. Given time restrictions, the same is not true of every proceeding in the Supreme Court.

Because the Court of Appeal does not have the same volume of cases as in the Supreme Court, appeals are not frequently bumped or re-scheduled, eliminating the requirement for judges to become familiar with material on short notice. There is no judge on the Court of Appeal that does not read the factum very closely prior to the appeal and has not had their law clerk work up a factum by carefully checking the research.¹¹ If a justice appears to have not understood your argument, it is not for lack of preparation.

When you stand up to present your case in oral argument, you will rarely need to take the Court of Appeal through the facts of the case or the issues in your factum. Your oral argument supplements your written work. It is said no better than by J. Edward Gouge, QC:

A guiding principle of advocacy is: "Don't insult people by telling them what they already know." Because appellate judges come fully prepared to oral argument, they already know most of what you want to tell them. Don't read from your factum—they have already read that. Don't tell them what the issue is—if your factum is any good, they will already know that. Don't read from the authorities—they have already read the references in your factum.¹²

In the Supreme Court and particularly in chambers, it may be helpful to refer more to your written argument, given the absence of lead time. When in doubt, ask the court whether it is necessary to briefly review the facts or issues in dispute.

In both courts, be judicious with your use of authorities. Even complex appeals usually turn on three or four cases or less. Deciding how many cases to include means including only those necessary to support your case and those adverse to your position you feel must or cannot be distinguished. Do not include a mountain of authorities in the hope that one or two will catch the judge's eye. This is another example of what Justice Cromwell decried as "drowning the fish"¹³—a large book of

8 J. Edward Gouge, QC, "Some Thoughts about Appellate Advocacy" *The Verdict*, 11:127 at 34.

9 See Meg Gailey, "What the Court of Appeal Looks for in a Factum" delivered at CLEBC, Appellate Practice (October 1, 2011) at 4.1.1 to 4.1.2.

10 Court of Appeal Rules at Rule 33(1).

11 Gailey at 4.1.2.

12 Gouge at 37.

13 Justice Thomas A. Cromwell, "Lessons You Don't Have to Learn the Hard Way: An Address to the UBC Law Alumni Association" reprinted in *The Advocate* (January 2010) at 99.

authorities that includes every single case, regardless of whether the facts relate to the issue(s) to be decided smacks of inefficiency. In fact, there are a number of decisions in the Court of Appeal that are so frequently cited that the court has instructed counsel to include only the head note and the particular section of the case to which the parties refer.¹⁴ Consider what the court is saying by preparing a long list of authorities to be reproduced in this abbreviated way. As Justice Laskin said:

Our storage area at the Court of Appeal is filled with casebooks cluttered with cases never referred to by counsel. I estimate that over 90 percent of cases cited in most factums are not referred to in oral argument and are not referred to in our judgments.¹⁵

Opinions vary as to whether it is useful to plead multiple issues or grounds of review. Sometimes pleading in the alternative is unavoidable, particularly when you are commencing a proceeding. However, by the time those issues come before the court in chambers, at trial or on appeal, you should be able to present only what is paramount. As Justice Fichaud of the Nova Scotia Court of Appeal said:

When counsel says “there is only one issue here,” a ray of sunshine breaks out in the courtroom. The reward is the blissful judge’s undivided attention to your best issue. But when counsel opens a straightforward case with “there are seven issues in the alternative,” the judge may reflect on the topics of redundancy, insecure lawyering, or flotsam and jetsam.¹⁶

Avoiding such flotsam and jetsam also requires your submission to look “clean.” “Overcrowding the page with content,”¹⁷ using footnotes or endnotes solely as a space saver, or producing pages with little “white space” can leave a visual impression that may get your submission slid to the bottom of a large pile of reading. Under no circumstances should the judge be required to “embark upon a “voyage of discovery”¹⁸ to discern your meaning.

IV. Bringing It Together: Restatement of Tactics for Written and Oral Advocacy

Having reviewed much of what has been written on techniques for effective legal writing, the following five main points capture what I see as the common recommendation of judges and senior counsel:

1. Recognize the Value of Research Time: The research and writing process is naturally front-end loaded. Good factual analysis, followed by extensive research takes a lot of time. Clarity in your research result produces clarity of thought that leads naturally to clear writing and expression. Resisting the temptation to put pen to paper until you have a good roadmap of the points you must prove can be advantageous.

14 *Frequently Cited Authorities* (Civil & Criminal Practice Note, 21 October 2011).

15 Justice John I. Laskin, “A View From the Other Side: What I Would Have Done Differently if I knew What I Know Now” *The Verdict* 11:127 at 52.

16 Justice Joel Fichaud, “How to Catch the Judge’s Wave” online: <http://www.courts.ns.ca/bench/judges_wave_fichaud.htm> .

17 Justice Eleanore A. Cronk, “More Lessons on Excellence in Written Appellate Advocacy” *Canadian Lawyer* (October 31, 2011) online: <<http://www.canadianlawyermag.com/3918/more-lessons-on-excellence-in-written-appellate-advocacy.html>> .

18 *Transportation Lease Systems v. Viridi*, 2010 BCCA 347, 7 B.C.L.R. (5th) 30 at para. 71.

2. Use “Point First” or “Point Early” Legal Writing: If you have done your research and have a good roadmap of the points you must prove, this should be easy. “Point first” writing describes a technique where you to state your point first in each paragraph, then provide the arguments or evidence supporting that position. It is counter-intuitive to lawyers because many prefer mystery writing characterized by the slow wind up that reveals the point at the end. Duplicating this chronological thought process on paper is not “reader-friendly advocacy”¹⁹ and enrolls you in what Mr. Justice Cromwell called the “CSIS school.” That is, your writing is cast with the “attitude that ‘what this case is about is a secret, and if I told you I’d have to kill you.’”²⁰ The difference between thinking and point first expression is shown in the simple chart below:

Thinking Process	Point First Expression
1. Insurance claim is made 2. Insurance claim is processed 3. Coverage is unfairly denied	3. Coverage is unfairly denied! 1. Insurance claim is made 2. Insurance claim is processed

The differences between thinking and writing are nuanced. In the academic writing much of us learnt in university or even high-school, we are taught that each paragraph should have a “topic sentence” that hints at the conclusion to follow, but does not give everything away.

An example of a topic sentence relevant to the chart above might be something like “There are several factors suggesting coverage has been unfairly denied.” A better lead in is one that states the exact thesis, such as: “Coverage has been unfairly denied in this case because of X.” Later in the paragraph, you could explore how that statement is supported on the facts and evidence or explore the “several factors” supporting your argument in detail.

Merge point first thinking into how you use your headings. At one time, I used rhetorical headings to try and get the judge’s attention, such as “Did the trial judge err in admitting the hearsay evidence?” These are far less effective than just coming out and saying it confidently: “The trial judge erred in admitting the hearsay evidence because of X.”

Even small statements that are frequently used like “it is submitted that” or “this is an appeal from Justice ...” can distract from the main point early in a sentence. Avoid multisyllabic, overused and antiquated “throat clearing” language such as “this Honourable Court,” “hereinafter,” “heretofore,” “aforesaid,” “furthermore,” “it appears that,” “the fact that,” “it is the case that,” “the evidence will show that” or “it is respectfully submitted that.”²¹ In the words of Justice Laskin, “forget the windup and make the pitch.”

3. Gain Control of the Main Issue in the Case: The “point first” principle also informs an overall approach to the case. Most judges and senior counsel reiterate that every case will have one or two main or “controlling” points that will win the day. The principle has been expressed in different ways: “The controlling idea,”²² the “shortest road home,”²³ the “first

19 Laskin at 50.

20 Cromwell at 100.

21 Eugene Meehan QC, “Strategic Legal Writing” CLEBC (November 8, 2002) at 9. online: <http://www.jessupcanada.org/problem_related_materials_and_research_tools/strategic_legal_writing.pdf>.

22 Laskin at 52.

23 Nathanson at 5.1.3.

shot,”²⁴ “the theme,”²⁵ or the “tipping point”²⁶ on which the case turns. As Justice Fichaud said: “Get to the heart of the problem. Propose your solution. Say it simply, clearly and once.”²⁷ While it is not unforeseen that a judge may take an argument in a different direction, confident writing that summarizes one or two key issues inevitably leads to that “ray of sunshine.”

Defining and dominating the main issue is part of what Eugene Meehan, QC refers to as “positioning,” a term used by ad agencies. While the issues and facts in a case “are what they are,” positioning can distract attention from a weakness and draw attention to a strength.²⁸ He argues that it is your job to find the central theme in each case and stay on message by emphasizing relevant strengths in both your legal writing and presentation:

The most powerful themes go beyond one idea and lock two opposing ideas in conflict, creating a dialogue. For instance “the defendant valued money more than safety.” In such instances, it is not the moral of the story that involves the reader so much as the struggle between the two opposing points of view in the theme.²⁹

Capturing the main theme in a few words also gives you something to circle back to in oral argument, particularly during closing. A theme does not mean reiterating a phrase over and over again, but a single, punchy message gives the judge something to remember when your case is reviewed (sometimes well) after argument.

3. Come Across as Objective: Mr Justice Cromwell described a lawyer in Halifax who was known as “Chicken Little” behind closed doors. No matter how straightforward the case, or narrow the issue, “the very continuation of civilization as we know it” was put at risk if the issue was not decided in his client’s favour.³⁰ There is nothing wrong with strong advocacy and advantageous portrayal of the issues, but beware the overstatement. Even using “false intensifiers”³¹ such as the terms “clearly” or “absolutely” can ruin prized objectivity.

Compare submissions teeming with this type of hyperbole with the effect of understatement. Both dare the reader to dig deeper, but understatement makes you believe there is more to support the case, whereas hyperbole dares you to find evidence undermining the theory presented. The latter is a challenge to which many judges and law clerks may eagerly respond.

24 Justice Eleanore A. Cronk, “More Lessons on Excellence in Written Appellate Advocacy” *Canadian Lawyer* (October 31, 2011) online: <<http://www.canadianlawyermag.com/3918/more-lessons-on-excellence-in-written-appellate-advocacy.html>> .

25 Leslie J. Muir, “Factum Writing for the BC Court of Appeal” *The Verdict* 11:127 at 39.

26 Fichaud at 94.

27 *Ibid.* at 96 - 97.

28 Meehan at 2.

29 *Ibid.* at 13.

30 Cromwell at 98.

31 Justice John I. Laskin, “Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums” delivered at Annual Ceremony to Mark the Opening of the Courts of Ontario for 2012, online: <<http://www.ontariocourts.ca/coa/en/ps/speeches/forget.htm>> . This principle is also referred to as “over-torquing” by Cromwell at 98.

4. Sweat the Petty Things: Ensuring you get the details right can increase your credibility. Being careless can have correspondingly detrimental effect. Besides the common advice to avoid grammatical or typographical errors, be consistent with your formatting, the format of your citation and the reporters that you cite to, and scrupulously obey the forms and directives of the court. Write succinctly: a good rule of thumb is that you should be able to read a paragraph aloud in one breath. If you cannot, break your submission up into separate paragraphs.³²

V. Conclusion

An effective presentation will convince the judge of three things: 1) if they decide the case in your client's favour, they are doing the just thing, 2) if they decide the case in your client's favour, they are legally correct and 3) the presentation you have made is credible.³³ Achieving this end requires that you spend the necessary time to narrow the issues through research and translate those issues into a succinct, point first presentation in a form best digestible by the court.

32 Meehan at 7.

33 David Stratas, "Some Factum Writing Suggestions" delivered at Queen's University, Kingston, Ontario. Online: <<http://law.queensu.ca/students/jdProgram/mootCourt/oslerMoot/legalWritingTips/doc6.pdf>>.