

The Art and Science of Appellate Advocacy

**April 30, 2009
Hilton Lac-Leamy, Gatineau, Quebec**

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INTRODUCTION

When I was first asked to speak on the subject of appellate advocacy, one of my learned colleagues asked whether the topic had been sufficiently trampled by leading appellate counsel and members of the judiciary. What could I add? In fact, research uncovered a wealth of references on appellate advocacy in Canada and elsewhere. Thinking that the reader might benefit from the wisdom of those with far greater experience and exposure to the subject, I took the liberty of collecting insightful statements and helpful suggestions from some of the leading commentators on appellate advocacy.¹

What follows are selections from some of the leading advocates on appellate advocacy, organized by topic. Please make note of the bibliography where you will find references to articles, commentaries and texts on various aspects of appellate advocacy, both written and oral. We are especially fortunate that members of the judiciary have written on the art of appellate advocacy, including Chief Justice Richard of our Court of Appeal, and Justices Binnie, Rothstein and Cromwell of the Supreme Court. If you read their words and heed their advice, you will at least have someone other than yourself to blame if your appeal goes badly.

TIPS FOR EFFECTIVE APPELLATE ADVOCACY

“Yet it is true, is it not, that in the argument of an appeal the advocate is angling, consciously and deliberately angling, for the judicial mind. Whatever tends to attract judicial favor to the advocate’s claim is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other. Why otherwise have argument at all?”

Reference: John W. Davis, “The Argument of an Appeal,” p. 745.

¹ I am indebted to Brendan Brammal (who toiled as a clerk for Justice Ian Binnie and is now a new associate working with me at McCarthy Tétrault) and James Gannon (an articling student) for their able assistance.

Advice for the Advocate, by Justice Story, United States Supreme Court (1811-45)

Be brief, be pointed
Lucid in style and order
Spend no words on trifles
Condense
Strike but a few blows, strike them to the heart
Scattered fires smother in smoke and noise
Keep this your main guide
Short be your speech, your matter strong and clear
And leave off, leave off when done.

Reference: As quoted by Justice Ruth Bader Ginsburg, “Remarks on Appellate Advocacy,” pp. 570-71.

Focus on no more than 3 points

“The most important—the very most important—step you will take in any presentation, whether before a trial court or an appellate court, is selecting the arguments that you’ll advance. . . . Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court. If you’re not going to win on your stronger arguments, you surely won’t win on your weaker ones. It is the skill of the lawyer to know which is which. Pick your best independent reasons why you should prevail—preferably no more than three—and develop them fully.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 22.

“In any given case, the most significant issues cannot number more than three. As an *aide memoire* to be attached to every counsel’s brief, permit me to state unequivocally that no judge in a single trial has made more than three reversible errors. Counsel may think the judge has made many more, and the panel members may have their own thoughts, but that is an impermissible

thought for the true advocate. Three is the outside number for judicial purposes.”

Reference: Justice Finlayson, “Appellate advocacy in an Abbreviated Setting,” p. 3.

“Almost all appeals have only one or two or, at most, three good issues. Yet, even in ordinary error-correcting appeals, we frequently see counsel listing seven, eight, even ten issues for the court to decide. We can never know the case as well as counsel does, and we can spend only a fraction of the time that counsel has spent on it, so you must focus our attention on the one or two issues on which you believe the appeal will turn. Counsel do not always give that question enough thought. Figure out these one or two issues and, in most cases, dispense with the rest.”

Reference: Justice Laskin, “Forget the Windup and Make the Pitch,” p. 13.

“It is easy to spoil an otherwise good argument by arguing too many issues. Indeed, most cases turn on no more than a few. . . . [T]he argument is stronger if you confine yourself to the major arguments and, difficult as it may sometimes be, let the minor points go. Legal contentions, like currency, depreciate through over-issue.”

Reference: Justice Robins, “Appellate advocacy,” p. 5.

“In so many arguments in our court, counsel have figured out that they have got five or six points and they are going to argue them all, but three times as fast. The result is that no one understands anything. Instead, select one or two points that you really think are winners, and argue those as if your time were unlimited.”

Reference: Justice Sopinka, “Appellate Advocacy,” p. 9.

“Sort out your arguments in the order of their strength, number them 1-2-3-4-5-6, etc. Then, if you want some really good advice, throw out everything

after #3. If you have to reach down to #4, chances are you're not going to make it."

Reference: Justice Catzman, as quoted by Justice Laskin, "The Right Stuff: Marvin Catzman and Legal Writing," p. 5

Define the issues with care

"[S]ome counsel operate on the assumption that everybody will ultimately agree on what the argument is about. This is a mistake. A key to success to advocacy in the Supreme Court of Canada is the ability to set the agenda, in other words, to define the issue or issues raised by the appeal in a way that the judges find attractive and that will motivate them to want to write in your favour."

Reference: Justice Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada," p. 6.

"Inexperienced counsel go into a courtroom assuming that everybody is agreed on what the question is. In fact, much of the time, counsel are in silent, unacknowledged, semi-conscious disagreement over 'what the case is about.' These unarticulated differences of approach create much of the adversarial fog that sometimes envelops us."

Reference: Justice Binnie, "In praise of oral advocacy," p. 4.

Be reasonable

"persuasive burden = distance x resistance

Minimize the legal distance we must travel to agree with you, and minimize our resistance to being moved. In practical terms, this equation translates into making the court as comfortable as you can with your position. Give the court narrow, not adventuresome, grounds to decide in your favour, and narrower, not broader, rules to adopt."

Reference: Justice Laskin, "What persuades," pp. 5-6.

“Select the most easily defensible position that favors your client. Don’t assume more of a burden than you must. If, for example, a leading case comes out differently from your desired result, don’t argue that it should be overruled if there is a reasonable basis for distinguishing it. If you’re arguing for a new rule in a case of first impression, frame a narrow rule that is consistent with judgment for your client.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 19.

“I used always to have before me the vision of the Judge sitting down at his desk to write his judgment after all the stir and excitement of the debate was over. Extreme propositions confidently advanced at the Bar do not help him then. He wants the clear phrase; the moderately stated principle, the dispassionate array of facts which may appropriately find a place in his judicial finding.”

Reference: Lord Macmillan, “Some Observations on the Art of Advocacy,” p. 23.

Know the standard of review

“When the standard of decision favors your side of the case, emphasize that point at the outset of your discussion of the issue—and keep it before the court throughout. Don’t let the discussion slide into the assumption that you and your adversary are on a level playing field when in fact the standard of review favors you.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 11.

“Everybody knows—or should know—that leave isn’t usually given to sort out the facts. There may be all kinds of cases that appear to you to be wrongly decided on the facts that appellate courts can do little about. The Supreme Court has neither the mandate nor the capacity to retry the case. . . . The

“mother of all juries” has a heart of gold, but submissions that ignore the limits of appellate review will get short shrift at a court conference.”

Reference: Justice Binnie, “A Survivor’s Guide to Advocacy in the Supreme Court of Canada,” pp. 5-6.

“Now I realize that the standard of review permeates every one of our appeals and that good counsel cannot afford to ignore it in their factums or their oral argument. Counsel need to ask, not just where the trial judge went wrong and why, but also whether the Court of Appeal can do anything about it.”

Reference: Justice Laskin, “A view from the other side,” p. 5.

“As to the merits of the argument, in my experience the most consistent mistake made by appellants’ counsel is in failing to recognize the limited jurisdiction of the Court of Appeal. We are not a trial court, and we do not conduct trials *de novo*.”

Reference: Justice Finlayson, “Appellate advocacy in an Abbreviated Setting,” p. 4.

“In all appeals, at whatever level, that case has been tried before, by somebody. The appellate court is not there to re-try it. It’s there to have you tell it what’s wrong with the way it’s been tried.”

Reference: Justice Arnup, “Advocacy,” p. 50.

Don’t overstate the case

“You’ll harm your credibility—you’ll be written off as a blowhard—if you characterize the case as a lead-pipe cinch with nothing to be said for the other side. Even if you think that to be true, and even if you’re right, keep it to yourself. Proceed methodically to show the merits of your case and the defects of your opponent’s—and let the abject weakness of the latter speak for itself.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 13.

“Overstatement is jarring. Be careful about using this form of advocacy, in which you are really expressing a conclusion in superlatives. If you do use superlatives, then you’d better have the ammunition to back them up. Otherwise, not only will your argument suffer, so too will your credibility with the court.”

Reference: Justice Laskin, “Forget the Windup and Make the Pitch,” p. 10.

Keep your submissions as brief as possible

“[T]his jury [i.e., the Supreme Court of Canada] has a relatively short attention span for secondary arguments. . . . A lot of your argument probably consists of rehashing their old judgments. They likely remember more or less what they decided. You too could move quickly if your old opinions were the subject matter of debate. There is really no need to recite once again the facts in *Regina v. Oakes*. Get quickly to your real point, and hit it with a two-by-four.”

Reference: Justice Binnie, “A Survivor’s Guide to Advocacy in the Supreme Court of Canada,” pp. 2-3.

“When you are finished, sit down. Some lawyers think they are obliged to talk until the red light goes on. If you are just filling up time at the end, you are probably not as coherent as you were before and you may end up confusing the judges or getting yourself into difficulty. You may have time left for questions and there are no questions or very few. That is usually a good sign. When you are finished, sit down. The judges will consider it an act of mercy.”

Reference: Justice Rothstein, “Winning Appellate Advocacy,” p. 173.

“I have never heard a judge complain that a factum was too short. John Robinette, one of the greatest advocates our country has ever produced, wrote factums that were almost always less than 15 pages. He knew the point he wanted to make, and he wrote simply and concisely. He simply pruned away all the fat.”

Reference: Justice Laskin, “Forget the Windup and Make the Pitch,” pp. 12-13.

“Having summoned the courage to abandon feeble arguments, do not undo your accomplishment by presenting the points you address in a confused or needlessly expansive manner. They must be presented clearly and briskly and left behind as soon as their content has been conveyed—not lingered over like a fine glass of port. Iteration and embellishment are rarely part of successful legal argument.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 24.

“The mere fact that you have an allotted time of one hour more or less does not constitute a contract with the court to listen for that length of time. On the contrary, when you round out your argument and sit down before your time has expired, a benevolent smile overspreads the faces on the bench and a sigh of relief and gratification arises from your brethren at the bar who have been impatiently waiting for the moment when the angel might again trouble the waters of the healing pool and permit them to step in. Earn these exhibitions of gratitude therefore whenever you can, and leave the rest to Zeus and his colleagues, that is to say, to the judges on high Olympus.”

Reference: John W. Davis, “The Argument of an Appeal,” p. 756.

Avoid angry or overly emotional submissions

“Appealing to judges’ emotions is misguided because it fundamentally mistakes their motivation. Good judges pride themselves on the rationality of

their rulings and the suppression of their personal proclivities, including most especially their emotions. And bad judges want to be regarded as good judges. So either way, overt appeal to emotion is likely to be regarded as an insult.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 32.

“[S]ave the rhetoric for other occasions. It doesn’t help on appeals. Likewise, it doesn’t help to be angry in court or to be condescending to the judges or your opponent. That may work with witnesses but not with appeal judges.”

Reference: Justice Rothstein, “Winning Appellate Advocacy,” pp. 165-66.

“Florid speech, highly emotional appeals with scant reference to the facts—these are passé.”

Reference: Justice Arnup, “Advocacy,” p. 32.

Don’t cite authorities with abandon

“You’re not writing a treatise, a law-review article, or a comprehensive *Corpus Juris* annotation. You are trying to persuade one court in one jurisdiction. And what you’re trying to persuade it of is not your (or your junior associate’s) skill and tenacity at legal research. You will win no points, therefore, for digging out and including in your brief every relevant case. On the contrary, the glut of authority will only be distracting. What counts is not how many authorities you cite, but how well you use them.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 126.

“[M]any counsel list far too many cases in their factums. The Court of Appeal storage area is filled with casebooks cluttered with cases never referred to by counsel. My guess is that over 90 percent of cases cited in most

factums are not referred to in oral argument and are not used in our judgments. Listing too many cases shows that you really have not thought enough about which cases will really help you.”

Reference: Justice Laskin, “Forget the Windup and Make the Pitch,” p. 11.

“Don’t quote thirty cases when three will do. You can read the whole thirty in the course of preparation, if you like. That will help you with what you must do, which is to state principle. Then you can quote the leading case, and the two or three closest to your facts. And don’t put those thirty cases in your statement of law and fact, either. You then run the risk the judges won’t read any of them in advance, because you haven’t told them what to read.

Mazengarb speaks of lawyers who flood the court with cases: ‘. . . their heads so full of common law they have no room for common sense.’”

Reference: Justice Arnup, “Advocacy,” p. 39.

“Avoid citing too many authorities. It may look good in the factum, but it annoys the court because they think they have to read all the cases and then find that half of them do not have anything to do with the point.”

Reference: Justice Sopinka, “Appellate Advocacy,” p. 4.

Have all the materials that will be relied on during oral argument well-organized in a condensed book

“Just like dead time on the radio, dead time in oral argument is a disaster. Fumbling through papers during an embarrassing silence not only wastes your argument time; it makes you look like an incompetent. All the materials you are likely to need—not just to support your presentation but to respond to arguments by the other side or questions from the court—should be methodically indexed and tabbed for ready access.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 157.

“A wise practice for counsel in the Supreme Court is to hand to the judges a book of extracts or ‘condensed book’ at the beginning of the oral argument. Most lawyers include the key extracts of evidence and passages from the case law. This avoids wasting time waiting for the judges to shuffle through a mountain of paper, looking for the particular document you want to refer them to.”

Reference: Justice Binnie, “A Survivor’s Guide to Advocacy in the Supreme Court of Canada,” p. 9.

“So you have to judiciously decide what references you need to make in oral argument from the record or the cases or the statutes. Everything has to be in a condensed book of references and indeed some counsel do provide them. You shouldn’t even refer to your factum. If there is some paragraph in your factum that you want to refer to, it should be in the condensed book.”

Reference: Justice Rothstein, “Winning Appellate Advocacy,” pp. 169-70.

“A . . . useful tool is a compendium of extracts from exhibits, transcripts, and authorities that you propose to rely upon. This is not only useful in complex cases, it is essential if you are to avoid the waste of time and loss of focus that inevitably accompanies the search by panel members for the document, transcript, or authority to which you intend to refer.”

Reference: Justice Finlayson, “Appellate advocacy in an Abbreviated Setting,” p. 2.

“Orderliness in the arrangement of the documents in a case has far more importance than is generally realised. Which of us has not seen the discomfort and confusion produced by a paper going amiss just at the moment when it is wanted, or the irritation of the Judge when he finds his copy of documents differently paged or arranged from counsel’s copy? The thread of the argument is interrupted, tempers are upset, and half the effect of a good

speech may be irretrievably lost. All this can be avoided by a little forethought and system.”

Reference: Lord Macmillan, “Some Observations on the Art of Advocacy,” p. 25.

If the court is likely to have read the materials in advance, don’t waste a lot of time reciting the facts and lower court judgments

“The most effective advocates forget the introduction and the summary of the facts. Instead, they get to the issues very quickly. The facts are vitally important, but the facts are best argued in the context of the issues. There may be a few cases—such as a long appeal—that require a more elaborate introduction, but in most appeals, forget the windup and make the pitch.”

Reference: Justice Laskin, “A view from the other side,” p. 6.

“Assume that the panel is familiar with the facts and is aware of the legal principles involved. Counsel should be prepared to proceed directly to the argument.”

Reference: Justice Finlayson, “Appellate advocacy in an Abbreviated Setting,” p. 3.

“You have a limited time for argument, and don’t want to waste a minute of it. If you’re the appellant before a court that you believe may not have pored over your brief . . . , it may be worth your time to state the facts and history of the case, including, of course, the precise holding of the court below. In argument before a federal court of appeals, that would ordinarily be a waste of time: assume a basic knowledge of the facts and history, and proceed directly to your points of law. In your legal argument, of course, you can and should mention the specific facts that militate in favor of the outcome you’re advocating.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, pp. 168-69.

If a particular passage is crucial, bring it to the court's attention

“If the outcome of your case hinges on the meaning of a text—whether statute, regulation, ordinance, or contractual provision—move quickly to consideration of that text. It greatly facilitates comprehension if the listener can read the text during the discussion.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 172.

“If a particular extract of testimony contained in the middle of a dozen or more volumes of transcripts is essential to your success, or if you think everything turns on a particular provision in the contract buried in five volumes of exhibits, stop and read the extract to the court.”

Reference: Justice Binnie, “A Survivor’s Guide to Advocacy in the Supreme Court of Canada,” p. 9.

“The worst thing that can happen is to lose an appeal because you didn’t bring something important from the record to the attention of the judges in answer to a question. The judges won’t be scouring the record or necessarily reading the cases that are relevant unless you point them out.”

Reference: Justice Rothstein, “Winning Appellate Advocacy,” p. 166.

“Even when appeals do not involve an attempt to change the findings of fact, I am still amazed at how the atmosphere can be changed by the reading of key passages in the evidence. This is especially so if you have former counsel or trial judges on the court. Suddenly, the drama of the courtroom comes to life when some dramatic passage of the evidence is read. So, it is not a bad technique to read a particularly good passage in the evidence that supports your position.”

Reference: Justice Sopinka, “Appellate Advocacy,” p. 6.

Welcome questions from the bench

“Only the least competent counsel regards questions from the bench as an annoyance and distraction. What skilful and experienced counsel most fears is a ‘cold’ bench, which leaves the advocate looking from face to face for some indication of interest, some hint about what aspects of the case a judge finds troubling.”

Reference: Justice Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, p. 189.

“Some lawyers complain that a problem in the Supreme Court is that often the hearings consist of little else but questions. This is an unfair criticism. We didn’t interrupt you when you were preparing your factum. Now it’s our turn.”

Reference: Justice Binnie, “A Survivor’s Guide to Advocacy in the Supreme Court of Canada,” p. 9.

“If you are getting questions and you aren’t answering directly and simply, you are missing the most important opportunity you have in oral argument—reinforcing what the judge is already thinking if it is favourable to you and changing the judge’s mind if the questions are unfavourable.”

Reference: Justice Rothstein, “Winning Appellate Advocacy,” p. 167.

“Don’t be afraid of questions. Questions can be one of the most helpful parts of the argument. After all, the very person you are trying to persuade is telling you what is in his or her mind—what is not understood, or the point that is bothering him. How can you ever get a better chance than that?”

Reference: Justice Arnup, “Advocacy,” p. 41.

“Rejoice when the court asks questions. And again I say unto you, rejoice! If the question does nothing more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover a

question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises.”

Reference: John W. Davis, “The Argument of an Appeal,” p. 752.

CONCLUSION

In the end, perhaps the most solid advice I was given was by Mr. John Robinette, Q.C. who had written inside the binder he used on hearings: **SPEAK SLOWLY AND REMEMBER TO SMILE.**

BIBLIOGRAPHY

- Arnup, Justice John D. "Advocacy" in the Law Society of Upper Canada Gazette, vol. 13 (1979) 27.
- Binnie, Justice Ian. "A Survivor's Guide to Advocacy in the Supreme Court of Canada" (1999) 18:2 Advocates' Soc. J. 13.
- . "In praise of oral advocacy" (2003) 21:4 Advocates' Soc. J. 3.
- Cromwell, Thomas A., *Effective Written Advocacy*, Canada Law Book (2008)
- Davis, John W. "The Argument of an Appeal" (2001) 3 J. App. Pr. & Pro. 745.
- Finlayson, Justice George D. "Appellate advocacy in an Abbreviated Setting" (1999) 18:2 Advocates' Soc. J. 22.
- Ginsburg, Justice Ruth Bader. "Remarks on Appellate Advocacy" (1999) 50 S.C.L. Rev. 567.
- Kirby, Justice Michael. "The Future of Appellate Advocacy", Australian Bar Review, March 2006, Vol. 27
- Laskin, Justice John I. "A view from the other side: What I would have done differently if I knew then what I know now" (1998) 17:2 Advocates' Soc. J. 16.
- . "Forget the Windup and Make the Pitch: Some suggestions for writing more persuasive factums" (1999) 18:2 Advocates' Soc. J. 3.
- . "What persuades (or, What's going on inside the judge's mind)" (2004) 23:1 Advocates' Soc. J. 4.
- . "The Right Stuff: Marvin Catzman and Legal Writing" (2008) 26:4 Advocates' Soc. J. 19.
- Macmillan, Lord. "Some Observations on the Art of Advocacy" (1935) 13 Can. Bar Rev. 22.
- Richard, Chief Justice John D. – Speech – Appellate Advocacy in the Federal Court of Appeal: A View from the Bench. CLE Seminar, Law Society of British Columbia, September 19, 2003.
- Robins, Justice Sydney L. "Appellate advocacy" (1997) 16:3 Advocates' Soc. J. 11.
- Rothstein, Justice. "Winning Appellate Advocacy" (2007) 32 Man. L.J. 163.
- Sopinka, Justice John. "Appellate advocacy" (1992) 11:1 Advocates' Soc. J. 16.