Written Advocacy in the Court of Appeal: One Lawyer's Perspective

Overview

My goal, in preparing to appear in the Court of Appeal and for that matter in any court, is winning. I try to craft an argument which will convince the panel to find in favour of my client. How the court may ultimately find in my client's favour is of limited interest. Only the result counts.

How then to craft an argument which will win?

I have always guided myself by my friend Professor Charles Nesson's approach. Professor Nesson is the William F. Weld Professor of law at Harvard University Law School. (He is also the founder of the Berkman Institute For Internet and Society). He teaches the law of evidence and tort litigation. Charlie has said that the way to win an argument in court is by telling a short story which will convince your mother[1] of the righteousness of your position. If you cannot persuade your mother, then you certainly will not be able to persuade the court.

Charlie's focus is first on the auditor: your mother. If you imagine your mother as your adjudicator then it becomes easy to prepare an argument in the way I suggest. Selecting her implicitly recognizes what he and I believe: judges are swayed, influenced and governed by the same considerations that ordinary people are. Judges come to their task

[1] I have maintained Charlie's choice of parent, notwithstanding, that some might see it as biased. I use your mother because, in my mind she is reasonable commonsensible and humane. Your father is not.

with a sense of humanity and a sense of justice. Just like your mother's. Taking the oath does not change this. Judges recognize that they have one job – do justice between the parties. Your mother, in making a decision, would try to do the same.
In addition, your mother (generally speaking) is practical and sensible. She tries to solve family problems with a dollop of common sense. Judges try to do the same. All this means that your argument should appeal to the panel's common sense and sense of justice. In my view and Charlie's, this is what wins.

Next Charlie requires that it is a story that is told to your mother. It is not a submission, or a presentation or an argument. It is a story.

If you want to convince your mother of something, then you need to capture her attention and keep her interest. Most everything we learn comes through the medium of the story. The diet of information we receive from the media is invariably delivered in the form of a story. Everyone, including judges, is accustomed to receiving their information through stories. An appeal should not be any different. Why should the form of your presentation differ from what the panel is accustomed to? It is also worth remembering that we are in the age of the "sound bite". Shorter is always better.

Finally Charlie chooses the righteousness of your position as the end point of your story. Coulter Osbourne, when he was the Associate Chief Justice for Ontario, described this as the struggle for "the moral high ground". Either way, in telling your client's story, your aim is to convince the panel that justice is on your side.

THE STORY: What will engage your mother?

Consider that the panel before whom you appear is sitting for a fortnight followed by a fortnight off to prepare for the next sitting. During the period it is sitting, it will hear, on average 2 appeals per day or 20 appeals for 10 hearing days. This means each judge must read at least 40 factums and 20 sets of reasons. Some of them will not be models of clarity and that includes the reasons. What type of factum do you think the panel will be most receptive to? What type of factum will it easily absorb? What type of factum will it want to finish? What type of factum will it remember?

To ask these questions is to answer them. Look at your last 3 factums, would your mother or anyone, for that matter, be interested in anything you have written, let alone be persuaded. I know that my mother would have only paid attention so long as I was telling her an engaging and interesting tale. Judges are no different. How can they be persuaded when you cannot hold their attention?

First and foremost the story must be interesting. I have yet to argue an appeal where I was unable to tell an interesting story. Appeals, in the end, are all about people. And people are inherently interesting. You have certainly told a dinner party or group of friends about your latest case. Therefore you do know how to make the tale interesting. Move on from there.

The style of writing is entirely yours. You are, in the best sense of the word, an artist. Use your imagination and your own experience to create a finished product that you will be proud to show to anyone because you know they will read it and enjoy it.
I cannot overemphasize the advantage you hold in preparing your factum; you know the record and the panel does not. You control the story they will read first, particularly where you are the appellant. Indeed many judges read that factum before the reasons in order to find out what you are putting into issue.

When you are up for oral argument you will still know the facts and record far better than they do. Do not squander that advantage.

Structurally, the story must be ordered. A beginning, middle andend should lead the listener to your point(s).

The story must be written in simple, concrete terms. Leave abstractions for others. The writing must be specific and detailed. Generalities are an anathema. Details are the colours on your palette. They should be used for both interest and persuasion. A plaintiff, who is a single mother of 3 pre-school children who works night and day immediately becomes more sympathetic than a mere shareholder or policy owner. While these facts (details) are irrelevant to the determination of the "*lis*" before the court, they are highly relevant to your story.

The story must be brief. Here, as in most things, less is always more. I recognize this runs counter to the received wisdom of making the factum as long as the Court of Appeal office will allow through the use of smaller type face, minimal spacing and extensive use of foot notes. But if your mother has a choice between long and short when she is burdened with at least 20 appeals and maybe more, what would she or anyone choose? Remember that oral submissions are restricted in length and the court is content to rely on that limited argument. You suffer nothing when you are brief. In my view you gain a distinct advantage. In this case, more is less.

The story should be told in the factum's Overview (where you will articulate the one or two issues underpinning the appeal) and in the Facts section. The sections for Issues and Argument (as mandated by the Rules) are, for me, of minimal significance. I complete my story and therefore my argument by the end of the Facts. The latter 2 sections are for emphasis and summing up.

I write with short paragraphs, trying to limit each to one or two facts. I try to use short sentences. I shun, in no particular order, conjunctions, the intricate, the convoluted, the complex, the dense, verbose and the legalistic.

I use adjectives very carefully. First,I try never to use superlatives and evocative terms, They add nothing and generally detract from the story. For example if there is no evidence to support a finding of fact, simply say so. To add that there is not a scintilla or a shred of evidence is, in my view, counterproductive. It will most certainly put off the

judge. Furthermore, descriptions, such as, egregious or scandalous, are also off putting. They effectually usurp the role of the judge. Indeed, you rarely, if ever, see such terms in a judge's reasons. Let the panel reach that conclusion on its own. If the facts do not drive the panel there, your heated or colourful language will not. The colour and heat, while important to the story, are to be found in the facts themselves. Leave to the characterization of those facts to the panel. Hyperbole, in the end, undermines your credibility as an advocate.

THE LAW

In my view appeals, like trials go off on the facts and not the law. The role of the law in appeals is greatly exaggerated. There are legal principles, which underpin the result, but they are subsumed in what I consider to be the common sense of the argument. Not only will your mother be uninterested in the law, in my view judges share the same lack of interest when they are reaching a decision.

Legalities, procedural niceties and, for that matter, the law itself are distractions. Many of my factums cite no law. I find it gets in the way and uses up space better spent in advancing the tale. In any event, the court knows the law far better than you do or will. Indeed this also applies to "the standard of review". In my experience, if the panel wants to help you, it will find the law to do it.If, however, you must recite the applicable principle, be as brief as possible. The advocacy lies in a story convincingly told.

THE FACTS

I generally accept factual findings of the trial judge. Rarely do I attack a finding. To do so is to go on a fool's errand. I will try to tell the story with the facts that the judge has found. There are exceptions, of course, but these errors must be both clearly wrong and pivotal to the argument. When in doubt accept the finding. In drafting I try to use the judge's findings where ever possible. It simplifies and shortens the text. Generally there is no need to go into the underlying evidence when the finding itself is not in issue.

I also try to use the facts adduced at trial by the opposition. Nothing strengthens an argument (particularly orally) more than saying this was my friend's evidence.

The facts that I do include are only those that are necessary for telling the story. Editing is critical. There is no point including facts which do not advance the tale. Remember your audience is your mother. Superfluous facts are distracting and dilute the argument. You have heard many times that the Court of Appeal is not there to re-try the case. At one level this is true. At another it is not. Certainly the court is not there to weigh the evidence, draw inferences or make findings of credibility. That is what I take when I hear it is not there to re-try the case.

However, judges always check the reasonableness of the result and the reasoning process by which the trial judge arrived at it. Accordingly, I will always argue that the result is

reasonable (or not) based on the facts as found. It is in this sense that I attempt to have the case re-tried. Ultimately this finds its way finds its way into the story I am telling.

I use direct quotes where ever possible. The witness always has far more credibility than I do. Summarizing his words is a poor substitute. Short quotes worked into the body of the paragraph are effective. Where the evidence is a critical part of the story, I use chunks of the transcript. However where the transcript is convoluted or close to unintelligible, then a summary is in order.

It is also worth noting that facts can be dealt with in the negative. You can write that there was no evidence on a particular point. You can write that the witness was not challenged by cross examination on a point or that your opponent led no evidence to the contrary. On an effective cross-examination you can say counsel made no attempt to rehabilitate the witness with re-examination.

In the context of a just result and credible advocacy, I cannot over-emphasize the critical importance of accurately reciting the facts and the evidence. Nothing can be more damaging to your case than misstating the evidence. It undermines your credibility as an advocate and the justice of your position. Your mother would not be happy if she thought you were trying to fool her. If you are trying to mislead the court, how just can your case be? I read every line of evidence that impacts on the fact or point of which I am writing to ensure the accuracy of my writing.

ISSUES

There are three categories of issues on appeal.

The first issue is the same on every appeal. Whether you appear for the appellant or you appear of the respondent you will argue the justice of the result. It is of course the point of the story you are telling. If you appear for the appellant the result you are seeking is just. And if you are appearing for the respondent, the result you have obtained is just. I need not elaborate on this.

The second category is more familiar to appeal lawyers. It contains those issues which you will articulate in the Issues section of your factum.

The third category contains, what I call, the unlisted issues. These are articulated more informally as you tell your story.

In the second category there are generally no more than 2 issues. These issues are governed by the "no harm – no foul" rule for judging. This means that if the error does not directly affect the result, no foul will be called by the judicial referee because there has been no harm caused by the error. In other words, if you cannot connect the error to the result, as in cause and effect; don't bother raising it in this section. A good example of the application of this rule can be found in Marchand v. Chatham General Hospital. (insert citation) There the conduct of trial counsel for the defendants deprived the plaintiff of her fair day in court. However on a reading of the trial evidence, the appeal panel

determined the result would not have been otherwise even if counsel had behaved properly. There was no point in giving her a second trial if, with properly behaved counsel, she would still be unsuccessful. The appeal was dismissed: no harm – no foul.

There are always mistakes made at trial. It is not an exercise in perfection. Errors such as the improper use of discovery transcripts, interference with counsel by the judge, improperly striking the jury notice, applying the wrong law/legal test, misapprehending the evidence or delivering incomprehensible reasons are, in one form or another, ever present. However the errors only become meaningful on appeal where they lead to the erroneous result.

In addition there are few such issues in each case. Thus choose carefully. Again, less is more. Adding weak issues to this list will only dilute the powerful issues. It is worth emphasizing, that where there are no such causative issues present on appeal, all is not lost. Remember that the prime issue is the result was just. Where the panel determines that the result is wrong, as in unjust, it may well substitute its discretion for the trial judge and do justice between the parties. For this reason it is the first issue which always takes precedence.

The third category contains what I call the unlisted issues. Here you can raise those errors which the judge has made which fall short of the "no harm – no foul" rule. They can be easily worked into the written argument (and your oral presentation). I do this to

undermine the judge's reliability as a sound trial judge in the eyes of the panel. This of course also goes to the justice of the result.

There are numerous other issues which can be woven into the text. What did the judge not deal with, that he ought to have. How did the opposite party handle the trial; e.g. what arguments were not made or made, what evidence was not led etc. All of this will show that their position was constantly shifting. By dealing with these points at this level, the panel is not likely to attack you because they are subordinate.

Secondly and importantly this approach is part of my "gold fish" theory of argument. When you feed a gold fish, you sprinkle morsels of food across the top of the bowl. They rest there upon the surface of the water. You can never predict where the fish will rise to the surface and nibble. You can be certain, however, that the fish will not eat all the food. Only some bits will appeal to it. Arguing an appeal is the same. I try to sprinkle, throughout my argument, those facts and issues which may appeal to the panel's sense of justice. I do not know what they might nibble at, but I do know that my mother would be interested in the "food".

RIGHTEOUSNES

In every appeal in which I have been involved, there has been only one issue and that issue is always the same; was the result reached just?

My aim is to convince my mother that my position is just, reasonable, fair and righteous. The word does not matter, the sentiment does. It is an easy argument to make. Remember

you are in a court of justice. That should remain your focus. It is worth noting that appeal judges see the issues the same way. The judges are not there to write law, correct law, castigate judges, discipline lawyers or the like. Such matters are mere byproducts of their doing justice between the parties.

THE COMPENDIUM / THE ORAL ARGUMENT

The rules specify what the compendium must contain. In addition I ask myself what the court will want to read. For example in a jury trial I always include the entire charge. I try to include sufficient excerpts of the evidence such that the particular item referred to in the factum is placed in context. Do not underestimate the importance of the compendium; you will refer to it much more in argument than you will to your brief of authorities. This highlights the importance of the facts of the case – the story – as opposed to the law.

More importantly I recognize that the court will not read the transcript before the hearing. Indeed you now need to file only one copy of the transcript. The judges, when preparing, will read parts of the compendium in conjunction with your factum. So here I include more rather than less.

When you arrive in court to make your oral argument much time will have passed since you have written your factum and thought about the case. Furthermore your time will be limited. You will neither be able to tell the story that is in your factum, nor will you want to. What you will want to do is engage in a dialogue with the court and answer the

panel's questions. I would add parenthetically that you should not fear these questions. You should welcome them. I use their questions to make my argument. They should be seen as the sprinter's starting blocks. This requires you to anticipate their questions. What will they want to know about? I craft my oral argument to answer such questions.

In addition since I am considering the matter anew, I know that I will have different and hopefully fresh insights into the case. Matters will occur to me for the first time. New ways of expressing issues will also appear.

With this in mind I prepare a second compendium, one which will support my oral argument. I prepare it the day before I argue. It is something I hand up to the panel. It is the basis of my oral submissions. It is substantially smaller than the compendium mandated by the rules. It is organized to follow my oral submissions. By this I mean that I hope to start at the beginning and move numerically through the tabs. The idea being that I want my argument to be seamless. I do not want the panel fishing for its place in the volume or searching on their desk for other volumes. That is a waste of time and distracting.

CONCLUSION

Ask yourself whether your mother would accept your argument. If she won't, then try another. Generally it is easy to find the moral high ground. So the argument should be obvious. Capturing it is another matter.

Start with a story about the people involved. Tell it to your mother as if she is across the kitchen table. Add all the details that you believe will likely interest her and keep here attention. Forget about the law. Use the judge's facts and your friend's facts. Use actual excerpts from the transcripts.

Tell it in the most compelling way you can write. Ask your spouse what she/he thinks of it. Ask your mother.

When your mother listens and ultimately agrees with you, you are on the road to winning. – w~~W~~hich, in the end, is all that matters.