How to Catch the Judge's Wave

By: Justice Joel Fichaud
Nova Scotia Court of Appeal

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I was asked to address the “brass tacks” of persuasion in court, particularly in administrative law. My only other instruction, thankfully, was to avoid the case law. As for brass tacks, I'll relate my anecdotal impressions. There is no book of spells. These are just thoughts that struck while I was reading a factum or listening in court.

First, a word about the context. Administrative law is a textured field. Judicial review follows the pragmatic and functional approach. Direct litigation filters through Weber and Vaughan. But administrative law is not unique. Lawyers practice generally in a world of matrices, not bright lines.

How do you catch the judge's wave in these choppy waters? I have six suggestions.

1. GET ON THE JUDGE'S WAVELENGTH

This first point underlies the others. Counsel who value true objectivity-- and not just its appearance--will find everything else comes easier.

The judge's perspective differs from that of the client, who may have been exhorting his counsel in the hall before they entered the courtroom. Some lawyers effervesce at the counsel table with the client's transferred tension of winning over losing. This partisan perspective is unlikely to mesmerize the judge.

The judge enters the courtroom in a problem solving frame of mind. The parties are at odds over a thorny issue. They need an answer. The judge wants to solve this problem, with legally sound reasons grounded in common sense.

Counsel should adopt the same problem-solving frame of mind. Then it is easier to illuminate the judge's path. The judge quickly distinguishes the advocate's perspective, in the factum or oral presentation. *92 Effective problem solving captures the judge's attention. Brusque partisanship diffuses it.

It is a delicate exercise to be objective while promoting your client's point of view, like juggling while riding a bicycle. But it is the heart of advocacy. The next items are my thoughts on how to approach it.

2. KNOW YOUR THEORY

What is your case really about? I don't mean the seven alternative errors of fact and law listed in the notice of appeal. I am speaking of your private preparation. Usually there is a basic point of contention that drives the litigation. Most cases, in retrospect,

can be defined by a single question. Looking back, I wonder why my cases seemed so complicated at the time.

Drill down to the irreducible core of your case. Define the issue to yourself, clearly and simply. Be objective. Wishful thinking has no upside. You will have the nucleus of your theory.

Draw a mental axis from the nucleus for each avenue of argument or challenge. The axis should traverse the law that directs your requested order, to the facts that trigger the legal principle, and then to the evidence for those facts. A converse axis should track your opponent's reasoning, and identify the gap in your opponent's path through the law, facts and evidence. This is your theory map.

The exercise is valuable for two reasons.

First, you will have a GPS for the litigation. You will always know the way home. You will know when an off-road issue is irrelevant. If the other lawyer makes an unexpected submission from a side street, you will have a lanterned response. If the judge asks a difficult question, your theory map will expose the answer. If that submission or question has no sensible answer, then your case may have been a loser from the start. If so, your theory analysis will tell you this at the start.

Second, you will be on the judge's wavelength. The judge is weaving her own way through the underbrush of the case. For the judge, it is toward a decision, not a theory. But your journeys may correspond. Later I will discuss tipping points. It is easier to predict the judge's tipping point when the two of you have walked empathetically along the same reasoning path.

***93 3. TAKE HOME FIELD ADVANTAGE BY DEFINING THE ISSUE**

Once you know your case, how do you define it for the judge? The definition of the issue is not a rote function. It is strategic. By this, I don't mean that counsel should infuse the issue's wording with a partisan tone. To the contrary, objectivity is essential. I mean you should mind the judge's perspective and frame a judge-friendly issue. Make your issue the judge's home field, instead of a visiting ballpark. I have two suggestions.

First, have a realistic goal. If the argument is unsupportable, drop it. Don't heave it wishfully onto the battlefield because, if only it were supported, the victory would be glorious. Throwaway submissions may challenge the judge's confidence that you can assist with her problem-solving task.

Second, consider making your best point your only point, or at least consolidating multiple issues into a few. There are not many cases, at least on appeal, with a menu of alternative arguments or responses each having a real chance of success. When counsel says “There's 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. You don't need these distractions to the ineluctable power of your logic. The next point further addresses the technique of issue consolidation.

4. MAKE A RIVER OF LOGIC FLOW THROUGH IT

Before fashioning your argument, read some decisions by your judge. They can be on any topic. You aren't reading them for precedential value. What is your judge's reasoning process? How does he move from premise to conclusion? Your judge may not be a Euclidian logician, but neither do his conclusions materialize, Gestalt-like, from chaos. A judge's reasons usually track the case's single dominating theme, generated by the law that is triggered by the facts, progressing naturally to the conclusion mandated by that law. The single dominating theme is the river of logic that flows through the case. I hope I'm not eroding the metaphor, but rarely in a decision do you see random streams and rivulets happening to trickle into the same pond.

Prepare your argument from the judge's perspective.

To show what I mean, I'll give an example, in the administrative law field, of what not to do. Sometimes the factum's "Standard of Review"*94 (SOR) opens with a boiler plate discussion of the four contextual factors, a multi-page recital from the law firm's word processing data bank. Then the SOR submission fires all its missiles, hoping to cause damage, and wraps up by requesting the most extreme standard of review favoring that party. When applying the SOR to challenge the tribunal's decision, the submission lists every possible error, however tenuous, describes them all as "incorrect" regardless of the standard, and hopes the judge will dovetail the errors into whatever SOR turns up.

No river flows through this submission. This is belly flopping into the middle of a pool and dog paddling to the nearest edge.

There are reasons for each of the contextual factors. The Supreme Court has explained them in several decisions. The features of your case will magnify or foreshorten particular factors. The Supreme Court has explained the difference between "correctness" and "reasonableness" analyses. The latter is not just correctness with a margin of error.

An effective submission is not simply the shortest goal-oriented path to your client's best result. The judge is committed to the process of sound reasoning, not to any preordained result. The result just follows from the reasoning. Connect the idiosyncrasies of your case to the rationales for the legal principles. Sound reasoning means a tailored submission, not off the rack. If you want to be on the judge's wavelength, commit your submission to that reasoned process. If sound reasoning cannot induce a satisfactory result, your client should have settled.

5. OWN THE TIPPING POINT

Each case has a tipping point. It can be a deciding precedent, a damning fact, or a climactic moment on cross-examination when credibility stands or topples. It can be a witness's turn of phrase or a colloquial proverb by counsel, like a bolt of clarity that illuminates basic fairness. It is a seminal event that dwells in the judge's mind. Predict the tipping point. Craft it. Identify your case with it.

Many cases are not commandeered by precedent. The judge may be left with discretion, a margin for decisive fact finding or, in judicial review or the appeal court, flexible standards of review and deference. Think carefully before just citing an authority as checkmate. Often the case turns on common sense and fairness, accommodated by precedent.

Make the deciding factor your touchstone. Instead of seven alternative arguments, try to define one problem, with one solution. Recall the judge's problem-solving perspective. The seven independent arguments become mutually reinforcing structural support for the overarching *95 solution. There aren't seven tipping points. You can't win seven times. One mighty river of logic is better than seven trickling tributaries.

6. EMBRACE THE DIFFERENCE BETWEEN WRITTEN AND ORAL ARGUMENT

Oral argument is not the audio version of your brief. If it was, we could save resources by enclosing a disc with the factum and cancelling the hearing. The factum (or pre hearing memorandum) and oral presentation have different purposes. Each has a message and a meta message. Don't leave any of these arrows in your quiver.

The factum is your wellspring of substance. You want the judge to consult it as the primary source for the key principles from the authorities, the findings of fact from the tribunal or lower court, and the passages from the evidence that support your position. But it is more than an encyclopedia. It is your logical narrative, the trees and the forest. Pretend you are writing the decision, soundly reasoned from the facts and law and grounded in common sense. What would it say? Express it that way in your factum. Invite the judge to make it a template.

The factum also carries a subliminal message. It is the judge's first impression of your case's personality. Each side of every case has a personality. The impression can be favorable or unfavorable. At one extreme, the personality trait may be one of: repetitive, avoids the key issue, less than meets the eye, tendentious, insults the intelligence, and so on. At the other: clear, to the point, logical, weaves the facts into the law, answers the very question I am concerned about, realistic and objective. First impressions are important. Dress your factum as if it were going out for dinner on a first date.

I will add a comment about one interesting couplet of personality traits. On the one hand, some factums teem with hyperbole. There is “not the tiniest jot of evidence”. The other fellow's conduct was “unmitigatedly flagrant”. This dares the reader to

ferret out a jot of evidence or an excuse for the flagrancy. Compare this to the temptation of modest understatement.

Your factum does not belabor, or even recite, an obvious conclusion. The reader's mind naturally connects the dots. The factum subtly induces the reader to take ownership of your conclusion.

My nine pointers on factum writing are these:

(1) Get to the heart of the problem. Propose your solution. Say it simply, clearly and once.

***96 (2)** After you write it, leave it for a day. Then, in the light of dawn, edit out the surplus age. Leave the facts until the end, then recite only those facts that connect to the joined issues and argument.

(3) A no-nonsense tight writing style, with picture words in active voice, is like a hammer hitting a nail. Bland word congestion in passive voice has the impact of a vanilla cream puff.

(4) Remember the KISS principle. There is power in simplicity.

(5) Persuasion is impossible without clarity. Subjunctive clauses in pluperfect tense cloud the mind. State one thought per simple sentence.

(6) Add cohesion by using transitions and cross referencing your thoughts. This unifies the river flowing through it.

(7) Take the judge to the point of understanding. That is your apex. Then let the judge coast downhill by herself. Don't try to bend the judge's will. She will resist.

(8) Don't asphyxiate a good argument by strangulating repetition. Justice Estey once described the three Bs of advocacy: Be Prepared. Be Brief. Be Gone.

(9) Remember the forest and the trees. The judge doesn't have counsel's intimate familiarity with the case. The judge constantly wants context for every detail. Use subtitling and prefacing to define each point before unbridling your argument.

I have been discussing written argument. Oral argument delivers different stimuli.

Some counsel become frustrated by questions from the bench. They seem to resent interruptions to their soliloquy. These lawyers miss the point. Your factum is your only soliloquy. The oral hearing is all about questions and answers. The judge is telegraphing: “This is the problem I'm having. What solution do you suggest?” Don't bristle at this risk. Embrace the opportunity. Your tipping point can be a home run answer to the judge's question.

Prepare for oral argument as if you are in the batter's box at a home run derby. Stand figuratively in your opponent's shoes and ask yourself the toughest questions to challenge your position. This detachment is difficult. It is easier to repose in contented marriage to your own argument. But brace yourself and examine the hard questions under the clear light of objectivity. Prepare irresistible answers. At the hearing, hope the judge throws you the fastball.

In my view, the most underutilized weapon in counsel's armory is the subliminal power of an inspirational oral presentation. A written *97 page is a cool medium, addressed to the logical left brain. Oral argument is a hot medium with a right-brained stimulus. Use both as counterpoint, or a pincer attack on the judge's neurons.

Reading anything out loud at a hearing is a spoiled opportunity. You should talk from the heart, coherently but extemporaneously, while looking the judge in the eye.

To prepare for this, write out your argument. Be as long winded as you please. Then rewrite it, in half the space. Write it a third time, again halving the space. And so on. Eventually, you will have it edited down to one page. Then reduce it one more time to point form key words. Your whole presentation may be condensed in a dozen key words, each with the mass of a neutron star.

From the start, the judge will be impressed when you come to the podium holding just one sheet. He will be stimulated further when you speak. Your preparation process has induced memory osmosis. It lets you speak extemporaneously. Of course you have no choice, with no reading material in reach. But you won't have the speech memorized, and you won't exhibit the glazed look of script recollection. Rather you will have a fusion of spontaneous delivery with key word jogged recollection of your substantive points. Your presentation will emit the electricity of common speech charged with conviction. While speaking, your gaze will burn the judge's retina. I have seen this done well only a few times. Those were the only occasions when I have seen an oral presentation rise to spellbinding theatre.

SUMMARY

The theme that flows through these suggestions is objectivity. Adopt an objective problem-solving attitude. Analyze your case dispassionately to ensure your case makes sense. Express it simply. Argue it clearly without distracting yourself or your judge. Then you have done all you can do.

This article is prepared from speaking notes for an oral presentation by Justice Joel Fichaud of the Nova Scotia Court of Appeal to the Canadian Bar Association's Administrative and Labour Law Sections in November 2007.