A Series of Reflections on Persuasive Writing

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Overview

To be effective, your writing must persuade. Persuasive writing consists of choices. As an advocate your success will depend upon the strategies you choose to apply in your writing. The choice or strategy which forms the basis of today's presentation is *readability*. In the pages that follow I will explain why, for me, readability is essential to persuasive writing.

Introduction

We have all heard the expression that advocacy is the art of persuasion. In a courtroom, a lawyer's principal objective is to persuade the trier – whether judge or jury – to find in favour of the advocate's position.

Whole textbooks have been written on the subject of advocacy, offering advice and commentary on the "secrets" for success and for honing one's skills in the courtroom. Such treatises often distill strategies from the most famous trials or jury summations of the ages.

In this paper[1] I will not attempt to share "secrets" or offer up a holy grail to

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[1]The author gratefully acknowledges the assistance of Philip Carpenter, Law Clerk with the Nova Scotia Court of Appeal, for his help in assembling the series of slides which complement this paper, and providing technical support in today's presentation.

winning advocacy. I leave it to you to roam the shelves of your library or search on line for your own favorite icons as time and interest permit.

My objective in preparing this paper has been much more modest. I was asked to address the theme *Persuasive Writing*. You will appreciate that this is neither the place nor the forum to present a page by page primer on how to write a masterful factum. Whole courses have been developed with that objective in mind. My focus will be to draw your attention to what I think works. You will then be able to reflect on what I've said and consider the list of resource materials I've appended, at your convenience. I would also encourage you to practise and experiment with your own style of writing. That is often the best way to improve one's skills in the craft.

You will understand that the thoughts expressed herein, as well as our conversation later this morning, reflect my own personal views and ought not to be taken as representing the position of my colleagues, or the Court.

It is always a challenge to be asked to offer ideas that are fresh, original and

of practical application.[2] But I will do my best.

The reflections in this essay will be an extension of a paper[3] I presented to the annual meeting of the Canadian Bar Association held in Quebec City last year. There I was asked to examine the features of "winning advocacy". My analysis began with a broad assessment of advocacy in general and then moved on to a consideration of why, in the hands of some, the art is mastered.

By contrast, today's presentation will focus on written advocacy at both the trial and appellate level. The paper's emphasis will target what I think are the keys to persuasive writing. However, I suspect that much of what I say will prove to be applicable, or adaptable, to oral argument.

In offering the reflections that follow I have attempted to draw upon my own experiences both as an advocate and sitting on the other side of the bench as a trial

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[2] I wish to express my sincere appreciation to such writing experts as Stephen V. Armstrong and Dr. Edward Berry, together with Justices John I. Laskin, Stephen T. Goudge, Paul M. Perell, and Marshall Rothstein. Their papers and presentations at the Annual Course on Written Advocacy, Osgoode Hall Law School, Toronto, Ontario, have proved invaluable. Whether consciously or not, I'm sure that much of what I have written here, will have originated from the insights of others who have gone before me.

[3] *A Series of Reflections on Excellence in Advocacy*, Canadian Bar Association Annual Meeting, August 18, 2008, Quebec City, QB., Canada

and appellate judge observing lawyers who appear before me[4].

Whether rising to your feet to begin an oral argument, or leading with the opening paragraphs of a factum, it is essential to begin your presentation by orientating the audience (in this context the judge) to the nature of the dispute and the ground you intend to cover. A simple outline is all that is required to provide the necessary structure through which your audience will come to understand what it is you have to say.

So let me do just that by identifying the five themes I wish to explore in this paper. They are:

- The importance of writing persuasively
- Keys to preparation
- Tips for style and structure
- Writing to win
- Conclusion: Reciprocity and The Big Picture.

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[4] Justice, Supreme Court of Nova Scotia 1990-2000
Nova Scotia Court of Appeal 2000 -

#1. The Importance of Writing Persuasively

Why is persuasive writing important? Or more simply, why bother?

Composition and writing are a central part of any lawyer's day. One cannot over-emphasize the significance of solid legal writing. A sound, well-crafted, concise and memorable pre-trial brief or appellate factum often influences the result more than oral argument. Your brief or factum is an integral part of your advocacy on behalf of a client. Consider why this is so.

- It offers the first opportunity to plead your case.
- It will be the judge's first impression of the merits of your position.
- It assists the judge in preparing for the trial or appeal.
- It provides an outline for your eventual oral submissions.
- It opens a dialogue with the judge by focusing on the important issues and arguments.
- It presents a road-map for the outcome you wish to achieve.
- It highlights the weaknesses in your opponent's case which may then enable the judge to pose tough questions to your adversary at the hearing.

- It may persuade the judge to incorporate, sometimes verbatim, much of your submission as part of the decision.
- Done effectively its shelf-life will carry on as a kind of "silent advocate" after the hearing, should the court's decision be reserved.
- It offers an opportunity to make a favourable impression and enhance respect for your skills as an advocate.

Personal qualities one expects to see in lawyers would include fearless independence, honesty, hard work, candor, courtesy and fair dealing.[5] These same hallmarks should be reflected in your submissions to the court.

#2. Keys to Preparation

Competence is also demanded of members of the legal profession.[6] One assumes that a lawyer will provide representation and service of the highest order. Success as an advocate demands dogged, thorough preparation.

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[5]*The Rules of Engagement: Professionalism, Ethics and Civility in the Adversarial System,* where some of these same themes were first considered in a paper presented by the author to the CBA's Excellence in Advocacy Conference, Halifax, NS, March 28, 2003.

[6]CBA *Code of Professional Conduct*, C.II.

When I attended law school the curriculum included a course on legislative drafting and statutory interpretation but little in the way of practical instruction on how to write effectively as a lawyer. It has really only been in the last 20 years or so where we've seen a serious commitment to professional training in effective legal writing offered to lawyers, judges and other decision-makers. Happily, there are now easily accessible materials containing useful advice for preparing written and oral submissions. Valuable courses offering hands-on instruction are available to those who are interested in honing their skills.[7]

Within the limits of this paper I can only touch upon certain key features which ought to anchor one's preparations for written argument. My objective will be to improve the readability of what you write. Obviously what we say is important. But so is how we say it.

Many of my suggestions may already be well known to you. Others might seem intriguing and worth a try. My point is that writing well requires time, a

[7] For example the Annual Written Advocacy Program jointly sponsored by the Advocates' Society and Osgoode Hall Law School held every November in Toronto. As a member of faculty I have drawn upon my experiences and those of my teaching colleagues in some of the suggestions I make in this paper.

sharp focus and plenty of effort. But these skills can be learned and developed with practice. Let me explain what I mean by posing the following five questions.

Where Do I Start – You will know from experience when and where you work best. Find the time and necessary solitude. Be disciplined. Shut the door and avoid interruptions. Crafting a well-reasoned and persuasive submission is hard work. Have your standard tool box ready (colored pens, post-it notes, legal pad, file folders, computer, Dictaphone, dictionary and thesaurus, etc.). Gather those parts of the record and case law and whatever other resource materials you need to accomplish your task. Assemble it all within easy reach.

Sometimes the hardest part is getting started. Pick up the pen, or the Dictaphone, or sit at the keyboard – whatever is your style – and get busy. Prepare an outline or template to give organizational structure to your factum. Think carefully about the standard of review and the issues. This will clear your mind and focus your attention on what is truly important in the case. Clarity in defining the issues will enable you to chronicle the relevant facts, ignore the irrelevant facts, and address the “bad” facts head on.

Begin at the beginning. You have lived with the case for months or years. The judge has not. Your narrative of the facts need not, necessarily, start with the very first thing that occurred in a long chronology. Rather, it should orientate the reader, however subtly, to an orderly progression of the facts which are relevant to the issues and the outcome you desire.

What Are You Appealing – Before framing the issues and imagining how you will structure your arguments, identify the proper standard of review. As you know, the standard of review analysis depends on how one characterizes the matter in dispute. Are you appealing a question of law, or a question of fact, or a mixed question of law and fact? Is the order under appeal a discretionary order, and if so, is it interlocutory, or final? These preliminary questions will guide your presentation of the issues, and everything else that follows.

What's the Difference between written and oral argument – They are two very different species. Your factum is not the place where you rehearse your oral submissions. The appeal hearing is not the time to read your factum to the panel. Each occasion gives its own unique opportunity to persuade the judge. Do not diminish their impact by conflating the two.

What's Your Objective? – Remember that we who judge do not sit as partisans or advocates. We assess the whole case from both sides and try to find a solution to the problem.

Counsel should try to conceptualize the issues as a judge might and develop the argument in a way that will help the judge(s) in solving the problem.[8] Naturally your goal is to persuade the judge to adopt your position and grant the relief sought, whether it be to allow or dismiss the appeal. But that's far too general an objective. Sitting down to craft your factum requires a much sharper focus.

Your statement of the issues must be lucid and concise. Your chronicle of the facts must be accurate, balanced and persuasive. Your review of the law must be current, relevant and complete. Your application of the law to the facts must – as the case may be – either show why the judgment below should be upheld, or reveal with clarity the reversible error. Ideally whole chunks of your factum may set the very framework for the judge's decision, with parts thereof incorporated

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[8] *Appellate Advocacy Practice Tips*, remarks by Justice Elizabeth A. Roscoe, NS Court of Appeal, to the Canadian Bar Association, Nova Scotia Branch, as part of their Views From the Bench Program, April 22, 2005.

verbatim. Such a result is a wonderful compliment to those who authored the factum.

Who is Your Audience? – I expect that your factum will be seen by three readers: the judge(s), the lawyer on the other side, and perhaps your client. In the context of this paper, the most important reader is the judge you are attempting to persuade. Take a moment to put yourself in his or her shoes. While you may have lived with the case at its every stage, for years, the judge's first inkling of what the case is all about may not come until he or she opens the factum. You need to make an early, favourable impression. In the next section I will suggest ways to do that so that your writing is as persuasive as it can be. Always try to take a balanced and reasonable approach. Avoid overstating your position. Judges expect sound, sensible arguments. Don't get off on the wrong foot by making an assertion which is later shown to mischaracterize the record. Be objective and accurate in citing exactly what the evidence was, and not what you interpreted the witness to say. Use pinpoint references, citing both page and line numbers. Try to make it easy for the judge to agree with your position.

#3. Tips for Style and Structure

Writing is all about choices. You hold the pen. Understand that the persuasive impact of your writing will in great measure depend upon the manner and sequence in which you express your thoughts.

It is invariably more difficult to write concisely, then to go on at length. Brevity and concision require reflection, and rigorous editing. I've never forgotten Mark Twain's opening comment to a friend in correspondence:

> "I wrote you a long letter because I didn't have time to write you a short one."

Collect writing samples from lawyers or judges whom you admire. Study the way they write and try to emulate it. If it works, and feels comfortable, adopt it as your own.

Begin at the beginning. Tell the reader, early on, what you are doing, where you are going, and how you intend to get there.

Do not confuse, or worse, annoy. Clarity of purpose and expression should be your principal objectives. Crafting a persuasive brief or factum is not the same

as writing a mystery novel.

Clarity in expression comes with clarity of thought. Apply what I call the "neighbour" test. If you were engaged in casual conversation with your neighbour, how would you describe what the case was all about? Write that down. A brief description, in plain and simple language should form the introduction and theory of your case, from which you can then develop the issues and your arguments.

As you handwrite, or dictate, or compose on your computer, keep a scratch pad at the ready for incidental thoughts as they occur to you. <u>But do not</u> go back to your original text and attempt to immediately incorporate these new ideas, as it may distract you from the creative process of the whole. Instead, jot them down for later use when you come to review and revise your entire draft.

Understand that the writing will be a work in progress, done in intervals and with interruptions from time to time. If you get bogged down I find it often helps to put the work aside and come back to it later with fresh eyes. Ultimately the process will bring you to the point where you have developed "the argument to a

sophisticated level of refinement".[9]

Never be satisfied with the first effort. Recognize that the art of writing persuasively requires rigorous editing and pride of authorship. The late Chief Justice Brian Dickson said that he routinely revised his draft judgments eight times or more. The Chief Justice also said he tried to write in such a way that if one of his decisions were found on the street and picked up by a stranger it could be read and understood by any reasonably informed observer. Make that a litmus test for your own writing.

Here are some proven tips I would encourage you to try.

Easy Ways to Improve Readability

- Prepare a logically sequenced list of the headings and issues you intend to cover.
- This will lend structure to your composition and serve as a checklist to your writing.
- Begin with a succinct introduction which captures your theory of the

[9]As explained by Justice Stephen T. Goudge, ONCA, in the paper he presented to the 13th Annual Course on Written Advocacy, Osgoode Professional Development Centre, Toronto, Ontario, November 13, 2009.

case. To persuade, you should write with conviction. The reader should know that you believe in the case.

- Avoid hyperbole. Make sure your writing sounds reasonable and balanced.
- Offer the judge a “road map to victory” by presenting a sensible, reasoned solution to the problem in dispute.
- Keep it simple. Limit the use of adverbs and adjectives. Constantly ask yourself “have I made the point in plain language?”
- Try to employ the active rather than the passive voice, e.g., “The Sheriff served the defendant on December 2, 2009" rather than “The defendant was served with notice by the Sheriff on December 2, 2009". Exercising these “choices” will reduce the length of your prose and more easily engage the reader in the way you intended.
- Make “point first advocacy” a cornerstone of your writing. Start with the point you are making without bogging down the reader in the clutter of detail. Before taking the reader to the details which support your argument, we need to know why it matters and how it is relevant.
- Having given the reader an impressive overview and introduction to the issues make sure the rest of your factum is appealing to your audience.

- Follow the requirements under the **Civil Procedure Rules** for font, format, parts and page limits. Judges put them there for a reason. Make use of paragraph indentation, headings and "white space" to keep your reader cued and focused. Help the judge "stay on message".
- Avoid lengthy, complex sentence structures. Keep it simple. Vary the cadence of your phrasing and sentences so the reader's interest is maintained. Staccato style sentences, at intervals, are often very effective.
- Proofread carefully. Spelling errors, or inaccurate references do not leave a good impression.
- Recognize that headings, in themselves, can be persuasive forms of advocacy. For example, why be content with innocuous headings like:

  "Analysis

  Issue #1 Trial Fairness

  Issue #2 Jury Charge

Instead why not make the headings themselves part of your argument, e.g.

"Issue #1 The trial judge erred by continuously and improperly interrupting the appellant's cross-examination of

the respondent."

and

"Issue #2 The trial judge erred in her instructions to the jury on the standard and burden of proof."

Let me now offer some additional suggestions on the content and structure of your factum, in particular the parts often labeled as the FACTS, the LAW, and the RELIEF SOUGHT. This is what I call writing to win.

#4 Writing to Win

All cases are important to someone. As you engage in the writing process remember that your brief or factum will be one of many on the judge's desk. Try to write it so that its structure, substance and style will leave a lasting, favourable impression. Ask yourself whether the judge will be able to turn to what you've written for guidance after the hearing and, ideally, incorporate your words as part of the court's judgment?

I regret to say that we sometimes see a factum where it would appear the principal objective of its author was to bore, tire or irritate the reader. A factum

should be written in a manner that welcomes the reader to what it is you have to say. Submissions ought to be presented in such a way that the reader's interest is maintained, the arguments are clearly understood, and the merits of the author's position linger in the mind of the judge long after the factum is put away.

Before reading the reasons for judgment or the jury charge in the court below, the judge will likely begin his or her preparations by looking at the notice of appeal and then turning to your factum. The first page should say it all. Ask yourself whether in the space of a single page you have told the court in a nutshell what the case is about. The strength of your arguments will depend upon the persuasiveness of your introduction. So spend whatever time is required to get that right.

Make sure that your brief or factum reflects an appreciation of the role of the court, and how it may be constrained by the applicable standard of review. When arguing the law in your factum <u>always</u> include a section dealing with the standard of review on appeal. Of all the substantive issues in the appeal, this is one that must be addressed in virtually every case.[10]

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[10] *It's English, But What's Your Point? Writing Factums That Even A Judge Can Understand*, by Justice Marshall Rothstein, Chapter 1 in Effective Written Advocacy (Aurora, ON, Canada Law Book: 2008).

Some counsel seem to forget that an appeal is not a chance for a second trial. Our role is to review for error and correct those that are serious. Often the most effective technique for respondents will be to demonstrate that the trial decision is reasonably supported by the evidence. To get the court to intervene, an appellant must be able to point to a major error and answer the "who cares?" principle.[11]

As I have stressed, use point first advocacy, where you state the point clearly and concisely first, before referring to the evidence or the law to support it.

When preparing the FACTS section of your factum be smart and selective. If the issue on appeal in a criminal case is self defence, don't spend much time reviewing the evidence at trial on identification. If the issue on appeal in a personal injury case is causation I expect your factum will concentrate on the facts connecting trauma to injury and loss, as well as dealing with any pre-existing or overlaying condition. Negligence *per se* may be of much less importance.

Be creative in your writing. Make use of lists or bullet points. Lists within a sentence are a way to make your writing more readable and persuasive.

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[11]See the excellent paper, *Strategic Legal Writing: Preparing Persuasive Documents* presented to the Continuing Legal Education Society of British Columbia, Vancouver, November 8, 2002 by Eugene Meehan, Q.C., Justice Peter Lowry, and Brian Samuels.

For example:

> *"We ask that the decision and order of Judge A be set aside for three reasons: first, he applied the wrong standard of proof in a civil case; second, he misapprehended and then excluded important expert evidence called by the defence on the issue of causation; and third, his award of damages is wholly disproportionate to the minor injuries suffered by the plaintiff.*

Without overdoing it, try to use words to present the facts in a way which evokes a reaction from the reader. Compare:

> *"As a result of the altercation his jaw was fractured, necessitating extensive dental work."*

to

> *"The punch shattered his jaw and knocked out five front teeth."*

Or

> *"Upon observing the accident the plaintiff cried and felt nauseous."*

to

> *"As soon as Ms. Parker saw the pedestrian's injuries she became hysterical and vomited."*

Or

> *"The plaintiffs respectfully submit that the actions of the bank call for a sizeable damage award."*

to

> "*The bank's high-handed conduct in their dealings with Mr. and Mrs. Jamieson caused them financial ruin and requires the court's denunciation*

by an award of substantial general, pecuniary and punitive damages."

Which sentence will linger in the mind of the judge, long after you've written it?

When preparing the LAW section, limit yourself to your best arguments. A notice of appeal listing ten or more alleged mistakes, is always suspect. Be sparing in your references to case law and your use of quotations. State the principle and provide the single leading authority without – unless it is important – distracting the reader from the thrust of your argument by frequent interruptions with quotations. Maximize the impact of the authority upon which you rely, by minimizing the number of cases cited. If the principle has been decided by one binding authority it does not bear repeating.

Don't just recite the law; argue it. Present the law in a manner that connects it to the facts of your case. State your propositions concisely, supported by pinpoint references limited to the key evidence in the case. [12]

Reading should not be a burden. Judges should not feel pain or be traumatized by your writing. We sometimes receive a factum where it is

[12]As demonstrated so effectively by Benjamin Zarnett, one of Canada's leading litigators, in his regular lectures to the Annual Course on Written Advocacy, *supra.* Footnote 7

impossible to distinguish between an original thought, and what is pasted text from another (perhaps unidentified) source. The pages read like a stream of consciousness from James Joyce's *Ulysses*. This is hardly the way to persuade the judge to your way of thinking, since we are left to guess what the writer is thinking at all. Yes, the style and content of the factum will leave an impression; but it won't be positive.

Before concluding your factum – whether as appellant or respondent – make sure you include a final section to cover the REMEDY or RELIEF sought and the order requested. Don't embarrass yourself by asking for something beyond the court's own jurisdiction. If there are alternatives, set them out. And don't forget to provide a considered position with respect to costs, whether in the court below or on appeal.[13]

Set aside the time to polish your written submission. Careful revision is essential. I often say that some things are better said than read; while others are best left read than said. One uses different sentence structures when crafting oral argument, as opposed to a written submission. Read what you have written to yourself. Then read it out loud. Keep a red pen close at hand. Revise, revise, and

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[13] *Effective Written Advocacy In Factums*, by Justice Thomas A. Cromwell, Chapter 4, in Effective Written Advocacy, *supra*, Footnote 10.

revise it again. Edit your work with an objective in mind. Ask yourself whether you have communicated that particular fact or argument clearly and persuasively. Is what you've just written, consistent with the rest? Never patronize or appear arrogant. Do not "talk down" to your audience. Make sure that the style you employ is not so casual that the force of the argument is diminished.[14] Consider asking a colleague to go through your factum, not for substance but for readability and understanding. A fresh eye and ear is often the best way to improve the submission before you sign it and file it with the court.

When you come to the end ask yourself whether what you have written is consistent with the introduction you provided at the outset. Is the relief you seek appropriate to the issues arising at trial or on appeal, and does it fall within the court's mandate and authority? Is your conclusion as forceful and persuasive as the opening and body of your submission?

Try not to say anything in a submission that would cause the court to doubt your credibility or integrity. You took an oath when you were admitted to the Bar. You became an officer of the court and a judge is entitled to treat your word as

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[14] *Statement of Argument*, a paper presented by Justice John C. Major to the CBA Excellence in Advocacy Conference, Halifax, March 28, 2003.

your bond.[15]

Conclusion: Reciprocity and The Big Picture

Happily, we are all blessed with different personalities, mannerisms, talents and experiences in life. Each of these will mold the style one has as an advocate. Much can be learned by watching others. For those who practise in large firms, I hope you will have the chance to serve as a junior to an experienced barrister and thus acquire some of the proven skills of a seasoned veteran. For those who practise alone or in smaller firms I would urge you to take an hour every now and then, go to court and watch the best at work. Such occasions provide valuable lessons in how the art of advocacy is mastered.[16]

Similarly, learn from the submissions you see written by other lawyers. Is there something you might borrow in your next case? Improvement requires discipline, clear thinking, uninterrupted time, and solitude. There are no shortcuts.

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[15]This point is eloquently stated by Earl Cherniak, Q.C., one of Canada's preeminent barristers in the chapter he contributed, *The Ethics of Advocacy*, in the marvelous book *Advocacy in Court: A Tribute to Arthur Maloney, Q.C.* (1986, Canada Law Book Inc., Toronto, edited by Moskoff, Franklin, R.)

[16] I have added as Appendix "B" a list of personal peeves and irritants with which some of you may be familiar.

Writing well is hard work. At least it is for me. It takes time to get it right.

United States Supreme Court Justice Antonin Scalia says that he finds it difficult to write well. Facility does not come easily to him. When he edits his drafts, or his law clerks' memos, he invariably deletes from, rather than adds to the text.[17] I suspect that he – like most legal writers – finds that brevity leads to clarity whereby persuasiveness is enhanced.

Develop an interest in things beyond the law. Read voraciously in a broad variety of subjects.[18] Travel so that you experience other languages and cultures. Canada's best advocates have a depth of experience upon which to draw, enhancing their ability to express themselves persuasively, before the attentive and interested audience they command.

Be creative in your preparations. Be bold in your presentations, never afraid to take a novel approach in a case.[19]

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[17] *U.S. Supreme Court Justices speak ...*, www.lawprose.org/supreme_court.php

[18] It's a hobby of mine to roam used book stores in search of obscure texts on philosophy, literature and law. They provide a treasure trove of useful information and interesting perspectives on these subjects. Appendix "C" is a list of books I have found especially helpful and inspiring.

[19] In *Exco Corp. et al v. Nova Scotia Savings & Loan Company et al* (1987), 78 N.S.R. (2d) 91, Alan Lenczner, Q.C. one of Canada's leading counsel, sought leave from the trial judge,

I hope you will be encouraged to try out these suggestions for yourselves. Ultimately develop a practice and a style that works for you. Greatness as an advocate is not easily attained. But for those who dedicate themselves to its pursuit, the rewards are great.

I would close by saying that the diligence and dedication I ask of you as advocates should be no less than what you might expect of judges. In my paper *The Morality of Judicial Reasoning,*[20] I explain the perspective I bring to decision-making as a judge.

I believe that we who decide are communicators. Our obligation to reason and to reason judicially, in a public forum, springs from a moral imperative: a reciprocal agreement between ourselves and society by which the community has delegated to its decision-makers the power to oversee the affairs and the conduct of its citizens. Therein lies our capacity and authority to judge, and to decide.

Justice K. Peter Richard to present "a rather long opening statement". When Richard, J. inquired "Well, how long, Mr. Lenczner"? counsel replied "Three days My Lord . . . just three days". Permission was granted. Mr. Lenczner then proceeded to chronicle the issues, the facts and the law by taking the judge through three binders of key documents which counsel had distilled from rooms full of records and discovery transcripts. All of this before a single witness was called. The plaintiffs were successful at trial and on appeal.

[20] This paper was first presented by the author as an Address to the Annual General Meeting of the Ontario Court of Justice, Niagara-on-the Lake, Ontario, May 25, 2006.

Your written advocacy and my preparation of a judgment share certain characteristics. In many ways we are both writing to persuade. You hope to advance the merits of your position. I seek to demonstrate the soundness of my reasons. Each is a craft, developed through skills honed in both the use of language and pride in its expression.[21]

I trust the many experiences and reflections I've described in this paper will not leave you with the impression that the level of advocacy I have witnessed over the years is in desperate need of repair. On the contrary. My work as a judge has invariably been improved by the quality and effort of the lawyers who have appeared before me. Your skills, integrity, courtesy and fearless representation of the clients you serve reflect the finest traditions of the Bar.

I simply offer these suggestions as ways to improve the persuasive quality of your work as advocates. Let me also issue a challenge. Occasionally when time permits, shut the door to your office, take a walk, or go for a run, and let your mind work outside the box. Consider the big picture. How will change affect the legal profession, and your place in it? What do you do differently now as an advocate, than you did say ten, or five or even two years ago? What are your predictions for

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[21] *How To Be Reversed in Ten Easy Lessons*, a paper presented by the author to The Canadian Institute's Symposium on Decision-Writing, Halifax, June 10-11, 2008.

novel areas of litigation and how will you react to those opportunities as trial and appellate counsel? As certain types of litigation become more complex, difficult and time consuming, how will you marshal your resources or revise your own approaches to ensure effective representation as an advocate? How will you adjust your style as an advocate if asked to appear before foreign tribunals? How will you inform yourself, and adapt to the procedures and culture of those jurisdictions? What systems have you established in your own office to ensure that mentoring and skills enhancement courses are made available to your young associates?

The tremendous increase in the cost of litigation today is of grave concern to bench and bar alike. Some would characterize the problem as a question of access to justice. What steps have you taken to impress upon your client the ramifications of pursuing litigation to trial, or appeal (to say nothing of the risk of losing)? The relationship between recoverable costs and fees charged are matters any advocate will need to review with his or her clients.[22] You will want to have procedures in place to prompt such timely and frequent discussions.

[22] ". . . in matters before the court . . . one expects that a claimant's demands for relief are intended to be taken seriously. Putting them forward invites consequences . . . a trial judge is well placed to separate the sensible from the unreasonable, the necessary from the unwise . . . An award of costs . . . may be a useful tool in reminding litigants of the financial risks attendant upon suing and losing." *Leddicote v. Attorney General (Nova Scotia)*, 2002 NSCA 47 at ¶ 86.

Finally, and perhaps most importantly, what steps have you taken to ensure balance and wellness in your own lives? The demands upon an advocate are enormous. Safeguard your own well being with other activities which offer pleasure, diversion and rest.

It seems to me that these are some of the pressing issues facing the Bar today. I will leave you to consider such questions as you enjoy your time together. I hope these observations will be of assistance in your practice, and perhaps in some small way add to the fulfillment and excitement you experience as advocates. Thank you for the privilege of addressing you this morning.

I will finish where I began. Persuasive writing is about the choices you make. You have the power to decide. You hold the pen.

Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal
Halifax, N.S.

Appendix "A"

LIST OF RESOURCES - PERSUASIVE WRITING

Ronald Goldfarb and James Raymond. *Clear Understandings: A Guide to Legal Writing* (Goldenray Books: Tuscaloosa, 1982).

Stephen V. Armstrong & Timothy P. Terrell. *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, 2nd ed. (New York City: (Practising Law Institute, 2003)

Forget the Wind Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums (reprinted with the permission of The Honourable John I. Laskin, Court of Appeal for Ontario, 13th Annual Course on Written Advocacy, Osgoode Hall Law School, November 13 & 14, 2009.

Aristotle and Effective and Defective Legal Writing, Reprinted with the permission of The Honourable Justice Paul M. Perell, Superior Court of Justice, 13th Annual Course on Written Advocacy, Osgoode Hall Law School, November 13 & 14, 2009.

It's English But What's Your Point? Writing Factums That Even a Judge Can Understand by Justice Marshall Rothstein, Chapter 1 in Effective Written Advocacy (Aurora, ON, Canada Law Book: 2008).

George Orwell, "Politics and the English Language" in *Why I Write* (Toronto: Penguin Books, 2004) 102.

Strategic Legal Writing: Preparing Persuasive Documents. Eugene Meehan, Q.C., Justice Peter Lowry and Brian Samuels, Continuing Legal Education Society of British Columbia, Vancouver, November 8, 2002.

Pure Drivel by Steve Martin, (Hyperion: New York, 1998)

U.S. Supreme Court Justices speak ..., www.lawprose.org/supreme_court.php

Writing Reasons, A Handbook for Judges, by Edward Berry (E-M Press, 1998, Victoria, B.C.)

APPENDIX "B"

SUGGESTIONS ON WHAT NOT TO DO

Starting all over again – When court opens and the trial judge, or the chair of the panel calls the case and identifies counsel appearing, do not stand up when you are asked to begin your submissions and the first words out of your mouth are to repeat your name, and the names of your colleagues opposite, and the names of the parties whom you represent. That's just been said. Why say it again? To do so suggests inexperience or an acute lack of awareness of what's going on around you.

I know it's here somewhere – Making a point and then losing your place in the record (or not having an accurate note as to where it can be found). Valuable time is wasted while you search for the missing reference, eventually losing track of the point you intended to make in the first place, while the panel sits idle, growing more frustrated by the minute.

Thank you, My Lord, My Lady, I'll get to that point later – When a judge asks a question, deal with it immediately or at least indicate to the judge that you will answer it in short order. Show confidence in your own position. The judge wants the answer now, not 25 minutes later. Your job is to assist the court in understanding your arguments so that – presumably – one or all of them will be persuasive. Don't dodge the question. Try your best to answer it right away. You can always come back to it and deal with it more completely at the point in your argument where you intended to do so.

Don't beat a dead horse – If you sense that you have not attracted support for your position from the judge (or the member of the panel who posed the question) move on. Presumably you have other arguments to make. Get on with those. And if you suspect that you've not convinced one member of the panel as to the merits of your submission, remember that there are at least two others. Be persistent, but pragmatic. Learn to gauge the dynamic of the hearing, and what's working, what's not.

Keep your eye on the ball . . . and the clock – Do not be glued to your notes. Watch the judge(s). Look for signs – favorable or unfavorable – as to how your submissions are being received. Manage your time so that you present all of the arguments you intended to make and aren't rushed in your delivery. Use clear and vivid language to make your points. Once the judge or panel of judges has left the courtroom, the force of your arguments should linger.

Are you serious?! – When I see a notice of appeal listing 15, 20 or even 30 grounds of appeal I immediately come to suspect the motives, or the ability of its author. No judge is ever that wrong! As counsel, you should be bold. Be confident. Choose your best points and stick to those as you prepare your factum, and your supplementary oral remarks. Your strategy should never be "well let's just throw it on the wall and see what sticks".

Miscellany

A. Conduct and Deportment

1. Coming to court "gowned" but without a proper waistcoat and hoping the judge will excuse your navy blue suit coat as a suitable substitute.

2. Not standing or at least not rising to one's feet immediately when objecting or otherwise addressing the court. In such instances, judges may simply ignore the lawyer until s/he stands to signal an intervention.

3. Lawyers not being punctual and obliging the court to wait.

4. Counsel slouching in their seats and appearing disinterested when being addressed by the court.

5. Counsel, consciously or unconsciously, rustling papers, audibly signing, or generally making noise and a nuisance of themselves, as if to annoy or distract opposing counsel.

6. Sarcasm, inappropriate tones of voice, or other signs of rudeness between counsel during a trial.

7. The frequency with which counsel only "communicate" by fax or letter when a simple telephone call would have sufficed.

8. Counsel not being gracious in defeat, either when their motion or objection is overruled by the court, or when the ultimate decision

goes against them. Far better for counsel to be respectful and courteous both to the court and to other counsel.

9. Counsel thinking they can simply pass documents up to the judge, rather than hand them to the clerk first.

10. Counsel failing to ask the judge for leave to approach the witness in the witness box, rather than assuming that they have the "right" to be there.

11. Counsel not knowing that they are expected to bow slightly towards the court each time upon entering or exiting the courtroom.

12. Counsel being sarcastic and discourteous with witnesses.

13. Counsel not properly trained in the introduction and marking of exhibits prior to or during a trial and, collaterally, not taking time to figure out whether agreement can be reached between counsel so as to avoid unnecessary delay.

14. Counsel unreasonably withholding consent to the simplest of things: like proof of uncontested facts, waiver of strict compliance with the Rules, reasonable requests for adjournments or recessing early so as to accommodate their learned friends.

15. Counsel who are unaware of courtroom decorum, the significance of the "bar" separating them and the judge from other members of the public, and the security and other problems that arise from such ignorance.

16. Counsel who appear in court looking so disheveled, unkempt and disorganized that one wonders, as a judge, whether their appearance reflects the degree of care they have taken with their client and with their case.

17. Counsel who are notoriously sloppy in their research and documentation. Judges are human. While this failing is not "uncivil" behaviour, it reflects on counsel's competence. Be assured it is something we talk about and remember.

B. *Oral and Written Advocacy*

1. quoting from a head note

2. citations: inconsistency, no level of court given

3. improper use of supra, ibid, infra, etc.

4. failing to address the standard of review

5. failing to address leave

6. failing to address statutory provisions or limitations for appeal

7. citing from an outdated edition of a secondary source

8. spinning the facts in an overtly partisan manner (omitting relevant facts that weaken one's case). Once the omission is noticed, trust is lost

9. relying on quotes from case law taken out of context to support one's position

10. tone - superior sounding/condescending, or telling the court what it HAS to do

11. word choice, improper use of legal jargon or "big words"

12. over-statement of both facts and law

13. advancing an oral argument which was not listed as a ground of appeal or argued in their factum

14. not understanding the jurisdiction of the court; i.e., arguing to overturn findings of fact; ignoring the statutory appeal section

15. sarcastic and patronizing comments toward the court, or opposing counsel

16. interrupting the judge asking the question

17. being unfamiliar with the factum and just passing it off as “one of the young associates wrote the factum and I won’t be arguing that” (making the factum virtually worthless and turning the hearing into an appeal by ambush since the other side has no notice of what is about to happen)

18. failing to cite and distinguish case law which runs contrary to your position

19. not taking the time to even understand how the basic law operates, i.e., arguing a section 15 Charter case without understanding the various steps

20. materials or other expert reports assembled but not in chronological order

21. duplicate documents scattered throughout the appeal books

22. critical documents such as exhibits omitted

23. illegible page numbers in the appeal book (or none at all)

24. parts of transcript missing and then putting a spin on what is alleged to have been said in those sections

25. factum exceedingly long - inability to write concisely

26. use (especially overuse) of exclamation marks and “quotation marks” to create urgency/importance/doubt

27. no effort made to limit case law to the single best authority

28. writing that is so obtuse the reader needs to re-read sentences several times to make sense of it all.

APPENDIX "C'

SUGGESTED READING LIST - ADVOCACY, ETHICS AND OTHER ESSENTIALS

***The World of Law*, Vol. 1** "The Law *In* Literature", (Edited by Ephraim London, Simon & Schuster: New York 1960)

The World of Law, Vol. II "The Law *As* Literature:, (Edited by Ephraim London, Simon & Schuster: New York 1960)

The Principles of Argument, (Edited by Edwin Bell, Canada Law Book, Toronto, 1910)

Law and Philosophy, (Edited by Sidney Hook, New York University Press, 1964), in particular Part I, *Law and Ethics.*

A Preface to Morals, Edited by Walter Lippmann (The MacMillan Company, New York, 1929)

The Story of Law, (John Maxcy Zane, LL.D., LITT.D., Garden City Publishing Company Inc., New York, 1927)

Scintillae Juris and . . . Meditations in the Tea Room, (5th Edition, Stevens and Haynes, London, 1903)

For the Defence, The Life of Sir Edward Marshall Hall, by Edward Marjoribanks (The MacMillan Company, 1929)

Advocacy In Court: A Tribute to Arthur Maloney, Q.C. (1986, Canada Law Book Inc., Toronto, edited by Moskoff, Franklin R.)

On the Pursuit of Truth, by Alley Finch (Longmans, Green, and Co., London, 1873)

The Seven Lamps of Advocacy, by Judge Edward Abbott Parry (T. Fisher Unwin Ltd., London, 1923)

The Ethics of Advocacy, in ***Law and Other Things,*** (Lord MacMillan, Cambridge University Press, 1937)

Great Speeches by Great Lawyers, A Collection of Arguments and Speeches Before Courts and Juries, by William L. Snyder (Baker, Voorhis & Co., New York, 1882).