

## Appellate Advocacy Practice Tips

The following suggestions are made by the Judges of the Nova Scotia Court of Appeal in response to a request from a member of the Bar Liaison Committee:

### THE FACTUM:

1. The factum is your first communication to the panel - make a strong first impression. Do not wait until the oral hearing to state your best argument. Try to be persuasive and concise. Remember that the judges will not be in the same frame of mind as counsel. The judges are not partisans or advocates; they look at the whole case from both sides and try to find a solution to the problem. Counsel should try conceptualizing the issues as the judges might and develop the argument in a manner that will assist the judges in solving the problem.
2. The appellant's factum should address the grounds of appeal as set out in the Notice of Appeal and the respondent's factum should respond in the same order, directly, head-to-head, to those arguments. It is very difficult to follow a respondent's factum that restates the issues in a way different from those stated by the appellant. If the appellant decides to combine grounds, consolidate 20 grounds into four, or modify them in some other way, the respondent should be notified in advance. Consideration should be given to an application for leave to amend the notice of appeal if an extensive reorganization of the grounds is contemplated. Note that **Rule 62.04(1)** says ".... An appellant may not without leave of the Court or a judge rely on any ground not specified in the notice."
3. The standard of review should always be addressed - to succeed the appellant must identify a reversible error.
4. If you purport to be quoting from the record or representing what a witness says in evidence, cite the pinpoint reference, using page and line numbers, and do not editorialize. Say exactly what the evidence was, not what you interpreted the witness to say. The two statements of facts should be responsive to each other and reflect findings, express and implied, made at the trial. Too often they read like two loosely related stories, told as if there had been no trial.
5. An introductory overview paragraph for each issue helps the flow of the factum.
6. Keep the rhetoric out of the factum, e.g. "rush to judgment", "vilification", "travesty of justice".
7. If you are going to argue an issue not argued at trial, or take a new tack on an issue raised at trial, cite the authority which permits you to do so. Be honest and identify what you are doing, in other words, advise the panel that you did not bring this to the attention of the trial judge but are raising it now.

8. Parties often ask for costs but seldom have any specific amount in mind. Think about it and make a specific suggestion. Is the normal 40% of costs at trial appropriate? If so, what were the costs at trial? If not, why not? On interlocutory matters, should costs be in the cause, or payable forthwith? If forthwith, what amount do you propose?

### **ORAL ARGUMENT:**

1. Start your presentation with a opening statement which captures the essence of your approach and highlights the merits of your case.
2. Without exception, the panel will be prepared for the case. Before you launch into a lengthy review of the facts, ask if it will be necessary. We usually want to cut right to the issues. The facts are best argued in the context of the issues.
3. Do not read from the factum.
4. The oral argument should track the written submissions. Often, a junior has written the factum and then senior counsel comes to the appeal hearing and presents a totally different argument. This may make it difficult to comprehend. (see #1 under Factum)
5. Be prepared for questions. Be absolutely familiar with the transcript and the exhibits so you will be able to find specific references when asked. Answer questions when they arise and not "I'll come to that point later..." Delay seldom works. Try not to take a defensive stance when a question is asked. Think of it as an another opportunity to suggest a solution to the issues raised on appeal.
6. Try not to portray your belief that you are the smartest person in the room. Be respectful of the trial judge, notwithstanding that you thought he or she was in error.
7. Watch the time. For a half day appeal, do not plan an oral presentation that is longer than 40 minutes. In all likelihood, there will be questions from the bench which will use several minutes and you will not normally be allotted any longer than an hour, including questions.
8. In reply, respond only to points raised by the respondent.

revised April 3, 2003