TORYS LLP

Keys to Successful Oral Advocacy

ONE VIEW FROM THE BAR

Being asked to write about oral advocacy is a bit like being asked to paint the ceiling of the Sistine Chapel. It has been done before. It has been done exceptionally well.[1] I have decided, therefore, to do only a brief review of the basics, and then pose some potentially controversial propositions as a way to discuss keys to successful oral advocacy from the perspective of counsel. As well, I will tread carefully into the subject of what to do when you are actually on your feet in Court and encounter some of the more challenging characteristics of our learned judges.

THE BASICS

There are many excellent articles on the subject of oral advocacy. I acknowledge that it is difficult to find time for this type of reading. But in this area, as distinct from many areas of legal writing, the works are highly entertaining. Where else can you both learn, and read Justice Binnie's description of Chief Justice Dubin deploying "the inquisitorial method with a skill not seen since Robespierre presided over Le tribunal révolutionnaire", with the counsel on the wrong end of the momentum hearing "the tumbrels coming from la place de la guillotine."[2] Where else can you find definitive advice on "How to lose in the Court of Appeal."[3]

Learned works on oral advocacy reveal these common themes:

- Be Prepared
- Be Focused
- Be Clear
- Be Candid
- Be Resolute

Be Prepared

We have all heard the stories about senior counsel who pick up the material for the first time the night before, and still manage to be brilliant in oral argument. True or not, this is not a good practice to adopt. The first and most important step toward effective oral advocacy is thorough preparation. You should know the evidence and the law on both sides.

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[1] For example, see the articles collected in Ethos, Pathos, and Logos: The Best of The Advocates' Society Journal 1982- 2004 (Irwin Law).

[2] Binnie, I., "In praise of oral advocacy" (Spring 2003) 21:4 Advocates' Soc. J. 3

[3] Justice Catzman's definitive series on how to lose in the Court of Appeal, published in The Advocates' Society Journal: (Summer 2000) 19:1 at 3; (Summer 2002) 21:1 at 1; (Autumn 2002) 21:2 at 25; (Winter 2002) 21:3 at 17; (Spring 2003) 21:4 at 25; (Summer 2003) 22:1 at 23; (Spring 2004) 22:4 at 26.

It is in preparation that counsel develop and refine the theme, and the theory of their case. The theory of your case should maximize your strong points, and minimize or dispel the weak ones. The theory of your case should identify for the Court the patch of high moral ground that you seek to stake out for your client.

Thorough preparation is not only a prerequisite to preparing an effective oral presentation, but it is also your safety net when you are on your feet in Court. I have seen junior counsel, nervous and ill-at-ease, and tripping over words read from notes, still succeed in securing the attention of the Court as it becomes obvious that he or she is well-prepared. Similarly, I suspect that judges can pick out the unprepared counsel moments into that counsel's oral submissions, and the judicial interest-level in those submissions immediately starts to plummet. To achieve the credibility you need with the Court, you must be well-prepared.

Be Focused

It is often said, "*Counsel should have no more than three points.*" In most cases, counsel should have no more than three or perhaps four main points. Why? I suggest there are two reasons, which are flip-sides of the same coin:

1. For effective oral advocacy, you must distill your case down to only the key issues, and impress upon the Court that you have done so.
2. If there are more than three or four points, the Court will begin with the view, perhaps correctly, that counsel has not sufficiently focused on his or her case, and the Court is in for a protracted and unproductive oral argument.

We all know we should focus on only the important issues. The logic is inescapable. Otherwise, key points are diluted by being surrounded by weaker points. The impact of key points is similarly diluted. In turn, the ability of the Court to understand the argument is diminished with all the background noise.

Why, a judge might ask, does counsel not just focus on the key points and get on with it. There are at least two possible reasons:

1. Identifying those key issues can be hard.
2. There is sometimes the tendency to think that there is a gem hidden somewhere in the rubble that the judge may seize on in your favour.

As counsel, we must abandon the faint hope exhibited by the second reason, above, and trust our own judgment. Accepting that it can be hard, force yourself to advance only the arguments that you believe, with conviction, are strongly in your favour. If you have more than a few main points, it is a signal that you may need more focus. Discuss your case with a colleague or a mentor for helpful input.

Where there is a factum, this focusing process ideally should have been done at the factum-writing stage, with the key issues clearly articulated in the factum. If, on reflection, there are too many issues in your factum, do not feel obliged to refer to all of them in your oral argument. One conventional wisdom is that you begin with your strongest point, and if all your points have merit, you needn't be concerned about finishing with a weak one.

Remember that defining the issues can influence the outcome of the case. It is an opportunity, not a

burden. Through the selection and articulation of the issues, you set out a road map that compels the Court to follow your theory of the case, to your desired outcome.

Be Clear

A common observation about our leading counsel is that they are able to make even the most complicated case simple, and easy to understand. To persuade, you must not only have a theme, and theory of your case; you must articulate it clearly.

Clear oral advocacy has many of the same hallmarks as clear written advocacy

- begin by telling the Court where you are going (i.e. the road map);
- keep that road map as simple as possible (i.e. the easiest way to get there);
- use overt structure as much as possible (i.e. describe your map); and
- distill your argument into simple propositions that convey the theory of your case.

The first three points deal with structure. In preparation, write out the structure of your argument. Distill it. Then offer it up at the outset of your submissions as the roadmap for your submissions. Tell the Court where you are on the road as you go.

Use written material to convey structure. Tables of contents in factums, with the proper use of headings, will generate a draft outline for you. If there is no factum, hand up an outline. Remember that even in a relatively straightforward motion, the judge would like to know what is on the agenda before you get into it. Overt structure helps the listener (i.e. the judge) know what to do with the incoming information (i.e. your submissions). Overt structure makes your argument more clearly and therefore more persuasive.

In addition to structure, develop simple propositions that convey the theory of your case in terms that are easy to understand. This means dropping legalese where it is not needed. While it will often be necessary to descend into complex legal material, begin with a sound bite[4] that says where you are going and why, using simple, persuasive terms. Break complex points down into sub-points, each with its own headline signalling where you are going and why.

Use the actual facts and familiar phrases. If your facts are obscure, look for a familiar analogy. Even if the Court has read the material, take the Court to the key evidence.[5] Use the actual documents, rather than relying solely on submissions.[6] This will help bring life to your case.

There are many different ways that documents can be used to assist in clear communications. Be creative. If a chart or chronology, or a "who's who" would provide helpful context, prepare one and hand it up.[7] These tools can help simplify complex information, and keep the Court from becoming overrun with detail. These tools can also be used to present complex information in a favourable way, while still being fair to the evidence.

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[4] More on sound bites, below.

[5] Since too much detail is like too many issues, go through only the key evidence.

[6] The use of a compendium is very helpful in this regard.

[7] Of course, the record must contain the evidence reflected in this type of document, and the document must fairly present the evidence. In addition, opposing counsel should have fair notice of such material.

Similarly, documents can be used to present the legal argument, even where no factum has been filed. A point form outline can be very helpful, or a simple extract from a statute on the same page as the key quote from a case. These devices help with clear communications, and in turn help persuade the Court to go down your road.

Be Candid

As stated by Justice Blair,[8] "Candour is particularly important in a counsel. An advocate must display honesty and forthrightness in dealing with the court, other lawyers and clients."[9] In all advocacy, your credibility is your calling card. Should the Court accept what you say? To be effective, the answer must be yes.

It should go without saying that counsel should never overstate or misstate the evidence or the law. The benefits have been aptly stated as follows:

> "[I] urge the advocate to always *tell the truth:* don't misstate it, don't hide it, don't shade it, don't bend it, don't distort it. Just tell it. This is not only good and right, *it is effective*. It has been said that 'facts that are not frankly faced have a habit of stabbing us in the back.'"[10]

Assuming that counsel do not set out to mislead, thorough preparation is the best insurance against misstatement. Be vigilant about accurately stating the law, and the facts as found in the record. If an error slips in, correct it.

What if you are asked a question by the judge, and do not know the answer? If the question relates to a central issue, this should not occur, given thorough preparation.[11] However, unanticipated questions do arise. Either way, don't guess. Tell the judge you would like to look the answer up on a break and then reply, or ask to take a moment to do so immediately if the material is on hand. It is not unusual to go off and look something up in the Court House Law Library on a break if the judge raises a new point.

Another key element is an appreciation of the benefits of understatement. As put by Justice John I. Laskin: "Nothing weakens trust more than overselling. Understatement works far better. Conversely nothing instills trust more than facing up to your weaknesses."[12]

Courtesy

I would like to take another page from Justice Blair, and mention courtesy.[13] Quarrelling with opposing counsel in the courtroom does not contribute to effective advocacy. At best, it distracts the court from your argument. Nor do discourteous remarks contribute to effective advocacy. On the contrary, counsel who are candid and courteous will develop the credibility needed for effective oral advocacy.

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[8] Court of Appeal for Ontario

[9] Blair, R.A., "Oral advocacy in matters argued before Superior Court judges" (Summer 1999) 18 Advocates' Soc. J. No. 2, 26

[10] Baughman, T.A., "Effective appellate oral advocacy: beauty is truth, truth beauty" (Jan. 1998) 77 Mich. L.J. 38; citing Sir Harold Bowden, in The New Dictionary of Thoughts (Standard Book: 1977)

[11] as discussed above

[12] Laskin, J.I., "What persuades (or what's going on in the judge's mind)", (Summer 2004) Advocates' Soc. J.

[13] Blair, *supra*

Be Resolute

An effective advocate must have confidence in his or her position. Even in heavy weather,[14] the effective advocate remains resolute, with the conviction that there is a good argument to be made notwithstanding the direction the wind appears to be blowing. Careful preparation and focus go a long way to accomplishing the task of standing firm when the Court is plainly against you.

DEMEANOUR

Body language can be important. Certainly, good counsel show their confidence in their submissions through their demeanour. An appropriate stance, tone and pace can convey that confidence, and assist in persuading the Court. The contrary is also true.

It is difficult for me to recount specific do's and don'ts when it comes to demeanour. Different counsel have different styles, many of which are effective. However, advocacy skills training courses assist in improving in-court demeanour, since these courses give you the opportunity to view your performance on videotape with the benefit of a critique, and an opportunity to practice and refine your skills. For all counsel, even those who do get to court regularly, these courses can be an invaluable way to improve oral advocacy skills.[15]

GET THE EASY THINGS RIGHT

One last point before I move on to my more controversial propositions. Counsel may have prepared the best oral submissions possible, and still find the Court distracted. Why? Because, often, some of the more mundane matters have not been properly attended to. Get the easy things right, including at least the following things

- make sure your written material actually conforms with the relevant rules (including the relevant forms and practice directions);
- pay attention to the required formatting, including the required font size, margins, etc.;
- make sure that photocopies of cases are actually legible;
- ensure that all materials are filed with the Court;
- make a note of the name of the presiding judge or judges before you come into the courtroom, and ensure you know who is sitting where so that you can address them by name;
- ascertain the proper manner of addressing the judge or judges, and use that manner of address;
- be prompt;
- have your materials organized before you stand up;
- tell the judge which court materials he or she need to have handy at the outset of your oral submissions; and
- ensure that there are no spelling errors, or grammatical errors, in your material.

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[14] More on this topic, below.

[15] The Advocates' Society runs such courses on an annual basis, which provide an excellent training in oral advocacy skills.

There are no doubt many other matters that could be on this list. Unfortunately, if counsel slip up on one or more of these matters, it can distract the Court from the oral submissions. None of this serves the objective of effective oral advocacy.

THREE POTENTIALLY CONTROVERSIAL PROPOSITIONS

Let me first say that I suspect that none of my propositions would be seen as controversial by judges. Counsel, on the other hand, may be appalled by these propositions. I stand behind all of them. They will help you be a better oral advocate. They will help you win cases.

Proposition #1 - Time limits are good

As anyone who practices before our Court of Appeal will know, time limits are short, and are enforced. I recently received a notice that we had been allocated fully ten minutes for oral submissions on a motion.

And as anyone who practices before the Court of Appeal will know, you do not actually get ten minutes to make submissions. You get about ten minutes to have a dialogue with the panel about the issues on their mind, during which you will be able to make some submissions.

If ten minutes seems short, which it does, it need only be compared with the Supreme Court of Canada, where an appellant normally gets only sixty minutes for oral argument on an appeal.

It is extremely difficult to meet these time limits. Yet I submit that time limits are good.[16] Absolutely. Time limits force counsel to focus their argument, and anything that forces counsel to focus on only what is important is good.

Proposition #2 - Sound bites are good

Politicians have given sound bites a bad name. Sound bites are, in fact, a very useful tool in oral advocacy. They need not be an obfuscation. While there are less positive definitions available, I advance this definition of a sound bite: a short phrase or sentence that deftly captures the essence of what the speaker is trying to say.[17]

As counsel, you should have sound bites. That is, in your oral advocacy you should strive to find short, clear and memorable phrases or sentences that capture the essence of what you are trying to say. You can then move on in your submissions to the more detailed articulation of your points. Begin with something that an educated bystander would understand. Often, it is enough to prepare a simple answer to these two questions:

1. What is the [trial] [motion] [appeal] about?
2. Why should your client win?

It can be difficult to succinctly answer these questions. Preparing those short answers is a key part of the preparation of your oral argument.

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[16] I reserve the right to complain if the time allocation is plainly inadequate or unfairly distributed. Courts will usually do the right thing when genuine issues regarding timing are raised.

[17] "sound bite", Wikipedia, The Fr Encyclopedia

The 'sound bite' answers to these questions should be given at or close to the beginning of your oral argument,[18] and become recurrent themes. They should reflect the theory of your case. They should provide context for your argument, and help the Court understand why you should win. If your argument has a number of substantial points, extend the use of sound bites in order to distill each of your points into a simple proposition.

It can be difficult to find a good sound bite. Often, counsel are buried under the detail of the case, and attendant legalese, and their oral submissions are similarly buried under detail and legalese. Here are some suggested ways of pulling yourself out of the detail, and finding your sound bites: ask yourself how you would describe your case

i. to a colleague in the gowning room, who asked what you were doing in court that day; or

ii. to a colleague, who was at the airport boarding a plane and needed to know the gist of the situation in two minutes; or

iii. to your neighbour, who asked you what you were doing in court the next day.

It may seem artificial, but if you force yourself to answer one of these questions *out loud*, you will be well on your way to finding your sound bite.

In developing your sound bites, remember that judges generally do not respond well to jury addresses made in motions court, or impassioned rhetoric on a straightforward breach of contract case. Memorable does not mean melodramatic. The objective is to advocate your position in clear, simple, memorable terms. Use a simple, succinct message that sticks.

Proposition #3 - Judicial questioning (sometimes called interruptions) is good

The complaint is sometimes made (privately, in the gowning room) that the presiding judge did not even 'let' counsel make their submissions. So frequent were the interruptions from the bench that counsel could not get through their prepared notes. The judge peppered counsel with questions, including questions that seemed to have nothing to do with the key issues in the case. Et cetera.

While I am sympathetic to this scenario,[19] I nonetheless advance the proposition that judicial questioning is good. Bring it on. The more the better.[20] Why?

- Because you can learn what is troubling the judge from those 'interruptions'. That information is gold. That information is not available in any other way. Those judicial questions provide an opportunity for counsel to directly address what is on the judge's mind.
- Because if counsel does not address what is on the judge's mind, reasonably promptly, the judge will remain pre-occupied with his or her question. Counsel's brilliant, carefully prepared submissions will go unnoticed while the judge privately ponders that question.

Answer the question as soon as possible. If you had planned to address the point in your submissions, you may suggest to the Court that you are about to address that question. But if you are not going to get to it

[18] and they should be found in the overview of your factum!

[19] There can always be too much of a good thing.

[20] With the caveat that there can still be too much of a good thing.

very soon, either move to the point immediately, or give the Court a preview of your answer immediately. You can then continue with your submissions with more confidence that the judge is focused on your submissions, rather than wondering what your reply will be to that question. If the question is raised again, answer it immediately.

Prepare answers to key questions. Anticipate the hard questions, which usually correspond to the strong points in your opponent's case. In the Court of Appeal, any appellant's counsel should have, ready to go, an answer to the question: *What do you have to say about the standard of review?* or *Why do you say we can interfere with the decision of the Court below?*

Persuasively answer questions. Use the answers to move your argument forward. If the Court is stuck on a point, stay with that point until you are satisfied that you can move on.[21] As put by Justice Binnie, "The task of an advocate is to… find out what is actually bothering the court as distinguished from what merely seems to be bothering it, or what, in counsel's view, ought to be bothering it."[22]

Above all, listen; really listen to the judge. Stop and think about what the judge is saying before replying, and then reply rather than sticking to your notes.

PHENOMENA YOU MAY ENCOUNTER

The "Hot Bench"

I first heard the phrase "a hot bench" from a senior counsel from British Columbia, who was recounting a story about a CLE program. Counsel was asked to talk about what he would like to see more of from judges, and said it was gratifying to appear before a judge who had already digested the material fully. In reply, one appellate judge said accusingly -- *What you want is a hot bench! On the contrary, judges should come to oral argument with a blank slate, unsullied by the preliminary views that may be formed by too detailed an analysis of the written material.*[23]

While it is the dream of some counsel that they might have, in oral argument, a fresh unencumbered chance to persuade the Court, it is rarely if ever true. Even if the judge has not had any opportunity to review the written material, the judge's own experience and expertise provides a backdrop to any case. A our Court of Appeal, we have the quintessential hot bench. The judges are prepared. It is as if the bench has warmed up, and is off on a sprint as soon as Court is called. Counsel must be ready too. If you can enthusiastically adopt the three propositions above, you will be off to a good start with a hot bench.

When you are not in the Court of Appeal, there may be an initial need to gauge how familiar the judge is with the case (i.e. attempt to determine whether or not the judge read any of the material). In a busy motions court, with lists constantly changing, it is unrealistic to expect that the motions judge has had an opportunity to read everything. Counsel can ask some polite questions of the judge (like, *Would you like me to take you through the evidence/law in detail or provide an overview?*). In my experience, judges who have read the material readily volunteer this fact, and, for the rest, you will get something like: *Counsel should take me to those portions of the record that they think important to their argument (aka*

[21] I accept that this runs somewhat contrary to proposition #1.

[22] Binnie, *supra*

[23] or words to that effect

I haven't had an opportunity to read anything but your notice of motion). Adapt your oral submissions based on the signals you get from the Court, and take the Court to the key pieces of evidence and key authorities.

The Silent Judge

In my view, the silent judge is more challenging for the advocate.

With the silent judge, you will have the opportunity to make your submissions, but no signals other than, perhaps, the judicial pen and highlighter. Again, the best first step toward dealing with the silent judge is to have a well prepared and focused oral argument using the objectives set forth above. It is also fair game to ask the judge whether or not he or she wants counsel to address any points in more detail, or has any questions.

Heavy Weather

When you find yourself experiencing a storm from the bench, it is helpful to remember that aggressive or persistent questioning does not necessarily mean the judge is against you. On the contrary, sometimes the judge is inclined to find in your c 's favour, and needs you to answer the issues that must be dealt with for your client to win. There are days, however, where it seems perfectly clear that the judge is against you. Either way, the key is to continue to answer the Court's concerns as persuasively as you can, and remain resolute.

A colleague of mine recently had the following experience in the Federal Court: he was well into his first point when the judge asked, "Counsel, is it your practice to start with your strongest point?"[24] Ouch. Counsel, being senior and undeterred, answered that it was his practice to start and finish strong (and proceeded to win the case on that first point). It is important not to be deterred. I have seen junior counsel who, faced with a persistent, unconvinced judge, concede a point having apparently concluded that there is nothing more that can be said in support of the position. Do not concede the point just because it appears you are about to lose it. Instead, once you have done your best to persuade the judge, simply say that you have nothing further to offer on that point and at least the issue will survive to be considered for a possible appeal.

THE LAST WORD

Always remember that judges have the last word. T

[24] The judge went on to say that he had been reading Justice Binnie's learned paper on oral advocacy, and noted Justice Binnie's advice that counsel should begin with their strongest point...

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