

THE DO'S AND DON'TS OF WRITTEN ADVOCACY

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INTRODUCTION

First impressions carry tremendous weight. This truism applies equally whether meeting someone for a blind date or a court date. And the first impression we create as advocates is formed by the written material we file in Court.

Well-structured, clear and credible written materials allows the Court to have a written reference point to your client's case. They also provide your first and best opportunity to persuade the Court as to the merits of your case.

Not so long ago, oral advocacy was viewed as the most important of all litigation skills. It was common practice in the IP bar and elsewhere to have junior counsel prepare the written advocacy materials, while senior counsel would present the case in Court. It was also not uncommon to have senior counsel [once they had directed their minds to the matter, whether it be a motion, appeal, interlocutory application or trial] completely change the focus of the written advocacy, and in some cases totally disregard the written submissions.

Things have changed. Less and less time is now allotted for oral advocacy. As a result, written advocacy is as important, and often more important, than oral advocacy.

Poor written materials create problems for counsel when he/she appears before the Court. The Court may form a negative impression about your case ... and maybe even about you personally. Precious time is wasted alleviating confusion arising from a defective written argument.

What follows is a list of "do's and don'ts" to keep in mind as you set your fingers to the keyboard. These tips are based on my own experience (the don'ts in particular) and from canvassing a number of leading advocates in the IP bar.

BEFORE YOU BEGIN WRITING

1. **Think before you write.** I can't tell you how many times I've hopped on my horse metaphorically speaking and galloped off madly in all directions because I didn't take the time to create the framework for my argument. Begin with a cup of tea or the beverage of your choice and outline a framework.
2. **Know the facts.** Spend as much time as is necessary to ensure that you have a good understanding of the relevant facts. Your task is to convey your knowledge of the facts to a busy judge who will be unfamiliar with them. Any lack of understanding or

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knowledge of the facts on your part will have a negative impact upon your ability to communicate them in a clear, concise fashion

3. **Do your research.** Review the cases before you begin your substantive work. The key cases often help you establish a framework often a useful phrase or two will jump out at you. One trendy phrase today is “the standard of appellate review” those of you writing memorandum in support of appeals from the TMOB.

FORM AND STRUCTURE

4. **Use the proper form.** Motherhood - but often honoured in the breach. One of my cardinal rules is to always check the form, even those I know by heart because my memory isn't very good and based on what I've seen - I'm not the only one. Using a wrong or a deficient form looks sloppy at best and at worst, gives the impression that you don't know what you are doing. *Rule 5 of the Federal Court Rules, 1998* provides that the “form may incorporate any variations that the circumstances require”. Major variations in the forms are, however, incorporated at your client's peril, as the Court may not accept the document.
5. **Know the Rules.** Comply with the *Rules* regarding page limits, fonts and margin size, spacing, appendices and cover colours. Use of very small font size, single spacing or anorexic margins is not only contrary to *Rule 65 of the Federal Court Rules, 1998*, it is discourteous to the Court and opposing counsel. See **Stranger**, [should be Strayer - *this is as a result of* either over reliance on spellcheck or failure to comply with tip # 36 - review your materials for typos] Review the *Rules* of Court and make certain that you have adhered to them. Never assume you have the *Rules* memorized. *Assumption is the mother of all screw-ups: Murphy's Law of Suspended Judgment.*
6. **Avoid poor presentation.** The more visually appealing your document is the easier it is to read and the easier it is to read, the greater the more readily it will be understood. Documents that are not visually appealing are more difficult to read and less readily understood.
7. **Incorporate headings and paragraph numbering.** Proper structure plays an important role in enhancing the visual appeal of your document. A well-defined structure is both pleasing to the eye and more easily read. More importantly, a well-structured document is more convincing. A reader who does not have to struggle to simply read your argument can be more focussed on the substantive content. A liberal use of headings provides not only structure, but also an outline of your argument. Notice and learn from the increased use of headings and paragraph numbering in judgments.
8. **Do not inadvertently omit boilerplate clauses.** The standard boilerplate clauses are there for good reason. For example, the clause requesting “such further and other relief as this Court may deem just” in a Notice of Motion permits you or the Court to go beyond the specific relief sought when appropriate and reasonable. “Such further and other material as this Court may permit” allows you to rely on additional materials”, where fair and reasonable. It is surprising how often these clauses are in fact relied upon, particularly in Motions Court.

9. **Do not slavishly follow precedents.** This may appear to be somewhat inconsistent with the above statement. However, a closer examination will reveal that both statements can co-exist effectively. Boilerplate clauses have a value in that they remind us to include some of the more mundane requests for relief that we might otherwise forget as we attempt to craft the more substantive arguments in our document. The danger in relying too heavily on office precedents is that the law may have changed in the meantime.

OPEN AND CLOSE STRONGLY

10. **Open with an overview statement.** I learned this from the written advocacy program offered from the LSUC. It was a point stressed by Mr. Justice Laskin, of the Ont. CA one of the teachers and key supporters of this program. Take it! While you may have a passion for mystery novels, legal documents are not the time you should consider turning your passion into a vocation. Begin your written submissions with an overview statement which summarizes the key issue before the Court, your client's position, and why it is preferable to that of the other side. Its really a variation of the theme of three - tell the judge what you're going to say, say it and tell the judge what you said.
11. **Set out precisely the relief you are seeking.** Immediately following your overview statement let the Court know exactly what remedy your client wants. Apparently this is a pet peeve of a number of judges - being forced to wade through pages of stuff before finding out what the party wants!
12. **Cite the Rules you intend to rely upon.** Seeking vague or non-specific relief is improper. You must put opposing counsel on notice as to precisely what *Rules* the relief sought is founded upon. It is a good idea to list all the *Rules* relied upon in one paragraph under the heading "THE GROUNDS FOR THE MOTION ARE".
13. **End strong.** Do not assume you have completed your task simply because you "wowed" the Court at the outset. Your conclusion is as important as your opening.

FOCUS ON THE FACTS

14. **Focus on the facts.** By the time you're drafting a memorandum you know the case so well that it's easy to forget that others don't. Presentation of the facts is often the most important component, simply because the judges know nothing about the facts, and you can assume that they have some knowledge of the law. *The statement of fact is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case more than half argued...[I]n many, probably in most, cases when the facts are clear there is no great trouble about the law.* Davis, J.W. "The Argument of an Appeal" (1940), 26 A.B.A. Journal 895 at pp. 895-6.
15. **Establish a logical factual structure.** Much has already been said about structure, and to a large extent, this point is related to those earlier comments. But just as visual

structure is important to the aesthetic appeal of your document, logical and organized structure is vital to the clarity of your argument. Create a clear pattern and follow only one pattern at a time. Common patterns are: chronology of events, the people involved, the issues, witness or geography. My favourite - a chronology of events broken down by parties or the IP involved.

16. **Be fair and accurate in your assessment of the facts.** Although good advocacy requires one to put as favourable a spin on the facts as is possible, it is imperative that you recognize how far you can go in creating that spin. Counsel must guard against crossing the line and Never misrepresent the facts. The last thing you want to develop amongst members of the bench is a reputation for misrepresentation. Credibility is the most precious commodity an advocate can have with the Court and once it is damaged it may be lost forever. **ASK BOB IF HE'S SEEN AN INCREASE IN MISREPRESENTATIONS.**
17. **Do not include facts irrelevant to the case.** If you have properly prepared your overall strategy, you will know which facts are relevant and which are not. Do not muddy the waters with facts that have no bearing on the litigation or the remedy you are asking for. Time is precious ... spend it on the points that are germane to your case.
18. **Avoid sins of omission.** Brevity will be greatly appreciated by the Court. However, it should not come at the sacrifice of a thorough argument. Do not overlook facts that **are** relevant even if you think you do not need them to succeed. Remember ... if you fail to refer to them in your written documents, you might find it difficult to introduce them when the time for oral advocacy is upon you.
19. **Include adverse facts.** You cannot simply ignore those facts which hinder your position. Omitting unfavourable facts can discredit your entire argument. Rest assured that your opponent will raise them. So be prepared to address them in a way that minimized their impact. Courts not only appreciate but demand candour. By the same token, you can discredit your opponent by pointing out to the court that he/she has omitted important adverse facts. *The real skill of advocacy is showing how these matters are not really problems at all, or at least they are problems with solutions.* T. A. Cromwell, "Effective Written Advocacy in Factums" in Preparation of Factums. Aurora: Canada Law Book Inc. 1996, p. 17.
20. **Do not belabour axiomatic points.** You do not increase the chances that the Court will find in your favour by repetition of self-evident points.
21. **Tie the facts and the law together.** Your brilliant assessment of the facts and the state of the law will all be wasted if you do not take the next step ... tie your particular facts together with the law you have cited. The judge needs you to apply the law to the facts of your case. Your goal is to present your argument in such a manner that the only legal conclusion that could possibly be arrived at has to be obvious. However, that does not mean you should leave the conclusion unsaid. Bring it all together with clear statements as to how the law should be applied to the particular facts of your case.
22. **Avoid the "cookie cutter" approach to drafting.** Don't cut and paste from other documents. Succinctly but fairly paraphrase evidence and jurisprudence. It is unavoidable that your written argument will contain references to facts which were discussed in earlier documents, such as a Notice of Motion or an affidavit. However,

this does not mean you should simply “cut and paste” those passages from the earlier document to your argument. Now is your chance to demonstrate some creativity by coming up with a new twist to an old song! This may seem like an insignificant point. However, if a judge is reading a passage that is identical to one used in an earlier document, there is a temptation to skip ahead a bit in order to look for a new point. If a judge does that, you have lost an opportunity to drive home what could be a highly relevant point. Even worse, you may have lost the judges attention, which could mean the judge might not fully absorb the next point he/she read, or might even skip over that next point entirely while searching for a new point.

23. **Clearly identify what facts are based upon personal knowledge and what facts are based upon information and belief.** Do not file an affidavit based upon information and belief in cases where this type of evidence is inadequate or improper. Understand that an adverse inference may be drawn from the failure to provide evidence of persons having personal knowledge: Rule 81.
24. **Don't put argument into evidence.** Reserve argument for the written and oral submissions. Including argument in evidence exposes the affiant to needless cross-examination.
25. **Don't put in evidence if the Court file is deficient on its face.** If the facts you intend to rely on appear from the Court file, you do not need an affidavit in support: *Rule 363*. Unnecessary evidence is a waste of time and money and could expose your client to needless cross-examination.

WRITING STYLE

26. **Write clearly, economically and simply.** You want to ensure your written materials will be read and understood. Be brief. Be clear. Keep it elegantly simple. Short, declarative sentences work best. Use of plain language is also helpful. Do not make your argument more complicated than it has to be. *The more complicated and grandiose the plan, the greater the chance of failure.* Knag's Derivative of Murphy's Law.
27. **Be true to your own style.** As much as we may all want to emulate Rumpole of the Bailey your document will appear awkward if you're trying to mirror some one else's style. Use language with which you are comfortable. If you're a pedantic, obfuscatory sesquipedalian you may want to adopt a simpler voice but otherwise you'll communicate better if you remain true to your own voice.
28. **Write in a lively fashion.** This is always an important point, yet it is frequently overlooked. Too often, we as lawyers believe we have to sound like ... a lawyer. The more interesting your story the more likely it will be remembered. Consequently, our written arguments fail to convey the drama of the events we are attempting to describe. If you have a fact situation that is dramatic, full of egregious violations of fundamental principals of justice that are enough to make any judges blood boil, do not be afraid to put a bit of heat into your document. Judges are just like anyone else ... they can get angry when they perceive that one party has taken advantage of another party. If you are arguing for a party likely to benefit from such a response, you are doing your client a tremendous disservice if you revert to a purely academic tone.

29. **Avoid unnecessary “legalisms”.** Plain language works best. Avoid the use of Latin phrases *ad infinitum* and legalisms such as “It is respectfully submitted”.
30. **Refer to the parties by name.** Referring to the parties by terms such as Applicant or Respondent muddies matters, especially in trade-mark matters where “Applicant” can refer to the trade-mark applicant or the moving party and they are not always one and the same. Use Molson and Labatt or Apotex and Ciba-Geigy instead and then the judge doesn’t have to refer back to the title of proceedings to figure out who did what when.
31. **Pick memorable means to define a trade-mark or patent and use it consistently.** Referring to a trade-mark as Reg. No. TMA 1,555,555 or a patent as Canadian Patent No. 2,345,678 is equally mind-numbing. Define the subject IP rights in a lively way and use that term consistently throughout the document. Refrain from using an unfair or misleading title to describe the other side’s IP rights. Example: “Device for attracting attention of wayward canine” or “dog whistle patent” is more readily retained than “the “555 Patent”. And “woofer” is easier to remember than Reg. No. TMA 1234567.
32. **Use a leitmotif.** Choose and repeat effectively in your memo a key phrase which cleverly sums up your best point. I mean we all know that the subliminal message is “My client is the good guy and Bob’s client is the bad guy” but all good story tellers have a more obvious thread running through their tales. Having said all this skip down to #35!
33. **A picture is worth a thousand words.** And a coloured picture is worth 10,000 words. Where appropriate, paste a copy of a design trade-mark, or a picture of the trade dress right into the text of your submissions. For patent and industrial design cases, include a clear copy of the relevant drawings, colour coded to show similar and/or different features, the equivalents and the inventive aspects.
34. **Use the voice of the affiant.** Although lawyers typically draft affidavits, speak with the affiant before you prepare the first draft. Then use his/her language. If the affiant refers to a product as “beer” then his/her affidavit should not refer to “brewed alcoholic beverages”. Your affiant will then be much more comfortable and credible on cross-examination and less likely to be tripped up over unfamiliar or inconsistent language.
35. **...Don’t sing matters too high.** Just don’t take it over the top. Think of all those times you sat watching a movie thinking how the director took a great, dramatic story line but ruined it by taking it “way over the top”. You do not want to make that same mistake with your written material. Drama, where the facts bring it out, is a great thing. Too much drama will leave the reader thinking “oh brother” and questioning the credibility of your argument.

AFTER THE FIRST DRAFT

36. **“Reveiw” your written materials for grammatical, typographical and other “oblivious” errors.** Such as stranger for Strayer! Odds are good you made some of these mistakes and it is inevitable that I will. So do as I say and not as I do and Take the time to reread your written submissions slowly and critically. These types of errors are distracting to a judge and reflect badly on you as counsel or a speaker.
37. **Review the document to see that it flows.** Make sure you have good transitions or to use the CBC word of the month “segway” Remember as you were writing and your argument seemed to flow from your mind effortlessly? Review your document to make sure that it flows logically. Make sure you finished one point before moving onto the next. Make sure that the points follow in a logical manner and do not appear to be jumping all over the map. Tell a story that is concise and easy to follow.
38. **Do as many drafts as necessary.** The first draft is a great opportunity to get all your thoughts on paper in front of you. The second draft is best used to reorganize the document as a whole so that you are bringing it closer to an argument with a sound, logical flow. Keep revising your argument until you are satisfied that each section is crisp, and all sections flow into each other in a logical procession. Once you have that, you are almost done.
39. **Let a critical mind review your early draft.** Ask this person to pretend they are a judge, coming to the matter for the first time. Is your written advocacy easy to follow. Are all the key points readily understood. I always ask another lawyer in my firm to review my penultimate draft - penultimate because almost invariably they suggest something to make it better. This is the hard part ... the time when we have to abandon our egos and allow another person an opportunity to review what we have done. Just remember, you have likely chosen someone who you think can help you. So let them help you. This person is not as familiar with the facts as you are so they are less likely to fill in any details if you have inadvertently left anything out. Third persons bring a whole new perspective because they are not as close to the case as you are. You may not feel the need to include all of their advice. However, often these readers can provide you with a little nugget that allows you to tweak your argument in the right direction.

THE LAW

40. **Update your case law.** Of course you spent a great deal of time meticulously researching the law *before* you started writing. However, it does not hurt to conduct one final review to make certain that the one case your whole argument depends on was not reversed. Nothing is more embarrassing than having your opponent demonstrate greater knowledge of the current state of the law than you.
41. **Do not ignore unfavourable jurisprudence or misstate the law.** *If unfavourable precedents are omitted from a brief, opposing counsel will surely point out the omissions: if a precedent is misstated, the court will question the value of the brief and counsel's integrity. In either instance, the reviewing court will view all other statements, whether accurate or not with a degree of scepticism. Frankness and honesty, on the other hand, inspire confidence.* E.D.Re. Brief Writing and Oral Argument, (6th ed.) Dobbs Ferry, N.Y.: Ocean Publications Inc., 1987, p.8

42. **Pick the most relevant cases.** Do not cite more case law than you have to in order to make your point. Obviously, if it is acknowledged that there is a leading case on a particular point, you want to include that case in your argument. If it is an older case, you may want to include one or two recent cases which demonstrate that the principle from that case continues to be relied upon today. Avoid the temptation to cite every case you read during the course of your research if those cases simply reinforce the relevance of the leading case. More is not always better, and if additional cases do not add to your argument, think twice before including them.
43. **Check your citations.** This is one of those obvious points that is so often honoured in the breach. Provide accurate pinpoint citations to your factual and legal references. Do not assume that the judge or a law clerk will read a lengthy decision to locate the relevant passage you are relying on. I can tell you for a fact that if you're relying on a lengthy decision and what decisions today are not lengthy, and you either fail to include the pinpoint cite or get it wrong, its unlikely the judge will read the passage. I was recently in the Ont CA - key passage was on page 478 - pinpoint cite said 474 - one judge indicated how frustrating it was to deal with sloppy citations -my our new approach - whether I'm doing the drafting or one of my associates is - attach copy of page with highlighted passage tot he draft so my secretary and I can both check the cite.
44. **Short quotes are ok ... but long ones?** Very rarely is it necessary to reproduce an entire long passage from a case you have cited. You can convey the principal of that passage in a much shorter amount of time. If the judge wants to read that passage, he/she can find the case. Even short quotations are unnecessary unless the Court made the point in such an eloquent fashion that you believe it would lose some of its impact if your were to rephrase it in your own words.

OTHER GEMS OF KNOWLEDGE

45. **Remember you are an officer of the Court.** Your written submissions reflect on you. Never lose sight of the fact that you are more than a hired gun. Don't put anything in written argument, regardless of whether there will be a hearing or not, that you would not say in Court. Your duty to your client is second only to your duty to the Court.
46. **Seek Leave to Dispense With a Motion Record When Appropriate.** Take advantage of the preamble to *Rule 364(1)* and request, in your Notice of Motion, for leave to dispense with the requirement to serve and file a motion record for motions that are moving forward on consent for non-controversial relief.
47. **Avoid the ambush strategy.** Trial by ambush is a thing of the past. Make sure all the issues you intend to address in oral submission are included in your written argument or be prepared for the judge to query (and often in a disapproving tone) "where is this in your Memorandum?"

CONCLUSIONS

Judges, like the rest of us, are busier now than ever. Your case is just one of many on their plates. Judicial attention spans are, of necessity, short. More information is absorbed by reading than by listening. Your ability to rescue your case in oral argument is limited. Accordingly, establishing a strong foundation for your case in your written material is imperative.

This does not mean you should not prepare for the oral argument. In fact, a good written argument will often stimulate the Court and will result in your being challenged at the hearing and directed specifically to that part of your case on which the Court requires further clarification or assistance. Do not look upon this in a negative light. It often means the Court is intrigued by what you wrote and wish to have an opportunity to expand upon it.

You may leave the courtroom feeling as though you have been raked over the coals and that all is lost; only to receive an order or judgment from the Court stating “based upon the submissions contained in the written argument”, the Court finds in your favour.

Acknowledgements

I wish to acknowledge and thank the following IP litigators for providing a number of the most thoughtful and helpful tips herein: John Macera, Ron Dimock, Adele Finlayson, Janet Fuhrer, Brian Isaac, Andrew Shaughnessy and Shawn Peers.