

**Reflections on Effective Written Advocacy**

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Halifax, Nova Scotia**

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& Municipal Government Lawyers  
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## Introduction

The story is told that a New York newspaper editor once sent the famous American journalist, A.J. Liebling a batch of “How to Write” books for his review. They said of Liebling that nobody better could write faster, and nobody faster could write better. Liebling returned the pile of books to the editor with a note that read:

***“The only way to write is well, and how you do it is your own damn business.”***

While Mr. Liebling may have had his tongue in his cheek when he wrote the note, I like to think that while the process of writing is a very personal thing, we can all improve the quality of our work by sharing the lessons of our own experience.

Let me start by thanking you for the opportunity to speak to you today. Those who know me will attest to the fact that I have a passion for excellence in advocacy, in all of its forms. So when Ms. MacNeil and Mr. Bodurtha contacted me last September and asked me to reprise earlier versions of this seminar, I jumped at the chance. Besides speaking about a subject close to my heart, it gives me the opportunity to meet some of you for the first time, and also catch up with many old friends from our past lives together.

I hope that whatever I am able to impart this morning will prove profitable and that my modest suggestions will heighten the interest, energy and enthusiasm you bring to your writing.

In the interest of full disclosure I should also admit to a more selfish objective. By improving your effectiveness as a writer you will make my job a lot easier in judging the merits of your submissions.

This year, based on your suggestions, Ms. MacNeil and I were happy to revamp the format. We have a good three hours together. Instead of presenting my paper interspersed with Powerpoint slides as I have done in past years, we thought it might be more instructive and encourage a more robust conversation about persuasive writing later, if I distributed my paper<sup>1</sup> in advance so that you would have two weeks to reflect on its content.

Then, instead of responding to earlier submitted questions as we did last year, I undertook to critique some of your writing samples which were collected and submitted to me with the author’s identity kept anonymous. I asked that I be given two copies of each writing sample: one on paper and the other on acetate so that I could offer some constructive suggestions with the use of overheads, to better engage the audience and

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<sup>1</sup> This is the most recent version of the paper presented by the author to a variety of audiences over the years.

all learn from the discussion that follows. This is the approach we take as Faculty every year at the Osgoode Hall Law School Annual Written Advocacy Program.

In addition I will provide detailed feedback in writing for each author of the writing samples and these will be returned to Ms. MacNeil who devised some kind of secret code to preserve the identity of the writer and ensure that my written comments are returned to the appropriate author.

Let me thank those who volunteered. It takes courage to “put your work out there” for consideration by your peers. We are grateful to those who did.

So here is how I propose that we spend our time together. I will start by highlighting and then drilling down into a few subjects covered in my paper. Then I will turn to the writing samples and offer my personal thoughts on the strengths and weaknesses of what we are all able to look at on the screen. The third segment is deliberately set aside as a Q&A session so that there will be ample time for me to respond to your questions. Then, before we wrap up our time together I thought I might put up on the screen a few samples of my own writing, both to illustrate some of the things I will review in my talk but also give you the chance to be my editors and critics.

I hope you won't be shy with your questions. In my experience, some of the greatest benefits in sessions like this come from the dialogue that ensues, so that we might all profit from the lessons learned by others.

There is one *caveat* attached to my presentation. I know you will appreciate that the views expressed here are mine alone and should not be taken to reflect the sentiments of my colleagues either individually or collectively.

Let me begin by offering a quick outline of what I intend to cover in the paper. I will address three broad themes:

- How to start
- How to write
- How to finish

In the first segment I'll talk about the environment and systems you need to create to begin the process of writing. Then I will move into a consideration of the things that in my experience have proved essential if we are serious about improving

our skills as writers. The final segment will address what you need to do when you think you're finished, but aren't.

I will include some thoughts about what really bugs judges. In preparing this list I've incorporated my own thoughts as well as ideas from a quick canvas of my colleagues on the Court, having offered the assurance that anonymity will be preserved. You can assume that I agree with all of the suggestions others have made and that therefore my name can be associated with whatever commentaries might follow.

As with so many things we do in life, it is wise to consider the big picture before we get bogged down in the details. Since the point of our getting together this morning is to talk about the keys to effective written advocacy, we should first pause to reflect a moment on what we really mean by "advocacy".

In my view, the simplest but perhaps the best explanation of advocacy is that it is the art of persuasion. As lawyers you are employed, or retained to persuade a decision-maker (whether judge, or jury, or potential client, or adversary) that your position should be preferred. And so your task as lawyers is to advocate – in other words, promote – that position, whether orally or in writing or both, so that the listener, after proper reflection, will choose the outcome you propose and the path of reasoning which leads to it, over the other.

When I became a judge, it may surprise you to learn that my job was still to advocate. Not in a partisan way, pushing one view ahead of another, but rather, to express myself in writing in such a way that this new audience would clearly understand the disposition or verdict or sentence and the path of reasoning which led to it. To achieve that goal forced me to spend the time and effort required to ensure that my writing was always clear; concise; legally sound; and produced a just result. These are the things we will talk about this morning.

At the end of the paper I have included a bibliography to a collection of textbooks and other resources I've built up over the years. I commend them to you. You will see that some references are geared towards judges. It's not a mistake that I included them. It seemed to me that your skills as legal writers would be sharpened if you had some idea of the techniques and objectives judges bring to their own writing.

I'm sure that some of the things I say this morning will seem "old hat" and little more than homilies or platitudes on well-known habits and techniques. To that I say two things. First, like any great concert pianist or athlete, there is no substitute for practice, practice and more practice. In other words, saying it and then doing it so that it

becomes an instinctive part of your writing lexicon is what elevates writers, or musicians, or athletes from the simply ordinary to someone who is a game changer. The second thing to notice is the remarkable similarity in many of the suggestions offered by the leading authorities on effective writing. Pick up any of the books listed in my bibliography. You will see common themes and ideas expressed throughout<sup>2</sup>. Surely if some of the best writing professionals are saying the same thing, repeatedly, the rest of us should pay attention!

You will appreciate that our discussion this morning is not intended as some kind of holy grail to winning advocacy, or meant to provide a workshop on how to prepare the perfect factum. Whole conferences and CLE programs are available where such hands-on training is given.

My focus will be to draw your attention to what I think works, and to encourage you to try out some of these ideas as a way to improve your skills as a writer. Nobody can or should attempt to put all of these suggestions into effect at one time. Instead, experiment with a few ideas and see if they work for you. Then add more as your confidence builds.

Let's begin by asking ourselves this question:

***Why is one person's brief, or factum, or submission much more persuasive than someone else's?***

To me, the answer, or at least an answer, is clarity and lucidity in your writing.

The principal advice I want to give you is that writing well depends upon choices.

You should appreciate that how you choose to write is a deliberate strategy.

You should understand the power and the consequences of the choices you make in your legal writing.

To summarize, my thesis is this:

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<sup>2</sup> Except for the author's emphasis on the power and consequences of "Choice". Recognizing Choice as a strategy is a product of the author's own invention.

- To be effective your writing must persuade.
- Persuasive writing consists of choices.
- Choices ought to be strategic decisions.
- An essential strategy should always be to evaluate the quality of your writing.
- Improving its quality in the ways I'll discuss will elevate the persuasiveness of your writing, and greatly increase your chances of winning.

### **How to Start**

In this segment of my paper I want you to ask yourselves how you approach the task of writing. Posing that simple, single question should prompt a cascade of many others. They might include:

- What's involved in writing?
- What do I need?
- Where do I do it best?
- What are my objectives?
- Who is my audience?
- Why should I care?

Let me challenge you with my answers to some of those questions.

Writing anything requires thought.

Think about it. Whether you're writing a grocery list, or directions to a restaurant, or a letter home to your Mom, you have to be *thinking* about it. Obviously the style,

structure and content will be different but no matter what the context of your writing, each will have a style, a structure and a content.

And so for me, before you ever pick up a pen, or Dictaphone, or lay your fingers on a keyboard, you always have to have in mind your objectives, and the audience for whom you are writing.

In the context of this morning's presentation, I am your audience. You are not writing for a client, or a supervisor, or a peer-review committee. Your only audience that matters – the person or persons you are trying to persuade – is the judge.

### **Remember Your Objectives**

I suggest there are four:

- To inform - what is it you are asking me to do?
- To explain - how am I to do that?
- To engage - where's the "hook"?
- To persuade - why should I endorse the outcome you propose?

With your audience, and your objectives firmly in mind, it's now time to create the proper environment to write effectively.

### **Time & Place**

Think of the host of things you do as lawyers in the service of the municipal, provincial or federal government. Drafting a contract. Negotiating a purchase or sale. Writing a brief or a factum for a judge or panel of judges. Producing a legal opinion. Giving advice to a Minister or Deputy. Preparing legislation. Retaining outside counsel to act for your government. Finalizing a new collective agreement. Analyzing statistics, or demographics, or predictions in formulating policy for government departments. Negotiating with the private sector, or foreign governments.

I know that with these few examples I've barely scratched the broad canvas of talent and experience represented in this room.

But every one of those tasks requires suitable quiet time and surroundings in order to complete the assignment effectively. That is what I want to talk about.

To do any job well you must think it through. You need to ask yourself many of the same questions I posed earlier. What is it I need to say? To whom am I saying it? How much time do I have to produce a result of which I can be proud? What materials do I have to have at my disposal to complete the task? Who is my audience? Where can I do my work?

Each of you will have your own preferred methods of writing. And so too, your choice of instruments - whether computer keyboard and screen; pen and paper; or hand-held Dictaphone. The mechanics are not especially important. What is, is the exercise of discipline in setting aside the time and finding the place, where you will have the opportunity to reflect, think clearly, make choices, and be uninterrupted as you tackle the assignment.

Let me offer some ideas that work for me.

My workplace consists of piles of books, documents, exhibits and paper. That's the world in which I operate. I won't try to imagine yours. Rather, my hope is that the suggestions that follow can be refined to suit your own individual circumstances.

Facta, case law and transcripts are my bread and butter. I have to read, and understand, the record and the jurisprudence before I can begin to write a decision.

So for me the first step has to be to gather together, in one place, within easy reach, all of the materials with which I need to work.

Every case has at least two parties; some more than that. Early into my career I developed a system to keep track of who said/wrote what. It's foolproof.

I use a green highlighter to emphasize or keep track of everything an Appellant says. Choosing green was easy - it just means GO.

I use a red highlighter to keep track of everything the Respondent says. Nothing magic about that. The Respondent is resisting the appeal and so I choose red to mean STOP.

I use a yellow highlighter to keep track of my own personal extracts, which in turn link back to the handwritten notes I make in preparation for and during an appeal. And I use a blue highlighter to remind me of things to add, which come to mind later during the actual writing of my decision.

So those different colored highlighters and pens and post-it notes go into my “tool box”. Besides the tool box and the complete written record from the court or tribunal below, I cannot work without having both a comprehensive dictionary, and a thesaurus close at hand. We are wordsmiths, always trying to improve our choice of language for clarity and emphasis. To me a dictionary and thesaurus are as essential as pen and paper.

If you have an office, shut the door. If you work in a cubicle, find a quiet space where you will not be interrupted or distracted during this part of your work.

And when I say “this part of your work” I anticipate that whatever it is you are writing will be done in stages. You won’t have the necessary hours or days to complete the task in one fell swoop. We are all denied that luxury. Life gets in the way. But recognizing that this is a task you will be coming back to is a positive thing. It will force you to manage your time, profitably. And breaking the task into a series of efforts will bring fresh eyes to your writing when you return to it, and make a daunting task seem less overwhelming and more manageable.

The important thing for you to remember is that writing is a process and to manage it successfully you need to develop a system that suits your habits and practice style. There can never be a “one size fits all” approach. Rather, you have to create and refine a system, a template as it were, that works for you and stick with it. Practice makes perfect.

Whatever system you develop, it should be designed to make the task of writing easier. For example, if you have four issues to address in your factum, separate your photocopied cases and notes into four discrete piles, so that you can easily reference those materials as you tackle each of the four issues. Organize the transcript, documents and other parts of the record in the same way. Once you’ve completed your writing on one particular issue, you can push that pile aside and turn to the next, and so on.

The point is that you should have all of the materials easily available, and within the same space, so that you are not delayed or disrupted when you begin to write.

Now that you have learned how to start, let's move to our next theme: how to write.

## **How to Write**

### **Audience**

As with any writing of significance, always pay attention to your audience. You should turn your mind to who will be reading what you are about to write, before you begin to draft.

Remember the limited role of the court on appeal.

We review for error and correct those that are serious. It is not a chance for a second trial. As an appellant you need to identify a major error and persuade the court that it matters. As a respondent, your task is to show why the judgment below should be upheld, and that any error is immaterial to the result.

Remember that as an advocate your primary objective is to persuade the judge(s) to your way of thinking.

Put yourself in the shoes of the judge.

Judges are not partisans. We are neutral observers who try our best to assess the case from all sides and find a just solution according to law.

Ask yourself: What is it the judge needs, to decide the case in my favour?

Conceptualize the issues as a judge might, and then argue the case in a way that will help the judge solve the problem.

Start by asking yourself "What is this case really all about?" Express the answer to that question in plain, engaging language, as if you were speaking to your spouse or neighbour.

Then reflect upon the issues that surround that question. This will clear your mind and focus your attention on the facts that are truly important. You can then brief the law that pertains to those facts.

Begin at the beginning.

Subtly focus the reader's attention on the facts which are relevant to the issues and the outcome you desire.

If you are writing in the context of an appeal to this Court, ask yourself "What are we appealing?"

Drafting a notice of appeal is not something I intend to address in this paper. I will assume that's been done, and now some weeks or months later, you are facing a deadline to file your factum. But let me just say that I am always leery of a Notice of Appeal that lists 15 or more grounds of appeal, often subdivided into supplementary complaints of error in the court or tribunal below. Believe me, no decision is ever that wrong! Littering a notice of appeal with a myriad of alleged shortcomings shows a lack of confidence and focus on the part of its author. Far better to take the time at the outset, before you ever file your notice of appeal, to limit its grounds to the three or four principal issues.

Frame the issue and the argument to best suit the Standard of Review analysis you wish the Court to undertake. In other words, is it a question of law which ordinarily obliges the court to apply a standard of correctness? Or is it a question of fact, or mixed law and fact, which will typically engage a less rigid standard, one that checks for palpable and overriding error? Unless the standard of review is a critical issue, or is in dispute, don't waste a lot of pages in your factum dealing with it. I often see lawyers going on and on, citing case after case, when both sides appear to agree that the appropriate standard is one of correctness, or reasonableness. So, if you're not fighting about it, get it over with quickly. State the principle and one leading case to back it up. Move on to the merits.

Ask yourself what type of decision or order is it that you are appealing?  
Interlocutory or final?

What is the remedy or relief you seek?

Does the court have the jurisdiction and authority to grant it?

Answers to these preliminary questions will guide your presentation of the issues and everything that follows.

Having taken the time to reflect upon the questions and issues that will drive the substance of your submission, it's now time to design the framework which will provide structure and strength to your submission.

That process starts literally with an Outline. I pick up a pen and on a legal size pad of paper I begin to list the various headings or topics I expect to cover in my decision. It starts with Introduction and ends with Conclusion. In between, I will have listed other headings which in a decision of mine would typically include such things as Background, Issues, Standard of Review, and Analysis.

Let me turn now to a consideration of some of the keys to success in putting words on a page.

### **The Keys to Success**

I know that each of us could come up with an impressive list of qualities that mark successful writing. Given this morning's time constraints I will limit my comments to only a few. Some are questions of substance. Others are matters of style. But each is essential. Today the five keys to success I want to highlight are: The Importance of an Overview; Effective Use of Headings; Courtesy to the Reader; Point First Advocacy; and Careful Editing.

### **The Overview**

An Overview is intended to provide a concise summary of what the case is really all about. You offer the judge an engaging roadmap to the result you hope to achieve.

It should explain the heart of the case, in simple language, and provide the judge with a sensible, reasoned solution to the problem in dispute.

You need to provide the judge(s) with answers to two basic questions:

1. What is this case all about?
2. Why should you win?

A good way to do that is to apply what I call the "neighbor" test.

If your neighbor happened to see you some weekend while you were out in the back yard gardening and asked: “What is this case you are involved in next week all about?”, how would you respond?

Write that down. It may be all you’ll really need to say – perhaps with some slight tweaking and amplification in the Overview section of your factum.

We should all use language in our writing which sounds like the way we speak to our family and our friends.

Keep it simple. Limit the use of adverbs and adjectives. Constantly ask yourself: Have I made the point in plain language?

Try to restrict your Overview to three or four simple paragraphs, and certainly never more than a single page.

In your Overview, avoid unnecessary detail or specific reference to the evidence. In other words, don’t clutter the Overview or interrupt the reader’s facility in understanding the essence of the case by throwing in a bunch of dates, citations, or bracketed information, e.g., “The appellant, John Derry Smith (“Smith”) ....”. These verbal interjections interrupt the sight line of the reader and delay a quick understanding of the subject-matter, and proposed solution. They have no place in an Overview.

The Overview is not the section of your factum where you provide a Concise Statement of the Facts. Our **Civil Procedure Rules** make it clear that that is an entirely separate section of your factum. Do not waste the chance to create a positive, lasting impression by blurring the two.

Your Overview needs to “say it all” in a single page. Here’s why. As you know, our Court’s sittings are scheduled during terms. We sit five terms a year, each term lasting five or six weeks’ duration. At the moment there are nine members on the Court. Suppose during every term, each judge sits on between 10-15 appeals. Let’s use the number 15. Each appeal has at least two sides, in other words, one appellant and at least one respondent. Fifteen appeals means 30 facta. Forty pages per factum mean 1200 pages. And that doesn’t count the record, where the evidence is sometimes contained in multiple volumes and thousands of pages of transcripts, exhibits and other documentary evidence. That’s a lot of reading.

Speaking for myself, the first thing I do in preparing for an appeal is to read the grounds listed in the notice of appeal. The second thing I read are the facts filed by the parties and the first thing I read in your factum is the Overview. What kind of impression do you wish to leave? I very much doubt that your objective is to confuse, annoy or bore me as one of the panel members hearing your appeal. Yet, in some of the submissions I receive, that unfortunately is the impression one gleans from reading the very first page. The writing is dense and obtuse rather than crisp and engaging.

Instead of choosing to read on with mounting interest in the case, I want to close the factum and put the file back in my cabinet. When that happens I have to remind myself that laziness on the part of the writer should never color my attitude towards the merits of the client's position.

It may interest you to know that requiring an Overview is a product of judges attending professional writing conferences, and discussing among themselves the usefulness of including the Overview as an essential part of the factum. We became convinced that this requirement forced lawyers to pay close attention to the essential aspects of their case, and gave a tremendous boost to judges faced with an ever-increasing volume of material to read. So much so that we made it part of our new **Rules!**

### **Headings That Work For You**

I insist on the use of headings. They sharpen the mind and keep me focused. They also offer a sense of satisfaction when you are able to check them off as you go.

But there's a more altruistic purpose to headings. They help the reader. You are being courteous. When you write you want to attract and engage the reader, not annoy or confuse her. It wasn't all that long ago when Chief Justice Brian Dickson first employed headings in his writings. He was one of the few jurists in Canada to do so. As a young lawyer I remember reading his decisions in the so-called Trilogy of cases (damages) like **Teno v. Arnold**. There, for the first time, the Supreme Court of Canada employed headings in its written reasons. Some in the room will remember them: "non-pecuniary damages"; "special damages"; "diminished earning capacity"; "cost of future care", etc.

It didn't take long for this approach to take hold. Now it is commonplace.

So remember that using headings to break up the text is an act of kindness to the reader. We don't have to swallow whole chunks of data before understanding why it's important. It gives us a break to pause and catch our breath before having to read on.

Spend some time thinking about the headings to include within the text of your opinion or brief or factum. Make the headings work for you. Let them *advocate* your position. Why employ headings that are dull and unhelpful? You can easily capture the nugget of the point you wish to make by choosing a phrase that states the essence of a particular assertion or complaint. Not only will simply reading the heading subtly guide the reader to the position you want him/her to take, but it will also serve as a handy reference guide when the reader comes back to your submission days or weeks later. Why say:

***Issue #3***

when instead you can say:

***Issue #3 - Trial judge erred by admitting evidence of bad character, and then using it to prove propensity.***

Why say:

***Issue #4***

when you can say:

***Issue #4 - Trial judge failed to charge the jury on the defence of honest but mistaken belief.***

This is such a little thing; and yet it pays huge dividends. I can tell you that in the course of the last couple of years after making that simple suggestion to groups like this one, I have seen many more lawyers take the advice to heart and apply this technique to great effect in their factum writing.

## Courtesy To Your Reader

This may strike you as an odd thing to include in a list of the keys to successful written advocacy but I think it's essential. Because it forces you to put yourselves in the shoes of your reader. I am your audience.

I have a lot of cases on my docket. You should know that I will read your factum at least three times. The first will be as soon as the files for the term are brought into my office and I start with the one on top of the pile. The second will be a day or two before the actual hearing. The third will be when I start to draft my reasons.

Make sure you choose a font that is easily read. Of course, if you are submitting anything to our Court, the **Civil Procedure Rules** compel you to do so.

Indent each paragraph so that the strain on the reader's eye is eased when trying to understand the message.

Manage the size of your paragraphs by ensuring that they do not run on with endless sentences covering a variety of subjects. Generally, a paragraph should be confined to a single argument or topic.

Make use of margins so that the text of your submission attracts and engages the reader, rather than looks like some Old Testament scripture!

We have already talked about taking the time to craft effective headings which, in and of themselves, advocate your position.

Being courteous to your reader also means taking the time to ensure that what it is you have written is attractive in appearance to the reader's eyes. One important technique is to make use of "the white". What's "the white" you say? It means making sure the page is not covered with text. It means creating a page that is attractive with a decent balance between the harsh black of the ink and the soft white of the page.

Why would you ever want to turn off your reader at first glance?

Carefully check your sentences for length and structure. Are they proper sentences? Have you said what you intend to say, as persuasively as you can?

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

Use evocative language if the occasion suits. But do so sparingly. A factum is not the time for histrionics. Make sure your writing sounds reasonable and balanced. Judges can smell artifice a mile away.

Read your draft out loud. If you are stuck on a particular opening, have a colleague read it and offer suggestions for improvement.

Change the cadence of your sentences so that the rhythm isn't always the same. Short, sharp, staccato-like phrasing is an excellent way to force the reader's attention to your particular point, in a subtle and effective way. So too with the use of rhetoric. Often stating a proposition in the form of a question and then answering it is a very effective method to drive home the argument you are making.

Don't overdo any of these techniques. The trick is to incorporate them in your writing, in a variety of ways, so that your reader continues to be engaged and, at the end, is persuaded to accept the merits of your position.

I said earlier that from a mechanical standpoint it doesn't much matter whether you craft your writing using a computer, or pen, or Dictaphone. That does, however, have one exception.

I do not draft using a computer. I did not learn that way and my typing skills would not permit it. Rather, my experience has always been to use a Dictaphone and occasionally pen and paper.

Experts with whom I've worked do say that there is a drawback to drafting with a computer. The disadvantage is auto-correction. By seeing the text unfold on the screen in real time, the writer often stops and makes a correction in punctuation or style or content, thereby interrupting the creative flow which is so important to initial thought and drafting. In my experience the time for refinement comes later - much later. It is far better to get your initial ideas down on paper first, before attempting to produce that best-selling masterpiece for the ages.

People often ask me: “How much evidence do I need to refer to in my factum?” or “How do I know what facts to include in my factum?” To me the answer is simple. Ask yourself this question: Do the facts, or the evidence, relate to a material issue? If they do, then you need to refer to it. If they don’t, you can ignore it. That is why it is essential for you to sit down and reflect upon the issues that arise in your appeal before you begin the writing process. For it will only be after you have isolated the truly important issues that you will be able to decide, in a confident and disciplined way, the facts you are going to elicit, and how you can present them in the most persuasive manner.

No case is perfect. Every case has “bad facts”. It is folly to ignore bad facts. You should meet them head on. They do not go away. In my experience the impact of bad facts can be explained or diminished when met head on. Let me offer three examples to illustrate my point.

- In a contractual or matrimonial dispute if the self-represented litigant accuses you of being overly aggressive, unfair or inflexible, respond by pointing out that the self-rep is a “frequent flyer” with considerable experience before the courts and no stranger to litigation, procedure, or judicial reprimand.
- In a sentencing hearing where the Crown emphasizes your client’s lengthy criminal record, point out that much of the record is stale and that your client has not been charged, let alone convicted, of any offence for a decade.
- Where a plaintiff in a personal injury case accuses your client, the insurance company, of delay, heavy handed tactics and a failure to consider settlement, point out that the plaintiff refused to submit to an IME; ignored requests to meet to discuss her claim; and that you expect to produce evidence showing three separate claims, for precisely the same injury, made over the past five years.

When writing for a judge or a panel of judges try to understand the judge’s world. Imagine the judge’s workload. Yours is not the only case we have to read. While it is certainly important to you and your client (as it is to us), it is one of many on our dockets. We put page limits in our **Rules** for a reason. The 40-page limit is a maximum cap, not a goal or requirement! My personal view is that you should be able to present and argue your position effectively, in far less than 40 pages.

Make sure that your summaries of the evidence are accurate.

Make sure that your references to the transcript are complete and easy to find.

Do not clutter the text of your submission with lengthy or needless quotes from the case law. Rather, restate the principle from the case as a proposition which you assert, followed by the single case authority and citation which stands for that principle, should the judge wish to look it up.

Do not litter the factum with acronyms, or unimportant dates, or statutory excerpts, or footnotes, or references to the pleadings so that the eye and mind of the reader are constantly being jarred and the judge is forced to ask: Why am I reading this? Why is it important? These are two questions you never want a reader of your submissions to have to ask!

Which leads me to the importance of point-first advocacy.

### **Point-First Advocacy**

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 facts which support your argument, the reader needs to know why it matters and how it is relevant.

What I mean is explained in this illustration I’ve created:

### **Say this:**

*The application of a standard of care is a mixed question of law and fact. The definition of the standard is a question of law. The determination of whether the evidence establishes a breach of, or compliance with that definition, is a question of fact. **Canada (Director of Investigation & Research) v. Southam Inc.**, [1997] 1 S.C.R. 748.*

*For the reasons that follow we respectfully submit that the Discipline Committee was correct in the definition it applied to the standard of care owed by Dr. Raymond. The Committee's findings that Dr. Raymond's conduct breached such a standard were reasonable and fully supported by the evidence. The appeal should be dismissed.*

### **Not this:**

*The charges facing Dr. Raymond all related to the principal complaint that she was guilty of professional misconduct contrary to Discipline Regulations 4(1)l and (d); and 28(4)l(iv). These Regulations define "professional misconduct" as. . . . Here in charge number 1, involving patient Jane Doe, the evidence related to Dr. Raymond's treatment of the patient over a period spanning eight months from January 2005 through to August 2005. The details of this treatment are fully described in the record (see for example, Appeal Book, Volume VIII at pp. 3326-3398). We submit that in reaching its conclusions the Discipline Committee failed to correctly identify, define and apply the appropriate standard of care and further, misapprehended the evidence when concluding that the appellant had breached such a standard. Given these significant errors this Court's intervention is required. **Dr. Q. v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226; **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247.*

Always ask yourself whether you need to include any quotations from the case law. It's usually far more effective to state the principle of law in your own words, followed by a leading citation, and forget the quote.

Never provide 20 case references, when one will do.

The last key to success I want to discuss this morning is the importance of editing.

### **Editing**

Here again you have to consider your objectives. One purpose in reviewing your initial draft(s) will obviously be to ensure accuracy, correct typos, etc. But that should never be your only goal. Your intent should never be to just read what you wrote.

In a few minutes I will describe the kinds of things you need to focus on, when you set out to edit your work. You must set aside the time to review and revise the text of any substantial legal writing you do. This is an essential exercise, and a profitable one. It gives you the chance to step back from the first draft and take a fresh look at what you've written. While your staff or other colleagues can certainly assist in that process, it is something you also need to do yourself.

Never be content with your first, second or even third draft.

My decisions invariably go through seven, eight or as many as ten revisions before I am prepared to sign my name to the judgment and send it out the door.

Your mantra should always be: Revise, revise and revise again! That takes me to my final theme.

### **How to Finish**

In this final theme we will drill down into some of the points considered in the earlier sections.

One of my objectives in editing a draft is to reduce its length. I never approach the editing process thinking that I will make my draft judgment longer.

Whenever I edit my own writing or that of a colleague I always ask myself: Is what I've written as clear as it ought to be? Would it be easily understood by a reasonably informed individual who knew nothing about the case but happened upon my decision? Would the reader not only understand the result, but the path of reasoning which led to it? Would the reader appreciate that all sides of the argument had been addressed? Have all of the principal issues been considered? Is there a way to say it better, with less? Putting myself in the shoes of the reader, have I made it interesting? Have I said too much, such that an errant sentence or paragraph in this case may come back to haunt us in the next case? Have I used words which are too strong and which ought to be tempered out of respect for feelings or futures?

I suggest these are many of the same questions you will wish to ask yourselves when you sit down to edit your own prose.

To my mind a careful and thorough edit is as important as the initial drafting process.

## Cadence and Variety

When you write, write in the active voice. Avoid formalistic writing. It is hard to read and may sound pretentious. Develop a narrative style that is natural but never casual. Recognize the power and persuasiveness of plain language. Develop a writing style that has rhythm. Use cadence to draw the reader's attention to your words and the point you are making. While a factum or a judgment is not a novel, that shouldn't stop you from making it a good read. After all, you want to encourage the reader to share your interest in the case.

As you can probably tell by now, I am a voracious reader. To me the enjoyment of *reading* has always been an essential part of the enjoyment of *writing*. I have become a student of good writing. We can learn a great deal from some of our most celebrated writers who have mastered the *art* of writing. During my presentation I expect to share with you some of the insights they acquired after a lifetime of writing<sup>3</sup>.

Variety in the length and style of your sentences and paragraphs will bring balance to your writing and make it attractive to the reader's eye.

## Clarity

Clarity of purpose and expression should be your primary objectives.

Perhaps the one thing that annoys me the most in preparing for an appeal is having to re-read, several times, sentences or whole paragraphs in a written submission in order to understand the point the writer is making.

Have an appreciation for the judge's workload and constraints on time and resources.

Write in a way that establishes an early, favourable impression.

Always take a balanced and reasonable approach. Avoid hyperbole and overstating your position.

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<sup>3</sup> Using overheads I will refer to the literary advice offered by: Alice Munro, Elmore Leonard, Stephen King and Michael Connelly.

Never mischaracterize the evidence. Always summarize or quote it accurately with precise references to the record.

Write in a way that the judge is cued to, and impressed by, both the substance and appearance of your written submission.

Ideally, write in such a way that whole chunks of your factum may be incorporated verbatim into the judge's decision.

### **Concision**

As important as clarity is to your writing, so too is concision. Concision is not the same thing as brevity. Brevity means short. Short may be just enough to get by; or it could be woefully inadequate to advance the argument you are making.

Concision is something quite different. Concision means reading and re-reading what you have written to cut away extraneous verbage so that you express in as few words as possible, the assertion you wish to make.

In other words, what you write is not only brief, but is clear and succinct. It is not stated so tersely as to appear curt or rude. It must still seem smooth and polished. It does not jar the eye or thought processes of the reader. It does not have to be re-read to be understood.

It is harder to write concisely, than to go on at length. Remember Mark Twain's adage:

***I wrote you a long letter because I did not have time to write you a short one.***

Take the time to make it concise. It will pay dividends later.

### **Lucidity**

Finally, besides clarity and concision you must also be lucid in your writing. I believe there is a subtle difference between clarity and lucidity. To me "clarity" means writing plainly. Whereas "lucidity" means writing brightly. We can all write a short paragraph that may be very clear. But it might also be very dull. You should try to write

in a way that your sentences are both clear and lucid. This means thinking about what you are writing and choosing words that will explain the argument in a way that is easily understood and sharply defined. The attraction and lasting memory of what you say is found in its compactness through chosen words that brighten your prose, that resonate and linger.

Read the written work of other people whose style you admire. It need not be limited to *legal* writing. Save it for future reference. Attend seminars like this one. Consider the advice of experts in the field (see, for example, any of the resource materials I've listed in the bibliography). Experiment with those ideas. See which ones work for you. And then strive to improve the effectiveness of what it is you are writing.

Always think of your factum as a kind of silent but persistent sentinel for your position. Remember that the job of an appellate judge is, broadly speaking, divided into three parts or stages. First - reading and preparing for the appeal. Second - hearing the case. Third - reflecting on the submissions and writing a judgment. Imagine that during this third stage my eight other colleagues are doing exactly the same thing. They are writing and circulating drafts for the appeals on which they sat, while I am similarly occupied with my own files. That results in a great number of drafts in circulation at any one time. That means that there will likely be an appreciable gap in time between when your appeal is heard and when the Court's judgment is released. If the outcome of your case or dispute is deferred, reserved or otherwise delayed, will your written submission serve as a persuasive and engaging reminder of the strength of your arguments, when the decision-maker picks it up to read again weeks or even months later?

Before turning to a list of the kinds of things that really bug judges, I wish to offer a few brief comments on the difference between written and oral argument; ethics; and establishing a work/life balance in your practice of law.

### **Difference between Written and Oral Argument**

Each offers a unique opportunity to persuade the judge or decision-maker. I have always believed that some things are better said than read, while other things are better read than said. As an advocate you are expected to know the difference and use it to your advantage in the choices you make.

As a lawyer, whenever I was preparing for a trial or an appeal, I would always visualize my presence in the courtroom and try to anticipate what was likely to occur, and how I would react. My objective was to be so well prepared that there wouldn't be any major surprises, and if there were, I could respond appropriately. So, for example

in a trial setting I would try to anticipate objections that might be raised by my adversary during the course of presenting my evidence (or vice versa) and have an answer prepared (with case authorities in support) to deal with it. Similarly, in the context of an appeal, I always tried to spend time before the hearing reflecting upon the questions that might be posed by the panel, so that my answers were well thought out and sound.

At an appeal hearing you should look forward to engaging the panel so that a meaningful discussion develops between counsel and the bench. Treat it the same way you would a post-graduate seminar, and a wonderful opportunity to explain the merits of your client's case!

Do not draft your factum as if it were an outline for rehearsing your oral argument at the hearing.

And do not bore or irritate the panel by acting as though oral argument is the chance to read your factum out loud.

They are two very different chances to make your case. Don't diminish their impact by conflating the two.

## **Wellness**

I hope you will not think that my remarks today are meant to compel a standard of perfection. Not at all. Rather, my suggestions are intended to explain certain skills, to be learned and polished, so that all of our writing, at whatever level, may be improved. The good news is that we will all benefit! If you do it - I know your chances for success will increase. And my efforts in grasping what you are trying to say and then accepting the result you propose, will be made much easier.

Remember that writing to a high standard requires a rested and healthy self. Our profession places tremendous demands upon our health and well-being. Despite the stress of being accountable to Ministers or Deputies, Mayors or taxpayers, clients or judges, always set aside quality time for your family and yourselves to restore those often depleted batteries. Try hard to find and adhere to that balance in life that works for you so that when you sit down to write that difficult brief, or opinion, or factum, you will be able to bring to the effort the stamina, clear mindedness and enthusiasm it deserves.

## **Integrity & Ethics**

It may surprise you to hear these subjects discussed in a presentation on effective writing. To me they are essential.

Integrity stands at the pinnacle of all the essential qualities of a lawyer. If you open any Code of Professional Conduct you will see that Integrity is invariably discussed in the first chapter. It informs virtually every other aspect of our conduct as legal professionals.

We who are trained in the law are taught that dishonourable conduct will not only sully our own careers, but will reflect badly on both our profession's reputation, as well as the administration of justice as a whole.

Never use words which read or sound disrespectful to anyone in the courtroom, whether witness, adversary, court official, or judge.

You should never say or write anything as an advocate that would cause others to doubt your integrity and your sense of fair play.

Of course, effective advocacy obliges us to be vigorous, and fearless in the cases, clients and positions we take. But that should never obscure the oath you swore as an officer of the court to uphold respect for the law and to be honourable in your dealings with others.

Before concluding my paper let me offer a short list of some of the things that judges find irksome.

### **Pet Peeves – What Not To Do**

1. The grounds of appeal or list of issues is too long. This suggests desperation, inexperience, poor preparation, or lack of confidence in one's case. Take the time to carefully reflect upon what and why you are appealing, and distil the issues to those that really matter.
2. The factum is inappropriately emotional and lacks objectivity. This calls for savage editing. Get rid of the exclamation points. Eliminate passages that will come across as moralizing or preachy or self-righteous. Instead,

emphasize the facts which show why your client deserves a favourable outcome.

3. Ignoring the rules on electronic filing. CPR 90.30 obliges an appellant to file an electronic copy of the transcript in a format satisfactory to the Registrar. Similarly, 90.32 gives the same direction with respect to the electronic filing of a factum. The Registrar's instructions say that such filings must be in Word or Word Perfect format. But counsel still send in materials in pdf format making it very difficult to cut and paste (which after all is the purpose for which they are filed electronically in the first place). Similarly, we don't like receiving the cover page separated from the factum. There is no point in filing your factum in two parts. It is time consuming to fix it.
4. As explained, the Overview is a separate section of your factum, not to be confused with the next part, a Concise Statement of Facts. In drafting your Overview pretend your grandmother asked you what you're appealing and why you think you should win.
5. Books of Authorities – some of my colleagues prefer to have the whole case included and not simply excerpts. They wish to understand the context and don't want to waste time tracking down the full case report. This issue would seem to be a matter of preference, on which some judges differ. We all very much support the parties getting together and agreeing on the content of joint exhibit books, and joint books of authority.
6. Do not include your cases as a tabbed section of your factum. The factum and the book of authorities are two separate documents.
7. Unedited facta where incorrect grammar, poor spelling, typos and formatting issues reflect sloppiness and laziness on the part of the writer. Make sure your reference library includes a good dictionary, thesaurus and style guide. If grammar is not your strong suit, ask an assistant or colleague to go over your draft with an eye for spelling and grammatical mistakes. If that's not possible, set an artificial deadline for yourself to finish the draft, put it aside for a day or two, and then re-read it. It's amazing what will jump out at you then.

8. Be consistent in the way you refer to cases in your factum, i.e., bold only; or underlined; or italics; or some similar style. But don't mix them up!
9. Use neutral citations only, where available; not a long string of sources for the same case.
10. Use at least the font size required under the **Rules**. Imagine the eye strain that comes with having to read 30 long facts every term, more than once. Do your best to ease that burden. If you don't, it leaves the impression that you don't care about the reader, or are fudging on the page count.

## Conclusion

Writing well is hard work. It takes time. A lot of it. It requires solitude to focus the mind and encourage those creative forces within us.

It requires discipline.

And, most importantly, it involves choice.

Our life and life's experience help shape our individual styles as advocates.

Take the time to watch other leading counsel and see how they engage in the art of advocacy.

Work hard at improving your skills. Even if you don't win the trial, or the appeal - you haven't really lost. None of the leading advocates ever win all of their cases. But the quality of their written and oral advocacy lingers in the mind of the decision-maker. By following the advice I've offered today the currency, the value of your reputation as an advocate will soar. Judges will remember you for all the right reasons.

Develop an interest in things beyond the law as that will enhance your skills and ability to communicate. Advocates are, after all, story tellers. You need to be interesting to keep someone else interested.

From what we have talked about this morning, I think you will see that your written advocacy and my preparation of a judgment share certain characteristics. 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.

Each calls for hard and sometimes tedious work, practice and dedication. There are no shortcuts. Improvement requires discipline, clear thinking, uninterrupted time, and solitude. Yet, for those who dedicate themselves to the mastery of advocacy, the rewards are enormous.

Serious writing is an investment. It's the product of the time, sweat and sacrifice you've invested in the effort.

I hope the suggestions I've made will add to that investment and enrich your enjoyment of the practice of law.

Remember that persuasive writing is all 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. Canada  
February 25, 2014

Reflections on Effective Written Advocacy – February 25, 2014  
 The Honourable Mr. Justice Jamie W.S. Saunders  
 Nova Scotia Court of Appeal

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