Written Legal Argument

- **5 things to do – if you want to *LOSE***
- **5 things to do – if you want to *WIN***

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- **Trial**
- **C.A.**
- **S.C.C.**
- **Or, a Judicial Settlement Conference/Mediation**

by

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- 11 x 17 pull-out map of Canada

Lose # 1: Cite 'tonza' cases – show how smart you are

Cite tons of cases. Why? You know why: because you're *smart*. Do footnotes that have at least a dozen reported cases; better yet, get it up over 25. The more cases, the smarter you are, right?

Wrong.

Citing 15 cases for the same point of law tells the judge one of three things:

- there isn't any real authority for your position
- you can't tell the difference between important and pointless precedents (or else you haven't thought enough about which cases really help you)
- you're simply the kind of person who likes making lists (and probably list what clothes you put in the dryer in case you lose a sock).

What's better

You only need two cases – the "Double-L" rule:

- the Leading case
- the Latest case.

Or, the "Triple-L" rule[1]:

- the Leading case
- the Latest case
- the Local case.

If you insist, do a footnote starting with "See also", listing the cases in between. Don't matter. Won't get read. Know what reading "See also" causes? Blindness. Me, I'm tempted at some point to drop in my grocery list right after "See also" – virtually guaranteed nobody'll notice.

[1] Founding Dean Lee Stuesser, Faculty of Law, Lakehead University

Lose # 2: Put in every possible date – shows you know everything – you're smart, remember?

Lawyers often add in dates because it makes them feel precise or clever. But don't fall into the trap of writing for yourself – write for the reader who's going to read it. Usually dates are just clutter. For example:

> "On October 15, 2016, Dr. McTavish informed the plaintiff that the pain running down the back of her leg was from a pulled hamstring. On November 16, 2016, the plaintiff reported ongoing leg pain, and Dr. McTavish became concerned that there was a more serious issue. The plaintiff returned to Dr. McTavish on November 30, 2016, December 7, 2016, and December 20, 2016, each time complaining that her leg pain persisted. Dr. McTavish referred the plaintiff to an orthopedic surgeon on December 23, 2016, and on January 10, 2017, the surgeon diagnosed a herniated disc that was impinging on the plaintiff's sciatic nerve."

What's better

The basics on using dates:

- Dates distract. If the issue has no time-sensitive legal imperative, drop the date.
- Putting in unnecessary dates gives readers the cue that there is a time-sensitive issue; they stay on the lookout for that phantom point, and when they realize they've been fed a false impression, you're p*ssing them off.
- Focus on the temporal relationship between important events by using words and phrases that quickly capture that relationship for the reader.
- Use simple words indicating time, such as then, after, before, following, later.
- Avoid fancy alternatives like 'subsequent to', 'prior to', 'at which point in time'.
- Instead of referring to raw dates, use units of time, such as hours, days, months, years.

Here's the original example, rewritten:

> "Dr. McTavish originally told the plaintiff that the pain running down her leg was from a pulled hamstring. But a month later she reported ongoing leg pain, and McTavish became concerned that there was more serious injury. The plaintiff returned to Dr. McTavish three more times in the next two months, each time complaining that her leg pain persisted. After the last visit, Dr. McTavish referred the plaintiff to an orthopedic surgeon, who diagnosed a herniated disc that was impinging on the plaintiff's sciatic nerve."

Did you miss the dates, understand what happened, and when?

What if you're writing about a time-sensitive legal issue and you need to include specific dates – what to do then? Simple best way: calculate the relevant time frames for the reader, and state them explicitly. Two examples:

- "On October 23, 2016, two weeks before the close of discoveries, defence counsel sent a letter seeking dates for the plaintiff's examination. Almost two weeks later, on November 4, 2016, the plaintiff's lawyer responded with two available dates."

- "The plaintiff learned that she had a possible negligence claim on March 21, 2016, which triggered the six-month discovery period against the City defendant. She served her statement of claim less than five months later, on August 4, 2016."

Doing the math for the reader not only makes the sequencing of events more obvious but gives you the opportunity for strategic advocacy: to drive home a point in a way you could not with raw dates alone.

Lose # 3: Write it so it's dense and difficult to follow – it's a complex case after all – only a super-smart lawyer like you could do a case like this

If you're trying to lose – write the factum to show how intensely complex your case is: make it turgid, dense, and difficult to follow (it's complex, after all), make all the pages look the same. You're smart after all – only someone as smart as you could understand something so complicated.

What's better

A proposition has to be understood before it can be accepted, so accessibility (in terms of easy to read, easy to understand) is fundamental. The basics of font choice and the relationships between type size, line length, and spacing (between letters, words, lines, and paragraphs) is important. An effective document is one that conveys your message well and quickly. A number of simple, but important, rules include:

- Don't rely entirely on standard prosey block paragraphs. Look for alternative methods of formatting (e.g., bullets) that make it visually easier for the reader.

- Use sensible paragraphing and numbering. Don't go further than a third level of breakdown (e.g., I(a)(i)). If you feel the need to go beyond that, chances are you've overused headings (you aren't drafting legislation, after all). Avoid Roman numerals − they look too much like a foreign language.

- Never use a font smaller than 10 or larger than 12 for the main body of the text.
- Avoid lines that are entirely capitalized; their uniform size makes them difficult to read.
- Avoid underlining (mea culpa); it's a throwback to the days of typewriters. Use italics or boldface to add emphasis.
- There's evidence justified right margins make text harder to read, so may be best to use ragged-right margins for factums.
- Readers like "white space"; it makes the text easier to absorb.

Most lawyers write sentences that are too long (the 'I'm-really-smart' factor again). Usually, short sentences and small words work better than big ones.

Lose # 4: Force the judge(s) to read your long quotes – everything's important, right?

Why. You're smart. Remember?

People hate to (and usually don't) read long block quotations.

What's better

Paraphrasing is usually a better strategy than direct quotations. If you must include a quote, the best approach is to knit it directly into the paragraph, or at a minimum:

- keep it really short
- edit (use three periods … when you edit out)
- add emphasis.

Lose # 5: And, force the judge to read the whole case – they probably know the case already, so they can find the important part faster anyways

Heck *you've* read the whole case (at least that's your story and you're sticking to it), so can the *judge* – they're a judge, probably read it before, so they can read it faster anyways.

What's better

Always when citing a case put the actual page/paragraph that your point/quote is on – just giving the judge the standard cite with what page the case starts on and forcing him/her to go

read the whole case to find a single sentence is a real judicial p*ss-off factor – if you're in for a vasectomy why insult the guy (or gal) with the knife?

Putting in "at page [whatever]" tells the trail judge that, at a minimum, you've read the case (OK, someone in your office has – but at least someone has).

Win # 1: Be the person you're writing to/for – think like a judge

When writing anything for the Court, try and think like a judge. Change places with your judge, and keep three things in mind:

- in a judge's day many matters are competing for his or her attention
- an initial first impression is critical in the ultimate hard sell to the Court
- and if you're on appeal, an appeal court may not afford the same luxury of time that you enjoyed at trial.

David Lepofsky: "… your ultimate job … includes making the judge's work simple, or at least easier. Remember that the judge or judges who will be reading your factum are overworked. They are operating under a lot of pressure and stress. Their job gives them the unenviable task of having to read piles and piles of legal materials. Much of it is likely drab and dreary, if not outright boring."

Therefore, as David Lepofsky says, you must "write to engage".

Win # 2: Ain't nothing is absolute – unless it really is

Absolute expressions (all, always, every, invariably, never, none, totally, undoubtedly) are rarely accurate and should be used lightly.

Absolutes tend to trigger a reader's perversity; once told that "the campaign was a total failure," many readers begin to hunt for signs of partial success.

So avoid what Justice Laskin calls "false intensifiers, such as "certainly," "clearly," "absolutely", which actually weaken rather than strengthen whatever you're saying.

Understatement works much more strategically than overselling.

Win # 3: Don't quote/summarize your opponent's argument just so you can knock it down – the straw man might bite you in the rear end

Don't quote or summarize your opponent's argument. Familiarity doesn't breed contempt, but it may breed acceptance, so the less the judge hears about the other side's case, the better.

Win # 4: We're none of us super-smart – so, pictures, charts, diagrams (they all work) – but simple ones

Pictures, charts, and diagrams can really help to communicate. Particularly for legislation or complex corporate relationships, consider a foldout chart.

Win # 5: Drop the smarty-pants words, the legal lingo, the Latin

Don't clutter your writing with language that only lawyers can be bothered to decipher. Legalese may now be second nature to you, but it sounds exclusive rather than inclusive.

And skip the Latin – we all know you're smart.

And while you're at it, skip all these smarty-pants words too:

- hereinafter
- wheretofore
- herewith
- henceforth
- therewith
- whereof
- hitherto
- inasmuch as

I think my English grammar teacher in Scotland called them "pronominal adverbs". Not sure. But really, who cares?

Last deletion from your vocabulary – don't ever write/say in a court document/in court "We would respectfully submit – ". Just say it, i.e., say what you're gonna say:

- if you believe what you're gonna say, you don't need the silly intro

- if you're good/have a good case, you don't need the (rather obsequious) pretend-armour.

And besides, the phrase is so often used it covers a whole range of meanings, from "Yes Your Honour, we do respect you" to "We think you're a bit of a bozo Your Honour, so not sure you're going to get this next point, so we're gonna have to underline it for you". At a minimum it dilutes/distracts from what you're going to say; at a maximum ticks off the judge because he/she thinks you're not being sincere – see above re scalpels and vasectomies.

And in terms of how much to write, words are (obviously) key to persuading. Too many words and the reader tunes out. Too few and they think you're hiding.

Bottom line: being thought smart v. winning? At *Supreme Advocacy* we prefer the latter.

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