

1. Getting Leave to Appeal

Generally, advocacy before our Supreme Court starts with the application for leave to appeal. Some lawyers complain that it's hard to get leave in our Court. But there is no secret to getting leave. Our Charter of Rights came into force in 1982. We like to write judgments about the Charter. It doesn't matter whether the case is about the Charter. You just have to sprinkle the Charter through the application. At least half a dozen times. If it is bolded and put in large font, we won't miss it. Colour is good. If we see the Charter enough times and it is highlighted, we'll hear the appeal.

2. The Brief

We call the brief a factum. In our Court you don't have to worry about the factum. You can patch up any errors or omissions in oral argument. And if you don't put an argument in the factum and you argue it orally, you'll gain the advantage of surprise.

Don't worry about the page limit in the Rules for factums. Those limits are not meant to be taken seriously. Factums should be as long as possible. It gives weight to the argument.

If the other side has raised a good argument, don't get sucked into providing a response. Focus only on your winnable arguments. And if necessary, go off on tangents and that way you will divert the judges from the difficult and contentious point.

The judges get bored with reading dry, legal writing. So you should make the factum as rhetorical as possible. References to Greek mythology, Shakespeare or John Grisham are a welcome change. And spice up the factum by showing contempt for the other side. Calling them names will help the judges understand.

3. Approach to the Oral Hearing

As a senior, well-known lawyer, certainly someone who is a member of the College, you can usually rely on your reputation. The judges will hang on your every word. The judges will be so star-struck by your mere appearance before them that they will be won over even before you stand up. Whatever you say, you will have the judges eating out of the palm of your hand.

If in the remote case things go badly, becoming meek and timid will turn the tide. After all, we are the Supreme Court of Canada. Make sure you keep saying "it is respectfully submitted" and calling the judges "Your Lordship" or "Your Ladyship". "Your Holiness" only works with some judges. If you really want to make points, you should call the Chief Justice "Your Majesty".

4. Time

Your time for oral submissions is limited. For a party, one hour. For an intervener, only 15 minutes. So how do you cover everything you have to say in the limited time you have? The answer is, talk fast. The judges are always impressed by someone who can talk fast, even if they can't follow the argument.

5. Presenting the arguments

If you have a weak case, in our court you should do 4 things:

- (1) Argue the facts in excruciating detail, especially when they are agreed and your opponent won't contradict them;
- (2) Read from the record. Make sure you do so in a monotone voice;
- (3) Indicate a real sense of grievance and frustration with the Court of Appeal. It will show victimhood. That is always useful; and
- (4) Show a genuine desire to get even with your opponent. The judges will identify with your desire for vengeance. In describing your opponent's argument, terms like "absurd" and "preposterous" are useful.

6. Dealing with the materials

Some counsel prepare a condensed book for the day of the hearing, containing all the extracts from the authorities and record they will refer to in oral argument. You shouldn't bother with this. Especially if you are going to be referring to several different volumes of the record during argument. The judges are always impressed by counsel's ability to flip from book to book and all the commotion helps to keep them awake. They even keep a tally of which counsel referred to the most books. It helps them decide the case.

When you refer to the record or to books of authorities, don't waste time taking the judges to the material you are referring to. Just paraphrase. Your paraphrases will be better than the excerpt from the record or case itself. Some lawyers spend a good portion of their time dictating the tab and page numbers from the record to the judges. That is good. The judges like to write down lists of numbers. If they do follow up on the references, they will enjoy seeing if they can link the tabs and pages you dictated with the material in the record and then figure out why you wanted them to look at it in the first place.

7. Dealing with an authority that is against you

There are two ways to deal with a previous Supreme Court of Canada decision that is adverse to your position:

- (1) Tell the Court that they got it wrong and they should overrule the prior decision;
- (2) Better still, tell the judges what they really meant in their prior decision. That will be especially effective if the judge who wrote the decision is still on the Bench.

8. Dealing with questions

My pesky colleagues have a tendency to use up the time allotted to counsel with their pointless questions. I also ask questions, but they are always good. Some useful answers in our court if a question happens to strike a weak spot are:

- (1) I wasn't counsel at the trial or at the Court of Appeal;
- (2) Another lawyer prepared the factum and she isn't here;
- (3) I'll get to it later;
- (4) My colleague will address the point;
- (5) You are missing the point;
- (6) This question is irrelevant; and
- (7) You are trying to trap me and I won't answer.

9. Dealing with theoretical questions

Sometimes a judge will ask a hypothetical question about the application of principles of law that goes beyond the facts of the case. You shouldn't answer. It's a trap. You are there to win the

case for your client. You should just tell the judges there are no broad implications and that they will only confuse themselves if they think there are.

10. Persistence

As you argue, you must be persistent. You can't give in. If the Court says it disagrees with your point, just carry on. If the Court says it isn't interested in the point, don't be discouraged. Just make it again. The judges will eventually get it. And never sit down. When you are finished, if your time hasn't run out, just start all over again. Don't worry about the red light. Continue until the Chief Justice pleads for mercy and begs you to sit down.