

FEATURE

The wrong stuff:¹ How to lose appeals in the Court of Appeal

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Editor's Note: For maximum enjoyment, read the footnotes with the text.

I used to teach appellate advocacy. There were very few of us in the field then. I cannot remember whether we taught it well or badly, but it didn't matter, because we were the only game in town.

These days, however, it seems as if everyone and her² sister³ is teaching appellate advocacy. People write books and give speeches and run seminars about it. *The Advocates' Society Journal* even dedicated a whole issue to it.⁴ So the area is no longer my private preserve: it has been taken over by other, and better, teachers.

Then, recently, I had a good idea.⁵ People were so busy teaching lawyers how to win appeals that they were completely neglecting the art of *losing* appeals.⁶ And so I have decided to exploit that vast, untapped market.

In this article, I propose to share with you seven helpful tips designed to ensure that you lose your next appeal in the Court of Appeal.⁷ Using about two or three of these helpful tips should be enough to do the job; using more will guarantee a loss, no matter how good your case. Please do not try to be creative and dream up tips of your own. Deviate from this list at your own risk: if you do, and if by some accident you win, don't blame me.

1. I wish I could say that this title was original with me, but I can't. It was the title that Alex Kozinski of the Ninth Circuit Court of Appeals gave to a paper he delivered to a meeting of the State Bar of Montana in 1997. But it was such a great name that I decided to steal it and pass it off as my own.

2. This is a gender-sensitive paper. If "her" offends you, read "his."

3. Or, if you prefer, "brother": see note 2.

4. Summer Issue, August 1999, vol. 18, no. 2. The issue contained articles by Finlayson J.A. and Laskin J.A., who are members of the Ontario Court of Appeal, and by Binnie J. and Blair J., who aren't, but who apparently know a little about advocacy. They all got their pictures on the cover. That's more than I got for this piece.

5. This sentence is not true. See note 1.

6. I'm not exactly sure why lawyers would *want* to lose appeals, but there are so many of them trying to do it that there *must* be a good reason. It probably has something to do with tax write-offs, which are beyond the scope of this paper, not to mention the expertise of the author.

7. While I am in a confessing mood, I should also acknowledge that, while most of the suggestions in this paper are mine, a couple of them were also stolen from Judge Kozinski. But I don't feel all that badly about it. Cribbing the product of other people's labour and publishing it under your own name is what appellate judges do for a living.



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Tip 1: Always file an incomprehensible factum

The Rules of Civil Procedure contain a number of provisions governing the form and content of factums. Ignore them.⁸ Every other lawyer ignores them; why shouldn't you?

Let the court know right off the bat that you have a rotten case by filing a lengthy factum⁹ filled with gobs of conflicting evidence and lengthy quotes from irrelevant cases. And, while you are ignoring things, ignore the rule¹⁰ that requires double-spacing, left-hand margins of 40 millimetres, characters of at least 12 point or 10 pitch size, and good-quality paper 216 x 279 millimetres in size. Make repeated random changes in type size, letter spacing, and margin widths. Keep the content confusing and disorganized. Convey the message that your argument is not even remotely capable of presentation in a simple, direct fashion. Simple arguments are usually winning arguments and therefore are to be scrupulously avoided.

Counsel who are familiar with foreign languages¹¹ have a great advantage in the preparation of factums. Emulate, if possible, those languages that drive the reader to distraction waiting for the verb that is never disclosed until the conclusion of the sentence or, better still, the paragraph. Learn to write sentences that go on endlessly, sentences that are filled with dashes and with subordinate clauses that are – by the time the sentence is done – hopelessly unrelated to anything at the beginning.¹² Write your factum out in longhand, then strike out all the periods and substitute conjunctions¹³ so that the factum becomes one long, undivided sentence. Now insert, in completely inappropriate places, punctuation

8. For example, Rules 61.11 and 61.12 use the word "concise" (as in "concise overview," "concise summary," and "concise argument") a total of six times. It is widely rumoured that "concise" was a typographical error and that the word that Legislative Counsel intended to use was "verbose." I have been unable to find anyone who is prepared to confirm that mistake for the record.

9. There is a practice direction that limits factums to 30 pages. Ignore that, too.

10. Rule 4.01, if you must know. Rule 4.01 was the winner in 1998 and 1999 of the prize awarded for "The Least Well-Known and Most-

Concavened Rule of Civil Procedure." It is said to be strongly in the running for the current year's title as well.

11. Other than Latin. Latin is not a foreign language. Judges of the Court of Appeal speak it for hours and hours on a daily basis.

12. This sentence is a good illustration of what I mean.

13. Alternating between "and" and "but" several times in each sentence is a useful method of attaining the desired effect.

marks such as commas, colons, and semicolons, sprinkled in such a way as to make your factum completely incoherent.¹⁴

Tip 2: Never begin at the beginning

One of the most common mistakes in appellate advocacy, made usually by young counsel, is to argue their appeal by beginning at the beginning. This immediately signals to the court that it is dealing with a novice. Do as senior counsel do. Plunge into your argument roughly two-thirds of the way through the facts and the law you want the court to think about.

To master this skill, try the following experiment. Go home tonight and read a nursery tale to your favourite child or grandchild.¹⁵ Don't begin at the beginning. Begin well past the middle. Take, for example, "Little Red Riding Hood." Begin at the point where the Wolf is lying in bed in Grandmother's cottage, all dressed up to look like Granny, and Little Red is skipping up the front path with her basket of goodies. Or, if you prefer, begin at "Oh, Granny, what big eyes you have." Observe your subject's eyes carefully. If you have a stopwatch available, record how long it takes before her eyes glaze over in mystified incomprehension; then total confusion; and then, finally, resigned indifference. Now think back quickly to the last time you lost in the Court of Appeal. Remember the very same looks of incomprehension, confusion, and indifference you saw then?¹⁶ Now you know you are on the right track.

Tip 3: Never start with your strongest point

There is usually a fair lapse of time between the time you appeal from a trial judgment and the time your appeal is heard.¹⁷ If, during that period, you have been following the development of the law carefully by noting all of the helpful suggestions made by colleagues, friends, and the janitorial staff in your office building with whom you have discussed your case, you will have boiled your argument down to about fifteen or twenty well-honed points. At this stage, you should write all of the points down and assign numbers to them in the order that you assess the strength of each point. It does not matter whether they are numbered in ascending order of importance or in descending order of importance. The key is to re-

14. As originally written, this sentence read: "Now, insert in, completely, inappropriate places punctuation marks such as commas, colons, and semi-colons: sprinkled in such a way as, to make your factum completely incoherent." See footnote 12.

15. This experiment is best performed with children between the ages of five and seven, who are said, generally speaking, to approximate most closely the level of sophistication and mental acuity of the average appellate court judge.

16. Piaget, Jean, *Why Little Kids Are Smarter Than Most Judges* (1994), 25 *Can. J. Child Psych.* 436, suggests that many judges move directly from mystified incomprehension to resigned indifference, bypassing the stage of total confusion. It doesn't matter, really, so long as the ultimate objective of indifference, resigned or otherwise, is achieved.

17. The Court of Appeal keeps trumpeting that it is reducing the time lag to some laughingly short period measured in months, not years. This totally overlooks the fact that most counsel need a minimum of two or three years in order to refresh their retainer, figure out what the case is all about, and unleash an army of juniors to research every case decided from Genesis to the present day in the vain hope that they will find some peripheral proposition, however irrelevant, for insertion in the factum.

member to bury your strongest point approximately halfway between your first point (which should usually be your weakest) and your last point (which should usually be your second-strongest). When photocopying your factum in preparation for filing with the court, make sure that, when your photocopier reaches the page on which your strongest point appears, it is almost completely out of toner and that the glass reflector has been scratched repeatedly with a letter opener, thus leaving the page so faint as to be barely readable and streaked with annoying, distracting lines.¹⁸

Tip 4: Never say the magic words

Suppose your entire appeal turns on the language of a section of a statute or a paragraph of a contract. And suppose there is a distinct danger that, if you let the court know what precisely those words are, you will win your appeal hands down. What should you do? This one is a no-brainer. Keep those words away from the court's view at all costs. Do not quote them. Do not set them out in your factum. Do not set them out in a schedule to your factum. Do not even say them out loud.

Instead, talk policy. Judges love policy, because it makes them feel important. They can talk policy forever. Keep their minds away from the crucial words on which your appeal turns by talking instead about the need to adopt "a purposive approach" to whatever area of law you are discussing. That will effectively focus their attention where it belongs, and will almost certainly ensure defeat.

Tip 5: Always make a speech for the jury

Judges are people, too.¹⁹ They don't like dry, boring legal arguments. They hunger for something to enliven their day. Help meet this judicial need by making at least one passionate speech to the jury every time you appear before an appellate court. Invite your client and her²⁰ entire family to observe your performance. Instruct them carefully how to nod enthusiastically, whistle, and cheer in support of your submissions. Endeavour to whip the court into an emotional frenzy that leaves them thirsting for the scalp of your opponent. Overstate your case. Excoriate opposing counsel. Pound the desk. Sprinkle your argument with such phrases as "travesty of justice," "abuse of process," and "wisdom of Solomon."²¹ (This last phrase should be addressed,

18. While on the subject of copying factums, you might wish to consider following the lead of some eminent counsel who give to opposing counsel a different draft of their factum (earlier or later, it doesn't matter which) than the draft filed with the court. This makes it impossible for opposing counsel to follow your argument, and their repeated objections cannot fail to arouse the court's sympathy for them and animosity toward you.

19. Though there is a strong body of opinion to the contrary. See the paper "Machines Would Be Better," appearing in *Proceedings of Annual Symposium on Judicial Reasoning, University of Toronto Faculty of Law* (Toronto: University of Toronto Press, 1998).

20. Or "his," if your client is male: see note 2. In the interests of gender sensitivity, I have assumed throughout that all clients are women.

21. Generally speaking, Solomon was a pretty good judge, although that business about cutting the baby in half would probably not play well today with the office of The Children's Lawyer. But that's another story. (For the other story, see Solomon (King) in 1 Kings 3:16-28.)

with a sly wink, to whichever judge you think has been least receptive to your submissions.)

The more hysterical your argument, the more likely it is that one of the judges will then ask you a question about the weakest aspect of your case.²² Then another judge will join in, and another. Soon, they all will be parading dozens of flaws in your argument, each more egregious than the next. Press your advantage. Turn the judges into advocates for the other side. You now have them exactly where you want them.

Tip 6: Never answer a question directly or, better still, at all

Once in a while, despite your best efforts to discourage any interest at all in your argument, some judge is going to ask you a question. Questions must be handled with great care.²³ Remember your objective. Your goal must be to turn that flickering spark of interest into a firestorm that reduces your argument to ashes.

There are a number of ways to accomplish this. One is to wait until the judge is halfway through her question, raise your hand disdainfully and say, in a loud, clear voice, "Now, look, I still have a few more submissions to make and, when I'm good and finished, then I will entertain your question." This clever tactic enables the judge to dwell upon her question, let it roll around in her mind a bit and brood about it. Meanwhile, you should ramble on about how airtight your case is and how foolish it is even to be arguing about it. See whether she has the gall to return to her question after you are through.

But be warned. The judge may realize that you are just trying to talk out the clock and will wait, sharkishly,²⁴ to renew the attack. Time your next move carefully. When you perceive that the judge is just about to fly into a rage, turn to her, smile sweetly and say, "Oh, yes, did your ladyship have a question?"

Whatever the question is, avoid at all costs giving a clear, straightforward answer. Stonewall, stonewall, stonewall. Some helpful methods of stonewalling are as follows:

- talking over, under, and around the question. This might be a useful occasion to say some more nice words about policy;
- saying, "The answer to that question is found in the evidence of the witness X"²⁵ and proceeding to read three or four lengthy passages from the transcript that have nothing whatever to do with the subject under discussion;
- rephrasing the question in a manner more to your liking ("I gather that what your ladyship is really asking me is ...") and then proceeding to answer that question,²⁶ and, perhaps most effective of all.

22. But be careful. There is a right way and a wrong way to deal with questions. Never choose the right way: see Tip 6.

23. See note 22. Didn't I tell you?

24. My guess is that many of you think I made this word up, but I didn't. I got it out of *Roger's International Thesaurus*, and it's a real word: see *The New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993), vol. 2, p. 2814 (between "sharker" and "sharky").

25. Choose a witness whom the trial judge expressly disbelieved and whose evidence she utterly rejected.

26. But remember: the answer should have nothing to do with the original question.

- making fun of the question. Look as if you are doing everything in your power to keep from bursting out with laughter. Cast at the judges who didn't ask the question a knowing look that says: "I really feel for you two; it must be tough to sit up there day after day and listen to all these ridiculous questions." Then glance condescendingly at the judge who did ask you the question, blurt out the first thing that comes into your mind and move on quickly, before he thinks of something else to ask you.²⁷

Tip 7: Never keep your promises

Never, never, make a promise that you intend to keep. As noted,²⁸ if a judge asks you a particularly incisive question, say calmly, "That is a very interesting question, my lady. I shall answer it presently." Then forget all about it.

Other promises you may make but should under no circumstances keep include the following:

- "There is a case directly on point that answers that question, and I will get the name and citation over the lunch hour";
- "The court has noted that I raised fifteen separate grounds of appeal in my factum, but of course I do not propose to argue all of them in my oral submissions";
- "I will not weary the court by repeating what I said at the outset";
- "I will just read a short passage from the leading case on this subject";²⁹ and
- "I have only a brief reply."

Conclusion

I hope that you will find these tips helpful in significantly lowering your baring average in the Court of Appeal. If they do, console yourself by remembering that winning isn't everything.³⁰

This concludes my remarks. Even if you find them of no assistance whatsoever, I hope you will be reassured by my promise that I will never write on this subject again.³¹

27. Those of you who are keeping track will note that I have switched genders at this point but, having regard to the context (stupid questions), it seemed the politic thing to do.

28. We've done this already (see Tip 6). Weren't you paying attention?

29. Reading is an important skill. Be guided by the aphorism "Reading maketh a full man" (Bacon, Francis: *Essays, Of Studies*, 1624). (This is an inappropriate aphorism in a gender-sensitive paper (see note 2), but that's Bacon's fault, not mine.) Try to read at least five paragraphs from your factum and five pages from your authorities on every appeal. Pretend you are appearing before a court whose members don't know how to read. Brook no interruption. If a judge tries to stop you, put your finger down at the point where you were interrupted, glare menacingly at the offender, and then continue reading as if nothing had happened.

30. I disagree with Knute Rockne, who said (rather unkindly, in my view), "Show me a good and gracious loser and I'll show you a failure" (Rockne, Knute, Remark to Wisconsin Basketball Coach Walter Meanwell, 1926). But then again, he also said, "Win this one for the Gipper," and you all remember what happened to the guy who played George Gipp in the movie (*Knute Rockne: All-American*, Warner Bros Pictures, 1940, B&W; 96 min.).

31. But see Tip 7.