APPELLATE ADVOCACY IN THE FEDERAL COURTS

IN INTELLECTUAL PROPERTY MATTERS

THE HONOURABLE JOHN D. RICHARD

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FEDERAL COURT OF APPEAL

CANADIAN BAR ASSOCIATION – NATIONAL IP SECTION

(COURT PRACTICE COMMITTEE)

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I am pleased to have the opportunity to give a perspective from the bench on the topic of the day: appellate advocacy in the Federal Courts in IP matters. Your program deals with writing persuasive factums and delivering effective oral submissions, as well as applying for leave to the Supreme Court of Canada. You are fortunate that, on these topics, you will hear from leading advocates at the Bar: John Laskin, David Scott, Eugene Meehan, and Ronald Slaght. This offers you a tremendous opportunity to hone your advocacy skills and to benefit from the experience of proven advocates.

Based on my experiences both as counsel and as a judge of the Federal trial and appeal courts, I propose to address the importance of younger members of the Bar developing advocacy skills early in their career. Following this, I will share with you some of my thoughts about improving both oral and written appellate advocacy before the Federal Court of Appeal.

Advocacy is not only an art, but a science. As a science, it requires a thorough knowledge of the rules of practice, of the facts and, of the applicable law. As an art, it requires the development of a winning strategy and the ability to transpose that strategy into written words and spoken form. It requires discipline, concentration, and effort.

In 2005, the Advocates' Society published *Learned Friends*, authored by Jack Batten, which profiles eminent Ontario advocates from 1950 to 2000. In his foreword to this book, the Honourable Roy McMurtry, former Chief Justice of Ontario, stated that good advocates have certain common attributes – integrity, careful preparation, proper relationships with their clients, and civility to the court and to their opponents. In the words of Gordon Henderson, who is profiled in this book, to be an effective advocate you must know your case and deal with the legal issues properly.

These skills must be learned and developed. Unfortunately, opportunities to practice the arts of trial and appellate advocacy have become a rarity for many lawyers, especially young practitioners. In the *Globe & Mail*'s Law Page of March 25, 2009, in an article entitled "The lonely guys of litigation", it is stated that the high cost of bringing intellectual property cases to trial means that lawyers in this field are lucky to see a trial every couple of years. The one exception appears to be *Patented Medicines (Notice of Compliance)* proceedings, although these are applications for judicial review and not full trials.

I suggest that there are three key ways in which young lawyers can develop and refine their advocacy skills: mentorship, pro bono work, and continuing legal education programs. The onus is on young lawyers to actively seek out these opportunities. Both law firms and senior practitioners have a responsibility to facilitate and encourage these efforts.

Both formal and informal mentoring should be encouraged in law firms. Senior practitioners have significant expertise to share with their juniors. Young practitioners should observe senior litigators in action before the courts. In addition, senior lawyers should take the time to give advice, encouragement, and feedback to junior lawyers.

Pro bono work, either through programs such as those of the Advocates' Society and Pro Bono Law Ontario, or through work with charitable organizations or government agencies, should also be encouraged among young lawyers. While few opportunities to do pro bono IP work may arise, there are other areas in which young practitioners may gain some experience on their feet. Young lawyers can also gain advocacy experience outside the traditional courtroom setting before administrative tribunals or in alternative dispute resolution settings.

Continuing legal education programs, such as the one you are attending today, are also helpful in improving advocacy skills. The provincial Law Societies, le Barreau du Québec, the Canadian Bar Association, the provincial and territorial branches of the CBA, and the Advocates' Society offer various continuing legal education programs. Le Barreau du Québec has introduced a rule, which took effect April 1, 2009, obliging all practicing lawyers to participate in thirty hours of continuing legal education over a two-year period. I believe that "how-to" sessions can be especially useful at developing particular advocacy skills, such as cross-examination. Other beneficial programs, such as the one you are attending today, focus on particular areas of the law.

As part of your continuing legal education program taking place this afternoon, I have been invited to comment in particular on both oral and written appellate advocacy before the Federal Court of Appeal.

At the outset, it is important to note that the Federal Court of Appeal is a national court for the better administration of the laws of Canada. It is an itinerant court, a bilingual court, and a court which applies both the common law and the civil law of Quebec in appropriate circumstances. Just like the Supreme Court of Canada, our Court is moving towards e-filing and a wired courtroom. We also offer opportunities for videoconference hearings.

The Federal Court of Appeal hears appeals as of right on final and interlocutory judgments from both the Federal Court and the Tax Court of Canada. It also hears statutory appeals from certain tribunals and the judicial review of decisions of 17 federal boards go directly to the Federal Court of Appeal.

The Federal Court of Appeal is composed of judges drawn from every region of Canada. The Federal Courts Rules have been updated to improve and simplify access to justice in those courts. Therefore, the first requirement for an advocate before the Federal Courts is a thorough knowledge of the Rules of Practice and compliance with those Rules and any practice directions issued by the Chief Justices.

I would like to start with a suggestion of what not to do.

Mr. Justice Rothstein, who was a member of the Federal Court of Appeal prior to his appointment to the Supreme Court of Canada, had this tongue in cheek advice concerning

appellate practice on the occasion of his induction as an Honorary Fellow of the American College of Trial Lawyers:

1. Don't worry about the factum – you can patch up any errors or omissions in oral argument;
2. At the oral hearing, 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;
3. In dealing with questions from the Bench that strike a weak spot in your case, it is useful to reply "I wasn't counsel at the trial" or "Another lawyer prepared the factum" or "I will get to it later" or "You are trying to trap me, and I won't answer";
4. And finally, 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 your point, don't be discouraged. Just make it again.

Let me now turn to the principles which I consider will assist in your appellate advocacy.

I will begin with written advocacy.

The importance of the written argument cannot be overstated. A party's memorandum of fact and law plays an essential role at all stages of an appeal and is as important as the oral argument since counsel's time before the court on an appeal is limited. Written argument serves as a judge's first impression of the proceedings and acts as a roadmap of counsel's oral argument. The factum is read by the judge before the hearing, it is with the judge during the hearing, and it stays with the judge after the hearing. It is often used as a reference in drafting reasons for judgment.

The factum should be written simply and concisely. Writing well is hard work and writing concisely is harder than writing at length. A badly written memorandum detracts from your arguments. You should take time to properly edit your factum in order to achieve clarity and simplicity. You must put yourself in the place of the judge and ask yourself what this appeal is all about.

When drafting your memorandum of fact and law, you should be aware of several factors which may affect the quality of your final product.

I would recommend that you preface your memorandum with an Overview Statement. While the rules of procedure do not require such a statement, it is often helpful, especially where the case is complex. The statement should summarize what you say the appeal is all about.

When stating the key issues, do not state them too broadly and do not list unnecessary issues. Over-issuing is a common problem. Where there are several issues, they may distract from the party's argument. In the rare cases where it is impossible to raise three issues or less, I recommend that these be grouped together under major subheadings.

It is important that the court be able to follow the argument of counsel with ease. Don't try to cram too much information onto each page. Where the record is voluminous, I suggest that you provide the Court with a compendium of the documents to which you will refer during oral argument, such as exhibits and extracts from transcripts. While a compendium is normally welcome at any time before the hearing, it is most useful for the Court to receive it earlier than the day of the hearing.

The Federal Court of Appeal engages the standard of review in every case it hears, whether it be an original judicial review, an appeal of an application for judicial review, an appeal of a trial decision, or an appeal of an interlocutory order. The Federal Court of Appeal does not retry cases. Rather, it looks for errors made by trial courts and federal boards, commissions, or tribunals. Thus, counsel must proceed accordingly. Also remember to give the court credit for knowing a little law.

In both oral and written arguments, you must be fair with the record, especially in relation to facts. Meet any weakness in your case head-on. State your opponent's argument fairly – and then rebut it. Provide accurate references to the material and provide proper citations for authorities. Cite only those authorities that are necessary.

Unlike written advocacy, oral advocacy allows the court to both see and hear you. Consequently, the way in which you deliver your argument is very important. Be precise, be fair, and be objective. Look composed and confident, use plain language, and do not just read your memorandum.

Most important of all, be prepared. You must thoroughly understand your case and, in order to do so, you must master the facts and the law. Inadequate preparation can have seriously detrimental effects not only on counsel's case, but also on the efficiency of the legal system and its capacity to render justice.

A slow, purposeful, and well-crafted opening statement will serve you well as it will give the judge a map to where you are going. Begin the argument by telling the judge what the appeal is all about and why you should succeed. Do not emphasize unimportant details and arguments. However, you should also avoid generalities. Acknowledge the weaknesses of your argument and do not oversell.

Finally, an important aspect of advocacy is the level of civility with which you treat your colleagues. The essence of professional responsibility is that the lawyer must act at all times with utmost good faith to the Court, to the client, to other lawyers, and to members of the public. A lawyer must be frank and candid in all dealings with the Court, fellow lawyers, and other parties to proceedings, subject always to not betraying the client's cause, abandoning the client's legal rights, or disclosing the client's confidences.

Therefore, when acting as an advocate, the lawyer must treat the Court with courtesy and respect, and must represent the client resolutely, honourably, and within the limits of the law. The lawyer's conduct towards other lawyers should also be characterized by courtesy and by good faith. It has often been said that it is the duty of counsel to try the

merits of the cause and not to try each other. Every effort consistent with the legitimate interest of the client should be made to expedite litigation and to avoid unnecessary delays.

Conclusion

As I said earlier, the art of advocacy has many elements. Lord Denning quite rightly concluded that language and the use of words lies at the heart of great advocacy. He said:

> To succeed in the profession of the law, you must seek to cultivate command of language. Words are the lawyer's tools of trade. When you are called upon to address a judge, it is your words which count most. It is by them that you will hope to persuade the judge of the rightness of your cause.