The Benefits of Written Advocacy for Young Lawyers

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"There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground."
Fred Rode, "Goodbye to Law Reviews" 23 Virginia Law Review 38-45 (November 1936).

Before I take a sip of my morning coffee, I am bombarded with e-mails. Each e-mail is a scratch to itch with a rapid, thoughtful and persuasive response.

By the time I leave the office, I have likely drafted, in no particular order, a demand letter, a Statement of Claim, a Notice of Motion, revised the demand letter, a factum, an update on the status of file to a partner, and the list goes on. As a young lawyer, I am now, more than ever, mindful of the impact writing has on the lawyer's craft.

The panache of oral argument may have attracted many young lawyers into our profession. The thrill of making an articulate and impassionate submission on behalf of your client, live and in the flesh can be euphoric. The written argument, however, is the workhorse of the law.

On October 13 and 14, 2017, I attended the 21st Annual Written Advocacy Conference as part of Osgoode Hall's Professional Development Series. The course was intense, spread out over two full days in Toronto. Long and arduous as the days were, the experience is one I will not soon forget and which I highly recommend to both my fellow young lawyers and senior members of the Hamilton Bar. The Course was, in the words of my colleagues David Thompson and Eric Nanyakkara, epic.

For those interested in a primer before enrolling in a more focused and intensive course, the 5th Annual Advocacy Skills Workshop presented by the Hamilton Law Association on February 1, 2018 includes a presentation by Andrew Spurgeon on written advocacy which will surely be best in class.

The keynote speakers at the Conference were the Honourable Justices Stratas and Laskin from the Federal Court of Appeal. A judge's panel discussion moderated by the Honourable Justice Matheson hosting the "who's who" of preeminent jurists included the Honourable Justices Lauwers, Penny, Perell, Corbett, Fairburn, Harvison-Young, Stewart, van Rensburg and Justice Bryson, visiting from the Nova Scotia Court of Appeal.

The lead instructor, Stephen V. Armstrong, a world renowned consultant, writer and professional development trainer for top-tier American law firms was highly effective in leading the audience through the topics of the Conference entitled "Arguing the Facts and Law in Your Factum, Creating Clarity in your Writing from Start to Finish and, Style: Grace, Strength and Clarity."

Armstrong engaged the audience with a thought provoking writing exercise, the purpose of which was to showcase how crafting a story and ameliorating negative facts can vastly improve the persuasiveness of one's legal position when confronted with an otherwise undesirable factual matrix. The exercise was to review both the defence and prosecution version of a statement of facts about the revered children's fable, Goldilocks and the Three Bears, affectionately revised to State v. Goldilocks.

Reproduced is a short blurb from the prosecution's statement of facts relating to criminal charges of trespass and destruction of property laid against the accused, namely, "G.L":

> At approximately 9:00 p.m. on September 25, John and Julia Barr and their son, Roger, returned home from a PTA meeting. When they reached their front door, they found that it was ajar. Mr. Barr entered the house and noticed muddy footprints leading across the living room carpet towards the kitchen.

I presume you know the rest of the story... Now, a blurb from the defence:

> On September 24, 1998., G.L., a 15-year-old girl living in the Smithville Home for Orphans, had an argument with her dormitory supervisor and ran away from the Home. She had no money or food with her, and only the clothes she was wearing. She spent the night of September 24 and most of September 25 hiding on the Smithville Country Club golf course.

What's the point?

The point, as opined by Armstrong is that a basic element of a story includes

characters, an opening and closing situation, and the movement between the two situations that constitutes the plot. Our job as lawyers, is to create inferences that point towards favourable conclusions about the nature of the acts and actors that make up the story. At its source, the law is born from a tradition of storytelling.

A highlight of the Conference was the judge's panel discussion. The candid revelations of the judges' pet peeves and preferences on written materials; do's and dont's when arguing your case; peppered with war stories from the bench did not disappoint.

The universal recommendation from all judges when writing for the Court is to employ what I have coined as the "CBC" approach: context, brevity and clarity.

During the panel discussion, a memorable moment occurred when Justice Lauwers brought the Conference into his chambers (figuratively of course), by sharing a behind the scenes peek at his approach to reading the otherwise daunting amount of written material at the start of each week in the Ontario Court of Appeal. His comments are roughly reproduced as follows:

> "I will have 20 – 25 civil appeals throughout the week, not including criminal appeals, with each appeal consisting of voluminous written materials, a minimum of 2 factums and, in a case with numerous appellants, respondents or interveners, having to read 10 factums is not unheard of..."

Justice Lauwers continues:

> "...my process is as follows. I pick up the Appellant's factum. I read the Overview section. If I do not understand the case by the end of the Overview I put it down. I then pick up the Respondent's factum. I read the Respondent's Overview section. If I understand the case, I continue reading the Respondent's factum first. If I do not, I put both factums down and move on to the next appeal, and save the other appeal for later."

The moral of the story from Justice Lauwers: know your audience, get to the point and get there quickly.

The Conference included breakout group and workshop sessions to put the theory learned in the plenary sessions into practice. Each group was equipped with a judge, a senior member of the Bar and a distinguished writing instructor from academia. Breakout groups consisted of 8 members, divvied up according to year of call to the Bar. We were required to submit a factum prior to the Conference for presentation and critique in our breakout groups.

I was fortunate enough to have the Honourable Justice Peter Bryson from the Nova Scotia Court of Appeal assigned to my breakout group. His humour and approachability were matched only by his sharp intellect and superior ability to recognize flaws in the persuasiveness in our factums.

Having input from an appellate level judge was invaluable. His main piece of advice to our group of young lawyers was that despite public opinion to the contrary, the profession retains much of its romanticism in advocating for equality, fairness and righteousness on behalf of your client, just as it was centuries ago.

A judge will often defer to the most reasonable person in the courtroom. Embrace concepts of fairness and reasonableness in your written material Justice Bryson counselled, and no matter your year of call, you will catch the judge's attention. The balance of the written argument is left up to the author to tell a compelling story.

Suffice it to say, I left the Conference inspired, my appreciation for the written word revitalized, but still confused about the revered oxford comma. I now strive to approach my writing alive to the principles of "CBC". And I will get around to responding to those e-mails.

Other quick tips from the Conference include:

- Get to the substance immediately (See: The Honourable Justice Laskin's "Forget the Wind Up and Make the Pitch: Some Suggestions for Writing more Persuasive Factums");
- Seize control of the factual and legal context in the Overview of your factum;
- Structure can be persuasive – chunk your prose into logical headings and subheadings;
- Employ the three C's when writing for a court of first instance: "Clarity, Candour, and Chronology";
- For estates cases, consider attaching a "family tree" diagram in the materials as a schedule;
- Persuade through clarity: make the complex seem simple;
- Explain the context, not just the details;
- Use both the power of simple statement and the power of details;
- Avoid shrillness and written sarcasm;
- Drop the arcane; the esoteric and the latin phrases; and,
- Do not traumatize your readers – what makes any piece of writing seem "long" is not the page count, but the mental exertion to get to the finish line. ■

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