Advocacy in Provincial Court: A view from the Bench

The Honourable Chief Judge Carol C. Baird Ellan

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This article
In her remarks at CLEBC's Advocacy Conference on November 16, 2001, Chief Judge Carol Baird Ellan of the Provincial Court presented the collated tips and comments of over a dozen Provincial Court judges on advocacy skills of counsel.

The Conference
We would like to extend our sincere appreciation to everyone who participated in the Advocacy Conference, which by all accounts was one of the best events of CLEBC's 30 year history. It's clear from the photos taken at the Conference that both participants and faculty had a great time.

Over 90% of criminal cases before the courts in BC are resolved at the Provincial Court level. The 146 judges of the Court also hear a volume of family cases roughly equivalent to that in Supreme Court, and about half that court's volume in civil cases, with a Small Claims limit of $10,000. For criminal lawyers, a significant part of their practice will take place in Provincial Court. Those counsel who concentrate on civil litigation perhaps attend less frequently, but may find themselves in Small Claims court more often in the future, if the limit is raised as some suggest it will be. And of course many of those who practice in the family area appear frequently at the Provincial Court level.

Most of the sound advice available to counsel regarding good advocacy skills is equally applicable to Provincial Court as to Supreme Court practice. Because the pace in Provincial Court is often faster and matters are often shorter, those who appear there regularly may develop a certain efficiency and economy of manner, but must not abandon their standards. Certain principles are perhaps more crucial, such as punctuality and preparation. If counsel is unavoidably late, or caught unprepared by a particular aspect of the evidence in a five-day trial in Supreme Court, there may be time to make it up, but that will not likely be the case in a half-day trial in Provincial Court.

Having said that, the length of Provincial Court cases is increasing, and those short snappers we used to see are dwindling. The average length of a trial now is probably a day. Good advocacy skills are more and more important in these times of increasing complexity of the law. Judges need skilled guidance from counsel at every level of court.

In preparing my remarks for the CLE's November 2001 Advocacy Conference, it occurred to me that it might be instructive for counsel hear comments directly from the judges of the Provincial Court, and indeed, that the judges might enjoy providing them, so I solicited their views. Of course, most judges are former counsel, and many are frustrated counsel, and they have a lot of time to observe the techniques that work and those that do not.

The following is a collation of the many helpful remarks I received. I am grateful to the judges[1] of the court for their responses and for allowing me to include them. (The judges who contributed are listed at the end of the paper.) I hope this paper will be of assistance to counsel who appear before the court.

I should say that in reviewing the judges' comments I quickly realized that this could easily be a two-way street. Perhaps some day soon judges will seek similar advice from counsel, but that is a matter for a quite different conference. This is an opportune time to provide

advance notice of the upcoming Provincial Court planning process, in which the Court will be seeking input on ways to improve the delivery of justice in the court. Counsel's views will be invited formally during that process.

I. Preparation

Judges feel that many young counsel get into trouble by not preparing properly for their cases. Sometimes it is obvious they haven't interviewed their client or their witnesses until shortly before the trial. One judge suggests that if a lawyer sleeps well the night before a big trial, it means they haven't prepared well enough to know everything that could go wrong.

A. Prepare Early

A judge who acted as defence counsel before her appointment suggests counsel do as much preparation as early as possible. The case will then live with you from that early date until the trial, and the case law you read, experience you gain, discussions you have, and ideas that come to you within that time will work naturally into your preparation.

B. Think

Another judge recalls his days as counsel, when a distinguished colleague at the bar advanced the theory that lawyers are paid to close the door to their office, put their feet up on the desk, and THINK. His message is that one cannot engage in effective advocacy unless one has thoroughly conceptualized the problem at a broad principled level, and analyzed how the client's objective can be achieved while conforming to established legal principles, and in a way that is going to appeal to a judge's perspective on the issue.

C. Know the Theory of Your Case

Judges tell me that they much prefer cases where counsel know the theory of their case and have decided on one or two issues they think they can win. Tagging every conceivable issue is for law school tests, not real law. Narrowing the issues and dealing clearly with only issues that are relevant will hold the attention of the finder of fact. In preparing for cross-examination, counsel should have a plan, and try not to ask too many questions. Tenuous lines of cross-examination and argument are exasperating and distracting. When you have a theory, you are in a position not only to present an organized and intelligent case, but also to identify the issues clearly and concisely in opening and closing arguments. In applications, tell the Judge at the start, the order which is being sought, and know the wording of the order.

D. Anticipate

Counsel should know ahead of time what issues and evidentiary questions may arise during the conduct of their case. If you anticipate that a particular issue will come up, then you may (and should) bring the leading authority on the point. And do bring copies for opposing counsel and the judge. Try not to cite cases you appeared in last week without a copy of the ruling. Judges do not want to have to call their colleagues to verify authorities. On a criminal case, read the information and read the legislation. That may seem elementary, but in my own experience as Crown Counsel in the olden days, sometimes seeing a file for the first time on the trial date, these essential precautions sometimes got overlooked. It may be different now. Be prepared to speak to sentence even if you do not expect your client to be convicted.

E. Know the Rules

Bone up on the rules of evidence: read the well-known texts and learn the basic principles, and re-read them, then read the cases that stand for the basic principles. Drum it in. This will assist you to anticipate the evidentiary objections that might come up and to prepare your response in advance. For those you do not anticipate, you will know the rules, and how to respond.

F. Take a View

If possible go to the scene of the event. Go yourself. Do not send someone. Look with your own eyes. One judge says he has watched counsel examine a witness about something that happened within two blocks of the courthouse where it was obvious he was not familiar with the scene.

G. Instruct the Witnesses

Preparation also means advising witnesses and clients as to court protocol, decorum and appropriate dress. For those who meet their client at the courthouse on the morning of trial (hopefully not for the first time), take a glance before you go into court. Is she chewing gum? You would be surprised how many people come into court and even take the witness stand with gum in their mouths. Is he wearing a t-shirt with an inappropriate slogan or design? It is important particularly in Provincial Court to get the client or next witness physically into the courtroom, and to be ready when the case is called. You might be stuck if there is no time or no means to fix unfortunate attire, but then you might want to consider whether to say something before the judge does.

II. Demeanour and Deportment

This is a subject of regular comment and concern on the part of Provincial Court judges. Unfortunately many inexperienced counsel (and a few more experienced ones) appear unaware of the image they portray, behaviour they exhibit, or annoying traits they display.

A. Refrain from Distraction

Your task as counsel should be to refrain from unintentionally distracting the judge's attention away from the evidence and toward yourself—anything you do or fail to do that causes the judge to focus on that, instead of on what it is you want to get across, will naturally detract from the success of your presentation. That is of course setting aside intentional distraction as a tactic, but generally that operates when the other side is presenting.

Counsel who dress oddly or provocatively, who have distracting habits, or are woefully unprepared or unskilled, will do their case and their clients a disservice. Judges of course must be expected to overcome any personal reactions to counsel's foibles; however, you might reasonably conclude that it makes their task much harder and cannot do your case any good to have them fighting distraction.

B. Quick Pointers

Some other perhaps pedantic pointers about deportment and demeanour follow in rapid-fire bullet form. (Many of these should be the advice you have already given your witnesses.) While much of what follows may appear elementary, the fact that the points were contributed by judges when asked recently for comment means that they reflect actual

behaviour.

- Don't argue with witnesses, opposing counsel, or the judge. Differing vocally or offering petulant comments in response to rulings by the court is poor form. Move on and raise the issue on appeal. Belabouring a point with a witness or differing heatedly with other counsel is ineffective and annoying.
- Be polite and respectful to everyone in the courtroom, including court staff and counsel on other cases. It is disrespectful to be disruptive while another case is proceeding by approaching the clerk, speaking audibly to someone in the courtroom, walking in front of counsel who are speaking, or otherwise calling attention to yourself.
- Maintain perspective. You bring into court your ability and your reputation. Never get so close to a client or a cause that you throw away your reputation. Don't overreact. Don't react. Keep your celebrations and your disappointments outside the courtroom. Emotion (on the part of counsel) has no place in a courtroom.
- If you lose a case that you think you ought to have won—appeal it; don't stand on the courthouse steps and whine to the media. Nothing is more unseemly than counsel complaining about a decision in a public forum. This deviates from the good traditions of the bar and attenuates the good relations between the bench and bar. There is only one appropriate way for counsel to challenge a decision: through appeal to an appellate court.
- Look at the judge when speaking to him or her; stand up when addressing the court. Sit down when opposing counsel rises to make an objection.
- Don't jingle the change in your pocket. Your hands should not be in there.
- Comb your hair and wear business attire. (This is not Allie McBeal.) Provocative clothing has no place in the courtroom. Women lawyers should wear jackets and high necklines. Men have always been required to adhere to a strict dress code and generally they do so (though ironing is sometimes overlooked). Why should women wear cocktail attire, and moreover, why would they want to detract from their credibility by doing so?
- Don't do anything sneaky or underhanded. Cases come and go, but you have only one reputation to ruin. Lawyers have long memories and gossip a lot about each other and about judges. What do you think the judges are doing?
- Don't chew gum in court or bring your Starbucks coffee cup in with you.
- One judge says only judges may make jokes; I would modify that to only judges may make bad jokes. And of course, never descend to humour at the expense of your client or when it is inappropriate. Another judge suggests humour properly used can make the finder of fact into a kinder, gentler audience. Just be careful and appropriately deferential to all participants in the process.
- Be punctual. Counsel should never be late. When you are unavoidably late, apologize before you say anything else.
- Develop a reputation for fair dealing and otherwise honourable behaviour both in and out of court. Once that reputation is damaged it is very difficult if not impossible to repair it. If you develop a good reputation with the bench and your colleagues at the bar, you will find them easier to get along with, and it will stand you in good stead when you apply to the bench.
- Be very careful what you say to the court; judges trust everyone the first time but keep a mental tally of those apt to take shortcuts, or misstate the evidence.

C. Watch Yourself

As stated, some counsel appear not to be aware of the image they are portraying as they present their case. One judge suggests counsel should watch their body language. Things

like crossing your arms as you ask a question, which might be taken as an indication that you do not want to ask it or are afraid of the answer. Try to stand relaxed, and display confidence even though you may have none.

Another judge suggests that counsel give themselves as much feedback as possible. The best way to do that is to set up a video camera—forget the bathroom mirror—and tape a presentation once a year or whenever you want to try something new. Watch closely for things you don't like—if you pace and it is too distracting, or if you want to use it for distraction but it is merely annoying; if your voice falls or you walk away from the mike and can't hear yourself; if you have facial expressions that signal you don't like an answer; or if you display other traits of which you were unaware, you may take steps to correct the problem.

III. Skills Development

A. Watch Others

Cross-examination is an art, but one that can be learned. One judge tells a story about seeing the top counsel of his day sitting quietly in the back of the courtroom and watching the cross-examination of a witness by counsel much more junior. When asked what he was doing there he said, "I never miss the chance to watch another counsel work; I might learn something." Take an afternoon off. Go to the courthouse and watch a good lawyer cross-examine a witness.

B. Gain Confidence

Good advocacy has a lot to do with confidence and the appearance of confidence. This may be gained by preparation, practice and experience. Learn to assert yourself and present your evidence confidently. Remarks of counsel that are spoken loudly, clearly and in a straightforward manner get the most attention. One judge advises: don't be intimidated by older, more experienced counsel. They don't always know what they are talking about.

C. Develop Your Own Style

Much of what counsel does is like theatre, so think seriously about how to develop your timing and delivery. One judge recalls attending the Federation of Law Societies annual criminal law program and participating as a witness in plenary role play demonstrations. Young lawyers were awestruck by a number of the senior counsel—maybe you have had that experience. Most notable then was David Humphries, QC. While young counsel are often tempted to emulate those they most admire, Humphries himself advised, "You can't 'do' a David Humphries". Every young lawyer needs to watch and learn from good counsel, but that which is observed should not be mimicked; rather, each individual must find a style suited to their natural personality and incorporate those practices which fit their natural style.

D. Pay Close Attention

A perhaps underemphasized skill is the ability to pay attention. All the preparation in the world will not help you if you do not notice the flaws in your case as they develop or the opportunities as they arise. You need to be alert and alive to every possible development in the case while it is developing in court, as well as anticipating what might happen in preparation. Abandon your checklist if need be, and adapt with the evidence as it changes. Watch your own witness as they give evidence; offer them water if they need it. Watch the other party's witnesses as you cross-examine; their body language may be telling and may

assist you to adapt your questioning. If the evidence does not come out as fully as you intended, do not be afraid to go back over it. Counsel are too shy about directing their own witnesses and correcting misapprehensions. There is no rule against directing a witness's attention to errors or gaps in the evidence, and you should do so.

E. Take a Cue

Bear in mind that a judge-alone trial requires persuasion of the judge who is presiding. If the judge asks a question, listen and respond. These are your biggest clues to how you are doing, and not generally attempts on the judge's part to thwart you or interfere in the conduct of your case.

F. Know Your Limits and Collect Your Tools

Try not to bite off more than you can chew; judges sometimes see young counsel overwhelmed by big trials before they have ever done, for example, an identity defence, or a continuity argument, or challenged the admissibility of a statement. Skills development is like collecting and adding tools to a toolbox. One judge suggests counsel plan the development of their skills by setting short term and longer term goals, and reviewing those goals regularly—perhaps every anniversary of your call date. That same judge says, "Ask for constructive criticism—specifically they should ask for a good thing that they did, something that was not so good or of considerable concern, and then something else they did well." This, she suggests, is a recipe for the most constructive criticism.

This collection of tips and suggestions is by no means exhaustive, nor is it intended as a treatise on the development of competence as counsel. It is simply a compilation of the features of counsel work that currently figure in the thoughts of some of the judges of the Provincial Court before whom you may appear, which may assist you in how best to present your case.

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