

TEN TACTICAL TECHNIQUES

TO

STAY ON TRACK

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by

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TEN TACTICAL TECHNIQUES TO STAY ON TRACK

1. STAYING ON TRACK – RIGHT FROM THE GET GO

First page rule

1. The first page should say it all. Every factum should contain an overview statement (no longer than one paragraph) that tells the reader what the case is about, who did what to whom, what the issues are, and outlines your position on those issues.

Avoid common opening statement blunders

2. Your opening statement becomes a filter through which evidence introduced will pass. Evidence consistent with this filter becomes more reliable, credible and acceptable. Evidence that conflicts with it will be questioned or discounted. Do not squander this opportunity for persuasion by using clichéd and banal introductions that turn the judge(s) off or render them neutral/politely disinterested – so forget all that “in my respectful submission” stuff– there’s only so much respect that even judges can absorb.

3. Don’t do the far-too-common ‘procedural history’ opening (ie summarizing all the prior motions before the one you’re in court for that day) – that’s like hitting the accelerator with car in ‘park’.

Purpose of the overview: grab attention, road map

4. The overview statement is important for two reasons:

- first, it's your opportunity to grab the reader's attention and explain what your case is all about. Capture the essence of the case in words that will excite the interest of the court. Arguments and evidence are much easier to absorb and retain if the reader is provided with the appropriate context.
- second, it provides a road-map for the rest of what you write, helping the reader to understand the points you're going to make.

Your opening paragraph — by definition you've only one chance to make a good first impression

5. You’ve only one chance to make a good first impression, or, if you’re mid-list in a busy Motions Court it’s more like shooting a bear at close range: you’ve only got one shot and you can’t afford to miss – what you say first when you stand up is likely the most important thing you’ll have to say in that motion.

6. Getting and keeping listener’s/reader’s attention is a necessary precondition for persuasion (as a parent with three teenagers, starting any sentence with “When I was your age” causes instant deafness). A strong opening statement will grab immediate attention by:

- leading with strength. Hit the reader between the eyes with your strongest argument right away;
- express the message clearly and in a way that the reader will have no trouble understanding;
- structure the presentation within the framework of the reader's knowledge, beliefs and attitudes. People approach problems from a certain perspective, it is your job to make sure that your factum fits into that judge's perspective.

2. LOOK BEFORE YOU LEAP...SOME TIPS AS YOU BEGIN

Point-first writing

7. Always start with the point you're trying to make - not the details of your argument. Readers and listeners remember and absorb information better when they first know why it matters and how it is relevant.

8. Avoid writing the factum (or even a paragraph) like a mystery novel, focusing on the details upfront and revealing only the point or the conclusion at the end. The reader shouldn't have to figure it out. You're trying to persuade the reader to accept your argument, not show how clever you can be at telling a convoluted story. It's better to provide context before detail, tell the reader off-the-bat what issue or idea or topic you're going to discuss in the paragraph, articulate it in the first sentence (usually our conclusion or submission on that issue) and the remainder of the paragraph is there to support your position.

9. Convoluted stories make people suspicious – and you don't want to come across with all the credibility of a disbarred lawyer on a book tour.

Be brief

10. Most oral and written argument is too long. At rock bottom, most cases really aren't that complicated. Select the facts, events and legal arguments likely to control the outcome of the case (and leave the rest out). We all know lawyers that even when you ask them the shortest of questions it's like trying to get a drink from a burst water main.

11. Too much argument is puffed up with all sorts of extra issues. Generally, this reflects the uncertainty of counsel as to which issue is likely to grab the Court's attention and the misguided belief that the client's interest is best served by presenting every conceivable argument. The put-everything-in tactic generates a large number of 'throwaway' arguments - and may tempt the Court to think that's what should be done with the rest of your factum.

12. Anyways, dumping everything in takes way more time, and we all write to deadlines – and we know too that if you try to do too much, those deadlines, like underwear, creep on you.

Be real, don't be academic

13. Don't try to be academic. Write your law review article after you've won the case and changed the law. The key to a good factum is clarity, brevity and simplicity: uncomplicate what's complicated, not the other way around. No-one has ever been convinced by an argument they didn't understand (no matter how brilliant it may have been).

14. Making things complicated – because it makes you feel better or makes the client feel they've got an important complicated case (or better yet, makes you feel like a really smart lawyer) is the opposite of what you should be doing: complexity is to legal argument what bagpipes are to lullabies.

Be yourself

15. Be yourself when you write. Forget the “we would submit”/ “with the greatest of respect” intros – it's just filler. A more individualized style is more interesting and more credible to the listener/reader – cowboy advice from Arizona: always drink upstream of the herd.

3. TABLE OF CONTENTS & WHY HEADINGS ARE IMPORTANT

Read first

16. In all likelihood, your table of contents will be read first. Its purpose is to help the reader navigate through the body of your submissions. Your headings and subheadings summarize your position, mirroring the logical flow of your argument.

Do two things

17. Choose headings and subheadings that:
- make a positive statement
 - develop a logical flow.

4. GIVE THE JUDGE THE QUESTION

Only one thing matters to the judge

18. Only one thing matters to the judge: "What am I doing here, and what's the question I'm supposed to answer?" Until the judge figures that out, she's not really going to pay all that much attention to your argument. The key to influencing judges and winning cases is to focus your attention on the key issues as soon as you get in the door. In order to effectively do this, identify the issues early and let everything develop out of that.

19. Justice Binnie advises a simple and coherent theory of your case: if you can't get your points on the back of an envelope then you probably haven't thought about it long enough. If you've followed this advice, it should be easy to summarize your argument in a single page at the beginning of your factum.

Throwing everything in doesn't work

20. Throwing everything at the Judge – “Here’s all the stuff that happened in this file, and here’s all the law that I could drag up, and could you please sort all of this out for us” – rarely works anymore, yet it’s commonplace in some Motion Courts. If you’ve got no theme, no structure, no opening, and thereby tick the judge off right off the bat, it’s a tough row to hoe thereafter – like pulling a tooth out of a rabid gorilla.

5. WRITE “THEME-ATICALLY”

Identify a theme

21. Every case should have a central theme or themes that evolve from one or more issues. It's your job to find that **central** theme of your case that on the facts and applicable law creates for you a strong arguable case. It's your job to strongly articulate such a theme in your factum — and the job of opposing counsel to puncture that theme or frustrate it and take it apart. Don't have too many – if you chase 3 rabbits 1 or 2 will escape for sure.

Conflict and dialogue

22. The most powerful themes go beyond one idea and lock two opposing ideas in conflict, creating a dialogue. For instance "the defendant valued money more than safety." In such instances, it's not the moral of the story that involves the reader so much as the struggle between the two opposing points of view in the theme.

Visual

23. Or a theme that's visual for the listener – “like a fragile vase that someone kept throwing up in the air and catching – until now”.

6. WRITE YOUR THEME DOWN

Write down the theme before you start writing

24. For best effect, write your theme down before you start drafting your document. Writing the story or the theme in a paragraph before you start writing lets you add and subtract facts to make the more compelling parts of that story last longer and shorten or delete parts that are simply boring or not in your favour.

How to start

25. A good way to start that first paragraph that helps you take off your lawyer's hat and avoid the legalese-type-intro is to simply start: “This case is about...”

My own personal technique

26. My own personal technique is to pretend to myself I'm at Tim Horton's (I take a medium double double) and the young lady/man knows I'm a lawyer on my way to court and asks me what my case is about and because there's a line-up behind me I've 20 seconds to tell her/him in simple ordinary language, and I start: "My case is about..." Works for me.

7. STAY TRUE TO YOUR THEME & ONE PRACTICAL TECHNIQUE TO DO SO

Fit it into the framework

27. In order to be persuasive, the evidence and arguments have to make sense and fit into the framework that your reader has adopted. If you don't stay consistent to your theme, the reader will be confused and lose the thread of your argument.

A good practical technique

28. My own personal technique is to develop a short sentence or maybe a short paragraph – sometimes you can do it in a word or two – but write that out on the top of a blank page. I then go to a Thesaurus or a dictionary of synonyms (if you want to get really fancy-dancy you can use a rhyming dictionary) and I list every word/phrase that is reasonably similar to my key word/sentence/paragraph. I make that list as long as possible, specifically including words that are stronger or weaker than my key word/sentence/paragraph.

28. I then tape that list to my desk light, and every time I use a particular word or phrase I put a tick beside it, so I know what I've used, how often, and what words I've yet to use. The benefit of this wee technique is that particularly in more complicated or longer factums (eg. the S.C.C. appeal factum is 40 pages) is that that list keeps you (and more importantly, the reader) on track for every one of those 40 pages.

For example

29. For example, your breach of contract case can be more than just recitations from the Chitty on Contracts book. Your case can be about:

- relying on a promise
- promises are not for breaking
- making a commitment means you're committed
- believing in someone
- trusting an institution
- counting on a corporation

An analogy can help too: "Putting honour back into the handshake".

30. Most lawyers approach the writing of a multi-faceted multi-issue long oral argument/long factum with the same joy a medieval peasant feels on being dragged off to the ~~law library~~ dungeon again who on arrival is told by the chief gaoler that they've made considerable improvements to the thumbscrew since their last visit – but if you try the write-the-theme-out-at-

the-top-of-a-blank-page trick, it really goes a lot faster, particularly for the more complicated cases, where it's more of a challenge to stay on track.

8. AND THAT'S A FACT...

The facts shape the outcome

31. The facts really are the hardest part of the factum to write because of our training as lawyers: we feel more comfortable oftentimes (O.K., not all of us¹) writing law because we're lawyers after all. Writing legal argument is almost easy, but the facts are where most of the time should be spent. After all, the facts are the context within which the legal issues are decided and that factual context is necessarily highly determinative of the overall outcome.

Craft your facts

32. Although readers generally best remember stories told in chronological sequence, it may be more strategic for us not to start at the beginning but start with the most significant event in the case.

Use the present tense

33. Tell your story in the present tense – ie. write the facts in the present tense: it makes the reader/listener a participant, not merely a listener. Makes them feel what happened, want to know what'll happen next: give them a ringside seat at the worst of car crashes – no matter if it's a commercial case, a securities issue, IP litigation or even a real car crash.

9. STAY ON TRACK IN ORAL ARGUMENT TOO: AND DON'T HOLD ANYTHING BACK FOR ORAL ARGUMENT — THIS ISN'T HOLLYWOOD

34. Put all your best arguments into the factum/motion record/written submission or whatever you're writing. In the past some counsel would save the best part for oral argument – or deliver it orally and not include it in written submissions later. Today written submissions are much more important than they once were and this is not an advisable strategy. It's possible to overcome an inadequate factum during oral argument but it's an uphill battle.

10. CONCLUSION

Conclusion: Make sure there is one

35. Make sure there is a conclusion – you don't put your hand in the air till the puck's in the net. Don't just end by outlining the relief requested: remind the Court why relief is required in your case.

Conclusion — Option #1: Tell the court why

¹ A couple of years ago I was sitting in our firm's Law Library reading a (law) book when a younger colleague walked in. She asked "What are you doing here?" I replied "I work here".

36. A good closing will encapsulate two or three compelling reasons for the Court to adopt your position. In brief, make your conclusions clear and make your reasons explicit. What you are really trying to do is draft the judge's decision.

Conclusion — Option #2: Answer your own questions

37. Writing the conclusion is simple if the opening was well-drafted. A good advocate will close by answering the questions posed in the issues section. However, it isn't enough to simply give the answers, a good conclusion will also outline the reasoning that leads inevitably to the answer provided.

Conclusion — Option #3: Finish where you began

38. Pick up the theme of your opening. Restate it, refine it, re-develop it. It can build a logical solidity, can close the circle.

ADDENDUM: COSTS

39. Oh and one final thing: always ask for costs and say why — even at the S.C.C. a surprising number of counsel forget to ask for them.

Selected Bibliography follows from which ideas in this paper are drawn, and which can be consulted for further information.

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