

## **TRIAL ADVOCACY: OWN THE MORAL HIGH GROUND**

By Alastair Clarke

On April 14th, I met with Justice Todd Archibald in his office at 361 University Avenue to interview him on the topic of oral advocacy. As a newly-called lawyer who has never argued a case before a trial judge, I prepared for the interview by reviewing my notes and articles from law school courses and prior to our meeting, I had a rough outline in my head. As soon as I was comfortably ensconced in one of Justice Archibald's armchairs, however, he began a long series of carefully thought-out points and my outline quickly went out the window. During the interview, Justice Archibald provided numerous pearls of wisdom on effective advocacy at the trial level. This short article is based on this interview and I hope that it accurately conveys Justice Archibald's best advice.

### **1. Own the Moral High Ground**

An effective oral advocate presents a complete picture, including all material points that support and, more importantly, hurt the case. The advocate who anticipates and presents his or her opponent's arguments and, thus, presents a cohesive pitch, occupies the moral high ground. By ignoring, misconstruing or glossing over negative points, the trial judge will place greater emphasis on the submissions by opposing counsel in order to gain a complete picture. Instead, provide a comprehensive roadmap to the trier of fact to ease the job of writing his or her judgment. Failing to provide a 3D, multi-hewed image of the case may cause the entire presentation to ring hollow. In addition, the advocate who makes calculated concessions establishes credibility in the courtroom.

When counsel is faced with an unduly aggressive adversary, establishing and maintaining the moral high ground becomes increasingly important. When confronting a bully in the courtroom, Justice Archibald advises that maintaining the moral high ground may have the effect of disarming the bully and reaffirming the position of counsel who maintain a courteous and reasonable manner. If necessary, calmly correct the record of any error and address all points to the court, not to opposing counsel.

At the discovery phase, owning the high moral ground is equally important. When faced with opposing counsel who may use abusive or truculent language, Justice Archibald advises to simply notify the individual that the those portions of the transcript will be read back in court. At trial, the credibility and reputations of the advocates may help decide the case and owning the moral high ground may ultimately win the day.

### **2. Tell a Compelling Story**

Effective storytelling includes identifying the most salient themes of the narrative and weaving them together to provide a clear, complete picture of events. Just as a storytelling may include a didactic statement that ties together any problematic points into a pithy conclusion, Justice Archibald emphasizes that a strong presentation at trial will also offer concrete, reasonable solutions within the story.

To illustrate the importance of effective storytelling, Justice Archibald provides an example that he attributes to Justice Laskin. Consider the conflicting perspectives within the nursery rhyme "Goldilocks & The Three Bears". The advocate for the Bears would tell the story of a trespasser who raided their food without regard to their privacy and property rights. The advocate for Ms. Goldilocks, in contrast, would tell

the story of a starving young girl who, in good faith, finds the front door of the Bears' house unlocked and, with no alternate residence in the area, enters and consumes only as much as to satisfy her basic needs. (This would be a fun fact pattern for Law Day.) Based on this example, it is easy to see the importance of persuasive storytelling.

Justice Archibald notes that the job of the decision-maker is to synthesize this clash of competing perspectives. The effective storyteller distills the salient points, bridges the good facts and the bad, and clearly explains why his or her perspective is the strongest after conceding the negative points.

### **3. Have the Courage to Select the Best Points**

Regardless of the complexity of the case, Justice Archibald advises that counsel select their most persuasive points and present only those. Even in cases where fifty points may seem important, the effective advocate will identify the strongest points and present a clear, focused argument that synthesizes the entire case. Arguing minor points dilutes the effect of the strongest and may well lead to an unfocused presentation.

### **4. Prepare, Prepare, Prepare**

No article on effective advocacy would be complete without emphasizing the importance of preparation. An effective advocate prepares by analyzing each and every issue from multiple perspectives to draft arguments, counter-arguments and counter-counter arguments. In Justice Archibald's words, "an ill-prepared lawyer can easily lose the case."

For young lawyers such as myself, Justice Archibald advises that we take advantage of every opportunity to get on our feet and that we adequately prepare each time regardless of whether we are presenting a motion, an application or any minor matter.

### **Final Words**

As part of my preparation for my interview with Justice Archibald, I reread Justice Laskin's article "Forget the Wind Up and Make the Pitch: Some Suggestions For Writing Most Persuasive Factums" – an article that I would highly recommend. Justice Laskin makes reference to a point from Justice Sopinka: "the quality of advocacy makes a difference to the outcome of 25% of appeals". During my interview with Justice Archibald, I mentioned this point and, in his response, he noted the differences between advocacy at the appeal level and advocacy at trial. At trial, Justice Archibald explains that the quality of advocacy may, in fact, determine the outcome in the majority of cases for the simple reason that the trial judge, at first instance, decides the controlling facts.

In sum, based on my meeting with Justice Archibald, an effective advocate owns the moral high ground, tells a compelling story, has the courage to select only the best points and prepares for every angle. This advocate articulates a cohesive pitch with a well-reasoned approach and, in the end, builds a strong reputation and earns the respect of the court.

*Justice Todd Archibald has practiced criminal law as an Assistant Crown Attorney and civil litigation at Borden Ladner Gervais LLP (then Borden & Elliot) where he was a partner. In 1999, he was appointed to the Superior Court of Justice in Ontario. He has taught effective trial advocacy techniques at various levels including in the Master's course in Civil Litigation at the Osgoode Hall Law School. In addition, he has*

*published numerous articles and written texts on civil, criminal and environmental law matters.*

*Alastair Clarke practices immigration law and poverty law at York Community Legal Services. He has appeared before the Immigration Appeal Division, the Immigration Division, the Refugee Protection Division, the Landlord and Tenant Board, the Social Benefits Tribunal, the Canada Pension Plan Review Tribunal and Small Claims Court.*