

CIVIL LITIGATION

How to go for broke – without going broke – on appeal

The bill from a civil appeal can shock even the most litigation-savvy client. While appeals will never be a bargain, counsel can help keep costs down by maximizing efficiency.

First, and most importantly, plan ahead. Use the appeal period to carefully consider the issues. What kind of finding are you appealing and what is the applicable standard of review? Keep in mind the powers of the appellate court and decide at the outset what your strong grounds for appeal are. Concentrate on developing those.

Assessing the basis for your appeal at an early stage allows you to consider and reject weak grounds of appeal. Your notice of appeal should reflect your strongest grounds. Resist drafting many very specific grounds – a few thoughtfully-drafted, broader grounds will reduce the need for a subsequent amendment. (This is equally true on a motion for leave to appeal.)

Having thought out your issues, you will be able to successfully resist the temptation to list all possible evidence in your certificate respecting evidence. Selectively determining which exhibits and transcripts should form part of the record will reduce disbursement costs. Your



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panel will be grateful for a more focused record – and a happier panel is a good thing!

Second, if you are responding to an unfocused appeal, work with appellant's counsel to narrow the issues and the evidence required before you spend considerable time and energy drafting your responding

factum. Rule 61.05(8) allows costs sanctions for unnecessary evidence. Warn uncooperative opposing counsel that, in the event the evidence or transcripts are unnecessary, you will be asking the appeal court to penalize his or her client in costs, as well as to disallow the disbursements related to the irrelevant evidence.

Third, when you start drafting your factum, use the proper formatting guidelines from the outset. It may seem like a small thing, but when managing page limits, it is inefficient (not to mention disheartening) to learn that the 30 pages of brilliant text you thought you had drafted are in fact 40 pages when formatted properly.

If you start with the right spacing and margins, you can evaluate length as you draft, and make strategic decisions about your argument to keep within your page limit as you go. Your argument will be more focused and your time spent editing will be kept to a minimum.

Fourth, work with opposing counsel to file a joint book of authorities and a joint compendium (and make it double-sided). The court will appreciate having fewer volumes to lug around and you can share the costs of the disbursements. The

extra time spent coming to an agreement about the content of the book of authorities and compendium will pay your client back in increased efficiencies.

Fifth, if significant portions of your record are in electronic form, consider seeking agreement of counsel and an order from a single appeal court judge to rely on the electronic record to minimize the need for paper and the resultant disbursement costs. If the order is granted, you will need to check with the court to ensure it has the technological resources to support your material, failing which you may have to provide those resources.

If your appeal takes you all the way upstairs, remember that the Supreme Court of Canada has gone electronic. By this fall, all appeal materials must be on CD-ROM, though some appeals are already proceeding electronically with agreement of the parties.

Currently, the Supreme Court of Canada is requiring a CD-ROM for each of your factum, appeal record and book of authorities.

Although fewer hard copies are required, you can't get away with an entirely electronic filing. Happily, however, the reduction in hard copies will translate into lower disburse-

ment costs for the parties.

Finally, if your practice includes a lot of appeals, staff them economically. A knowledgeable clerk will be invaluable in navigating procedures and compiling and filing the record at a lower hourly rate. If you don't do enough appeals to justify an appellate clerk, spend time at the outset of the appeal process familiarizing yourself with the procedural rules and requirements and ask your assistant and clerk to do the same. Mistakes that are easy to prevent can be time-consuming and costly to fix.

At the end of the day, there is no substitute for thorough preparation. A good argument on appeal can never be done on the cheap. However, by thinking ahead, working with opposing counsel and making small changes in your approach to appellate practice, you can keep costs manageable for your client, without compromising the quality of your representation. ■

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