

Preparing to face the Supreme Court like a pro

Dress rehearsals, complete with testy exchanges, help lawyers find vulnerable spots in their cases – before the judges do

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After a sleepless night spent rehearsing his legal submissions in front of a hotel room mirror, lawyer David Day watched pensively as seven judges of the Supreme Court of Canada filed into the courtroom the next morning.

As usual, his nerves were jangling. "It never changes, no matter the number of appearances," said Mr. Day, a veteran of several Supreme Court appeals since 1972.

Unlike his previous appearances, however, Mr. Day's fears evaporated as soon as he was on his feet. What made the difference was a rigorous dry run that the veteran St. John's lawyer had undergone a few days earlier.

Arranged by the Supreme Court Advocacy Institute, the simulated appeal - part of a novel trend that is changing the face of legal argument in the court - sought to parallel each ritual and nuance of a Supreme Court hearing.



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Even veterans such as Newfoundland lawyer David Day, shown in St. John's, suffer from top court nerves. But he says a dress rehearsal helped him to hone his oral arguments. (*Robert Young for The Globe and Mail*)

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The institute is the brainchild of two former Supreme Court law clerks - Owen Rees and Grégoire Webber. It provided mock sessions in 20 per cent of the cases the Supreme Court heard last year. It has held sessions in Ontario, B.C. and Alberta, and plans to branch into Quebec and the Atlantic region.

Beyond simply assisting colleagues, the sessions help prevent the kind of poor arguments that can hamper the development of sound jurisprudence. "Ultimately, the court benefits," Mr. Rees said.

Each session is conducted by experienced lawyers, donating their time on a pro bono basis, who act as mock judges. They study cases in advance - just as the judges do - and arrive at sessions with strong opinions about where the key legal issues lie.

Like musicologists discussing a classical composition, the "judges" then take apart a lawyer's arguments and suggest where they may fall flat, distract the judges or try their patience. They also pepper counsel with tough questions, ruthlessly cut off submissions, and even adopt the idiosyncrasies of particular Supreme Court judges.

Each session is followed by a candid, down-to-earth critique of what worked, didn't work, or just plain bombed - a process that can be as useful to veterans as it is to Supreme Court novices.

In an interview after last month's appeal, involving a Jehovah's Witness who wanted to reject a blood transfusion, Mr. Day said that he had "never been nearly as well prepared for oral argument in the Supreme Court as I was that day, due substantially to the institute rehearsal."

In two other court hearings last month, the submissions of lawyers who had been through mock hearings were noticeably more sharp and focused than those presented at their dress rehearsals.

"Without the Advocacy Institute session, we would have fallen flat on our faces," lawyer Cameron Pallett said.

On a cloudless Friday evening in late May, high in the office tower aerie of McCarthy Tétrault LLP's Toronto branch, lawyers Michael Barrack, David Stratas and John B. Laskin settled into their guise as Supreme Court judges.

The dress rehearsal over which they were about to preside involved a class-action launched by a group of elk farmers in Saskatchewan. The plaintiffs alleged that a provincial regulatory board destroyed their livelihood by imposing unnecessary regulations.

A week hence, Mr. Pallett and a colleague, Reynold Robertson, would be asking the Supreme Court to overturn a lower-court ruling in favour of the province.

As Mr. Robertson launched into a synopsis of his case, the "judges" fixed him with suitably intimidating stares. "Mr. Robertson, you can assume we have read the facts," Mr. Barrack remarked dryly, an admonition heard regularly in the Supreme Court.

The panel unleashed a volley of questions. Were the plaintiffs basing their lawsuit on the right legal tort? How did they hope to dodge provisions that confer legal immunity on the province? Could they prove that Saskatchewan was merely careless - or actually reckless?

The panel members complained repeatedly - sometimes testily - that some responses were off-base. "Could you answer my colleague's

question?" Mr. Stratas asked sharply, at one point.

"I'm thinking - but I'm thinking while my mouth is open," Mr. Pallett said, a deft enough retort, albeit best unused at the Supreme Court itself.

Both mock hearings turned out to be a marvellously accurate simulation of the Supreme Court bench at its liveliest. Afterward, Mr. Pallett, Mr. Robertson and the panelists mingled, chuckling about their most spirited exchanges.

Mr. Stratas noted that some judges are touchier than others: "We tried to imitate them all so that you could get a good cross-section," he said.

"I appreciate you being so miserable," Mr. Robertson replied. "We needed that. This was marvellous."

The panelists then identified the arguments that would most likely engage the court's interest, and warned against those that might hit a dead end. They urged the lawyers to anticipate and address the vulnerable spots in their own case, because the judges inevitably find them.

"Let them know that you have located their itch, and that you are going to scratch it for them," Mr. Barrack said.

Six days later, at precisely 9 a.m., Chief Justice Beverley McLachlin called on Mr. Robertson and Mr. Pallett to present their arguments.

At 9:06, the barrage of questions began. The judges leapt on some of the vulnerable points that the institute panelists had red-flagged. However, Mr. Robertson and Mr. Pallett were ready. They handled each question smoothly and directly. The fine polish the two lawyers had applied to their arguments was unmistakable; the awkward pauses in their delivery had vanished. They sounded like old pros.

Some primary rules of engagement emerged from this session (as well as another conducted a few days earlier by panelists Neil Finkelstein, Brian Greenspan and Scott Hutchison):

First impressions are important.

"Mark yourself as someone who knows the ropes, versus being a rookie," Mr. Laskin advised. "Don't introduce yourself. Just call them 'justices.' Using 'milord' is a relic of the past."

Avoid talking over the heads of judges who lack background in a particular field.

"Not all nine members of the court are going to be criminal-law experts," Mr. Greenspan said. "They come from a variety of areas."

All questions from the bench must be answered.

However, wise lawyers often attempt to buy time. "If you are asked a question that you don't know the answer to, say: 'That's an excellent question. I wonder if I could get back to it in due course?'" Mr. Finkelstein suggested.

Not responding at all is better than obfuscating.

"If you don't give them straight answers, they will get very mean," Mr. Stratas warned. "They are not a pleasant court," Mr. Barrack

agreed.

Steer clear of eliciting sympathy for a client or arguing the facts of a case.

"They aren't interested in an Oxford-Harvard seminar," Mr. Barrack said.

Don't become bogged down in a debate with a single, feisty judge.

"If somebody is giving you a difficult time, they may simply disagree with you," Mr. Finkelstein said. "You're not going to get all nine of them - and the fact that they are smart people doesn't mean they can't ask stupid questions."

Maintain eye contact with all nine judges, and always try to locate the one who has posed a question.

"It can be like hearing the voice of God," Mr. Hutchison said. "Sometimes, you can't tell who is asking a question until they wave at you."

The Supreme Court can and will refashion existing law, but it does it in modest, incremental moves.

"They will stretch and pull at concepts to fit what is justice in a certain case," Mr. Stratas said. "You are totally into the conceptual realm with them; the realm of ideas."

Judges do not like being talked down to.

"Don't use words like 'clearly,' 'plainly' or 'obviously,'" Mr. Barrack advised. "They are going to get a little irritated if you do."

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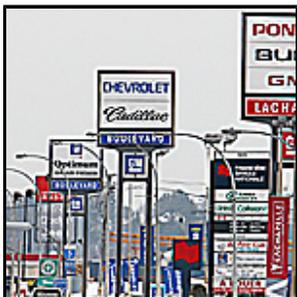
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