

Everything you wanted to know about appellate advocacy but were afraid to ask.

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The two attributes

1. **Attitude.**
2. **Application.**

The five rules

1. **Plan.** Determine your purpose and objective, and appreciate your role and function as well as that of others involved. Understand and adapt to the medium or the forum in which you are appearing.
2. **Prepare.** The key to court room advocacy is preparation and presentation as well as a commitment to the argument or case that you are advancing.
3. **Present.** Focus on good and sustainable points or arguments that are well supported. Your case should be clear, accurate and concise. Do not destroy or submerge your good points or arguments with bad ones. Do not defend the indefensible, or argue the unarguable. Review and reassess your case when necessary.
4. **Project.** Be confident and on top of the case you are advancing. Know the weaknesses and strengths of your case and that of your opponent's case.
5. **Persuade.** The theatre of a court room is different from the theatre of a play house. It is the art of persuasion, not the art of performance.

Appeals against conviction or sentence

1. Know the powers, the practice and procedures, of the appellate jurisdiction. Check and examine the source materials of the facts and of the statutory provisions and legal principles.
2. Identify the issue or error that is to be the basis of the appeal and frame it as a ground of appeal in clear and concise terms according to the relevant principles and requirements. Provide a brief contextual background of the ground of appeal if necessary. This should not be in the form of a written submission. It is important to note whether the ground of appeal involves only a question of law as this provides an automatic right of appeal to the Court of Appeal. Otherwise, leave to appeal is required.
3. The framing of grounds of appeal is an important step in the appeal process and should be conducted with absolute precision and care. The grounds of appeal should be reviewed and appropriate action taken. It is not an anything and everything exercise. It should be a ground that is reasonably arguable and has a good prospect of success. *HKSAR v Khaw Kim Sun* [2022] 5 HKC 249, at [126]-[137].

Written submissions

1. Comply with requirements and directions.
Comply with the Practice Directions, particularly PD 4.2, or the Court's specific directions. Comply with filing dates. Draft your written submission to address the issues of the case. Do not underestimate the importance of a written submission. Revise it until it is right.

2. Outline and format

- (i) Introduction.
- (ii) Background.
- (iii) The Facts.

The prosecution case/defence case or the plaintiff case/defendant case. It is sometimes a good idea to include a *dramatis personae* and a chronology. Tell the story. Make it easy to read.

- (iv) An overview.

Give a brief overview of the appeal points and an overall response to them.

- (v) The appeal grounds.

- Make sure your grounds spell out succinctly your complaint or argument.
- Identify each of the points to be argued with reference to the authorities or evidence to be relied upon in support.
- Identify the issue or issues and address them. Signpost your arguments. In explaining concepts use examples.
- Identify how the judge/magistrate has erred and the reasons why he or she has erred.
- Keep to the point and be brief. Clarity of expression.
- Cross-reference. Support any assertion of fact or issue with transcript reference or authority.
- Cite and quote authorities sparingly. Cite the reported version.

- (vi) Conclusion.

State your position and what you are seeking.

3. Overall approach

- (i) Check what has been done.

Check all transcripts and evidence before the Court. Make sure all relevant materials are before the Court.

- (ii) Prepare.

Prepare a Reading Note including the basic propositions upon which you rely.

- (iii) List of Authorities.

Correct citations – page references. List only relevant cases and texts. Only the key authorities.

- (iv) Address outcomes.

Address likely outcomes and concede points where necessary. In a criminal appeal consider – proviso – retrial – amendment or substitution – costs – loss of time. Some of these matters you should await the outcome of the appeal or address at the appeal hearing.

Oral submissions

1. Know your objectives.

Seeking to persuade an appellate court that a decision at first instance is erroneous and should be reversed or varied if for the appellant or affirmed if for the respondent. Know the jurisdiction of the appellate court and its powers.

2. Know the court.

Know your judges – their background, philosophy, approach to the law and to argument, and of previous positions and decisions. Know how the court operates – judges sharing the load etc. The differences between the judges – different interests and approaches to legal authority, legal principle and legal policy. Find recent authority from the assigned judges relevant to the issues. Accommodate your presentation to suit the judges before whom you appear. Bear in mind the difference between trial judges and appellate judges.

3. Know the law.
Know the basic procedural rules. Know the cases. Know the relevant legal principles. Be up to date. Check for recent authority.
4. Know your case.
Know the facts. Understand the legal argument. Be clear about what you are asking for. Concede what must be conceded.
5. Know your opponent's case.
Know the other side's points. Identify their good points. Consider how you would argue it. Face the difficulties and obstacles that you need to address.
6. A good opening.
Prepare your opening. Give the court a roadmap of your submission and the points you will be making. Open with your best argument. State the precise points upon which you rely.
7. Present and explain your case accurately.
 - Do not overstate your case. Be accurate in what you say – never make a statement that you are not certain is correct.
 - Present the merits of your case and deal with its weaknesses. Reveal the defects of your opponent's case. Judges are interested in the merits of an argument and in correcting an injustice.
8. Select your best arguments.
Concentrate your argument on a few good points than on many points that obscure your good ones. Have a list of points and deal with them as the situation allows.
9. Make your positive case and refute the opposing case.
 - (i) Do what is required. Do not overdo it. Be focused and concentrate on the essentials.
 - (ii) Do not defend the indefensible. Do not persevere with an argument that is not impressing the bench.
 - (iii) Beware of making concessions. If you think you have a good point do not acquiesce in a proposition from the bench that you are not convinced is correct. It is said that: "It is better for an advocate to die on his feet than live on his knees."
 - (iv) Maintain an objective approach. Do not advance arguments that your client wants which have no prospect of success. It will not enhance your reputation as an advocate.
 - (v) Reason over emotions. Concentrate on substance. Make sure you have made all your points.
10. Good communication.
 - Simplicity. Be clear and concise. Do not repeat yourself.
 - Be firm but not overly argumentative. Do not interrupt a judge.
 - Speak to, not at judges.
 - Do not over-read. Be conversational.
 - Be flexible.
11. Be prepared.
Answer questions from the bench. Listen carefully and if necessary ask for clarification. Try not to put off an answer but if you cannot answer say so and come back to it. Far better to say nothing than to give an unconvincing or non-responsive answer. Answer hypotheticals. Anticipate questions and be prepared.
12. The law, justice and common sense.
Understand the legal principle. A sense of justice. Rely on common sense.

13. Citing authority.

Cite authority accurately and with care. Always identify the principle for which the case stands. Explain policy and principle. Do not over-quote. Do not over refer to cases.

14. Watch the bench.

Maintain eye contact with the bench. Look for reactions. It can help to know how far to push an issue and when enough has been said.

15. A good closing.

Recall confidently your principal arguments and explain why the rule of law established by those arguments must be vindicated. Explain what you are seeking.

Dos and Don'ts

1. Make sure that the summary of facts of the case and relevant events are complete and correct.
2. Make sure your authorities are up-to-date and relevant.
3. Make sure that you have put all relevant material, including material that is against you, before the Court.
4. Make sure that have checked what happened at trial and consult trial counsel.
5. Make sure that you properly address the issue under consideration and in a style or manner that is appropriate in the circumstances.
6. Make sure that you have a complete command of your case and that of your opponent.
7. Make sure that everything has been done prior to the hearing of the leave application or appeal. There should be no last-minute matters.
8. Don't make up artificial grounds of appeal. They should reflect a genuine sense of grievance about a valid and material issue or error.
9. Don't make allegations that are unsupported or unsubstantiated, particularly when alleging flagrant incompetency of counsel: *HKSAR v Apelete (No 2)* [2019] 5 HKLRD 602.
10. Don't stray from the ground of appeal and argue new or esoteric points.
11. Don't retry or reargue the case at trial.
12. Don't be repetitive and prolix in submissions.
13. Don't quote a summing-up or decision in isolation or out of context.
14. Don't misquote or misrepresent a legal principle or authority.
15. Don't just read your written submissions at the hearing but engage in a meaningful dialogue with the Court.

Reminder

Remember your function and purpose as an appellate advocate and keep things simple.