

**Art of Advocacy, Court Craft,
Drafting & Pleading –
Technical & Practical Aspects**

**for Company Secretaries to
Appear Before Various Quasi
Judicial Bodies**

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Art of Advocacy – Introduction

What is Advocacy?

- Advocacy is an art by which a practitioner puts their client's case to a judicial or quasi-judicial body, and it may be both written and oral. It is a specialist skill, the quality and excellence of which distinguishes the practitioner from other providers of legal services.
- Advocacy is a practice which involves an active promotion of a cause or principle and requires formulation of strategies for achieving desired goals.
- There is no fixed recipe for a correct approach. Based on individual traits and experiences, everyone has a particular style and unique approach to solving problems. Qualities and skills develop and acquire flexibility with experience.
- The aim of advocacy is to make the Judge prefer your version of the truth.

Why do Company Secretaries need to learn Advocacy skills?

Company Secretaries have been recognized under various Acts to Appear as an authorised representative before various quasi-judicial bodies such as:

- National Company Law Tribunal (NCLT)
- Securities Appellate Tribunal (SAT)
- Telecom Regulatory Authority of India (TRAI) and its Appellate Tribunal
- CGST officer, appellate authority and Goods and Services Appellate Tribunal
- Central and State Electricity Regulatory Commissions
- National Company Law Appellate Tribunal (NCLAT)
- Competition Commission of India (CCI)
- Central excise officer, Customs Excise and Service Tax Appellate Tribunal (CESTAT), Commissioner of Central Excise (Appeals)
- Appellate Tribunal for Forfeited Property, Special Director(Appeals) and Adjudicating Officer
- Airport Economic Regulatory Authority Appellate Tribunal

Importance for Practicing Company Secretaries

Appearing before NCLT/ NCLAT under Companies Act, 2013

Pursuant to Section 432 of the Companies Act, 2013 a Practising Company Secretary (PCS) may present a case of a party to the proceeding before the NCLT or NCLAT, as the case may be.

“432. Right to legal representation.

A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be.”

Scope for Company Secretaries before NCLT/ NCLAT

- Establishment of NCLT/ NCLAT offers various following opportunities to Company Secretaries to appear and present the matters inter alia relating to: Compromise and Arrangement, Reduction of Capital, Compounding of Offences. Oppression and Mismanagement, Rectification of Register of Members, Other Miscellaneous matters etc.
- With the establishment of the NCLT/ NCLAT as adjudicating authority and appellate authority under the Insolvency and Bankruptcy Code, 2016 the scope of practice has increased.
- Company Secretaries can also be a technical member of NCLT, provided he has 15 years working experience as company secretary in whole-time practice and minimum age of 50 years.

NCLT Benches

- The NCLT Benches are functioning in Fifteen (15) cities – New Delhi, Ahmedabad, Allahabad, Amaravati, Bengaluru, Chandigarh, Chennai, Cuttack, Guwahati, Hyderabad, Indore, Jaipur, Kochi, Kolkata and Mumbai, with numerous benches handling a huge influx of cases.
- In exercise of the powers conferred by section 410 of the Companies Act, 2013, the Central Government constituted the National Company Law Appellate Tribunal for hearing appeals against the orders of the National Company Law Tribunal with effect from the 1st day of June, 2016.
- The NCLT and NCLAT also act as the Adjudicating Authority and its Appellate Tribunal under the IB Code, 2016.
- The NCLAT is also the Appellate Tribunal for Competition (Anti-Trust) Law Matters.

Why Company Secretaries Need to Learn Advocacy Skills?

- To represent client(s) before the NCLT or NCLAT, a CS must have good advocacy skills and the knowledge of the relevant provisions of the law as well as good drafting skills, command over language and mannerism to present pleadings etc.
- Without the aforesaid skills, a CS will not be able to represent the case of client before the NCLT or NCLAT in an effective manner which may result into negative results for the client(s).
- It is necessary for a CS to learn the art of advocacy or court craft for effective delivery of results to their client(s) when they appear before any tribunal or quasi judicial body.
- Apart from the legal side of the profession, advocacy is often useful in negotiations, drafting agreements, deeds, other documents, etc.
- Better the knowledge of a CS, the better their advocacy skills and the greater their impact.

Essentials of Good Advocacy Skills

- Based on individual traits and experiences, everyone has a particular style and unique approach to solving problems.
- Qualities and skills develop and acquire flexibility with experience.
- However, the common characteristics of good Tribunal advocacy which have remained constant over all the years are:
 - Passion and Enthusiasm both at time of preparation and presentation.
 - Assertive disposition and right communication.
 - Knowledge of all laws, rules and regulations associated with the case.

Preparing and Delivering Effective Advocacy before the Tribunal

- **Understand the Tribunal's jurisdiction, rules and procedures:**

Develop a comprehensive understanding of the Tribunal's enabling legislation, the applicable rules of procedure and any relevant regulations, policies, guidelines or practice notices. It is also important to respect case-specific instructions or processes as directed by the Tribunal. Referring to past decisions of the Tribunal may provide further guidance in relation to, for example, matters of jurisdiction, procedure to adduce evidence, filing etc.

- **Prepare thoroughly:**

Thorough preparation typically involves interviewing witnesses, researching facts and law, refining written and oral arguments, dissecting opposing counsel's submissions, identifying not only the strong points of your case but also the weaknesses and determining how to address those weaknesses, and preparing witnesses for questioning.

- **Develop a Strategy:**

This will ensure that the submissions are well organized and convincing. The evidence needed to establish the various elements supporting the theory of the case, and how that evidence will be introduced should be well strategized.

- **Use clear and concise language:**

Keep it simple. Plain language works best. The most effective submissions (oral or written) are clear, logical and convincing presentations of the relevant facts and arguments.

- **Written submissions:**

When filing written submissions, remember: less is more, make them crisp and to the point.

- **Evidence:**

Most Tribunals have a significant amount of discretion to determine its own procedures and is not strictly bound by the general rules of evidence, provided that it follows the rules of natural justice.

- **Closing Argument**

The closing argument is essentially a preview of what you want the decision to say. Focus should be on explaining how the facts and the law combine to allow the Tribunal to adopt the theory of the case.

Other Points to be Kept in Mind

- **Client Screening:** The first step when approached by a potential client is to decide whether to agree to represent the client in the particular matter. Before accepting representation, you should obtain as much information as possible to determine whether you can undertake the work required competently, effectively, and responsibly. This process of client screening can go a long way to avoiding many of the situations that result in malpractice claims. Conflict checks should be done at this stage.
- **Case analysis:** In doing so, the following factors should be considered:
 - Do the facts of the case support proceeding with the case?
 - The counsel's expertise and experience with similar cases.
 - Time availability to handle the case.
 - The "gut" reaction to the client and the case.
 - The prospective client's attitude toward the case.

- **Establishing Realistic Expectations:** After the screening process has been completed and a decision to represent the client has been made, the counsel should discuss the merits and problems of the client's case with the client. Any guarantees to the client regarding the outcome of the case should be strictly avoided. The counsel should convey verbally and in writing (*via* an engagement letter) the following to the client:

- The issues involved with the case.
- The problems regarding the case.
- The economics of taking the case to court or settling the case.
- The client's obligations throughout the case and any specific requirements of the client.
- The estimated time frame for case resolution.
- The process involved in pursuing the case.

- **Duties to the clients**

- To defend the client, not to judge the case or cause of the client.
- To bring on record all facts, not to misrepresent facts, to present all facts which are material and have a bearing on the issue under consideration
- To be punctual, methodic and systematic
- To raise proper preliminary objections whenever warranted and ensure that they are disposed of properly, by the forum concerned.

- **Other Skills required for Representation before Tribunals**

- Knowledge of substantive and procedural law relating to the legislation concerned.
- In depth understanding of court procedure and appellate mechanism and regulations and rules governing the above.
- Practical/ hands-on experience in appearance before the forums concerned and putting forth arguments and advancing contentions.
- Ability to summarize arguments and skill in presentation of the case effectively before the presiding officer/ judicial officer
- Knowledge of compilation procedure in relation to appeal petitions, paper books, annexure, case law citations, and material documents relating to evidence to be appreciated by the concerned forum.
- Advancing counter arguments, improvising of arguments impromptu etc.
- Coordinating with lead counsel.
- Upholding the interest of the profession concerned, by conducting oneself as a member of an honorable profession in a dignified manner .

Drafting and Conveyancing – Meaning

- Drafting, in legal sense, means an act of preparing the legal documents like agreements, contracts, deeds, petitions, etc. Drafting may be defined as the synthesis of law and fact in a language form.
- Conveyancing is an art; an art of drafting deeds and documents whereby any right, title or interest in an immovable property is transferred from one person to another.
- Both the terms “drafting and conveyancing” provide the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another, whereas “drafting” gives a general meaning synonymous to preparation of drafting of documents.

Importance of Drafting and Conveyancing to Professionals

Importance of drafting and conveyancing for a company executive could be well imagined as the company has to enter into various types of agreements with different parties and have to execute various types of documents in favour of its clients, banks, financial institutions, employees and other constituents.

General Principles of Drafting

- A draftsman, in the first instance, must ascertain the names, description and addresses of the parties to the instrument.
- He must obtain particulars about all necessary matters which are required to form part of the instrument.
- He must also note down, with provisions, any particular directions or stipulations which are to be kept in view and to be incorporated in the instrument.
- Duty of a draftsman is to express the intention of the parties clearly and concisely in a technical language.
- Consider as to whether those intentions can be given effect to without offending against any provision of law.
- Each pleading/ clause should work with the other paras without making anything redundant, repetitive or illegal.
- Must note down the important requirements of law which must be fulfilled while drafting complete instrument on the subject.

- Validity of document in the eye of law cannot be ignored and at the same time the facts which should be disclosed in the document cannot be suppressed.
- Knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the applicable law are not violated or avoided.
- Further, a company being a legal entity, must necessarily act through its authorized agents. A deed, therefore, should be executed by a person duly authorized by the directors by their resolution or by their power of attorney.
- The draftsman must keep his eye on the rules of legal interpretation and case law on meaning of particular words and choose his phraseology to fit them.
- All schedules, enclosures or annexures etc. shall be properly attached to the instrument referred therein.
- Outline the contents of the instrument before taking up its drafting.
- Get the draft vetted by the expert to ensure its legal fitness.
- The instrument, after drafting, should be self explanatory.
- The text of the instrument should be divided into paragraphs.

Fowlers' Five Rules of Drafting

According to Fowler, “anyone who wishes to become a good writer should endeavour, before he allows himself to be tempted by more showy qualities, to be direct, simple, brief, vigorous and lucid.”

The principle referred to above may be translated into general in the domain of vocabulary as follows:

- Prefer the familiar word to the far fetched (familiar words are readily understood).
- Prefer the concrete word to the abstract (concrete words make meaning more clear and precise).
- Prefer the single word to the circumlocution (single word gives direct meaning avoiding adverb and adjective).
- Prefer the short word to the long (short word is easily grasped).
- Prefer the Saxon word to the Roman (use of Roman words may create complications to convey proper sense to an ordinary person to understand).
- Always prefer active voice to the passive voice in the drafting of documents.

General Principles of Drafting - Some Dos'

- Reduce the group of word to single word;
- Write short sentences and avoid complex construction of sentences;
- Express the ideas in simple words and avoid unnecessary repetition;
- Prefer the active voice to the passive voice;
- Choose the right words; avoid the use of the words “less than” or “more than”. Instead use the words “not exceeding” or “exceeding”.
- Know exactly the meaning of the words and sentences you are writing;
- Put yourself in place of reader, read the document and satisfy yourself about the content, interpretation and the sense it carries.
- When clause in the document is numbered it is convenient to refer to any one clause by using single number for it.

Drafting of Deeds

- The term 'Deed' generally means a instrument by which rights and/ or liabilities between two or more is created, altered, modified etc.
- The usual parts of the deed are as follows:

Description of title of the deed;

Particulars of Parties to the deed;

Place and date of execution;

Recitals;

Testatum;

Consideration;

Receipt clause;

Operative clause;

Representation and warranties;

Severability;

Jurisdiction;

Other Miscellaneous Clauses;

Annexures and Schedule.

- A deed should be written in clear and concise language;
- Don't use complicated language;
- Purpose of the deed is to be achieved;
- Deed should be free from ambiguity;
- Proper stamp duty is to be paid on the deed;
- If registration of deed is to be required then the same is to be done.
- Rights and liabilities of the parties in the deed should be clearly defined

Pleadings

- Pleadings generally mean either a plaint or a written statement. The main objective behind formulating the rules of pleadings is to find out and narrow down the controversy between the parties. Drafting of plaints, applications, reply/ written statement require the skills and knowledge of a draftsman. These should be drafted after looking into the provisions of law so that no relevant detail is omitted.
- The present day system of pleadings in our country is based on the provisions of Civil Procedure Code, 1908 (CPC) supplemented from time to time by rules by High Courts of the States.
- Order 6, R. 1 of the CPC defines pleadings as either a plaint or written statement.

Pleadings – Fundamental Rules

- As per the provisions of Order 6, R. 2 of CPC:
 - Every pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved;
 - Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is conveniently, contained in a separate paragraph.
 - Dates, Sums and numbers shall be expressed in a pleading in figures as well as in words.

Pleadings before NCLT & NCLAT

- National Company Law Tribunal Rules, 2016 provides the manner and procedure for filing a case before the Hon'ble National Company Law Tribunal (NCLT).
- The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provide the manner and procedure for filing before the Adjudicating Authority (at present NCLT).
- The formats for Appeal from the Company Law cases, Insolvency and Bankruptcy Law cases, and Competition Commission of India (CCI), are all filed with NCLAT in the manner prescribed.

Petition Structure before NCLT

- Particulars of the Petitioners/Applicants and Respondents;
- Jurisdiction of the Bench;
- Limitation, if applicable;
- Facts of the Case;
- Relief sought;
- Particulars of Bank Draft evidencing payment of fee for the petition made

Pleadings – Written Statement Requirement

- The respondent is required to file written statement (Reply).
- When the respondent appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleading.
- Respondent is to examine the petition very carefully and to see whether all the particulars are given in it and whether the whole information that he requires for fully understanding the claim and drawing up the defence is available.

Pleadings – Drafting of Reply/ Written Statement

- One has to deny the averment of the plaint/ petition which are incorrect, perverse or false.
- Attach relevant correspondence, invoice, challan, documents, extracts of books of accounts or relevant papers as annexures while reply is drafted to a particular para of the petition.
- The reply to each of the paras be drafted and given in such a manner that no para is left unattended. The pleadings are foundations of a case.
- In every pleading, one must state specifically the relief which the party is claiming from the tribunal or forum.
- Nothing should be suppressed from the Court/ Tribunal.

Court Crafting

- Court craft is a popular word which means the art or craft of conducting the affairs of a court.
- Craft would imply the skill, technique or ability of performing a task.
- “Tribunal Craft” would be an appropriate term to describe the art of understanding the functioning of Tribunals and the objectives for which they have been established and thereby effectively representing clients and Tribunals and winning cases.
- It is mandatory to know the court craft for effective results.
- Court craft is learned when we enter the practicing side of the profession.
- It is a valuable and lifelong skill worth mastering.

Appearance – General Rules

- Maintain a respectful attitude towards the Courts.
- Do not influence the decision of a Court by any illegal or improper means.
- Do not act or plead in any matter in which one has any pecuniary interest.
- Preparation before presentation of the case.
- Carefully read the petition, provisions of law and judgements.

Appearance – Rules for CS

- **The dress code for Company Secretaries**
- Male Members:
Navy Blue suit and white shirt with a tie (preferably of ICSI) or navy blue buttoned-up coat over a pant or navy blue safari suit
- Female members:
Saree or any other dress of a sober colour with a Navy Blue jacket.
- Members in employment: may wear the dress/uniform as specified by the employer for all employees or if allowed the aforesaid professional dress.
- Practising Company Secretaries: appearing before any tribunal or quasi-judicial body should adhere to dress code if any prescribed for appearing before such tribunal or quasi-judicial body or if allowed the aforesaid professional dress.

Appearance – General Rules

- Jot down relevant points on a separate sheet of paper together with relevant pages of the compilation;
- Keep copies of judgements to be relied ready for the Court and for your opponent(s).
- Act in the best interest of the client;
- Act in accordance with the client's wishes and instructions;
- Take instructions from client in advance with respect to alternative reliefs.

Appearance – Verbal Argument

- The goal of oral argument is to convince the Tribunal/ Appellate Authority that your client should prevail.
- The key to a successful oral argument is thorough preparation. No matter how smooth a speaker you are, your argument will not be successful if you are unprepared.
- Be prepared to answer questions concerning matters in the record.
- Be clear on what you are asking the Tribunal to do and the broader ramifications that may follow.
- Try to avoid distracting mannerisms that might divert the attention of the bench.

Mistakes that Spoil a Good Brief

- **Ignoring the Other Side's Best Arguments**

The point of writing a brief is to help the judge arrive at the correct conclusion (i.e., the one you are advocating). You cannot do that without addressing the other side's best arguments. Give the judge the tools to do grapple the other side's arguments.

Ignoring the other side's best points suggests that (i) you cannot rebut them or (ii) you were not clever enough to see them coming.

- **Take Unreasonable Positions**

The most elegant argument in the world will not do you any good if you advance it in support of an unsustainable position.

General Tips on Drafting of Pleadings

- State facts, not law, but state all facts and material facts.
- Do not state or quote verbatim the contents of statutory provision – suffice to mention the section number when relevant.
- All evidence which are material and have a bearing on facts may be referred to in the pleadings.
- Grounds of appeal should be direct and to the point, bringing out all the weaknesses in the impugned order, supported by citations wherever available, by giving the law report reference.
- Statement of facts and grounds of appeal should be sequentially numbered and the relevant references to exhibits prominently stated.
- All Exhibits or Annexure references should be given in the form of an index.
- Copies of all documents should be legible, and typescripts to be used wherever the Photostat copies are not clear.
- Pleadings should be signed, verified in the prescribed manner, dated and place of execution mentioned clearly.

- The counsel should enclose his Power of Attorney/ Authorization of Appearance to the pleadings to bring himself on records of the appellate or other forum.
- The proper stamp duty to be paid on the P/A in the form of a non-adhesive stamp duty, i.e., stamp paper to be used
- Impugned order to bear court fee, wherever prescribed
- Attested orders to be attached to the appeal petition, when law requires the same, or an affidavit from the litigant that all the copies are true copies of the original.
- Fee concerned payable under law to institute the appeal to be paid by means of a Treasury Receipt challan or by a demand draft when permitted by law.
- Paper books to be prepared in required number of sets, paginated, serially numbered, annexure, indexed and filed with the presentation form/ covering letter of the counsel.
- Scrupulously adhere to the rules/ regulations of the concerned appellate forum while preparing the pleadings.
- Deliver the concerned number of sets to the appellate authority and the opposite side and ensure that no chances are taken in this regard.
- Maintain an extra set or two with the party concerned or with the office, to ensure that the same is produced to assist the court or the other side when required.
- Judgements which are relevant may be kept handy or attached to the paper book.
- The language employed should be polished

- The draftsman may employ language of the law, to distinguish the language from that of the layman and give the pleadings a flourish of its own
- Pleadings should not be scandalous, vexatious or frivolous, which are liable to be struck-off by the court.
- It is advisable to make a rough draft and cross-check it.
- Employ the words and expression suitable to the forum concerned, e.g., Ld. Assistant Commissioner/Ld. Commissioner, Hon'ble Tribunal, His Lordship Mr. Justice..... who decided the case held thus..... and so on.
- At the end of the pleadings, give a summary of the relief sought and if it is an appellate proceeding, pray for relief under the caption prayer etc.
- Spell check and grammar check the pleadings and written statement and ensure that no mistakes appear whatsoever
- Get all necessary documents signed by the client.

General tips on Arguments at hearing

- It is important to ensure that arguments are addressed in a coherent manner, consistent with the written pleadings, that the adjudicator or the presiding members/ judges are disposed to hear the case with patience.
- The counsel should bear a sober countenance and a mark of dignity about him while addressing arguments and ensure that at no stage should the presiding officer be offended or arguments unnecessarily stretched beyond a point.
- When the judge has seen your viewpoint and his demeanor shows that he is inclined to agree with you, show your mark of gratitude and take your seat (if arguments are addressed standing in court)
- When the opposite side is asked to answer a law-point or put forth his case, do not interrupt, make notes and when your turn comes traverse every point to which you object.

- Take preliminary objections at once, before the opposite side begins his case, if you are for the Respondent in appeal.
- Ensure that copies of case laws are handed over in advance to the court master and the opposite side, in a case compilation duly paginated with exhibits marked.
- While arguing a case, voice modulation makes a lot of difference to the person hearing you and opposing you. Therefore this art should be practiced effectively
- If you desire you may present a written synopsis of the case based on the original statement of facts and grounds of appeal already on record, before commencement of arguments, which would assist the court and the opponent equally.
- Carry your own books, manuals, statute references, dictionaries etc., to court and never take chances, since the bar room library may be locked, or a cupboard with a particular volume required may be locked or a particular decision may be mutilated in the library etc.
- Never leave things to chance, when it comes to references to circulars notifications of yester years. Adequate copies of these should be carried to hand over the same to the presiding officer / opposite side, as many a time the court may not have a library as well equipped as yours.
- Your demeanor and comportment is of paramount significance and so are your opening remarks, concluding remarks and sentence construction during the course of addressing the Bench
- Commence your arguments with the opening sentence. May it please Your Lordships / Honour(s) e.t.c

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- Commence your arguments with the opening sentence. May it please Your Lordships / Honour(s) etc.
- Maintain the same style of address throughout your arguments.
- Bow before you take your place at the Bar and after completing your case, when you enter the court hall and leave the same.
- Be firm and courteous to your junior instructing counsel if you are the lead counsel, and never allow the junior to address the court, without the special leave of the court.