

# Strategic Legal Writing: Preparing Persuasive Documents

by

**Eugene Meehan, Q.C.\***

Chair, Supreme Court of Canada Practice Group  
Lang Michener LLP, Ottawa

\*Lang Michener LLP  
300 – 50 O’Connor Street  
Ottawa, Ontario K1P 6L2  
Tel: (613) 232-7171  
Fax: (613) 231-3191  
*emeehan@langmichener.ca*  
[www.supremecourtlaw.ca](http://www.supremecourtlaw.ca)

## TABLE OF CONTENTS

<b>Introduction: This isn't a paper.....</b>	<b>1</b>
<b>"Positioning" — What Ad Agencies Do.....</b>	<b>1</b>
Implications for legal writing – keep it simple .....	2
<b>Know - and write - to your audience .....</b>	<b>2</b>
Communicating to a new audience .....	2
Rise to the challenge.....	3
Know your audience .....	3
Think like a judge.....	3
Write it for the judge that's going to read it.....	4
When your client is a child .....	4
7 habits of effective advocates: one judge's perspective .....	4
<b>The Basics of Writin' Good: Some General Overall Rules.....</b>	<b>5</b>
Legal writin' versus ordinary writin': one purpose – think tactically, write strategically .....	5
Look at how things look .....	6
Reader-friendly writing .....	6
Run-on sentences. Big words.....	7
Writing too much .....	7
Legalese: drop it.....	7
Avoid long paragraphs: one-breath rule .....	7
Use transitions .....	7
Structure sentences strategically .....	7
Good writing: reader feels smart. Bad writing: reader feels dumb.....	8
Beware the acronym.....	8
Avoid formulaic qualifiers and phrases.....	9
Not using the word "Not" .....	10
Nothing is absolute .....	10
Write with colour.....	10
What are you going to call them? .....	10
Always put yourself first .....	11
If it doesn't help, don't say it.....	11
Write visually.....	11
Tell a story.....	11
Making your story work.....	12
Tell your story in the present tense.....	12
Point-first writing: don't write it like a mystery novel.....	12
Find a theme .....	13
Write your theme down.....	13

Stay true to your theme.....	13
What, where, when, why? .....	13
Use a thesaurus. Make a list of synonyms.....	14
Dates: When to, when not to .....	14
Logic – 5 ways of building it .....	15
Beware of clichés .....	16
The importance of the analogy.....	16
Be realistic – maybe there’s another side to this .....	17
Be credible.....	17
Adverse authority: put it in and deal with it .....	18
Argue less, persuade more .....	18
Don’t overstate your position.....	19
Let go of the little stuff.....	19
The passive voice.....	19
Caring is contagious.....	20
A word on page limits .....	20
Caselaw — give the court a break.....	20
Be selective in what you cite.....	20
Only include necessary quotes.....	20
Citation, “at p. •” .....	21
Check your work: float it by someone else .....	21
<b>The Factum.....</b>	<b>21</b>
The importance of the factum: central document, more important at appeal than oral argument .....	21
Purposes of the factum: before, during, after.....	22
Opening: crashes, first page, Tim Horton’s.....	22
Avoid common opening statement blunders .....	23
Purpose of the overview: grab attention, road map .....	23
Your opening paragraph — by definition you’ve only one chance to make a good first impression .....	24
No-No’s of openings – rid your opening statement of taboos .....	24
Cultivate credibility.....	24
Be brief.....	24
Organize and highlight things for the judge.....	25
Be real, don’t be academic .....	25
Table of contents and why headings are important .....	25
The facts shape the outcome.....	25
Frame facts to fit theme.....	26
Difference between lawyers & Judges at a trial/motion .....	26
Craft your facts .....	27
Take the moral high ground.....	27
Give the judge the question.....	27
Drafting points in issue.....	27
Make your issues clear.....	27
Deep, not surface issues.....	28

Limit the issues – Abide by the Rule of Three .....	28
Make it work.....	28
Write your arguments “on the back of an envelope” .....	28
Memorandum of Argument: build it around your theme.....	28
Don’t hold anything back for oral argument — this isn’t Hollywood .....	29
The appellant’s factum: courts of appeal often presume trial judge got it right.....	29
The respondent’s factum: stand-alone document.....	29
Play your own game .....	29
And if you’re going to the C.A./S.C.C. ....	29
Conclusion: Make sure there is one .....	30
Conclusion: Relief requested.....	30
Conclusion — Option #1: Tell the court why.....	30
Conclusion — Option #2: Answer your own questions.....	30
Conclusion — Option #3: Finish where you began .....	30
Costs .....	31
<b>Conclusion: if it’s worth doing.....</b>	<b>31</b>
<b>Selected Bibliography .....</b>	<b>32</b>

## **INTRODUCTION: THIS ISN'T A PAPER**

This isn't even a paper (and deliberately so). It's simply a list of practical points our Supreme Court Group in Ottawa uses to strategically revise what someone else has written as a first draft, or to draft from scratch. There's nothing worse than reading someone else's writing about writing. Hopefully the points below reflect a practical, no-nonsense summary of some of the more effective tactics of written advocacy.

That being said, many lawyers believe they fulfill their role by simply delivering information to their clients or to the court in a written form. All one has to do is write it down. Right? (Write?) They write as if their sole function is to act as a conduit for the raw data their research has unearthed. But lawyers must be more than walking photocopiers and note-takers. They should be accomplished writers – meaning strategic writers, tactical writers. It's important to be strategic and be a tactician on your feet in the courtroom — it's just as important to be strategic and be a tactician on the page. It takes hard work, but the finished product is worth the effort — we all know a long dictated letter is a lot easier to do than a short one (and we can all recognize a far-too-long dictated letter too).

## **“POSITIONING” — WHAT AD AGENCIES DO**

1. Ad agencies (or at least some of them) position a product in a marketplace, or position a manufacturer in a marketplace. They sometimes succeed (sales up), fail (sales down), or come out even (sales flat — which may be a win — market share maintained).
2. An advertising “correspondent” (Mike Tennant) on CBC Radio’s “Definitely Not The Opera” says the following about his profession. Does any of this apply to us as lawyers in how we write? How we write an opinion letter, a motion record, a factum?
  - “Does positioning work? The short answer is yes.
  - But no amount of positioning/marketing will change your mind about:
    - An issue
    - A candidate
    - A headache remedy
    - A salad dressing.
  - What positioning can do is:
    - Soften an image
    - Sharpen it

- Create a favourable first impression
  - Boost momentum
  - Help slow it
  - Trip up a forceful argument with a well-placed “yes but”, or a well-placed practical proverb or analogy that a ‘normal’ (i.e., non-lawyer/non-judge) person can connect with
  - Distract attention from a weakness
  - Draw attention to a strength.
- The key is that the ad must have some basis in perception, and perception changes quickly.
  - An effective ad is one that doesn’t change simply because the public is privy to the strategy/intent behind it.
  - In fact, the more you know about the nuts and bolts – the more you understand what it’s getting at — the thinking behind it, the more likely are you to be affected and persuaded by it.”

### **Implications for legal writing – keep it simple**

3. Keep your message simple. Ideas still need to be big, but to be effective they must be clear and focused. Try to be simple enough that a stranger, preferably even a non-lawyer, can read and understand it.
4. The best argument is that which seems merely an explanation. Essentially, you know you have created a strong marketing argument when your prospects respond by saying, “That makes sense”.

## **KNOW - AND WRITE - TO YOUR AUDIENCE**

### **Communicating to a new audience**

5. Changes in information communication processes present new challenges to legal writing. Persuasive legal writing must consider and tackle the challenges presented by the impact of television, computers and e-mail.
6. Take for instance, the effects of television on communication:
  - Passivity** – Information is delivered in a painless, non-challenging, pureed form with built-in techniques that motivate audiences to stay tuned.
  - Inattention** – One listens with barely half an ear.
  - Lack of Continuity** – Commercials and daily-life interruptions teach us to expect information in small bites (bytes?).
  - Tight, succinct stories** – One and one-half minutes per news story.

**Visual support** – Words are no longer the message givers; pictures tell the story.

**Remote-control dismissal** – We know how much power we have to dismiss anyone or anything that does not please us right away.

**What’s “Prime”** – Teaches what is worth listening to and staying tuned into and what is considered boring, unimportant, or without mass appeal.

### **Rise to the challenge**

7. Use language that is clear, explicit, succinct, all-inclusive, and most of all, visual, so your audience can picture what you are talking about. Make your audience see, experience, and become a part of what you are talking about.
8. Give colour, ambience, and action – for example:  
 Not “the car was moving in a northwesterly direction,”  
 But “the red car left the curb and started up Main Street toward the McDonald’s on the corner”  
  
 Not “and in the files one finds”  
 But “when he opened the drawer marked ‘last year’s accounts,’ he found – nothing”.

### **Know your audience**

9. For example, if you’re applying for leave in the S.C.C. (but the same goes for other courts and tribunals too) time permitting, scan applications over the last several years; what got accepted and what got rejected in the area of your appeal. It’s possible to get a clear read on the kind of cases the Court is interested in. If there is a pattern, make sure you draft your application such that it relates to one of these “hot” issues. A related consideration is whether leave has already been granted to a similar case whose coattails you can ride in on. If you’re going fishing for trout, don’t bait your hook with pike food. If you know who the judge(s)/members of tribunal are going to be, do a QL search of their name; that may give you an idea of how the wind’s blowing.

### **Think like a judge**

10. Ted Williams always got into a pitcher’s mind days before a game. Similarly, when writing a factum try and think like a judge. Change places with your judge, and keep three things in mind:
  - in a judge’s day many matters are competing for his or her attention;
  - an initial first impression is critical in the ultimate hard sell to the Court;

- an appeal court will not afford the same luxury of time that you enjoyed at trial.
11. David Lepofsky: "... your ultimate job ... includes making the judge's work simple, or at least easier. Remember that the judge or judges who will be reading your factum are overworked. They are operating under a lot of pressure and stress. Their job gives them the unenviable task of having to read piles and piles of legal materials. Much of it is likely drab and dreary, if not outright boring."
  12. Therefore, as David Lepofsky says, you must "write to engage".

### **Write it for the judge that's going to read it**

13. At a basic level (and this can be played out directly or indirectly in a careful way) the story has to make sense to the judges in terms of their personal perceptions and attitudes about life. It has to be consistent with what they think is right and what they think is wrong.
14. Understand that strategically you have to make the judge part of your thinking processes – part of your team. The "deal" you propose to him/her must work for both parties, you and the judge.

### **When your client is a child**

15. When was the last time your audience viewed the world through the eyes of a five-year-old? Success at trial occurs when your audience think, feel, and react from a child's perspective. Form your arguments by using language and questions in such a way that guides your audience to think like children.
16. For instance, consider posing questions like, "do you know a child who must sit in a wheelchair on the front porch and watch the neighbourhood children play their games?"

### **7 habits of effective advocates: one judge's perspective**

17. Justice John Laskin of the Ontario Court of Appeal says that because of time limits on oral arguments and the increased importance of the factum, counsel must "uncomplicate" their arguments and go to the core of the case. To advocate their cases effectively, Justice Laskin suggests counsel follow these 7 guidelines:
  1. **Begin Well** – The overview paragraph should tell the court in a nutshell what the case is about. The goal at this point is to turn the judge into a smart reader of the rest of your factum.
  2. **Point First** – Always start with the point you are trying to make – not the details of your argument. Readers and listeners remember

and absorb information better when they first know why it matters and how it is relevant.

3. **The Right Spin** – Although the appellate standard of review limits judicial intervention on findings of fact, the facts still matter a lot. For instance, in family law situations, broad legal standards such as “reasonable needs” and “inequitable” and “economic hardship” gives the judges a lot of leeway to apply the facts to achieve a fair result.
4. **Know Role of Court of Appeal** - The most effective technique for respondents is to show that the trial decision rests on findings of fact, and that these findings are reasonably supported by the evidence. To get the court to intervene, you must identify a major error that affects the justice of the case. In other words, satisfy the “who cares?” principle.
5. **Anticipate the Court’s Concerns** – The most effective advocates are the ones who can notionally trade places with the judge, anticipate what is likely to concern the court and then provide a persuasive answer
6. **Be Reasonable** – Don’t overstate your case because nothing will destroy your credibility more than overstating your position. In fact, there is something disarmingly effective about an appropriate concession.
7. **Polish Your Argument** – Find the time to edit and rewrite your factum – clear thinking is the product of a lot of tinkering.

## THE BASICS OF WRITIN’ GOOD: SOME GENERAL OVERALL RULES

**Legal writin’ versus ordinary writin’: one purpose – think tactically, write strategically**

18. Legal writing differs from other sorts of writing in that it is singularly directed toward persuading the reader (a judge, tribunal member, arbitrator or other decision-maker) to accept a certain position. Everything that counsel submits should put into the reader’s mind the information and motivation necessary for a favourable decision. Appeal books, factums and everything else are devoted to that goal and nothing less. You’re not writing to entertain, show how smart you are, how many authorities you can cite for one proposition, or even writing to inform. You’re writing to **persuade**.
19. Consider your client’s overall **vision** (whether that be a corporate/institutional vision or perhaps a more personal family law one)

and your client's **objectives** in the litigation. Ensure no disconnect between vision and objectives.

### **Look at how things look**

20. Lawyers spend much of their time thinking about what to say and how they should say it. Relatively little time is spent considering how best to organize the material on the page. A good-looking document will help the reader get the point quicker and retain it longer. A well-organized easily-accessible reader-friendly document is simply more persuasive. Cornflakes in grey boxes don't sell well.

### **Reader-friendly writing**

21. Legibility (easy reading) is fundamental to readability (easy understanding). Good legibility is determined by font choice and the relationships between type size, line length and spacing (between letters, words, lines and paragraphs). An effective document is one that conveys your message well and quickly. A number of simple, but important, rules of thumb include:
- don't rely entirely on standard prose block paragraphs. Look for alternative methods of formatting (e.g., bullets) that make it visually easier for the reader;
  - use sensible paragraphing and numbering. Don't go further than a third level of breakdown (e.g., 1(a)(i)). If you feel the need to go beyond that then chances are you've overused headings (you aren't drafting legislation after all). Avoid roman numerals — they look too much like a foreign language;
  - if the items listed have no rank ordering, then bullets are preferable to numbered lists;
  - never use a font smaller than 10 or larger than 12 for the main body of the text;
  - avoid lines that are entirely capitalized — their uniform size makes them difficult to read;
  - avoid underlining — it's a throwback to the days of typewriters. Use italics or boldface to add emphasis;
  - there is evidence that justified right margins make text harder to read, so it may be best to use ragged right margins for factums;
  - align headings to the left in a larger, bolded font. Use a smaller bolded font for sub-headings;
  - readers like "white space", and makes the rest more easily absorbed.

### **Run-on sentences. Big words.**

22. Most lawyers write sentences that are too long. Usually small words work better than big ones.
23. And lawyers, when writing, use words and phrases that nobody (including them) would ever use in normal verbal communication – as Justice Laskin has noted, people:
  - don't talk about their motor vehicles, they talk about their cars
  - don't talk about where they're employed, they talk about where they work
  - don't talk about utilizing the proceeds of their remuneration to construct a summer dwelling place, they talk about using what they saved to build a cottage.

### **Writing too much**

24. Words are key to persuading. Too many words and the reader tunes out. Too few and they think you're hiding.

### **Legalese: drop it**

25. Don't clutter your writing with long literary language that only lawyers can be bothered to decipher. Legalese may now be second nature to you, but it sounds *exclusive* rather than *inclusive*.

### **Avoid long paragraphs: one-breath rule**

26. A good rule of thumb is that a paragraph should not be so long that it cannot be read aloud in one breath (generally 2-3 sentences). If you have more to say, then break the ideas into separate paragraphs.

### **Use transitions**

27. In order to create and maintain a flowing argument, you must consciously incorporate connectives in your writing.
28. Forget topic sentences – bridge your sentences by creating “echo” links. This connective technique allows you to cause a figurative echo in your reader's mind by repeating an earlier used word. A subtler technique may be to use a derivative of an earlier word.

### **Structure sentences strategically**

29. Use the beginning of a sentence to express ideas that are already stated, referred to, implied, safely assumed, familiar, predictable, [or] less important.

30. Use the end of the sentence to express the least predictable, the newest, the most important, the most significant information, the information you most certainly want to emphasize.

**Good writing: reader feels smart. Bad writing: reader feels dumb**

31. Augustine Bunell used to say, “Reading is not a duty, and has consequently no business to be made disagreeable.” Someone (including a judge) won’t read sluggish disagreeable prose. Deliver the goods simply, quickly, efficiently. Write in ordinary simple-to-understand language. If you’re writing it and it makes you feel smart, it probably makes the reader feel dumb. Good writing makes the reader feel smart. Bad writing makes the reader feel dumb.
32. Use ordinary day-to-day language. Don’t use any of the following (unless you’re applying for a government grant):
- synergy
  - paradigm shift
  - value-added
  - core competency
  - strategic alignment
  - outside the box
  - win-win
  - empowerment
  - leverage
  - benchmark
  - knowledge base
  - collaborative consultation.
33. “Easy reading is damn hard writing”. The opposite’s true too: if it’s easy to write, it’s probably hard to read.
34. Bottom line: good legal writing looks as if someone other than a lawyer has written it.

**Beware the acronym**

35. Although trendy, acronyms can become the nemesis of clear writing. Overuse, or unclear/confusing use, defeats the purpose of pithy and unobtrusive shorthand. The best approach is to use them sparingly and rely on shortened versions of terms that will be immediately obvious to

the reader (e.g., the Committee on Plain English becomes “the Committee” and not “the C.O.P.E.”).

### **Avoid formulaic qualifiers and phrases**

36. They’re a waste of space and add nothing to the quality. Classic examples include:

- The appellant respectfully submits... (there’s only so much respect even a judge can absorb)
- For all the foregoing reasons...
- We would submit...
- Essentially...

Get rid too of verbose/fancy-dancy intros/fillers:

<b><u>Instead of</u></b>	<b><u>Use</u></b>
At that point in time	Then
By means of	By
By reason of	Because
By virtue of	By
For the purpose of	To
For the reason that	Because
From the point of view	For
In accordance with	By
In connection with	About
In favour of	For
In order to	To
In relation to	About
In terms of	In
In the event that	If
In the nature of	Like
On the basis of	By
Prior to	Before
Subsequent to	After
With a view to	To
With reference to	About
With regard to	About
With respect to	About
The fact that she had died	Her death
He was aware of the fact that	He knew that
Despite the fact that	Although
Because of the fact that	Because
In some instances	Sometimes
In many cases	Often
In the case of	When

In the majority of cases	Usually
It is not the case that he	He did not
During the time that	While
For the period of	For
There is no doubt but that	No doubt
Whether or not	Whether
The question as to whether	Whether
Until such time as	Until
Attend at	Go to

### **Not using the word “Not”**

37. Avoid using the word “not” whenever you can. For some reason, lawyers invoke phrases like: “the witness did not remember” or “the car did not hit the tree”. It’s simpler and more elegant to say: “the witness forgot”, “the car missed”.

### **Nothing is absolute**

38. Absolute expressions (*all, always, every, invariably, never, none, totally, undoubtedly*) are rarely accurate and should be used lightly.
39. Absolutes tend to trigger a reader’s perversity; once told that, “the campaign was a total failure,” many readers begin to hunt for signs of partial success.
40. So avoid what Justice Laskin calls “false intensifiers” such as “certainly,” “clearly,” “absolutely”, which actually weaken rather than strengthen whatever you’re saying.
41. Understatement works much more strategically than overselling.

### **Write with colour**

42. Action verbs and deliberately colourful phrases make a difference. For example, a look might be a glance or a glare or a sidelong stare. Likewise people don’t just say things, they shout , mumble , or stammer.
43. Use affirmative language, not negative language. Just about anything that can be said in the negative, can be said in the positive – the brain has trouble accepting negatives.

### **What are you going to call them?**

44. Avoid lazy/easy short forms like appellant/respondent. The reader will never get into the story if the main players are faceless.
45. Don’t make it a struggle for the reader to figure out who is who. Maybe use the word that describes who they are/what they do — doesn’t have to be complicated:

- Landlord, Tenant
- use the parties' real names whenever possible
- if the names are long, shorten them but don't take them out
- personalizing a case may be important for the appellant or the respondent - for example, the respondent in a family law case might use the parties' first names to limit the story to the four walls of their house and thereby show that the issue is not of 'national importance' per the S.C.C. leave to appeal standard.

46. What you call them (or don't call them) is a strategic decision.

### **Always put yourself first**

47. Whether you're the appellant or the respondent, it's always better to present your own position first with contrary positions cast as responses to your own. Generally, drafting in this way tends to make the opposing position seem more suspect since readers tend to be critical of the adequacy of any response.

### **If it doesn't help, don't say it**

48. Don't quote or summarize your opponent's argument. Familiarity doesn't breed contempt, it may breed acceptance, so the less the judge hears about the other side's case, the better.
49. Likewise if you're the appellant, don't repeat a lower court's adverse findings of fact. These facts only emphasize potential problems with your case.

### **Write visually**

50. Pictures, charts and diagrams can really help to communicate. Particularly for legislation or complex corporate relationships, consider a foldout chart.

Options include:

- diagram, in phases, of how matter in litigation occurred
- sequencing, in diagram/written "box" form of what happened
- chart of key relationships/key factual findings you want the judge to rule on/make.

### **Tell a story**

51. Every file (that is absolutely **every** file) has a story. The basic elements of every story are:
- the beginning, the middle, and the end;

- a compelling point of view;
- simple active sensorial language (i.e., language that evokes sensory images);
- consistent use of the present tense;
- judicial participation.

### **Making your story work**

52. Writing a story isn't easy (if it was we'd all be John Grisham and wouldn't have our day jobs). Figure out what your story is, map out the main components, write it down and then build the necessary legal elements around that framework. Include a couple of simple elements:
- setting your story in a particular time and place;
  - including a human element;
  - some familiar details;
  - simple, ordinary and disarming language;
  - visual words;
  - an event of personal importance that everyone can relate to;
  - an absence of argument (the reader doesn't want to feel like you are manipulating them down a garden path).

### **Tell your story in the present tense**

53. The present tense is really important. Telling the story in the past tense turns the reader into an observer. In contrast, the present tense makes them a participant, wondering what's going to happen next.

### **Point-first writing: don't write it like a mystery novel**

54. Make sure you clearly and explicitly state your **point** or proposition before you start; try and develop or discuss it. Avoid writing the factum (or even a paragraph) like a mystery novel, focusing on the details upfront and revealing only the point or the conclusion at the end. The reader shouldn't have to figure it out. You're trying to persuade the reader to accept your argument, not show how clever you can be at telling a convoluted story. It's better to provide context before detail, tell the reader off-the-bat what issue or idea or topic you're going to discuss in the paragraph, articulate it in the first sentence (usually our conclusion or submission on that issue) and the remainder of the paragraph is there to support your position.

**Find a theme**

55. Every case should have a central theme or themes that evolve from one or more issues. It's your job to find that **central** theme of your case that on the facts and applicable law creates for us a strong arguable case. It's your job to strongly articulate such a theme in your factum — and the job of opposing counsel to puncture that theme or frustrate it and take it apart.
56. The most powerful themes go beyond one idea and lock two opposing ideas in conflict, creating a dialogue. For instance "the defendant valued money more than safety." In such instances, it is not the moral of the story that involves the reader so much as the struggle between the two opposing points of view in the theme.
57. Today, the media communicates information in sound bites. The theory of a case cannot always be reduced to a sound bite, but, when it can be boiled down to a phrase or a few sentences that can be reiterated from jury selection, through the presentation of evidence and in closing, it can be very effective.
58. If others are participating, make sure you have a unified theme.

**Write your theme down**

59. For best effect, write down your theme before you start drafting your document. Writing the story or the theme in a paragraph before you start writing lets you add and subtract facts to make the more compelling parts of that story last longer and shorten or delete parts that are simply boring or not in your favour. Start "this case is about...".

**Stay true to your theme**

60. In order to be persuasive, the evidence and arguments have to make sense and fit into the framework that your reader has adopted. If you don't stay consistent to your theme, the reader will be confused and lose the thread of your argument.

**What, where, when, why?**

61. Any case is more than just a pile of facts or a pile of law. The reader wants to know the four W's: what, why, when, where. Particularly for a leave to appeal, we have to demonstrate interest: motive, character, cause and effect, our personal notions of responsibility for our conduct — things like this tie stories together and develop a theme. For example, a case about contract law is more than simply about a contract; the emotional heart of the case could be our side's reliance on a broken promise. Therefore words like *believing* the promise, *trusting* the person, *counting on*, *relying*, paint the verbal picture.

**Use a thesaurus. Make a list of synonyms.**

62. Oftentimes, your theme can be tightly articulated by a pithy phrase or even a single word. Reduce your story to a workable outline or a set of topical words and use a dictionary that has synonyms to come up with other words that say the same thing in different degrees of shading, and use these words in painting the picture.

**Dates: When to, when not to**

63. Lawyers often add in dates because it makes them feel precise or feel clever. But don't fall into the trap of writing it for yourself – write it for the reader that's going to read it. Usually dates are just clutter.

eg: “ On Oct. 15, 2005 , Dr. McTavish informed the Plaintiff the pain running down the back of her leg was from a pulled hamstring. On Nov. 16, 2005, the Plaintiff reported ongoing leg pain, and Dr. McTavish became concerned there was a more serious issue. The Plaintiff returned to Dr. McTavish on Nov. 30, 2005, Dec. 7, 2005, and Dec. 20, 2005, each time complaining that her leg pain persisted. Dr. McTavish referred the Plaintiff to an orthopedic surgeon on Dec. 23, 2005, and on Jan. 10, 2006 the surgeon diagnosed a herniated disc that was impinging on the Plaintiff's sciatic nerve.”

64. Here's the basics on when to, when not to, do the date thing:
- dates distract
  - if the issue has no time-sensitive legal imperative, drop the date
  - putting in unnecessary dates gives the reader the cue that there is a time-sensitive issue, then stay on the lookout for that phantom point, and when they realize they've been fed a false impression they get pissed off
  - putting in a date that's not key diverts the reader from what you want them to be looking for – all you've done is create your own red herring.
65. So how do you establish the chronology of events without using dates? Here's how:
- focus on the temporal relationship between important events by using words and phrases that quickly capture that relationship for the reader
  - use simple words indicating time, such as: then, after, before, following, later
  - avoid fancy alternatives like: subsequent to, prior to, at which point in time

- instead of referring to raw dates, use units of time, such as: hours, days, months, years.

66. Here's the original example, re-written:

"Dr. McTavish originally told the Plaintiff the pain running down her leg was from a pulled hamstring. But a month later she reported ongoing leg pain, and Dr. McTavish became concerned that there was more serious injury. The Plaintiff returned to Dr. McTavish three more times in the next two months. Each time complaining her leg pain persisted. After the last visit, Dr. McTavish referred the Plaintiff to an orthopedic surgeon, who diagnosed a herniated disc that was impinging on the Plaintiff's sciatic nerve."

Did you miss the dates, understand what happened, and when?

67. What if you're writing about a time-sensitive legal issue, and you need to include specific dates, what to do then? Simple best way: calculate the relevant time frames for the reader and state them explicitly.

Three examples:

- "On October 23, 2005, two weeks before the close of Discoveries, defence counsel sent a letter seeking dates for the Plaintiff's examination. Almost two weeks later, on November 4, 2004, the Plaintiff's lawyer responded with two available dates."
- "The Plaintiff learned that she had a possible negligence claim in March 21, 2005 which triggered the six-month discovery period against the City Defendant. She served her Statement of Claim less than 5 months later, on August 4, 2005."
- "The Court ordered the Defendant to produce the document by February 13, 2005. Nevertheless the Defendant remained uncooperative – producing the disputed Records more than two weeks beyond the Court's deadline, on March 3, 2005."

Doing the math for the reader not only makes the sequencing of events more obvious, but gives you the opportunity for strategic advocacy: to drive home a point in a way you could not with raw dates alone.

### Logic – 5 ways of building it

68. **Logic** is important to your outcome: 1 therefore 2, X therefore Y, negligence therefore damages. People think this way. Five options to build logic include:
- (1) **Analogies** – analogies anchor the reader to a particular idea/concept, or maybe then move them sideways to where you want them to move to. See immediately below.

- (2) **Headings** – headings that make a positive statement and develop a logical flow. See below.
- (3) **Conclusion** – have a conclusion that picks up from your opening. Creates a circle. See below.
- (4) **The one-two punch** – ie: 2 follows 1. eg: George Bush ( or possibly one of his speechwriters Michael Gerson) post September 11: “Great sorrow has come to our country. And from that sorrow has come great resolve”.
- (5) **(Rolling) Triads** – ie: 2 follows 1 and 3 follows 2 ( ideally with sequential bridging, repetition of a key word to bridge from 1 to 2, repetition of a different key word in 2 to bridge from 2 to 3). eg: George (or Michael): “ Whether we bring our enemies to justice or bring justice to our enemies, justice will be done”.

### **Beware of clichés**

69. Expressions worn thin by countless repetition are not persuasive and should be avoided.
70. Everyone’s familiar with the expressions below – familiarity is precisely the problem:
  - Add insult to injury
  - Bitter end
  - Blind as a bat
  - Turn for the worst
  - Pitch black.

### **The importance of the analogy**

71. As a practical reality, most people reason from analogy based on their experience. People decide what *feels* right. Many non-lawyers (and judges) cannot easily accept a new proposition unless it’s a logical extension of an already-held view. A simple analogy can go a long way toward convincing your listener, either to confirm what they already accept, or move one step sideways from an accepted position.

For example:

- Jehovah’s Witness religious rights case:  
“A blood transfusion these days is like skating on thin ice”
- A firm of actuaries faced with a Discipline Committee, one of whose members is from a competing firm:  
“The legal equivalent of a cow wandering into an abattoir”

- Products liability:
    - “Letting the industry self-regulate according to a voluntary set of standards and guidelines is like letting a shark guard the fish tank/Colonel Sanders babysit the chickens”
    - “A smoke detector that’s rendered ineffective by an ordinary short-circuit is like a life preserver that keeps you afloat until it gets wet”
    - “Before the factory worker could loosen her grip, her hand was yanked into the machinery like a rag doll through an old wringer washer”
  - After a rotary power lawnmower had hurled a rock into the eye of a 13-year-old, the analogy used was:
    - “Toro had sent a four-wheel cannon into a residential neighbourhood”
  - Where the disability of a person or machine is alleged to be small:
    - “Like a clock that only loses 5 minutes per hour”
    - “Like a chemical plant near your home with only a small leak”
    - “A scar is only small on someone else’s face”
72. If your analogy or your theme is meaningful and strong – easy to remember, easy to repeat helps too – some judges may use it in post-appeal deliberations to convince others who are on the fence.

**Be realistic – maybe there’s another side to this**

73. Every case has two sides. If you close your eyes to the other side’s case your client will suffer. Your credibility will be affected if you ignore, or worse deny, indisputable problems.
74. A good strategy is to be the first to reveal the damaging information. Do not describe it as a “problem”, call it a “challenge”. Tell the judge before your adversary stands up and does it for you. Sounds simple, but be **fair** — it builds reputation.
75. Justice Laskin: “Nothing instills trust more than facing up to your weaknesses. Better it come from you than from your opponent. The right concession not only enhances your credibility, it is itself a persuasive technique and, I may say, an underused technique. A well-timed concession does not merely narrow the focus of the appeal, which judges like, but also makes your strong arguments seem even stronger.”

**Be credible**

76. Treat every brief and factum as a chance to build your and your firm’s credibility with the court.

77. Not every lawyer is brilliant, but every lawyer can be credible. A lawyer who acknowledges in a strategic way the obvious challenges of their case up front and with candor is going to be more credible throughout the proceeding. Likewise, nothing will alienate the court more than the appearance that you're distorting the plain meaning of a case or deliberately overlooking an important case or finding of fact.

**Adverse authority: put it in and deal with it**

78. Confront applicable adverse authority expressly and early — not merely because you're an officer of the court, but because it's more strategic to do so. The other side will probably cite it anyway, and even if they don't, the clerks will find it, or the judge may know it. Not all precedents are created equal. Even if you are faced with adverse authority, consider whether your case is one where you should ask the court to make new law.
79. Any adjudicative contest is not just about your client, your facts, your legal argument – it's about you. Politicians get elected because people like them, trust them, and believe them. In the 2004 U. S. elections the polls showed that most voters believe the country was headed in the wrong direction under Bush, yet they re-elected Bush. The reason for the counter-intuitive result is when it came down to the actual voting, they simply trusted Bush more that they did Kerry. Personally I think lawyers win cases for the same reason. So:
- above all, tell the truth
  - be up front about your challenges (they're 'challenges', not 'weaknesses')
  - summarize facts accurately
  - don't overstate
  - if you say case X stands for proposition Y, make sure it does; double-check the case to ensure there are no qualification.

For example, your client's an alcoholic. Tell the judge/jury/C.A. about it before your opponent does. Sure you're fearful of bringing up ugly stuff about your client, but better you than your opponent. The decision-maker is less likely (particularly at first instance) to hold a 'weakness' against you if you're up front about it – in fact, they may respect you for being forthright.

To go back to Bush, remember his famous statement: "You may not agree with me but you know where I stand". Saying so built trust and confidence. Worked for him.

**Argue less, persuade more**

80. The harder you argue, the less persuasive you are. The reason is simple. The more you press, the more you hype, and the more you wheedle and

urge, the more sales resistance you create and the more you start to sound like the guy from Fred's Water Beds on Saturday night TV.

81. Real persuasion takes place when the reader thinks the conclusion is his or her own idea. Your job as a writer is to help them find the right ideas in themselves that will lead them to decide the case your way.

### **Don't overstate your position**

82. Understatement usually works better than overstatement, e.g., saying the other side "completely misrepresented and misstated X" is generally not effective (unless that's actually a fair and accurate representation — and even if it is, maybe it's strategically better for the reader/listener/judge to figure that out himself/herself).

### **Let go of the little stuff**

83. Minor misstatements of the law or facts by the Court below aren't going to win your appeal (appeal courts aren't professors grading papers). Don't set out to just whack the Court below or judge below, rather identify major mistakes and criticize the *rationale* of the lower court's decision.
84. Don't whack the other side either — use courtesy (especially when it's tough to do so) as a strategic tool. Advice given to Ed Bayda, now Chief Justice of Saskatchewan, during his first summer job (selling "waterless" cooking pots door to door): "People buy things from people they like".

### **The passive voice**

85. Generally the *passive* voice should be *avoided* in favour of the active voice: for example, the case was decided by the court — **passive**; the court decided the case — **active**; the statute will be enacted by Parliament — **passive**; Parliament will enact the statute — **active**.
86. However in situations where you are strategically trying to be tactful, the *passive* voice is OK:
- when the identity of the subject is in the punch of the sentence and you want it to go at the end.  
**Active:** The president of the corporation shredded the papers.  
**Passive:** The papers were shredded by the corporation's president.
  - when the identity of the subject is irrelevant and you want to omit it.  
**Active:** Parliament enacted the statute in 1982.  
**Passive:** The statute was enacted in 1982.
  - when the identity of the subject is unknown.  
**Active:** Somebody mysteriously shredded the files.  
**Passive:** The files were mysteriously shredded.

- when you want to hide the identity of the subject.

**Active:** X regrets to inform you that he has misplaced the file.

**Passive:** X regrets to inform you that your file has been misplaced.

### **Caring is contagious**

87. If you're passionate about what you write, about what you say, other people will be too.

### **A word on page limits**

88. Page limits imposed by the courts (e.g., 20-pages for a S.C.C. Leave to Appeal factum) are NOT an invitation to cram as much as you can onto each page. This tactic defeats the spirit of the page limit, aggravating the judge and ruining the visual impact of your submissions, and maybe ruining your case.

### **Caselaw — give the court a break**

89. Give the court credit for knowing a little law. Many factums don't seem to recognize that there's a core body of legal cases and principles well known by the courts. These foundational cases are referred to so frequently that every member of the court is intimately familiar with them. In those situations, there's no need to spend three pages of your factum painstakingly articulating the basics of the law.

### **Be selective in what you cite**

90. Only cite the leading case, or, at most, the two leading cases. Safety lies in authority not in numbers. Citing 15 cases for the same point of law tells the judge one of three things:
- there isn't any real authority for your position
  - you can't tell the difference between important and pointless precedents (or else you haven't thought enough about which cases really help you)
  - you're simply the kind of person who likes making lists (and probably list what clothes you put in the dryer in case you lose a sock).

### **Only include necessary quotes**

91. People hate to (and usually don't) read long block quotations. Paraphrasing is usually a better strategy than direct quotation. If you must include a quote, the best approach is to knit it directly into the paragraph, or at a minimum:
- keep it really short
  - edit (use three periods...when you edit out)

- add emphasis.

### **Citation, “at p. •”**

92. Obviously double-check all cites. But also highlight (yup, with a yellow highlighter) each key extract/sentence in your Book of Authorities/ Authorities tab so the judge doesn’t have to search for your point. An (acceptable and better) alternative to highlighting is sidelining and underlining the master copy — so you only do it once, it gets copied through to all other copies, and you don’t have to highlight in multiplicity.
93. **Always** when citing a case put the actual page/paragraph that your point/quote is on — just giving the judge the standard cite with what page the case starts on and forcing him/her to go read the whole case to find a single sentence is a real judicial piss-off factor — if you’re in for a vasectomy why insult the guy (or gal) with the knife?

### **Check your work: float it by someone else**

94. Two lawyers (or, better, a lawyer and a non-lawyer) are generally better than one. So, after you’ve done a few drafts, let someone who isn’t familiar with the case have a look at it. Listen, don’t talk, or explain – if you have to talk or explain, whatever you’ve written is not good enough. A farmer friend of mine says, “When I talk I learn nothin”.
95. We all (lawyers in particular) think we know what someone is going to say when they’re partway through saying it — we don’t, because they haven’t said it yet.
96. John Steinbeck: “No one wants advice — only corroboration”.
97. If the reader doesn’t understand your points, stumbles over a phrase, or can’t cut through a thicket of verbiage, you’ve failed as a writer.
98. Don’t be shy to redraft – and redraft till you get it right. No serious writer gets it right the first time — why should you? Louis Brandeis: “There’s no such thing as good writing — only good rewriting”.

## **THE FACTUM**

### **The importance of the factum: central document, more important at appeal than oral argument**

99. The importance of the factum is obvious when you consider it’s the central document at all stages of an appeal or motion. Practically speaking, the factum is quickly becoming more important than oral submissions. Given their heavy workload and the limited time allotted for oral arguments, there is a natural tendency among judges to come to a preliminary

judgment upon the basis of written submissions. Therefore, the factum is a critical first opportunity to make a favourable impression on the court. Many cases can be won and lost on the basis of the factums alone.

100. Justice Ruth Bader Ginsburg of the U.S. Supreme Court: “As between [factum] and argument, there is a near-universal agreement among federal appellate judges that the [factum] is more important – certainly it is more enduring. Oral argument is fleeting – here today, it may be forgotten tomorrow, after the court has heard perhaps six or seven subsequent arguments.”

**Purposes of the factum: before, during, after**

101. Your factum must serve different purposes at the different stages of the appeal process:

**A) *Before Oral Submissions***

- the factum should make a strong first impression that the court will carry throughout the rest of the appeal process;
- the factum should introduce the issue and the law to the members of the court, who may or may not be familiar with the precise legal problem you are addressing;
- the factum is the Court’s principal source of information about the case and the law.

**B) *During Oral Submissions***

- your factum should act as a blueprint and reference that the Court can follow during your oral argument;
- the factum should be carefully structured to coincide with your oral argument such that it minimizes the need for note taking by the judges who are then free to follow the logical flow of your argument.

**C) *After Oral Submissions***

- if you have done everything properly, the factum will act as a memory aid for judges writing reserved judgments;
- ask yourself whether the court is likely to reserve judgment in your case.

Oftentimes, judges will lean heavily on a good factum when writing their decision.

**Opening: crashes, first page, Tim Horton’s**

102. Mr. Justice Estey used to say most plane crashes happen during take-off. Likewise your opening.

103. “The first page rule”. The first page should say it all. Every factum should contain an overview statement (no longer than one paragraph) that tells the reader what the case is about, who did what to whom, what the issues are, and outlines our position on those issues.
104. Tell your story in human terms, as if you’re explaining this to your fifteen-year-old kid brother or sister (my own personal technique is to close the office door, think I’m in a line-up at Tim Horton’s, I’ve just ordered a medium double double, and cashier says “so what’s your case about?”).

#### **Avoid common opening statement blunders**

105. Your opening statement becomes a filter through which evidence introduced will pass. Evidence consistent with this filter becomes more reliable, credible and acceptable. Evidence that conflicts with it will be questioned or discounted. Do not squander this opportunity for persuasion by using clichéd and banal introductions that turn the judge(s) off or render them neutral/ politely disinterested.
106. Avoid the following:
  - “This is a very simple case.” This phrase makes your audience feel that they are inept, ignorant, or naïve.
  - “What I say is not evidence.” This statement is easily misinterpreted, leading your audience to think what you say in the opening statement is not important or, worse yet, not true.
  - “The first witness we will call is....” Concentrating on the details of documents or testimony may obscure the central issues in the case. This approach generally bores the judge and causes them to lose interest.
  - “The evidence will show....” Any words repeated often enough can be irritating. Avoid this cliché altogether and just tell the story.

#### **Purpose of the overview: grab attention, road map**

107. The overview statement is important for two reasons:
  - first, it’s your opportunity to grab the reader’s attention and explain what your case is all about. Capture the essence of the case in words that will excite the interest of the court. Arguments and evidence are much easier to absorb and retain if the reader is provided with the appropriate context.
  - second, it provides a road-map for the rest of your factum helping the reader to understand the points you’re going to make.

**Your opening paragraph — by definition you’ve only one chance to make a good first impression**

108. Having the reader’s attention is a necessary precondition for persuasion. A strong opening statement will grab the reader’s immediate attention by:
- leading with strength. Hit the reader between the eyes with your strongest argument right away;
  - express the message clearly and in a way that the reader will have no trouble understanding;
  - structure the presentation within the framework of the reader’s knowledge, beliefs and attitudes. People approach problems from a certain perspective, it is your job to make sure that your factum fits into that judge’s perspective.

**No-No’s of openings – rid your opening statement of taboos**

109. Some Do’s and Don’ts (mainly don’ts):
- Don’t use disclaimer language in the beginning of your opening
  - Omit filler language
  - Don’t be defensive about weaknesses in your case. Accentuate the positive, but still deal with your “challenges”.
  - Don’t overstate your case
  - Keep your personal opinions to yourself
  - Don’t argue
  - Don’t discuss law
  - Use caution when discussing evidence of questionable admissibility.

**Cultivate credibility**

110. In your introduction and fact section, your goal is to build credibility and motivate the judge to rule your way.
111. Credibility comes from the details. Be respectful, be detailed and be reasonable in the relief you request.
112. Weak arguments will hurt your credibility. By showing a judge that you are willing to lead her into error, you reduce the trust that you want the judge to have in your other arguments.

**Be brief**

113. Most factums are too long. At rock bottom, most cases really aren’t that complicated. Select the facts, events and legal arguments likely to control the outcome of the case (and leave the rest out).

114. Too many factums are puffed up with all sorts of extra arguments. Generally, this reflects the uncertainty of counsel as to which issue is likely to grab the Court's attention and the misguided belief that the client's interest is best served by presenting every conceivable argument, like you're a chef at a hotel putting on the biggest breakfast brunch possible to impress the locals. The put-everything-in tactic generates a large number of 'throwaway' arguments — and may tempt the Court that's what should be done with the rest of your factum.

### **Organize and highlight things for the judge**

115. David Lepofsky: "Experienced judges know that much of the voluminous paper we pile on them turns out not to matter. They are no doubt eager to know what is most important to read, so that their scarce preparation time is not wasted. I have sometimes wondered whether we might be wisest to include in the factum a notation to the judge, such as 'Important Things to Read.' ... However, there are other, less blunt ways of conveying the message – for example, by noting in your factum 'the witness whose testimony is critical on this issue' or that a case is the 'leading binding authority setting out the test that governs on this issue.'"

### **Be real, don't be academic**

116. Don't be academic. Write your law review article after you've won the case and changed the law. The key to a good factum is: clarity, brevity and simplicity. No-one has ever been convinced by an argument they didn't understand (no matter how brilliant it may have been).
117. A good legal writer will create a context in which the reader can think, not a context where they're told what to do, or worse, what to think.

### **Table of contents and why headings are important**

118. In all likelihood, your table of contents will be read first. The purpose of the table of contents is to help the reader navigate through the body of your submissions. Therefore, your headings and subheadings summarize your position; mirroring the logical flow of your argument.
119. Choose headings and subheadings (so they'll show up in the table of contents) that:
- make a positive statement
  - develop a logical flow.

### **The facts shape the outcome**

120. All courts are powerfully influenced by the equities of the case, by the needs of real people. The facts have an overriding influence. The facts really are the hardest part of the factum to write because of our training as

lawyers. Writing legal argument is almost easy, but the facts are where most of the time should be spent. After all, the facts are the context within which the legal issues are decided and that factual context is therefore highly determinative of the overall outcome.

121. Justice Laskin: “Judges strive to do justice between the litigants, and almost always the facts show where justice lies. I call this the paradox of appellate advocacy. Despite ‘patently unreasonable,’ despite *Housen*, and despite deference to discretionary decisions, the **facts** matter far more than the law in most appeals.”

### **Frame facts to fit theme**

122. Scenes or units of action that illustrate the theme are more engaging than narrative summaries of facts or courtroom recitations of evidence.

### **Difference between lawyers & Judges at a trial/motion**

123. When lawyers are getting ready for a trial/motion (i.e. any court appearance that’s first instance) their focus is often on the facts – because that’s what they know the best, that’s what they’ve learnt from the case, that’s what their client has told them. In comparison, judges tend to focus more on the issues – what are the legal issues, what does that judge have to decide, what’s that judge’s job.
124. As Justice Helen MacLeod says: “Lawyers are fact-driven, judges are issue-driven”.
125. It will help you if you help out the judge by organizing your material (and your trial strategy) around issues instead of just facts. For example:
- set out at the very beginning what the issues are
  - organize and arrange your facts/documents/exhibits/discoveries around those issues
  - in most cases your facts etc won’t chronologically fall into the right issue-compartment as you put your evidence in, so think of ways you can signal to the judge that this fact goes to this issue, that document to that issue, etc.
  - ideally, do a chart that visually maps it out, that connects each fact etc. to each issue – that connects the dots for the judge...
  - another option is to hand up to the bench a “written issue statement” at the beginning of a trial (which Justice MacLeod always specifically asks for).

**Craft your facts**

126. Although readers generally best remember stories told in chronological sequence, it **may** be more strategic for us not to start at the beginning but start with the most significant event in the case (particularly if we're the respondent).

**Take the moral high ground**

127. The statement of facts provides us with a rare opportunity to tell the court our client's story and capture the moral high ground. Courts are frequently motivated by a desire to create fairness between the parties, irrespective of the existing law. The key to getting judges to depart from established precedent is a compelling and sympathetic presentation of the facts.

**Give the judge the question**

128. Only one thing matters to the judge: "what's the question I'm supposed to answer?" Until the judge figures that out, he or she is not going to pay much attention to your argument. The key to influencing judges and winning cases is to focus your attention on the key issues as soon as you get in the door. In order to effectively do this, identify the issues early and let everything develop out of that.

**Drafting points in issue**

129. The ability to ferret out the real issues and organize the presentation of evidence and argument according to those issues is indispensable.
130. Some counsel operate under the mistaken assumption that everyone will agree on the principal issue of a case. In reality, the ability to define the issue and thereby control the agenda is invaluable since it's the way that the question is framed that may ultimately determine the ultimate judgment.
131. Don't start with the word "whether". If possible, do *not* ask a question.
132. Weave concrete facts into the way you write the issues, so (if at all possible) you tell the story in miniature.
133. Write the issues so the answer you want is highly suggested — in some cases directly suggested, in other cases it may be more strategic not to be so direct.

**Make your issues clear**

134. Brevity and clarity should be the underlying goals of framing your legal issues.

**Deep, not surface issues**

135. “Deep” issues sum up a case in a nutshell and are therefore difficult to frame but easy to understand
136. “Surface” issues are abstract and require the reader to know more about the case before she can understand it. Consider the following example:
- Surface: Is Continental entitled to summary judgment on Jones’s fraud claim?
- Deep: To maintain a cause for fraud under Ontario law, a plaintiff must show that the defendant made a false representation. In discoveries, Jones concedes that neither Continental nor its agents or employees made a false representation.
137. The surface issue does not disclose the decisional premises; the deep issue makes them explicit.

**Limit the issues – Abide by the Rule of Three**

138. In any appeal, the significant issues cannot number more than three. If you’ve identified more than three critical issues, then you’re wrong (strategically). Few trial judges make more than three reversible errors in a single judgment (but if they do, and do often, you can start your appeal with “This is an appeal from the judgment of Mr. Justice •, but we have other grounds of appeal as well”).
139. Anyway, secondary issues aren’t worth pursuing. If you can’t get the court to bite at your main point, then he or she isn’t going to swallow your second or third string arguments.

**Make it work**

140. Tailor your arguments to what works. Sure, the other side’s case is a piece of garbage. But you know what, the righteous do not always win. If you’ve got the choice to win in your mind or in the courtroom, what would be your choice?

**Write your arguments “on the back of an envelope”**

141. Justice Binnie advises a simple and coherent theory of your case: if you can’t get your points on the back of an envelope then you probably haven’t thought about it long enough. If you’ve followed this advice, it should be easy to summarize your argument in a single page at the beginning of your factum.

**Memorandum of Argument: build it around your theme**

142. Select the main ideas proving your conclusion, then arrange them in such a way that the relationship they naturally bear to one another and to the

overall theme, together with all the main headings and subheadings, drives the reader towards the conclusion we want them to reach.

### **Don't hold anything back for oral argument — this isn't Hollywood**

143. Put all your best arguments into the factum. In the past some counsel would save the best part (or a good part) for oral argument. Today written submissions are much more important than they once were and so this is no longer an advisable strategy (if it ever was). It's possible to overcome an inadequate factum during oral argument but it's an uphill battle. Why put yourself in the position if you don't have to?
144. Jon Fauld's "Series of Dots Theory of Advocacy": in some cases it may be strategically better to hold something back in written argument [**explain verbally**].

### **The appellant's factum: courts of appeal often presume trial judge got it right**

145. The appellant should never forget that appeal courts often presume the trial judge actually got it right. Since the odds are against you, it's especially important for the appellant to grab the judge's attention immediately and demonstrate that an error has been made.

### **The respondent's factum: stand-alone document**

146. A factum should be a self-contained, comprehensive argument. It should review all of the essential facts, summarize the legal issues and present the arguments in a complete and methodical form. Cross-referencing over to the appellant's factum is a pain in the neck. Give the judge the ability to take your factum home and read it on his/her knee without having to jump around. Even if an authority is in the appellant's factum and you're referring to it, still put it in yours. If you absolutely must refer to something in the appellant's factum, include the full quotation.

### **Play your own game**

147. The respondent isn't obliged to respond to every argument raised by the appellant. Play your own game, don't let the appellant make the rules: just because you're called the respondent doesn't mean you have to respond, or only respond — strategically it may be better not to, or not to all.

### **And if you're going to the C.A./S.C.C.**

148. Justice Charron, when on the Ontario Court of Appeal, pointed out eight methods on how to lose at the Court of Appeal:
1. Don't change gears: don't shift your trial technique to appeal strategy. Assume you lost at trial because the trial judge was clearly deaf, and you now welcome the opportunity to deliver the same argument (but

now louder) to a 3 new hopefully more intelligent members of the judiciary with more acute hearing.

2. Decide to save some good evidence for the C.A.
3. Save a good argument.
4. Fail to object to a trial judge's direction (and vow to "save it up as a ground for appeal").
5. Prepare a lousy factum and hold your brilliance for oral argument.
6. Have a long list of grounds of appeal and mix the good with the not-so-good, so's "hopefully the C.A. will find something wrong".
7. Address an all-female 3-judge panel "Your Lordships" throughout, or better yet, if you agree with a question by one of the female C.A. judges reply "Yes dear" [both have happened].
8. Don't answer questions – it builds suspense.

**Conclusion: Make sure there is one**

149. Make sure there is a conclusion. Don't just end by outlining the relief requested; remind the court why relief is required in your case.

**Conclusion: Relief requested**

150. Occasionally, the relief requested can be tricky. Although there is a tendency to simply ask that the application or appeal be allowed or dismissed, it's obviously worthwhile to carefully consider all of the alternatives before deciding.

**Conclusion — Option #1: Tell the court why**

151. A good closing will encapsulate two or three compelling reasons for the court to adopt your position. In brief, make your conclusions clear and make your reasons explicit. What you are really trying to do is draft the judge's decision.

**Conclusion — Option #2: Answer your own questions**

152. Writing the conclusion is simple if the opening was well-drafted. A good advocate will close by answering the questions posed in the issues section. However, it isn't enough to simply give the answers, a good conclusion will also outline the reasoning that leads inevitably to the answer provided.

**Conclusion — Option #3: Finish where you began**

153. Pick up the theme of your opening. Restate it, refine it, re-develop it. It can build a logical solidity, can close the circle.

**Costs**

154. Oh and one final thing: ask for costs — even at the S.C.C. a surprising number of (non-Celtic) counsel forget to ask for them.

**CONCLUSION: IF IT'S WORTH DOING...**

155. As my mother told me (and your mother told you): “if it’s worth doing, it’s worth doing well”.\*

Eugene Meehan, Q.C.  
Lang Michener,  
Ottawa

---

\* Or as my grandfather would say when I tried to reply to my mother with any sentence beginning with “But” – “Save yeer breath tae blaw on yeer pooridge.”

Selected Bibliography follows from which ideas in this non-paper are drawn, and which can be consulted for further information.

Eugene Meehan, Q.C. – Lang Michener LLP, Ottawa

## SELECTED BIBLIOGRAPHY

### BOOKS

- Aldisert, Ruggero J. *Winning on Appeal: Better Briefs and Oral Argument* (New York: Thomson Legal Publishing, 1992), c. 2, 8.
- Berry, Edward *Writing Reasons: A Handbook for Judges* (Emond Montgomery Press, 1998).
- Butt, Peter & Richard Castle. *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge 2001)
- Cromwell, Thomas. *Preparation of Factums* (Canada Law Book, 1996).
- Greene Ian et al *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Lorimer, 1998).
- Hendricks, Mary. *Court Motions Handbook*, 2nd Ed. (Carswell, 1996).
- Kolb, Harold. *A Writer's Guide; The Essential Points* (Harcourt Brace 1980).
- Meehan, Eugene et al. *Supreme Court of Canada Manual: Practice & Advocacy* (Canada Law Book, 2005), Chapter 10.
- Morton, James C. & Freeman, Michael E. *Written Advocacy* (Butterworths, 2001).
- Morton, James & Iacovelli, Michael. *Procedural Strategies for Litigators* (Butterworths, 1998).
- Mowat, Christine. *A Plain Language Handbook for Legal Writers* (Carswell, 1998).
- Rosenberg, Alvin B. & Huberman, Marvin J. *Appellate Advocacy* (Carswell 1996).
- Ross-Larson, Bruce. *Go It Yourself: A Manual for Everyone Who Works With Words* (New York: W.W. Norton & Co. Ltd., 1996).
- Sopinka, John & Gelowitz, Mark. *The Conduct of an Appeal* (2<sup>nd</sup> ed. Butterworths, 2000).
- Stark, Steven D. *Writing to Win* (Doubleday 2000).
- Stuesser, Lee. *An Advocacy Primer* (Toronto: Carswell, 1990), Chapters 2 and 12.
- Eugene Meehan, Q.C. – Lang Michener LLP, Ottawa

White, Robert B. & Hon. Joseph J. Stratton. *The Appeal Book* (Canada Law Book, 1999).

Zinsser, William. *On Writing Well*, 5th ed. (New York: HarperCollins, 1994).

### Articles in Books , Journals and Conference Materials

Bastarache, Hon. Michel. "Supreme Advice to the Successful Litigator: Advocacy in the Supreme Court of Canada", County of Carleton Law Association, Civil Litigation Updated, Mont Tremblant, Nov. 7, 1998.

Binnie, Hon. Ian. "Random Thoughts About Charter Advocacy", County of Carleton Law Association, Civil Litigation Updated, Mont Tremblant, Québec, Nov. 7, 1998.

Conway, Thomas. "Getting Your Motion" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association-Ontario, 1994).

Cooney, Mark. "The Dating Game", *Trial*, Aug. 2005, p. 60.

Doody, Peter. "Rule 20 Motions - A useful tool for the practical litigator" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association-Ontario, 1994).

Foy, Patrick. "The Factum in Civil Appeals – 1994". C.L.E.S. B.C., May 1994.

Garner, Bryan. "The Deep Issue: A New Approach to Framing Legal Questions" in *The Scribes of Legal Writing*, Vol 5, 1994-95 3-4.

Garner, Bryan A. "Issue-framing: the upshot of it all". *Trial*, April 1997, p.74.

Gilbert, Lyon. "Motions and Pre-trials - The Importance of Preparation" in *Winning in Small Claims Court* (Toronto: Canadian Bar Association-Ontario, 1994).

Ginsburg, Justice Ruth Bader. "Remarks on Appellate Advocacy," 50 S.C.L. Rev. 567, 567-68 (1999).

Koeltl, John G. "Brevity"(2003) 30 *Litigation (Journal of the A.B.A Section of Litigation)*3.

Laskin, Hon. John I., "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums", *The Advocates' Society Journal*, Summer 1999.

Eugene Meehan, Q.C. – Lang Michener LLP, Ottawa

[http://www.ontariocourts.on.ca/court\\_of\\_appeal/speeches/forget.htm](http://www.ontariocourts.on.ca/court_of_appeal/speeches/forget.htm)

Laskin, Hon. John I., "What persuades (or, What's going on inside the judge's mind)", *The Advocates' Society Journal*, June 2004, page 3.

Lepofsky, M. David, "The unsung art of written advocacy: Strategies, tips, and a call for unorthodoxy", *The Advocates' Society Journal*, Summer 2004, page 10.

McElhaney, James, W. "Close with a Big Finish" (November 2002) *A.B.A. Journal* 56.

McElhaney, James, W. "Good words for writing" (May 2002) *A.B.A. Journal* 50.

Meehan, Eugene. "Intervening in the S.C.C." (1994) 16 *Advocates' Quarterly* 137.

Robinson, Sandy. "Injunctions" in *Avoiding Motion Sickness* (Canadian Bar Association-Ontario, 1995).

Rutherford, The Hon. Douglas. "Judging a Summary Judgment Motion: A View from the Bench" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association-Ontario, 1994).

Rutherford, The Hon. Douglas. "Just Write for Reading", C.C.L.A. New Lawyers & Articling Students Group, Ottawa (March 8, 2001).

### **Newspaper/Magazine Articles**

Bailey, William. "Tie Your Case Together With A Good Theme" in *Trial*, (February 2001) 58-63

Bell, Judith. "Avoiding Motion Sickness - Effective Advocacy on Motions" in *Civil Litigation Updated* (Toronto: Canadian Bar Association-Ontario, 1995).

Binnie, The Hon. Ian. "A Survivor's Guide to Advocacy in the Supreme Court of Canada" in *The Advocates' Society Journal* (August 1999) 13-19.

Blair, The Hon. R.A. "Oral Advocacy before Superior Court Judges" in *The Advocates' Society Journal* (August 1999) 26-29.

Blue, Lisa & Hirschhorn, Robert. "Lessons From the Campaign Trail", *Trial*, July 2005 p. 26.

Bobb, Patricia. "Remember the no-no's of openings" in *Trial*, (April 1998)

- Stephen B. Bight. "Developing Themes in Closing Argument and Elsewhere: Lessons from Capital Cases" in *Litigation*, (Fall 2000) 40-44.
- Catzman, The Hon. Marvin. "The Wrong Stuff: How to Lose Appeals in the Court of Appeal" in *The Advocates Society Journal* (August 2000) 3-5.
- Cohen, David. "Writing Winning Briefs" in *Litigation*, (Summer 2000) 46.
- Daisley, Brad. "'Focus' the Key to Winning Cases, Binnie tells Seminar" in *The Lawyers Weekly* (July 21, 2000) 6.
- Drummond, The Hon. Mark A. "Hollywood Help for Opening Statements" in *Litigation News*, Vol. 25 (July 2000) 8.
- Finlayson, The Hon. George D. "Appellate Advocacy in an Abbreviated Setting" in *The Advocates' Society Journal* (August 1999) 22-25.
- Garner, Brian A. "Issue-Framing: The Upshot of it All" in *Trial* (April 1999) 74-76.
- Hamlin, Sonya. "Who Are Today's Jurors and How Do You Reach Them?" in *Litigation* (Spring 2001) 11.
- Keenan, Don. "When a client is your child" in *Trial* (September 2002) 38-40.
- Kimble, Joseph. "A Modern Wish List for Legal Writing" in *Trial* (January 2000) 89-92.
- MacInnes, Norman. "Laskin lists habits of effective appellate advocates" in *The Lawyers Weekly*, (March 1, 2002) 12.
- Maxx, D.T. "How 2,988 Words Changed a Presidency", *Ottawa Citizen*, Oct. 13, 2001, B4-6
- McElhaney, James. "Balanced Persuasion: Let the Facts Characterize the Case, Without Adding Your Spin" in *American Bar Association Journal*, (March 2002) 60-61.
- Nolan, Kenneth. "More Than Just Words" in *Litigation*, (Spring 2001) 66.
- Perdue, Jim. "Starting Strong" in *Trial* (July 2002) 34-36.
- Perlman, Peter. "Analogies in Summation" A.T.L.A. pamphlet, Summer 2000.
- Schneiderman, Simon. "Helping Pleadings Speak Visually" in *Canadian Lawyer* (March 2000) 35-37.
- Eugene Meehan, Q.C. – Lang Michener LLP, Ottawa

Stolley, Scott. "Vital Transitions" in *Writer's Corner*, (May 2000) 61.

Stolley, Scott Patrick. "Aphorisms to Write By" in *For the Defence*, May 2000.

Trognitz, Laura C. "Bench Talk" in *ABA Journal* (March 2000) 56-107.

Vigil, Jacob. "Good Counsel" in *Trial*, (February 2001)109.

Watts, Shelley. "Technology creates winning visual evidence" in *Trial* (September 2000) 68-73.

Vesper, Thomas J., Orr, Richard. "Making time palpable by using per diem arguments" in *Trial* (October 2002) 59.