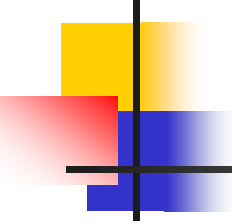


WRITING TO PERSUADE

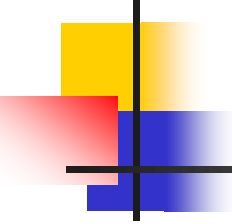
Legal Writing and Written
Advocacy

Queen's Law School
January 2011

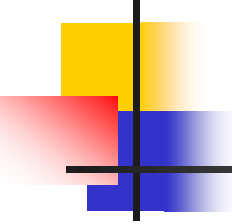


Topics

- Some preliminaries
- The overview
- Organizing the evidence
- Tips for written argument
- Respondents factums
- Relationship between written and oral advocacy

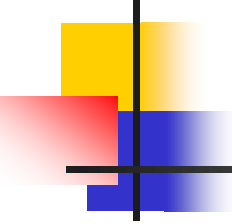


SOME PRELIMINARIES



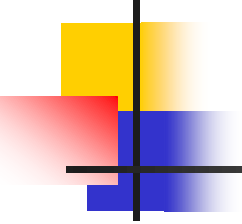
I haven't read my own factum!

- If I knew then what I know now, what I would have done differently
- A factum speaks to judges when they are most open to being persuaded
- A “silent advocate”



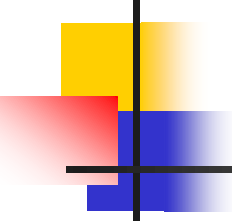
The goal

- Judges see persuasive advocacy differently from the way practising lawyers see it
- See your writing through a judge's eyes



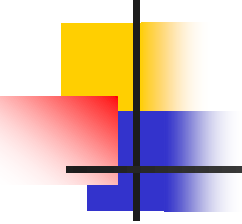
Credibility

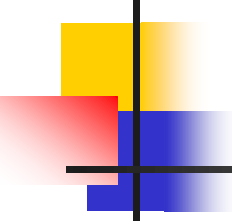
- Aristotle's ethos
- The hidden persuader
- Can you help us find a sensible, reasonable ,workable solution to the problem we must resolve



Judges will trust you if:

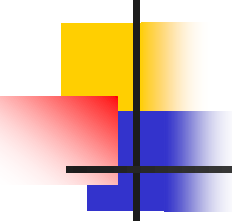
- You are fair to the record and the law
- You face up to your weaknesses and difficulties
 - Manage them; don't ignore them
 - The persuasive power of the right concession

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- You organize the evidence thoughtfully, not for example, witness by witness
 - You do not oversell
 - You avoid conclusory superlatives



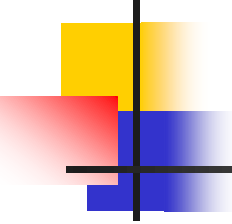
Is there anything the matter with this?

- Rather than accepting as true—as they must---the facts alleged in the statement of claim, the moving parties have instead chosen to infuse their motion material with new, unproven allegations, and have distorted the facts pleaded in the plaintiff's pleading. Even more disconcerting, the moving parties, in blatant disregard of our well-established civil procedure rules, have appended to their material matters that were not relied on by either side in the dispute, and have conveniently misstated the law to conform to their disingenuous theory of the case. This Court should not countenance these tactics and should deny the motion in its entirety.



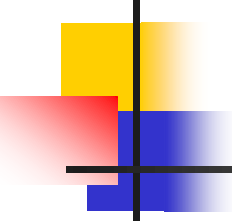
Is this better?

- This case belongs in Ontario.
- The plaintiff is an Ontario resident who was harmed, while in Europe, by false and defamatory statements published in Ontario blaming him for the collapse of an Ontario company.
- The moving parties—two huge multinational conglomerates that do business in Ontario plus an officer of both who was served here—now argue that Ontario is not the convenient forum. Instead, they say that the action should be tried on their home turf in Germany.
- This argument ignores the critical Ontario events animating this claim, bypasses the relevant evidence here, and fails to disclose that these same events and this same evidence continue to be the subject of government inquiry and other civil litigation in Ontario.



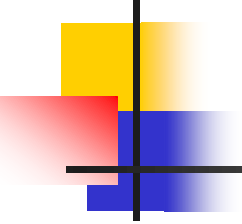
Think before you write

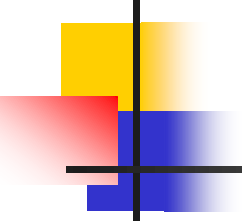
- A theory
- An underlying theme

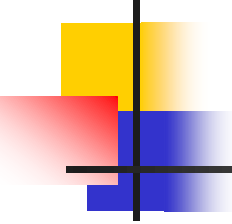


Three questions to ask

- What is the “controlling idea” of your case?
 - Characterize the issue
 - Getting the right answer depends on asking the right question

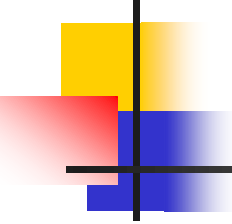
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- Why should your position prevail?
 - A lawsuit is a clash of competing stories
 - The moral high ground
 - The accused did not have a fair trial

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-
- How do I get there?
 - Factual foundation
 - Legal foundation



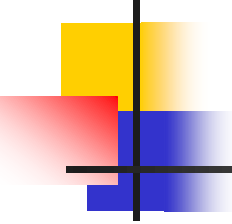
Anticipate the court's concerns

- “The key to successful gardening is thinking like a plant.”
- How will the court react to my argument?



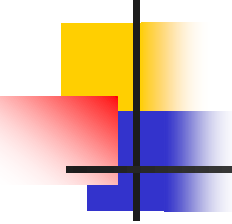
Will a judge be comfortable with this?

- The plaintiff Barbara Smith has a valid default judgment and it is irrelevant that the default was due to the sloppiness of the defendant's lawyer.



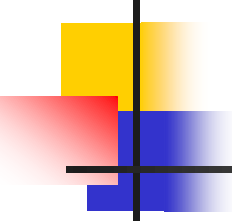
Or this?

- Of course, the court will be concerned that the effect of Ms. Smith's submission to uphold the default judgment will be to deny the defendant her day in court because of a default that resulted from her lawyer's neglect.
- In another case that concern may be decisive. But here it is outweighed by the failure of the defendant, despite having a new lawyer, to show any defence worthy of a day in court with the plaintiff. If it is right to blame the lawyer, the defendant can have her day in court with him. (thanks to Ben Zarnett for this example)



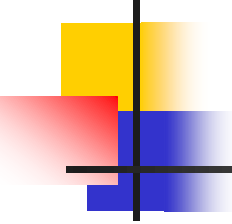
Conciseness is a persuasive strategy

- Time and fear
- The credibility of a good, short factum
- Less is more



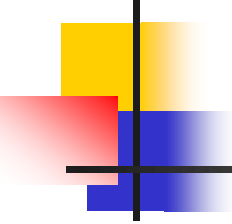
At the sentence level: micro-clarity

- Limit adjectives and adverbs
- Use strong, active verbs
- Vary the length of your sentences
 - Not too many long sentences
 - Average 20 words or less

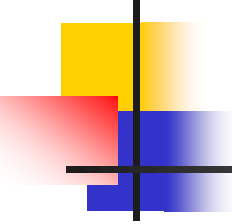


The “who cares” principle

- Not every error by a trial judge matters
- The courage of selection
- The rule of three

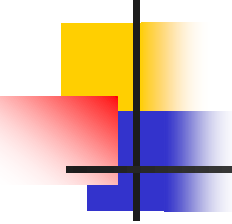


THE OVERVIEW



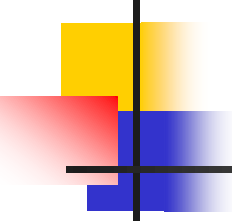
Your argument begins with an overview

- Introduce your legal theory and your theme
- Aim for a page or less
 - Simplify; save the details for later
- Clarify the issues and explain your position on them



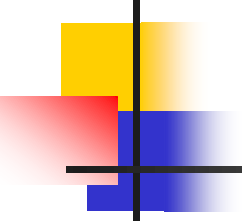
Why do we write overviews

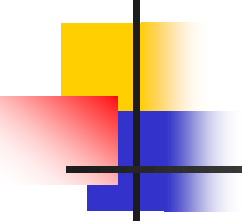
- Give context to the rest of your factum
- Build your credibility
- “Whet the appetite of the judge”

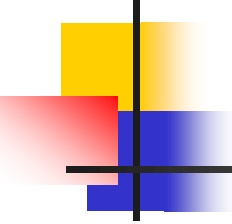


An example (respondent)

- Jim Martin and Sarah Miles are the parents of Emily, now barely three years old. Her parents have never lived together. Since her birth Emily has lived with her mother. Mr. Martin has never given them financial support.
- Emily was born in Atlanta, Georgia. Although Ms. Miles lived in the United States for several years, she has been ordered to be deported. In March, 2004, when Emily was three months old, Ms. Miles moved with her to Kitchener, Ontario, where Ms. Miles' family lived.

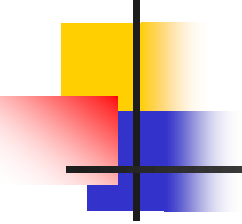
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- Mr. Martin then brought his application under the Hague Convention. He asked that Emily be returned to Georgia where he will seek joint custody of her.
 - The Hague Convention aims to prevent international child abduction and ordinarily requires that custody rights be resolved by the courts of the child's habitual residence. Mr. Martin contended before the trial judge that Georgia was Emily's habitual residence and that her mother had wrongfully removed her from that jurisdiction.
 - Williams J., an experienced family law judge, dismissed Mr. Martin's application. In doing so, he made three critical findings of fact:

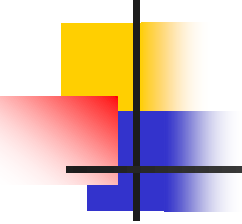
- 
- Immediately before Ms. Miles moved with Emily to Ontario, Emily was not habitually resident in Georgia;
 - At the time Ms. Miles moved to Ontario, Mr. Martin was not actually exercising custody rights; instead, he was merely exercising visitation rights to Emily; and,
 - Mr. Martin later acquiesced to Emily's removal to Ontario.
- To succeed on this appeal, Mr. Martin must show that each of these findings was infected by palpable and overriding error. He cannot do so. Each finding is amply supported by the record. This court should therefore dismiss the appeal.

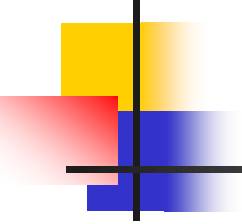


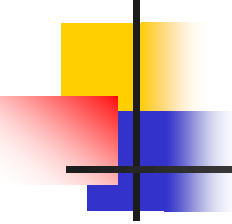
Another example (appellant)

- The appellant, the City of Hamilton, appeals the decision of Jones J, who refused to set aside a registrar's order dismissing its action for delay. The City sued the defendant architects and general contractor for negligent design and construction of a new hockey arena. The arena opened in 1997. Soon after numerous cracks appeared in the ice pad.

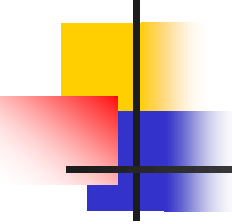
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- The City started its action within the limitation period, and pleadings have been completed. However, the City delayed arranging discoveries until it obtained expert reports substantiating its claim. A status hearing was then scheduled, and unfortunately the City's lawyer forgot to diarize the date, and did not appear. On March 10, 2008, the registrar dismissed the action.

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- Once it became aware of the order, the City moved promptly to set it aside. Still, the motion judge refused to grant the City relief. The City acknowledges that the motion judge's order is discretionary, but submits that he made two errors justifying this Court's intervention.

- 
-
- First, he erred by finding that the City had not adequately explained its delay. In, fact all parties had agreed to postpone discoveries pending exchange of expert reports. Second, the motion judge erred by finding that the defendants were prejudiced by the delay. This case turns on documentary evidence and expert reports, and thus the unavailability of lay witnesses on which the motion judge relied is irrelevant. The City asks that his order be set aside and its action reinstated.

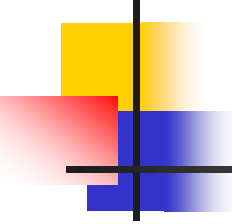


ORGANIZING THE EVIDENCE



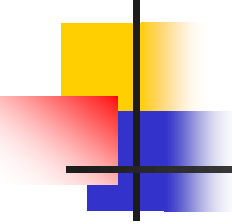
The facts must resonate with your legal argument

- Interaction between facts and law
- The factual context is critical to the fairness and reasonableness of your legal argument
- Justice lies in the facts
 - The law of leeways
 - In most cases, if you write a compelling statement of the facts, the argument will take care of itself



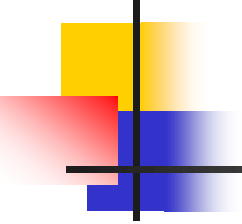
Is the oral amendment to the written contract enforceable?

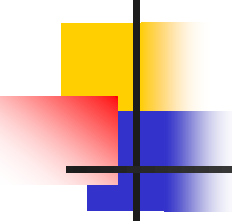
- The trial judge found that after the written contract was made, the parties orally agreed to amend it. But the trial judge was wrong because among the boilerplate terms in the contract was one that said that the contract could only be amended in writing.



Does this change your mind?

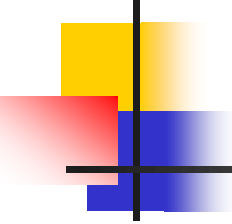
- The parties painstakingly defined in writing—with precision and after legal advice—the terms of their business arrangement. They included a clause excluding previous and contemporaneous oral contracts. Their intention was to define all their rights and obligations in writing. They then included a clause that pointed to the future. If the contract was to be changed, a written contract had to be signed. Nothing less would do.

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-
- Now what did the parties intend by that clause? Consistently with the rest of their dealings, as shown by the contract, they did not want their rights to be left to the uncertainty of who said what to whom, or to the frailties of memory, or indeed to a court to determine what was orally agreed to. They wanted the certainty of writing and they did it by an even-handed clause, one that precluded either party from asserting an oral amendment.
 - The trial judge was wrong to ignore these intentions and give effect to what one side said was an oral amendment. (Zarnett)



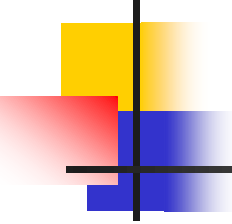
Tips for organizing the evidence

- Three ways to organizing the evidence
 - Witness by witness: avoid unless very simple case
 - Chronological: when what happened when matters
 - Issue-driven: usually more coherent and easier to follow



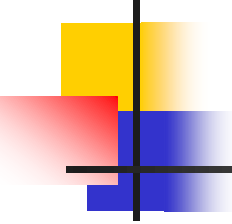
Context before details

- Use headings
- Point first or context sentences to keep the judge on track

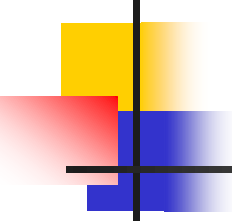


Some final tips

- Always look to cut: make sure every fact has a purpose
- BUT: don't bury facts unfavourable to your position
- White space persuades
 - Long, dense paragraphs are a turn off
 - Headings, lists etc. lighten the page

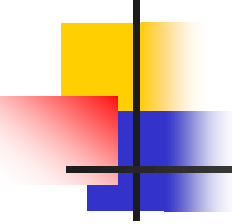


TIPS FOR WRITTEN ARGUMENT



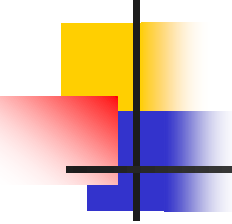
Simplicity is your friend

- “Simple arguments are winning arguments. Convoluted arguments are sleeping pills on paper.”
- Complicated arguments put you at a persuasive disadvantage
- Do not unnecessarily sub-divide issues



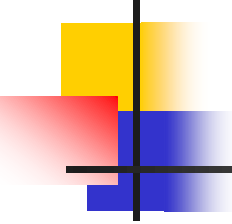
Begin with your best argument

- Unless you have a good reason for doing otherwise
 - Jurisdiction is in issue
- You are not bound by:
 - Your opponent's order
 - Your opponent's characterization of the issues



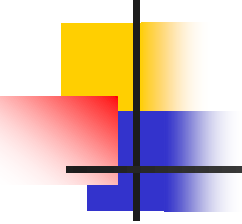
Write point first: ISPAC

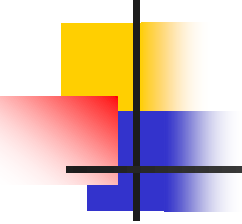
- I: Issue
- S: Submission
- P: Principle
- A: Analysis
- C: Conclusion (optional)

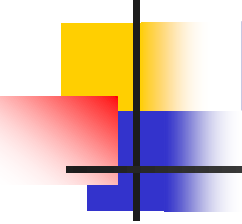


An example

- Issue 1: Did Smith have a reasonable expectation of privacy in his girl friend's apartment?
- The Crown submits that Smith did not have reasonable expectation of privacy in his girl friend's apartment.
- A reasonable expectation of privacy is to be determined on the totality of circumstances, including ownership or control of and ability to regulate access to the place: see *R v Edwards...*

- 
-
- In the circumstances of this case, several considerations militate against a finding that Smith had a reasonable expectation of privacy in the apartment. They include:
 - (a) Smith was just a visitor to the apartment.
 - (b) He did not contribute to the household expenses or the rent.

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- (c) He had no authority to regulate access to the apartment.
 - Accordingly, Smith is not entitled to challenge the constitutionality of the search, or the admissibility of the evidence seized.



Use specific and persuasive headings and sub-headings

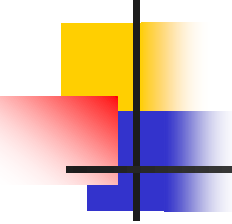
- Specific

- Not: The s. 8 argument
- Better: Jones s. 8 rights were not violated
- Even better: Jones s. 8 rights were not violated because he gave his informed consent to the search

- Persuasive

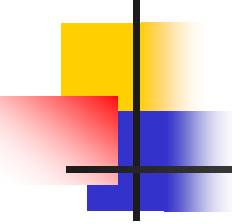
- Question: Did the Crown's failure to disclose the Amber report prejudice the accused's ability to make full answer and defence?
- Rhetorical: The Crown's failure to disclose the Amber report did not prevent the accused from making full answer and defence.

- Keep your headings to 25 words or less



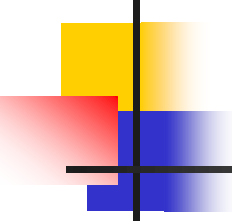
Advantages of headings

- Signposts to keep the judge on track
- Create white space



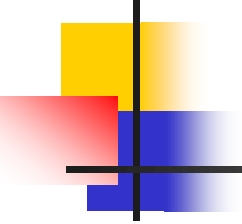
Show, don't tell

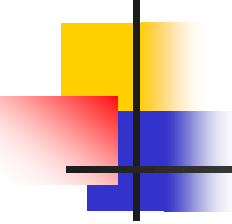
- Generalities don't persuade and general principles seldom decide cases
- Resist the urge to give us constitutional law 101
- Persuasion lies in the details
 - The right amount of detail



Argument, not general principles

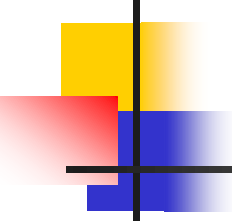
- Not this: A material change in the terms of a loan as between the debtor and the creditor discharges a surety absent the surety's consent to the change.

- 
-
- But this: A material change in the terms of a loan as between the debtor and the creditor discharges a surety absent the surety's consent to the change. An increase in the rate of interest and an extension of the time for payment are material changes.
 - As the trial judge found, the respondent and the principal debtor agreed to two increases of the interest rate on the loan, and the respondent extended the time for repayment of the loan three times for a period totaling 18 months. All of these changes were done without the appellant's knowledge or consent. The appellant is therefore discharged as a surety.



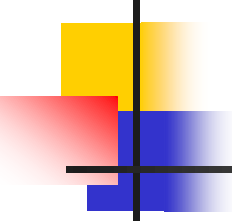
Prefer concreteness to abstraction

- Concrete facts and examples
- Word pictures to activate the judges' senses



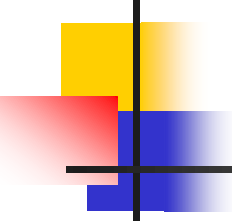
Do you prefer this?

- The accused cannot complain that his s. 11(b) rights were violated because he asked for or consented to most of the delays.



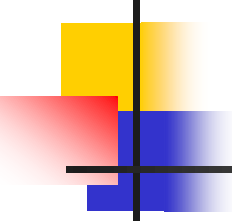
Or this?

- The Crown and the accused agreed to a trial date of June 1, 2007. The trial date was then adjourned seven times. The accused sought four of those adjournments. He consented to two others. The seventh adjournment caused a mere one week delay. In the light of the accused's conduct, he can hardly complain that his s. 11(b) rights were violated.



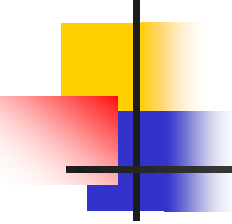
Another example

- Abstract—Carter tried to mitigate his losses but could not find other employment.
- Concrete—Carter applied for eight jobs but did not get a single interview. He first applied to...



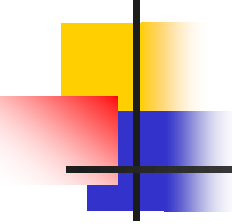
A final example of concreteness

- Abstract: The sunrise was strikingly beautiful.
- Concrete: The sun rose in a blaze of red and violet and gold.



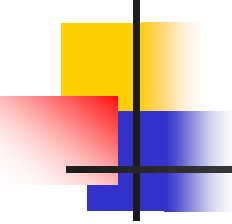
Some other “concreteness” techniques

- Charts: to simplify complicated information
- Lists: to grab the judge’s attention
- The witness’s own words: to humanize your story, and make it come alive
- A short quote from a case: to emphasize your legal argument
- DO NOT OVERUSE



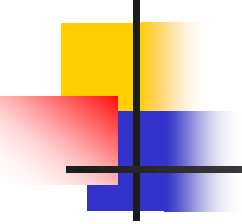
Paint word pictures

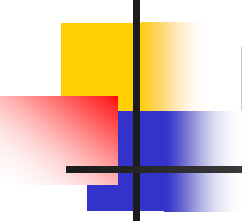
- The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing panic. (Holmes)
- Government funding of religious schools is a bramble patch.



Decide what facts to put in the argument section

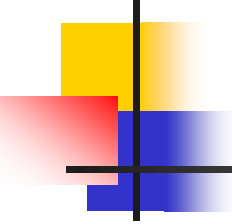
- Specific facts relevant to a legal point
 - Facts often take their persuasive power from their legal context
- Useful technique for respondents

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- Caution: Don't ignore the persuasiveness of an early statement of the facts
 - Extended overview
 - Key facts in the facts section of the factum



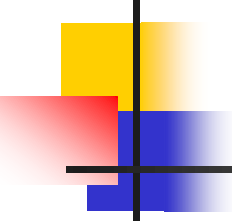
Incorporate the standard of review into your argument

- Unless the standard is itself in issue
- The Minister's conclusion that surrendering Mr. Lee to the United States would not infringe his rights under s. 6(1) of the *Charter* was a reasonable conclusion. It is supported by the following considerations....



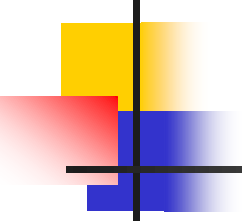
Start with why the court should decide in your favour

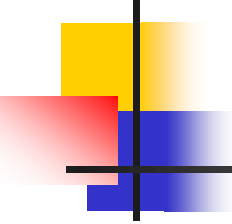
- Not with why the other side should lose
- Don't let your opponent define the debate
 - Deal with counterarguments in the course of your argument
 - State your opponent's position briefly, and then answer it



Don't overload your argument with quotes and citations

- Short quotes are better than long quotes, and often no quotes are better than short quotes
- Quote if:
 - The exact words matter (usually in a statute)
 - The words of a judge or witness are memorable

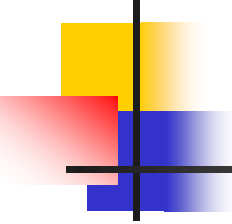
- 
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- If you do quote:
 - Context first
 - Don't overdo—don't turn the argument section of your factum into a string of quotations



No context (case)

- In *R. v. Hynes*, [2001] 3 S.C.R. 623 at para. 48, McLachlin C.J.C. said:

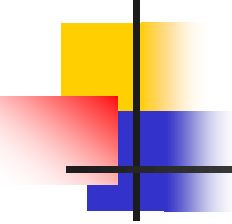
However, the fact that exclusion of evidence is involved should not blind us to the fundamental distinctions that exist between excluding evidence under the common law, on the one hand, and excluding evidence under s. 24(2) of the *Charter* on the other. Although these powers appear similar...
- MEGO



Context

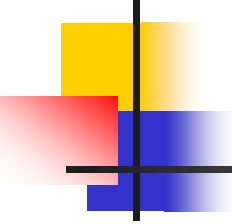
- In *R. v. Hynes*, [2001] 3 S.C.R. 623, the majority of the Supreme Court held that a preliminary inquiry judge may consider whether an accused's statement should be excluded because it was not made voluntarily, but may not consider whether the statement should be excluded because it was obtained in breach of the *Charter*. McLachlin C.J.C. explained the rationale for this distinction at para. 48:

However, the fact that exclusion of evidence...



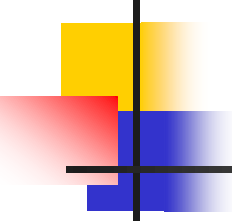
Even better

- A preliminary inquiry justice may consider the admissibility of an accused's statement based on voluntariness, but not *Charter* violations. Although the two powers appear similar, the latter requires the exercise of a remedial jurisdiction the preliminary inquiry justice does not possess: see *R v Hynes*...



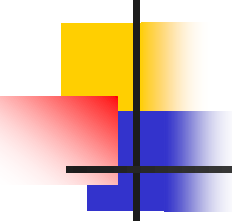
Citations

- Minimize the number of citations
 - Don't cite 20 cases when one will do
 - Unnecessary citations undermine your credibility and your argument's persuasiveness
- Unless you have a jurisprudential appeal and are showing the development of the law



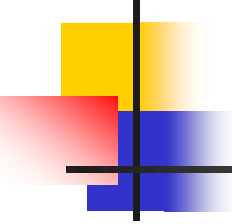
Don't ignore the judgment being appealed

- As appellant
 - Show where the trial judge or tribunal went wrong, and why the error matters
- As respondent
 - Show why the appellant's characterization of the error is incorrect
 - Point out the parts of the decision that show no error
 - Or if there is error, why it is harmless

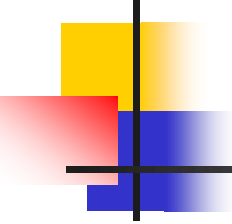


Statutory interpretation cases require context

- Write around the provision in question
- The statutory scheme and how it works
 - Purpose of the provision in question
 - How your interpretation accords with the scheme and purpose of the statute
- Especially statutes the court is not familiar with
- So the judges don't wish they could call the regulator

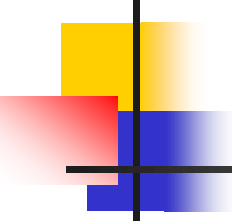


RESPONDENTS FACTUMS



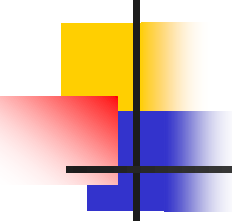
Try to write a free standing factum

- Judges want to read it without having to flip back to the appellant's factum



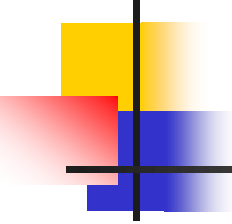
Dealing with the appellant's spin

- Follow the rules of court: don't automatically restate the facts
 - The Crown accepts the appellant's statement of facts subject to the following clarifications and additions....
- If you do, say why
- Better solutions
 - Extended overview
 - Key facts in the argument section



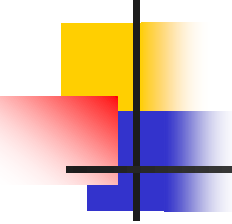
Respondent's argument

- You are not bound by the appellant's order or characterization of the issues



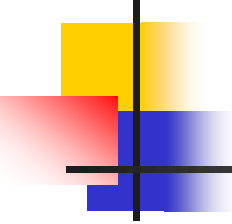
Order of argument

- Easier for the judge if you follow the appellant's order
- But if you think appellant's issue #3 is decisive of the appeal, then begin with it



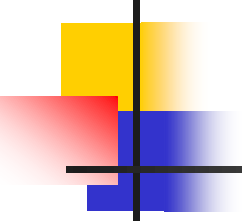
Characterization of the issues

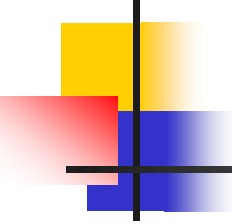
- Appellant: The trial judge erred in refusing to grant an adjournment
- Respondent: The trial judge's order refusing an adjournment was a discretionary order. The trial judge exercised his discretion reasonably and therefore this court should not interfere with the order.



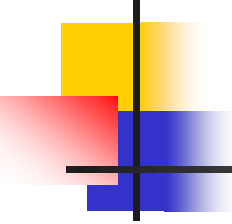
The power of deference

- A persuasive principle for respondents
- Jeter: The trial judge erred in finding that Jeter went through a red light.

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-
- Rivera: The trial judge's finding that Jeter went through a red light is a finding of fact. It is reasonably supported by the following evidence:
 - The unchallenged testimony of Rodriguez
 - The point of collision
 - The investigating officer's evidence
 - Accordingly, the court should not interfere with the finding.

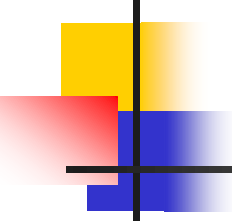


WRITTEN AND ORAL ADVOCACY



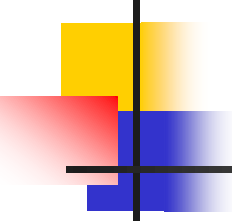
Advantages of a good factum

- Factum: starting pitcher
- Oral argument: closer
- A good factum
 - Permits a sophisticated oral argument
 - Used to question the other side



A good factum can't do it all

- Use oral argument for the nuances
- Make your argument “sing”
- Answer the judges’ questions
- The 25% rule



Pay attention to the judges' concerns

- There is much to be said for staying on message, but when you seek to persuade, you must address the concerns of the people you are trying to convince. (David Boies, *Courting Justice*, p.126)
- John Laskin