

Facts: some tips

David Stratas
Federal Court of Appeal

Opening considerations

- **Facts play a predominant role in winning cases, even on appeal**
- **What are the facts?**
 - At trial: facts established in the evidence, facts inferable from the evidence, facts from statutory presumptions or judicial notice
 - On appeal: facts found by the trial judge; facts found as a result of fresh evidence (tough test: *Palmer v. The Queen*, [1980] 1 S.C.R. 759)

Opening considerations

- **The concept of negative facts: what is NOT in the record (what evidence has not been called).**
- **You can use this to prove that the other side has not made out its case, or to invite the judge to draw a negative inference**

Opening considerations

- **The challenge of facts: no pre-set content, no pre-set structure, no pre-set point of view**
- **On appeals: facts are 70% of the work; trials are even higher**

A suggested methodology

- **Reverse-engineer the case**

The starting point

- **The concept of the controlling idea**
- **What *precisely* is/are the controlling idea(s)?**

Facts: the objective

- **Your objective – set yourself up for success on the controlling idea**
- **The facts are critical to the fairness and reasonableness of your legal argument**

Selecting the facts

- **What facts should go in?**
- **What facts should be left out?**

Selecting the facts

Three categories:

- orienting and basic facts
- facts necessary to win on the controlling idea
- “candor” or “fairness” facts

Selecting the facts

- At all times, imagine the reader saying “Why are you telling me this?”
- Solution: context before detail; or point first

Selecting the facts

The level of detail you'll need to put in:

Remember:

- (1) on key points, demonstrations are better than assertions; and**
- (2) the strategic use of detail can persuade**

Selecting the facts

Assertions vs. demonstrations: an example

Assertion: 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.

Selecting the facts

Assertions vs. demonstrations: an example

Demonstration: 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. They intended to define all their rights and obligations in writing.

Selecting the facts

Assertions vs. demonstrations: an example

Then they 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.

Selecting the facts

Assertions vs. demonstrations: an example

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.

Selecting the facts

Assertions vs. demonstrations: an example

The trial judge was wrong to ignore these intentions and give effect to what one side said was an oral amendment.

Structuring the facts

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

Structuring the facts

- **Tools for structuring and ordering:**
 - » **The museum designer analogy**
 - » **Headings; point first sentences to keep the judge on track; white space**

Dealing with bad evidence and bad facts

- **Where it is unclear what the facts are:**
 - ▶ **At trial, fight for your view of the facts; invite inferences, deal with credibility, argue admissibility; there is no problem with argument and some law in the facts section as long as it is relevant**
 - ▶ **On appeal, are the trial judge's findings clear? If not, interpret what the judge found; relevant argument is ok**

Dealing with bad evidence and bad facts

- **Argue the lack of relevance of the bad facts to the legal issue; persuasion at the level of "head" rather than heart**
- **The power of tactical concessions**
- **The danger of conceding too much**
- **Dealing with your client: get instructions**

Dealing with bad evidence and bad facts

- **Juxtaposition (viewing in context)**
 - ▶ **My client stole \$500 but they stole \$50,000 (my bad with their worse)**
 - ▶ **My client stole \$500 but then gave \$50,000 to charity (my bad with my better)**
 - ▶ **My client gave \$50,000 but other side gave nothing (my good with their bad)**
 - ▶ **My client gave \$50,000 but the other side gave only \$500 (my better with their good)**

Dealing with strong evidence and good facts

- **Give the judge ownership of the idea**
- **Let the judge “close the circle”**

Dealing with strong evidence and good facts

A case about whether police roadstops outside a town were warranted:

- **“The police had to act because many bikers were converging on the small town.”**
- **“The police had information that on four weekends 200 friends, associates and members of a known motorcycle gang, the Frontenac Riders, were to converge on a small property in the middle of the quiet, rural hamlet of Smithville, population 700.”**

Presenting the facts

- **The weakness of block quotes of evidence**
- **The power of a clear submission followed by quote snippets**
- **A quick way of dealing with uncertain or varying evidence**

Presenting the facts

- A good fact section: precedent no. 6

Structuring the facts

***Cornell* exercise**