How to Build a Cadillac Research Memorandum: A Reprise

By Barb Cotton
Bottom Line Research

Prepared for the LESA Advanced Legal Research Seminars

Dated November 5, 2009

Barb Cotton is the principal of Bottom Line Research & Communications, which helps lawyers, corporations and government and other agencies with their legal research and writing needs, including the preparation of research memoranda, briefs and factums, ghost writing or just a quick search and reporting letter with cases. Barb can be reached at (403) 240-3142, cell (403) 852-3462, fax (403) 242-5756, email barbc@bottomlineresearch.ca and website www.bottomlineresearch.ca

Introduction[1]

In 1991 I published the article "Advanced Legal Research and Writing: How to Build a Cadillac" (1991), 13 *The Advocates Quarterly* 232, which I will now take the opportunity to reprise for these LESA Advanced Legal Research seminars.

In reviewing my 1991 article, I was struck by how quaint the article had become in the intervening years, with its discussion of the role of secretaries in the preparation of a legal research memorandum, and its assumption that all research lawyers would, at the outset, roll up their sleeves and get into a library.

Times have changed, but many of the basic tenets regarding the research process and the preparation of a Cadillac research memorandum still resonate. Let me update these for you here.

In this paper I refer to the role of the "research lawyer", but I use this designation in a broad sense to encompass all lawyers who find themselves tasked with the preparation of a legal research memorandum.

Time Management Considerations Drive a Cadillac Legal Research Memorandum

Time management considerations drive the preparation of a Cadillac research memorandum, especially as the practice of law continues to move towards that of a business, and loses the patina of a profession.

Perhaps the most important thing to be said is that in preparing a legal research memorandum one must keep in mind the audience. Given that the legal research memorandum usually will be prepared by someone in a junior capacity for the review of a senior lawyer, note must be taken of the fact that the senior lawyer will spend time

[1] With many thanks to Andrea Manning-Kroon, Nicky Brink, Rosalia Nastasi and Allison Palmer for reviewing this paper.

digesting the memorandum at significant billing rates that will be charged to the client. The legal research memorandum must therefore be an "action" memorandum so that the time efficiencies of the recipient lawyer are best served, and thus the needs of the ultimate client. An academic treatise is seldom called for.

The research lawyer must also consider the end use of the legal research memorandum. Is it to form the basis of a legal argument that will be used in a brief for Special Chambers or in a factum? Is it to form the basis of an opinion letter that will be delivered to the client? Is it a simple review of the leading authorities to arm the recipient lawyer with the most up-to-date authorities as he or she heads off to court? Only by having the end goal firmly in mind can the research lawyer craft a responsive document.

The research lawyer must also keep in mind where the legal research memorandum may end up. It has been my experience that, given the significant expense involved in the preparation of a Cadillac legal research memorandum, the recipient lawyer frequently sends the memorandum on to the client, and thus to the broader world at large. In preparing your legal research memorandum you must keep in mind that your product may have such a broad distribution – once when I was a junior research lawyer I found my legal research memorandum excerpted in the Toronto Sun. Make sure that your legal research memorandum can withstand such scrutiny.

Caveat: Volkswagens v. Cadillacs

It is clear from the research assignments that I see flow through my office that the general research work assignment given to students and junior associates can be identified as falling within one of two types: Volkswagens or Cadillacs. A Volkswagen research assignment is one that is rather straightforward and is usually passed on to a student. The facts are given to the student as the factual assumptions upon which they are to conduct their research and the issue or, infrequently, issues, are also given. The student is then simply asked to charge ahead and find the relevant case-law and authorities to apply to the assumed facts to resolve the stipulated issue or issues.

The Cadillac assignment, on the other hand, is a much more complex assignment and is usually given to the more talented junior associates; it can, however, waylay the unwary student. There are two features which generally distinguish a Cadillac assignment: the facts are not given, but must be established, and the issues must also be established. An excellent tip-off as to when the assigning lawyer is looking for a Cadillac memorandum is when the research assignment arrives with the file and other material, e.g. a trial binder, enclosed, with an invitation to sit down with the assigning lawyer to discuss the facts. Not infrequently the assigning lawyer further advises the lawyer conducting the research to feel free to contact the client to gather such further information as is necessary to complete the task.

As the research time of students and junior associates is billable to files (albeit frequently written off), it is important for a research lawyer to know the difference between a Volkswagen and Cadillac assignment and, when a Volkswagen is called for, to simply deliver a Volkswagen. The eager research lawyer must be cautioned from turning every Volkswagen into a Cadillac and thereby generating massive research bills. Having said this, however, it must further be said that the more sophisticated legal research and writing skills required to build a Cadillac are important skills to develop and will greatly assist the research lawyer when fashioning a mere Volkswagen.

The Complex Research Process

Step One: Identify the Facts

The importance of fully identifying all the facts relevant to a research assignment cannot be over-emphasized. Again and again many senior members of the litigation bar have emphasized how many cases are actually won or lost on the facts. It is not that often that you will come across an area of law in which there is little or no jurisprudence: “the law is the law is the law”. It can fairly be said, however, that the facts of each case are

generally unique, and it is the application of the law to the unique facts at hand which will usually dictate the outcome of the litigation.

It is therefore very important for the research lawyer to establish carefully the facts relevant to the research assignment. Comb through the file, carefully review the trial binders or appellate material, scrutinize the relevant documents and contact the client for further information, if necessary. Pin down the facts.

Step Two: Analyze the Facts to Identify the Issues

In a complex research assignment, once the facts have been pinned down, it is important to take a broad view of the problem and not attempt to define the issues too soon. A premature assessment of the issues may cause the research lawyer to head down certain narrow research alleys without having gained an overview of all the possible routes available. It is therefore important to read generally in the broad areas of law that could pertain to the problem and take time to reflect before an assessment is made as to the specific issues to be addressed.

Consult the general textbooks in the area – do not consult just one author, but several, as they all have different views. It is often helpful to browse the reserve collection in the library, as it has the most recent textbooks. Consult Halsbury's for an excellent overview of broad areas of law; consult the Canadian Encyclopedic Digest. Look at the periodical indexes to see if there are any articles which can give you an overview. The two key Canadian legal databases Lexis/Nexis (Quicklaw) and Westlaw Canada (Carswell) have excellent journal and text searching features.

After you have read widely, go into your office, close the door, and take time to think about it. Think about it overnight, if necessary. Brainstorm the problem. What are the various approaches that can be taken?

This creative brainstorming will likely lead you to a much more refined definition of the issues than if you had not stopped to gain a broad overview and had simply started chasing up narrow alleys.

Step Three: Identify the Issues

Now spell out the issues that you have identified as requiring specific research. Keep in mind that issue identification is an evolving process and, as you delve deeper into your assignment, your research may twig you onto new issues, or help you further refine the issues that you originally identified. Be flexible.

Step Four: Gather the Raw Research

Now you are ready to roll up your sleeves and either go into the library or begin your computer research in earnest. Your goal will be to locate all of the relevant case-law and authorities bearing on your issues.

The importance of "noting-up" your case-law and authorities is another point that cannot be over-emphasized. The fact is, however, that the importance of this admittedly tedious task must be frequently re-emphasized to the beginning research lawyer, usually through unfortunate occurrences. The classic scenario which usually happens at least once a year with each new crop of students in a large law firm is when the student prepares a memorandum for a trial lawyer which relies extensively on one particular case to support the trial lawyer's argument. The witless student has failed to note-up this case, and the trial lawyer is informed at court, much to his or her embarrassment, that it has been overturned on appeal or subsequently distinguished by a highly relevant authority. You can imagine the scene that unfolds when the trial lawyer returns from court.

There is another very important reason to note-up your case-law, however. In order to analyze your raw research results to come up with a meaningful conclusion, you are going to have to "weigh" the authorities. By this I mean that you will have to attach some

relative significance to them: is it a root or leading case, or is it a one-time wonder? Is it one case among many which establishes a chain of authorities to ground a legal principle, or does it represent a split in the case-law and a minority or majority view? These are the types of factors that are taken into consideration in "weighing" the case-law. If you note-up your case-law as you go along, and thus gain insight into how the case has been judicially considered, this will greatly facilitate your ability to "weigh" the cases.

When you are looking at the cases which have judicially considered your relevant case, focus initially on the decisions of courts that are of binding authority, the Supreme Court of Canada and the appellate court of your home province, and those that are of highly compelling authority, the House of Lords, the English Court of Appeal, the federal courts and the appellate courts of other provinces. If the issue you are researching has been fully covered in a decision of one of those courts, you can safely give shorter shrift to the decisions of lesser courts and, for example, simply check these decisions to see if they are helpful because their facts are closely analogous to your factual situation.

If one of the cases you are reviewing is of binding or compelling authority, be sure to read all of the judgments, and not just those of the majority. This can be helpful for several reasons: quite frequently a dissenting judge will articulate the very arguments that you may want to make on behalf of your client in a helpful way, and will dissent on another point; the dissenting judgment may be an apt statement of what the law is *not*; and sometimes a dissenting judge may be at the leading edge of an emerging trend and will reflect the majority position of tomorrow. Keep in mind that there are also some judges who are simply of too lofty a judicial stature to ignore - their judgments must be read.

After some time in the library you will come to the end of "chasing up" cases and may have a stack of cases or copious notes in front of you. Now is the time for "mop up" research. There are certain basic research tools that must be consulted in order to deliver a thorough and reliable research product, and reliability is the touchstone that the research lawyer strives for. Have you conducted basic computer research on the leading databases

to make sure that you have captured all of the relevant case-law and, most importantly, on the databases specific to your province and thus home courts? Have you combed completely through all of the relevant sections of the Canadian Abridgment, either manually or via Westlaw Canada? Have you accessed the C.E.D. and Words and Phrases databases on Westlaw Canada, if relevant to your project? If English jurisprudence is important, have you conducted computer research on the Lexis database or gone carefully through Halsbury's or The Digest? Have you consulted all of the "ready reference" guides that are so helpful, e.g., a CCH series that might apply to the problem? Make sure that you complete a thorough "mop up".

Step Five: Analyze the Raw Research

Now we come to the "thinking part". The research lawyer is going to have to review the stack of case-law and other authorities that have been generated, come to some understanding as to what the governing principles of law are and then apply the law to the facts at hand to reach a conclusion as to the client's problem.

In a time management driven approach, the "conclusion" part of each complex research memorandum should essentially be broken down into two steps. Initially, the conclusion should outline a general statement of what the research lawyer considers the governing principles of law to be. Then the legal principles should be applied to the facts at hand in order to reach a conclusion as to the client's problem. The reason for this recommended "two-step" conclusion is that, in very difficult cases, the research lawyer can be quite right in his or her analysis as to what the governing law is and yet be dead wrong in the application of the law to the facts at hand. This is nothing to be ashamed of – it is simply a fact of life when dealing with very complex matters. If such a "two-step" conclusion is provided, however, the memorandum will still be a useful document as it will provide a concise summary of the governing principles of law.

Thus, in analyzing the raw research results, the research lawyer should also take a two-step approach, with a view to ultimately writing the conclusion. Firstly, the research

lawyer should analyze the raw research to ascertain the governing principles of law. Secondly, the research lawyer should apply the law to the facts at hand in order to reach a conclusion as to the client's problem.

When I am looking at the case-law in order to apply the law to the facts at hand, I take a much narrower view than when I am trying to ascertain the general governing principles of law. At this point I am really looking for cases that may be closely analogous to the facts at hand, so that, on the basis of the maxim "like cases must be decided alike", I can use these cases to support an argument that there should be the same result for the client's problem. Care must be taken to see if the cases are distinguishable, however. Thus, when looking through the case-law, I look for my "good news" cases – the cases that support the position I want to take – and my "bad news" cases – the cases that present a problem. I then think about how the "good news" stacks up against the "bad news" in order to assess the relative strengths and weaknesses of the conclusions that I will ultimately reach.

It is extremely important to keep a complete "research trail" as you go, a detailed record of all sources consulted in the process of conducting the research. This would include the keyword searches that you have used in your computerized searching, all the resources you have consulted, and proof that you have noted up all cases and statutes. The primary reason to be scrupulous about maintaining a research trail is that it will be evidence in the event of a future malpractice action to prove that you met the standard of care required of a competent research lawyer. The secondary reason for maintaining a scrupulous research trail is to help you in the future if you have to retrace your research steps if, for example, further research work is required or if there is a question as to whether you have covered off a certain key database or resource.

Preparation of a Cadillac Legal Research Memorandum

The basic components of a complex research memorandum are preliminary statements of the facts and issues, followed by a succinct statement of the conclusion or conclusions

reached, followed in turn by a detailed discussion which buttresses the points reached in the conclusion and illustrates the analytical process. It should be emphasized that this is the structure of the completed research memorandum – in preparing the memorandum you will likely actually write the discussion part after you have set out the facts and issues. For time management reasons, however, the conclusion (which will likely be written last), should be moved up to come after the statement of the issues in your final product.

Facts

You must be very careful to set out in your legal research memorandum all of the factual matrix for the conclusions you reach. This will establish any assumptions that you have made as to the facts, and flag further work that may need to be done if the facts change in the future.

Another "nuts and bolts" tip: if you have had to gather the facts, which, in a Cadillac assignment, you may have had to do, make reference to the source of the facts for the recipient lawyer. This will save the recipient lawyer time, e.g. when preparing the documents for trial, and will be of much appreciated time management assistance.

Issues

Clearly identify each issue that you are going to address in your memorandum, and as a general rule address first the issue that you know is most pressing to the recipient lawyer. This is important, keeping in mind that your memorandum is a working document. If another issue arises in the future the fact that it will not have been researched will be duly noted and a supplementary memorandum can be prepared.

At Bottom Line Research, if the issues are straightforward, we usually combine the facts and issues in a "Question(s) Presented" section.

Conclusion

In almost all cases the research lawyer, and especially the junior one, will actually write the discussion part of the memorandum before the conclusion. You should, however, as a general rule, state your conclusions immediately following the statement of the facts and issues. This is a time management driven approach – it allows the assigning lawyer to read the conclusions up front and then decide whether or not to go on and read the detailed discussion which will, hopefully, enlighten the assigning lawyer as to the analytical process undergone by the research lawyer in reaching the conclusions.

As already indicated, a "two-step" conclusion is recommended. The conclusion should commence with a general statement of the governing legal principles. These statements should be "bottom line" in nature as support for the conclusions reached will be detailed in the discussion part of your memorandum. Authority should also be cited for each principle of law stated – again this is a time management driven policy decision in that it gives the assigning lawyer access to the key authorities up front without having to wade through the discussion part of the memorandum.

In the usual Cadillac assignment the research lawyer will not be able to say definitively: "this is the law". There will usually be split lines of authority, conflicting authority, or possibly no authority. An assessment must be made, however, on the basis of an analysis of the raw research results, of what the governing law can most accurately be stated to be. If there is no case-law or other authority right on point this must be stated and an effort made to state which law may be applicable by way of analogy.

The second part of the conclusion should then summarize the research lawyer's application of the governing law to the facts at hand. Be sure to give the assigning lawyer the "good news" and the "bad news" with respect to the positions that could be taken on behalf of the client right up front in your conclusion – do not bury this news in the discussion part of your memorandum.

Finally, state your conclusion or conclusions as to the client's problem. This may sound obvious, but it is astounding the number of research memoranda prepared by students and junior associates which fail to state a conclusion, whether through general trepidation or for other reasons.

After stating your conclusions, identify the weaknesses in your conclusions and/or the arguments supporting your conclusions, red-flagging both legal and factual difficulties. An example of a legal difficulty which should be pointed out to the assigning lawyer is case authority that may go directly against the position that the assigning lawyer will seek to take on behalf of the client. Try to go one step further and suggest how to deal with this legal difficulty, e.g., by distinguishing the case or relying on another line of conflicting authority. Do not forget to point out factual difficulties as well as legal difficulties. For example, if a contractual provision that the assigning lawyer will want to rely on in support of his client's position is somewhat ambiguous, point out to the assigning lawyer that he or she may have proof problems.

Discussion

The discussion part of your memorandum will be substantial, but will essentially be a buttressing of all the points reached in your conclusion and an illustration of the analytical process whereby you came to your conclusions.

The discussion should be two-step in nature as well and commence, like the conclusion, with a discussion of what you consider the governing principles of law to be. The second part of the discussion will then address how you applied the law to the facts at hand.

<u>Use headings and sub-headings</u>

It is important to segregate your discussion by issues – this is so obvious that it probably does not need to be stated. Another suggestion, however, is to further separate your discussion part into subheadings within each issue in accordance with each major point

that you have made in your conclusion, or to flag key concepts or principles. Under these subheadings, you will deal with all of the relevant case-law and authorities in detail. As a general rule I always try to cite the seminal case, the leading cases, and the most recent Alberta cases in the body of the memorandum. I frequently also underline key words in the memo to add emphasis to the points I wish to make.

Make an outline

Another technique is to create an outline before writing the discussion part of the memorandum. In the outline the issues and sub-issues can be put in logical order, and notes made as to which cases and authorities should be discussed under each of them. Although this takes some time, it makes the writing process quicker and easier, and makes the memorandum flow better.

Discuss the case-law in detail

It is important to deal in detail with the case-law in the discussion part of the memorandum. Again, this recommendation is primarily time management driven – if you deal in sufficient detail with the case-law in your memorandum, the recipient lawyer will be spared the necessity of actually reading the cases unless he or she decides that they are of critical interest. It will also have the additional benefit of documenting the thoroughness of your research, which is an important consideration in the event that supplementary research memoranda are prepared, as is frequently the case in major files conducted over a number of years.

Explain the relevance of each case

What do I mean by "deal in detail with the case-law"? Start off by telling the assigning lawyer why the case is relevant to the client's problem. Then give the assigning lawyer sufficient information about the case so that he or she can assess how relevant the case is. Indicate which court the decision is from, and which judge wrote the decision that you

are relying on. If it is an appellate decision, indicate whether the judge wrote for the majority or for others, or if it is a minority opinion. This will help the assigning lawyer in assessing the relevance of the case in that, for example, they will want to pay more attention to an appellate decision from their own home court than a decision from an equivalent or lesser court of another province.

Set out the relevant facts of each case

Deal with the facts of the cases in sufficient detail. This will help the recipient lawyer to know how helpful the cases are. Are they directly precedential, i.e.: "on all fours", or are the cases merely helpful by way of general principles? As a general rule of thumb, consider whether the recipient lawyer can distill the *ratio* of the case and why it is relevant to the facts at hand just by reading the memo, without need to read the case.

Describe the main issue of each case

Indicate the main issue or issues addressed in the case – this will assist the recipient lawyer in determining whether the case is of assistance by way of *ratio* or merely by way of *obiter*. Indicate the result of the case – often a case can be helpful for its general statements of law even though the result of the case has little or nothing to do with the result that you seek to achieve for the client.

Cite each case accurately

In preparing your memorandum keep in mind that citations are a "tell" in a legal research memorandum, brief or factum. If your citations are incorrect or simply sloppy the recipient lawyer will wonder about the general quality and reliability of your analysis. Polished presentation of the citations will reflect to the recipient lawyer that you know your business, however, and signal reliability. It may also be necessary to use as many as three citations for one case, a citation to a reporter, a citation to an online reporter, and a neutral or generic citation.

Excerpt relevant quotes

Excerpt relevant quotes from the case for the recipient lawyer. This is again a time management driven recommendation and will assist the recipient lawyer in focusing on the relevant parts of the case in building an argument, for example. If you are relying on a certain passage, it is critical to state whether the passage is *ratio* or *obiter*. Quotes should generally be short – three to four lines – and not long excerpts taken from the cases. It is also helpful to add emphasis to the quotes through bolding, and then indicate that emphasis has been added with the simple notation "[Emphasis added.]".

Set out any subsequent history

Discuss the subsequent history of the case – was leave to appeal to a higher court denied and, if so, with or without reasons?

Give weight to the case

Give weight to the case. If the case is a root or leading case, say so. Discuss the subsequent judicial consideration of the case and quote from the subsequent cases, if relevant.

Deal with the cases in groupings. For example, if there is a split in authority, deal with all the cases representing one view together, and all of those of another together. If there are a series of cases establishing a chain of authority for a principle, review that chain, and indicate how each subsequent case has relied on the previous one for authority.

Identify relevant academic commentary

Is there academic discussion of the case-law and authorities that might be of assistance? If so, be sure to properly attribute this authority and summarize it or excerpt from it appropriately. Bear in mind, however, that an academic discussion is rarely persuasive if there is binding or compelling jurisprudence on point.

Identify the strengths and weaknesses of each case

Discuss whether there are any strengths or weaknesses in the leading authorities that you will be relying on. For example, has one of the primary cases which supports an argument that you will seek to make on behalf of the client subsequently been impugned? Or is a case that you are relying on weak in intellectual content, although helpful in the result?

Apply the law to the facts

Having discussed how you arrived at your conclusions as to the governing principles of law, it is important to then discuss how you have applied the law to the facts at hand. Generally, you will take a much more specific focus in this part of the discussion and zero in on the case authority that helps and hurts the positions that you think will be beneficial to your client. Again, deal with these cases in detail. Work with the facts – make the arguments for the assigning lawyer that can be made on behalf of the client, and then outline their strengths and weaknesses.

After you have finished writing the discussion part of your memorandum you may find that your understanding of the problem is significantly refined. At this point you may want to go back and revisit your statement of the facts and issues for fine tuning.

I am aware that some firms have a section titled "Authorities Reviewed and Not Specifically Cited" at the end of their research memoranda. We do not do this at Bottom Line Research, but rather rely on our detailed research trail prepared for each project to record these authorities. We also keep copies of the authorities reviewed but not cited in our working file and mark them as such. This is important if, in the future, someone queries whether you have considered a specific case that was not mentioned in your research memorandum.

Similarly, some firms put in a "Restrictions on Research" section at the back of their research memoranda. At Bottom Line Research we put any restrictions on research into the Questions Presented section at the outset of our memorandum. Some examples of restrictions that you may want to include in this section are any caps that may have been placed on the amount of time or money that were to be expended on the research, or if the research was done on a rush basis.

And, as noted, we are careful to put any assumptions that have been made into the Questions Presented section of our research memorandum.

If we have reviewed any documents that are key to the factual matrix, such as an affidavit, we record that these documents have been reviewed in the Questions Presented section.

Other ideas to include at the end of your legal research memorandum may be a recommendations section and a discussion of policy.

Presentation is Everything

Having come this far the research lawyer will likely have achieved a research product that is of quality in its substance. Too many research lawyers drop the ball at this point, however, and hand in a research product without sufficient attention to "cosmetics". The

most common mistake is to hand in a memorandum riddled with typographical errors – this is extremely irritating for the recipient lawyer and the research lawyer is perceived as having a "who cares" attitude. Another common mistake is to fail to check out all the quotes in the memorandum, and, as a result, the quotations are unintelligible. Although it may seem like quibbling to dwell on these cosmetic imperfections, in my experience an assigning lawyer forms a very poor opinion of the attitude of a student or junior associate who is prepared to hand in such sloppy work.

As a final step, give your memorandum a tight edit to make sure that it is highly readable. Don't use "legalese" and do not use a $100 word when a $10 word will do. Use as few words as possible to say what you want to say. In your final edit make sure that you have been clear in what you want to say, and that your arguments build and flow logically.

If your Cadillac legal research memorandum is of considerable length when concluded, it is helpful to the recipient lawyer to have a detailed table of contents accompanying the memorandum. This will allow the recipient lawyer to zero in on the specific parts of the memorandum when they are working with the document.

In times past it was a policy of Bottom Line Research to bundle together all of our case-law and other authorities relied on and place them in a hard copy Research Binder for the recipient lawyer's use. More and more, however, I find that my clients prefer simply to have a digital copy of these materials emailed to them.

Conclusion

There is no right or wrong way to conduct legal research, nor to prepare a legal research memorandum. The ideas I have offered here reflect our Bottom Line Research time management driven approach, with the assumption that the recipient of our legal research memorandum will be a busy legal practitioner who wants an "action" memo. These ideas have served us well at Bottom Line Research, and I hope that they are of some practical value to you.