ADVANCED LEGAL RESEARCH AND WRITING: HOW TO BUILD A CADILLAC

Barbara Cotton[*]

As the Research Director of a large law firm, responsible for supervising the research product of 18 students and assisting them in developing their research skills, I was recently requested to prepare and conduct a skill-building seminar for the students and junior associates. While most students become relatively proficient in their basic research skills after several months, and thus can generally be relied upon to capture the relevant case-law and authorities when researching an issue, most students, and indeed junior associates, have considerable more difficulty in analyzing their raw research results to assess the governing principles of law and applying the law to the facts of their particular problem in order to come to a conclusion that is meaningful for the client.

Like any good research director, in order to prepare for the seminar, I naturally researched the literature with respect to legal research and writing. Somewhat to my surprise, I found out that there is very little published in the area beyond the basic manuals that deal with how to gather raw research. The very little that is published with respect to advanced legal research and writing skills is highly theoretical in nature or little more than a collection of sweeping statements of principle.

Accordingly, I consulted with the various "research experts" in the firm and developed a presentation on two general themes: a discussion of the "complex research process", i.e. how to think through a complex research problem, and a discussion of how to structure a complex research memorandum. The synthesis of our ideas was then presented to several senior partners of the firm in order to ensure that our ideas passed muster with the major consumers of the firm's research product.

---

[*] Of Milner Fenerty, Calgary, Alberta. Many of the ideas in this article were generated from discussions with E.D.D. Tavender, Q.C., Darel Samuelson, Joel Shortt, Tom Mayson, Bernie Roth and Tammy Coates of Milner Fenerty, whose generosity with their time is much appreciated.

The following article is a summary of our ideas and is intended to be a non-theoretical "hands-on" guide for developing advanced legal research and writing skills.

Caveat: Volkswagens v. Cadillacs

It is clear from the research assignments that I see flow through my office that the general research work assignment 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, together 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 (the "research lawyer"), 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 in order to build a Cadillac are important skills to develop and will be of great assistance to 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 that bear on 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 that bear on the problem 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. 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 – do not forget that some titles in the C.E.D. have excellent summaries of the relevant periodical literature.

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 go into the library. 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 unfortunate 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 example 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 scenario 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 type 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.

I would now like to offer some "nuts and bolts" practical advice that has been gained from many hours of slogging in a library. I also admittedly have a penchant for time management. All too often I will go into the library and see a diligent student sitting at his desk with a row of reports marching in front of him, all duly tagged for subsequent photocopying by the secretary. This is a waste of time. By the time the secretary has had an opportunity to photocopy all of this case-law, the student will have long forgotten the reason why he thought the case was worth photocopying in the first place, and will have to read it afresh in order to appreciate its relevance. This "let the secretary do it" approach also has the significant disadvantage of not allowing you to note-up relevant cases, and thus weigh the cases, as you go along.

I recommend the "chase it up while you have it" approach. In this approach, through using now-accomplished basic research skills, the research lawyer will happily come upon the first relevant case. I recommend the research lawyer humble him or herself and go and photocopy the case right then and there. This will have the advantage of allowing the research lawyer to highlight the case while it is read the first time. Subsequent review of the case will then make it perfectly obvious, in yellow highlight, why you thought the case was worth photocopying. I also, at this time, attach a yellow "post-it" to the front of the case and write on it a one-line sentence in red ink as to why I though the case was relevant.

Another approach favoured by many is the "take copious notes" approach. In this approach, rather than photocopy the case, the research lawyer makes detailed notes on the case, including transcribing relevant excerpts. The major benefit of this approach is that in the process of writing down the notes the basic points to be gleaned from the case will be imprinted in your mind. Another benefit is that, when writing your memorandum, you can simply shuffle your notes and sort them out in accordance with their relevance to the issues.

Regardless of the approach you use, once you have found a relevant case the case should be noted-up then and there. In cases where the research is particularly critical, e.g., because the assigning lawyer is drafting an important opinion letter on the basis of it, or a trial lawyer will be relying on it in court, computer backup in noting-up the cases is recommended.

Once you have noted-up the case, go and look at the cases which have judicially considered it. Be sure to look at *all* the cases, regardless of the fact that your law firm library may not have the report on the premises. Ask your librarian to bring the case in for you – it can be a critical mistake to overlook a subsequent case simply because of an obscure citation.

As you go through the cases which have judicially considered your relevant case, you will be able to "weigh" the particular case. For example, subsequent judicial consideration will tell you if it is a root or leading case, one of many in a chain of authority, or a one-time wonder. You are already embarked on the analytical process!

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 most 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, e.g. Lord Reid of the House of Lords and Dickson J. of the Supreme Court of Canada.

In the course of reviewing the cases which judicially consider your relevant case, you will usually happen upon another or several relevant cases. The same "chase it up while you have it" approach is recommended: photocopy each case in turn, highlight and "sticky" it, note it up, and then chase up the subsequent authorities in a methodical fashion.

After some time in the library you will come to the end of "chasing up" cases and will have either 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. Therefore, it is important that you "mop up". Have you combed completely through all of the relevant sections of the Canadian Abridgement and its companion updating volumes? If English jurisprudence is important, have you gone carefully through Halsbury's and The Digest? 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 traveled through the indexes of the topical or regional reports that are relevant to your assignment? 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" before you leave the library.

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.

The firm where I am employed has come to a somewhat informal policy decision that 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 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.

Again I would like to offer some "nuts and bolts" practical advice to assist in this thinking process. If you have been following the "chase it up while you have it" approach, you will have left the library with a stack of cases. Go into your office with your stack of cases. Shut the door. Then start reviewing your cases and sort them out on the basis of which cases pertain to which issues. You will now have several stacks of cases on your desk. Then decide which issue you are going to address first – usually the most important one. Turn to that particular stack of cases and start sorting those cases out into further stacks according to which cases you think establish certain principles of law relating to that issue. This becomes a very complex process when you have split lines of authority, etc. At the end of this sorting process you will likely have little stacks of cases all around your office – on your desk, on your floor, on your credenza, on your side chair, etc. You should also have a pretty good sense, from reviewing these cases, of what you think the governing principles of law are.

Take out a pad of paper and try to prepare a skeleton outline of the governing principles of law. Be sure to jot down the case names and other authorities that support these principles underneath the bullet points of your outline – this is important because one case may stand for many principles. Think it through until you have a complete skeleton as to what the principles of law are, red flagging, of course, any "legal hurdles" that you will have to address, e.g. a split in authority.

At this point many research lawyers now feel prepared to pick up their dictaphone and start dictating the "discussion" part of their memorandum. I do not do this myself. At this time I complete the "thinking" process by applying what I think the law is to the facts at hand. I then finish my skeleton outline of the points I want to make. I frequently find that in thinking through the application of the law to the facts at hand I refine my thinking as to what the governing principles of law are.

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 governing principles of law. I am really looking for cases that might 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.

The Structure of a Complex Memorandum

I think it is very important to emphasize to a student or junior associate that a research memorandum is a working document. This document must have utility for the assigning lawyer, and the goal should be to make it as helpful as possible. For example, a well-written conclusion in a memorandum can frequently form the basis of an opinion letter sent to the client. The more detailed discussion part of the memorandum can frequently assist a trial lawyer in developing his arguments and perhaps form the basis of a written argument or factum filed with the court.

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

It is critical to commence your memorandum with a detailed discussion of the facts. The importance of the facts to the ultimate resolution of the problem has already been emphasized, and it is imperative that you state your critical assumptions as to what the facts relevant to your problem are.

Another "nuts and bolts" tip: if you have had to gather the facts, which, in a Cadillac assignment, you almost always will have had to, make reference to the source of the facts for the assignment lawyer. This will save the assigning 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. 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.

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. The firm where I am

employed, however, requests that research lawyers, as a general rule, state their conclusions immediately following a statement of the facts and issues. This is a time management driven policy decision – it allows the assigning lawyer to read the conclusions up front and then make up his or her mind whether he or she wants 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 principles of law. 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 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. From my discussion with assigning lawyers I understand that an assignment lawyer will not think poorly of a research lawyer should he or she come to a wrong conclusion, or perhaps a conclusion other than that which the assigning lawyer would have arrived at. What the assigning lawyer is interested in, and presumably what the law firm pays you for, is the benefit of the application of your intellectual abilities to the resolution of the client's problem and, as detailed in the discussion part of your memorandum, some insight into how you came to your conclusions.

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 the 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 may have proof problems.

There is a clear downside to preparing a conclusion of this nature – it will probably be quite lengthy. An informal survey of the assigning lawyers within the firm where I work, however, indicates that they would much rather have a well thought out conclusion up front than have a minimalist conclusion and have to wade through the significantly longer discussion part of the memorandum in order to extract all of the relevant information.

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.

It is important to segregate your discussion by issue – 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. Under this subheading, which will really just be an encapsulation of the point made in your conclusion, you will deal with all of the relevant case-law and authorities in detail.

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 discuss how you applied the law to the facts at hand.

It is important to deal in detail with the case-law in the discussion part of your memorandum. Again, this recommendation is primarily time-management driven – if you deal in sufficient detail with the case-law in your memorandum, the assigning 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 supplementary research memoranda are prepared, as is frequently the case in major files conducted over a number of years.

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 is writing for the majority or for other, or if it is a minority position. 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 that of an equivalent or lesser court of another province.

Deal with the facts in sufficient detail. This is important in order for the assigning lawyer to know whether the case is close to the facts at hand, and thus should suggest the same result, or is distinguishable. Indicate the main issue or issues addressed in the case – this will assist the assigning 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.

Excerpt relevant quotes from the case for the assigning lawyer – this is again a time management driven recommendation and will assist the assigning 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 merely helpful *obiter*.

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

Give weighting 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 cases in groupings. For example, if there is a split in authority, deal with all the cases representing one view together, and all 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.

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 the point.

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?

Having discussed how you have 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.

Tying the Bow on the Package

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 assigning lawyer and is perceived as reflecting 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.

A Cadillac memorandum will usually be of considerable length and thus a detailed table of contents accompanying the memorandum is also recommended. This will allow the assigning lawyer to zero in on specific parts of the memorandum when they are working with the document.

In this age of environmental concern, I also recommend that the research lawyer "recycle" his or her highlighted case-law and authorities. After I have completed a research memorandum I bundle together all of my case-law and other authorities and arrange them in the order in which I have referred to them in the conclusion and discussion parts of the memorandum. I then ask my secretary to prepare a list of the authorities and place them in a binder or binder properly entabulated. I hand in these authorities with the research memorandum and they are thus made available for the next lawyer who needs to work with the authorities in detail, e.g., when preparing for trial.

Conclusion

Most of the ideas expressed in this article are merely the result of several "research experts" within the firm trying to think through how we actually go about doing what we do for a living – there is no right or wrong way to conduct legal research. The ideas expressed in this article seem to work well within this law firm, however, and are the ideas that we try to pass on to the "research experts" of tomorrow.