



Eli S. Lederman

Jun 14, 2019

# What the Judges Want

Here are some best practices for what the judges want on the Commercial List.

## **What do commercial list judges perceive as effective advocacy?**

Effective advocacy in contested matters involves strong material and solid presentation. However, counsel should also be cognizant that the thrust of the Commercial List is dispute resolution, and as such, judges expect counsel to demonstrate that the parties have been and are continuing to attempt to resolve their matters without the Court having to formally adjudicate them.

## **How important is written material on the Commercial List?**

Written material is very important for cases on the Commercial List. Judges inevitably find themselves triaging material; it is impossible for a judge to read everything, but their starting point is always the factum. Within the factum, the most important part is the overview because it will be the judge's first impression of the case. It is important for factums to tell the whole story, not just the facts and the law that supports your point. The best factums will face up to the other arguments and tell the judge how to address the other side's position.

## **How important is the page limit on Factums submitted on the Commercial List?**

Judges will not read past 25 pages unless you have obtained leave to file a lengthier factum. Keep it short. Judges appreciate that this is not an easy task, but counsel should be giving themselves time to write something that gets to the point. Lawyers should put themselves in the mind of their reader and predict the questions and reactions the judge will have.

## **How argumentative should the Factum be?**

A Factum should have a strong presentation, but it should not be overly argumentative. If a judge relies on your Factum in his or her decision, that is a sign that you

wrote a great Factum.

### **What should counsel avoid doing when arguing a motion?**

Counsel should avoid reading their Factum. If counsel senses that the judge is not being persuaded, they should not be shy to concede or accept that there is not enough evidence.

A lawyer's credibility will benefit from tactical concessions. Lawyers should be judicious with their objections, and use them only when necessary. Judges do not appreciate it when counsel quarrel in front of the judge.

### **When should counsel take a clue that they should concede a point?**

Counsel should be alert to signals from the bench. When a judge asks a question, that point becomes the most important point of the case. Counsel should answer questions head on as cases will often turn on the question which the judge has asked. Lawyers should never give the impression they are trying to avoid scrutiny of their argument.

### **What is an effective opening?**

An effective opening is short, pithy, and crisp. Get your theory of the case out there and some insight about the other side; expose your view about why the other side is wrong.