

Drafting
a
Concrete Clad Decision

by

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These slides were jointly produced by Mr. Ramdas Tikamdas and Dr. Sivasangaran Nadarajah
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Configuration - Layout

- Plan layout – with a view to assist reading and communicating the Decision.
 - ↳ Font, Line Spacing, Tabulation, Hyperlinks
 - ↳ Types of emphasis
 - *Italicizing*, underlining, **bold text**, UPPERCASE – combinations, text in boxes etc.
 - ↳ Consider hyperlinking all cross referencing
 - ↳ Use numbering for cross referencing.
 - Do not use bullet points (as it is difficult to cross refer items).
 - ↳ Page numbering (p. 1 of 9), content of Footer/Header, Paragraph indentation.

Configuration - Structure

➤ Structure – should be logical.

↳ Facts then issues (eg maybe for procedural issues)? Issues then facts?

- Proximity of the facts to the issues should be considered – are they far apart?

↳ Issues then law.

↳ Sequence of issues in Decision (not necessary to be in same order as in submissions).

↳ Any attachments to Decision; e.g. case law, methods of calculations etc.

↳ Consistent language, Defined term to resemble definition, Ditto for Headings.

↳ Informative headings/sub-headings offer road signs for the Decision & testing its logic.

↳ A table of contents helps structure and for others to follow lengthy Decisions.

Contents

- Everyone has their own style of writing.
 - ↳ Style earns trust – bad style dissuades.
 - Use: Plain English; Simple language; & Active sentences.
 - ❖ e.g. don't use Latin phrases (unless it is a maxim).
 - Use short sentences. Vary its length. Concise without omission of full fact
 - When a sentence does not link to the prior sentence, start a new paragraph.
- Do not presume all are familiar with jargons, law etc.
 - ↳ What is obvious to the author may be obscure to others →author's blind spot?
 - e.g. CPC, CMGD, ITT/ITB, RFQ, RFI etc. Use expanded term to define.

Contents (... continued)

- Avoid any suggestion of a breach of natural justice.
 - ↳ Avoid unpleasantness – in tenor or usage of words. Use temperate language.
 - Avoid: Trivializing a case; Adversarial tone; Pomposity; & Humour.
 - Avoid adjectives/adverbs which do not convey material information.
 - ↳ Treat both sides equally – in what is included & excluded.
 - ↳ Sidestep from advocacy. Or ask parties to comment on an observation.
 - ↳ Engage all points submitted.
- Use footnotes to convey information which disrupts discussion in the main body.

Objective

- A Decision should be unambiguous (sufficient for lay persons to understand the issues).

The Decision should stand alone without requiring the reader to make further inquiry.

↳ This is achievable by planning what point is to be presented and how to do it.

- By identifying the issues and reasoning why the Decision was reached.
- By checking facts tally with party's contention.
 - ❖ Accuracy of facts reassures care was rendered in arriving at the Decision.
 - ❖ Address facts which suggest a conflicting outcome → shows accuracy.
- By quoting key passages to help understand Decision.
 - ❖ If paraphrasing, then ensure tenor/meaning of a passage is not distorted.

Objective (... continued)

↳ The Decision by its analysis should portray the reasonableness of outcome.

- Decision should be defensible on the facts and law.
- Reasoning should justify the correctness of the result.
- Alternative holdings strengthen the correctness of the result.
 - ❖ But not vital to refute all points.

➤ The better the justification, the lesser the chance of the Decision being reversed.

To Do

- Make decisions → Avoid opinions.
- Address all issues?
 - ↳ Do not sidestep complex issues.
 - ↳ Decide only on what is needed?
 - Albeit some issues may not be material, best to still deal with it.
 - Occasionally it might be necessary to deal with peripheral matters.

To Do (... continued)

- Write for the losing party of that issue.
 - ↳ Assures party that essentials of its positions/facts was understood/considered.
- Keep essential details/facts & omit the non-essential. But include rationale.
 - ↳ Keep the audience in mind – Parties need material background.
 - But if significant issues/number of issues, novelty, complexity require analysis & details.
 - ↳ Not necessary to include all arguments or statutory provision/case laws.
 - Not necessary to rule on each element so long as the Decision is found on cogent grounds (from the many with similar outcome).

Preparatory Steps

- Though a Decision is written later, prepare the groundwork at the outset.
- Master or review the records as they arrive.
 - ↳ This enables an understanding of the (i) facts, (ii) issues, (iii) party's position to issues, (iv) evidence led, (v) objections and (vi) relief sought.
 - Take note of the credibility or reliability of the evidence/witness.
 - Consider plausibility of positions taken against evidence led.
 - ❖ This can serve as a preliminary roadmap of the (final) Decision.
 - ❖ Useful against evidence led in a disorganized manner.
 - ❖ In taking note of the shifts in a party's position.

Preparatory Steps (... continued)

- ↳ Thus gaps to the above may be spotted & clarifications can be sought early.
 - By using inquisitorial powers, ordering discovery, by interrogatories etc.
 - ❖ Except for clarifications related to finding of facts not apparent in the records, ask for the counter party's response to clarifications received.
 - Identify early whether a response to the Adjudication Reply and a reply to this response is justified – failing which late objections/submissions to the same could disturb preliminary findings or the decision writing.

Writing the Decision

- Follow an organized structure → And the Decision will compose itself.
 - ↳ Omission of a step on the other hand may make the reasoning cryptic.
- Identify (1) the issues and (2) the contentions presented by each party.
 - ↳ What is the law/contractual entitlement which apply to the contentions?
 - ↳ Identify the applicable ingredients for this entitlement.
- Systematically review the evidence – reject the tainted or immaterial.
 - ↳ Confirm: the facts; that facts fit the contention; that the contention fulfils the ingredients of the entitlement; & that there are no legal impediments.

Writing the Decision (... continued)

- Prepare an outline (against a checklist).
 - ↳ Decide (at least decide tentatively) before writing the Decision.
 - ↳ If a decision is a close one, then the Decision should say so.
- Review (check submissions, facts & consistency) & Eliminate superfluous.
- Is there a better way of devising the Decision?
 - ↳ Its organization, inclusion of facts, discussion of an issue at length?
 - ↳ Is the sentence clear? Is it correct?
 - ↳ Are all words necessary? Will the words be misused? Are there typo errors?
- Review after say 24 hours.

Other Factors

- Have an Introduction.
 - ↳ Useful for complex matters; Will serve as a road map.
 - Tell the nature of the case
 - ❖ The Parties
 - ❖ The Issues
 - ❖ The Legal principles & Outcome.
- Issues – (1) Preliminary/Procedural, (2) Jurisdiction & (3) Claim/Defence.
- Describing material facts.

Other Factors (... continued)

- A Possible Structure for the Substantive Decision:
 - ↳ By breaking down to the (1) Heads of Claim or (2) Components of the case.
 - ↳ Establish whether a prima facie case was made out for the claim. Establish whether the defences apply against the claim.
 - ↳ Establish Liability → then Quantum.
- Deal Issue by Issue.
- Conclusions and Orders.
- Check Introduction tallies with conclusion.

Any Questions?

Thank you.

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Typo Errors

Can Have

Unintended

Consequences

Justice
or
Just ice

Depends on
Which **Bar**
You're in