FORGET THE WIND UP AND MAKE THE PITCH: SOME SUGGESTIONS FOR WRITING MORE PERSUASIVE FACTUMS

John I. Laskin, J.A.

Introduction

When I began practising law, written advocacy, the factum, was far less important than it is now. Most counsel did not write their own factums. Several did not even read what their juniors or students had written for them.

Although I believe that we still maintain a strong tradition of oral advocacy in Ontario, you can no longer treat your factum as casually as the bar did a quarter of a century ago. When I practised I worked pretty hard on my own factums. Now that I am on the other side I can say that if I knew then what I know now, I would have worked even harder.

In our court the factum is often far more important than the oral argument. The reasons are not hard to discern:

- our workload is heavy; to reduce our inventory we have been "overbooking" on both the civil and criminal side and are routinely hearing 3 or 4 appeals a day;
- we have limited counsel's time for oral argument;

- only a few members of the court routinely take pre-hearing bench memoranda so the factum is the only sure route to the judge's heart and mind before the hearing;
- we decide about 85%-90% of our cases right after argument, by endorsement or by a short judgment.

Before the appeal is heard, you can be sure that each member of the panel will have read the reasons for judgment or the charge to the jury, the appellant's factum and the respondent's factum. We all would like to read more and, in many appeals we do, but, in truth, we don't always have the time to read more than the reasons or charge and the factums. Judges cannot help but form an initial impression of your case from your factum. The factum, as former Chief Justice Dubin put it, "whets the appetite of the judge". But often the factum does more than that. The factum may leave the judge not just with an initial impression of your appeal, but a lasting impression.

In our court we do not have a formal pre-hearing conference to discuss an upcoming appeal. But informal chit-chat is inevitable, so a good or bad factum can take even firmer hold with the panel.

You can overcome a bad factum with good oral argument, but doing so is an uphill struggle. If you write a good factum, you have a great advantage and you will

enhance your own credibility with the court. Judges like to gossip. We remember the good-factum writers and even come to recognize their styles. In the March 1990 issue of *The Advocates' Society Journal*, the late Justice John Sopinka wrote that in his opinion the quality of advocacy makes a difference to the outcome of 25% of appeals in our court. If that is true, and I think it is, the factum is a large part of that 25%.

In this paper I offer some suggestions that I hope might improve the clarity and persuasiveness of your factums. These are not inflexible rules; they are just my suggestions. If something else works better for you, then use it.

My theme is readability and my focus is on the reader. When we write we sometimes forget about the reader. To persuade you have to consider your reader, your audience. When I write reasons, I try to think of my well-informed next door neighbour reading my reasons. My neighbour is my audience. The advocate's audience is more limited - opposing counsel and, of course, the judge whom the advocate must persuade.

I firmly believe that though what we say is obviously important, so too is how we say it. You cannot divorce content from language and style. Dull, dense, difficult to read prose will detract from what otherwise may be a strong legal point.

Writing well is hard work - at least it is hard work for me. Legal writing is difficult because what we write about usually is complicated. And we all have time constraints - too much to do and too little time to do it in. Writing concisely is harder than writing at length. But taking the time and trouble to write better will make you a much better advocate for your clients and will enhance your reputation with the court.

Here are my suggestions, which I have organized around a number of themes.

1. What Is This Appeal All About And What Is The Court Likely To Do With It?

Here I want to make three points, each of which should influence how you write your factum. First, before you write a single word put yourself in the position of your reader, the judge. This is what the great John Davis of the New York Bar called "the cardinal rule" of advocacy. In your imagination, trade places with the judge. You are immersed in the case, the judge knows nothing of it. What is this appeal all about? What is the key issue on which the appeal turns? Identify and frame this key issue, the issue that will control the outcome of the appeal. Then

think about the story that you are going to tell around this key issue. How would you want this story told? What approach will help the court reach the best solution?

Second, appeals generally fall into one of two categories: error correcting or jurisprudential. Decide into which category your appeal falls. Most appeals are simple error-correcting appeals. Do not make the mistake of trying to turn your error-correcting appeal into the next *Donoghue v. Stevenson*. We have far too much work to do to write a treatise on every case and generally we do not like opining on more than we have to in order to decide the appeal.

If your appeal is an error-correcting appeal, we will likely decide the appeal by an endorsement. Give us a simple factual or legal basis for your position; do not try to make new law. If you have provided a simple, clear route to the desired result, part of your factum will likely find its way into our endorsement. If the appeal is jurisprudential, then you have to write your factum, especially the law section, differently. You should address social policy or administration of justice concerns, and you should consider the implications of your position for related areas of the law. In other words, you should think, read and write "around the problem."

If your appeal calls on the court to interpret legislation, we need to understand the legislative scheme, how it works, the rationale for the statutory provisions in

question. We don't often get this, even from government lawyers, and we frequently wish we could phone the regulator for a better understanding of the statute.

The third point you should consider is whether we are likely to reserve. If you think we are going to reserve, your factum should be more detailed. I often make heavy use of a good factum in writing reasons. But remember the statistics: only about 10%-15% of our decisions are reserved judgments with full reasons.

If the trial judge has written careful or detailed reasons and we are going to reverse, we will likely reserve and write our own reasons. Otherwise, most error-correcting appeals are dealt with by endorsement. Jurisprudential appeals are usually reserved.

2. The Overview Statement

Jim Raymond, an English professor at Alabama, is the head of the judgment-writing course for federally appointed judges in Canada. He is also the co-author of an excellent book on good legal writing called "*Clear Understandings*"[1]. The subject of Professor Raymond's lecture at our judgment writing school is: "The First Page Says It All". Whether you are writing a factum or a judicial opinion, Raymond recommends that you begin with an overview statement, which tells the reader what

[1] Ronald Goldfarb and James Raymond, *Clear Understandings: A Guide to Legal Writing* (Goldenray Books: Tuscaloosa, 1982).

the case is about, who did what to whom, the issues and your position on them — all in no more than a page. Raymond's view reflects a fundamental principle of persuasive factum writing: put context before details. The principle of context before details is also an important theme in a superb book on good legal writing, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, by Stephen Armstrong and Timothy Terrell.

The overview statement has been used for several years by all good counsel arguing criminal appeals in our court, even though it is not required by the criminal appeal rules. The criminal bar has simply adopted the overview statement as a technique of good written advocacy.

Effective January 4, 1999, the Rules Committee amended the factum rules for civil appeals to our court to require an overview statement in Part II of the appellant's factum and in Part I of the respondent's factum.

Although the overview statement is now mandatory, you need to know why it is important. The overview statement is important because it provides a road map for the rest of your factum. It gives the judge the context for your appeal, and with the context the judge can better absorb and understand the details to follow. I consider the overview statement the most important part of the factum.

I have these suggestions for writing effective overview statements:

(i) In the overview statement you must begin persuading the court of the rightness of your client's cause. Tell your story in human terms, that is, appeal to the human being in the judge. Forget the legal jargon. Pretend the judge is just your well-informed next door neighbour. Engage the judge, capture the essence of what the case is all about and communicate the justness of your position. In other words, solicit the judge's affection for your cause.

(ii) State the key issue or issues on which the appeal turns in your overview statement but be careful not to state the issue or issues too broadly. If you state an issue too broadly, then your factum will be too long because the amount of detail is tied to how narrowly or broadly you state the issue. Worse, we judges will not know what to look for, what facts are crucial and what facts are background. For example, if you are attacking a municipal by-law, stating the issue as the validity of the by-law is too broad. Better to say that the issue is whether the by-law is invalid because it was passed in bad faith.

(iii) The overview statement should contain just enough facts to give context to the key issue and to preview what is to come. Most counsel do not give enough facts in their overview statements. You should front-load but not overload your overview.

3. Point First Writing

Of all of my suggestions, I consider point-first writing the most important. Point first writing, more than anything else, will improve the clarity and persuasive of your writing. The best discussion of point-first writing that I have read is in a book by Joseph Williams, a professor of English at the University of Chicago, called *Style:Toward Clarity and Grace*[2]. *Style* has strongly influenced my writing.

Williams delivers the following message: state your point or proposition before you develop or discuss it. Do not write your factum like a mystery novel in which the conclusion is revealed only in the final paragraph, if at all. In other words, give the context before discussing the details. Indeed, point first writing puts into practice the principle of context before details. Point first writing should be used throughout your

[2] (Chicago: The University of Chicago Press, 1990).

factum, both in the facts part and in the law part, and within those parts, in every section and in every paragraph. We see far too many factums that contain long meandering paragraphs, in which the point of each paragraph is never stated or almost, as bad, is stated three paragraphs later. This is not reader-friendly advocacy.

You can fix this problem in these ways. At the beginning of the paragraph, tell the reader what topic or idea you are going to discuss in the rest of the paragraph. Try to restrict each paragraph to one main idea or topic. Then, in the first sentence or two of each paragraph, articulate the point of the paragraph, usually your conclusion or submission on the issue. The remainder of the paragraph will discuss the submission, elaborate on it, support it, or qualify it. This is point first writing.

Unfortunately, too many factums contain either point last writing or no-point-at-all-writing. Lawyers seem to resist giving their conclusion upfront. They think that readers need to understand how the argument develops, or that readers will not appreciate their point until they are familiar with the relevant facts or that an anticipated conclusion will make the ultimate conclusion repetitive. As valid as these concerns may be, they do not outweigh the desirability of point first writing. We absorb and remember information best when we know why it is important and how it is relevant. If we are forced to read a lot of details before we know why they matter

we will skim and skip. Practise point first writing. The persuasiveness of your factums will increase immeasurably.

Another way to practise point first writing is to use markers or signals. Tell the reader what is coming next by using headings to separate each issue. Headings are helpful to the court because they give structure or road maps to your factum. They keep the judge on track and emphasize the order and organization of your factum. Most good counsel are now using headings. When you write a heading try using rhetorical language instead of neutral language. Instead of writing "First issue: whether there was a fiduciary relationship", try instead: "First issue: the trial judge erred in finding a fiduciary relationship". The latter formulation is more persuasive.

4. White Space

The visual impact of your factum plays an important role in its persuasiveness. Most lawyers cram far too much onto each page of their factum, no doubt to meet our court's 30-page rule. But we will not thank you when we are up late at night reading a dense 30-page single spaced factum with no margins. I suggest you ensure that the pages of your factum have enough white space. Generous margins, double-spacing, headings, and lists or tabulations will all improve the

visual impact of your factum. These devices will give the appearance of a less-dense document and show that you care about the reader.

5. The Importance Of The Facts

My view of good advocacy reduces to two simple propositions: first, tell the court why your client should win — capture, in the words of one of my colleagues, the "moral highground" – then, tell the court how to get there. The first proposition turns on how you present the facts; the second, on how you present the law.

We are powerfully influenced by the equities of the case, by the needs of real people. If we have to, we will bend the law to reach a fair result. Most cases are decided on the judge's view of the facts — certainly, in our court, and even in the Supreme Court of Canada.

Because we want to do justice between litigants, we are far less interested than you might think in great pronouncements of law or highly-legalistic arguments. If the facts have been persuasively presented, then the law section of the factum should show a simple legal basis for getting to the desired result. The facts, in my opinion, are the hardest part of the factum to write and the part of the factum where

we need the most help. We know something about the law. We are far more dependent on counsel to outline the relevant facts.

In the facts section of the factum, counsel must tell a story. Story-telling is persuasive. But counsel must carefully consider what story to tell and how to tell it. You have to tell a story that shows the justice and logic of your position, that persuades the court of the rightness of your client's cause. Lawyers like to tell stories chronologically. This is not always the best method. I suggest that you tell your story, your facts, around a theme that corresponds to the key issue (or issues) in the appeal. You have already identified the key issue in your overview statement. In the facts section, you put flesh on the bones. For example, if the key issue in a criminal appeal is the identification of the accused, acting for the appellant you may want to tell the facts by talking about the frailties in the eye witness testimony. And you will want to cut out the facts that do not relate to this issue.

Some other suggestions for writing the facts part of the factum more persuasively include: using headings, introducing the facts by giving the context for them, and separating the disputed from the undisputed facts or at least telling the court what facts are not disputed.

A frequently asked question is whether you should quote excerpts from the trial transcript in the facts section of your factum. My answer is that on occasion a short excerpt from the transcript, using the witness's own words, can make a point very effectively. But do not overdo this practice. Long transcript excerpts will make your factum too long and may divert the court from your main theme. Preferably the transcript excerpts you rely on should be in your compendium, which is now required in civil appeals and is desirable in most criminal appeals. If you do quote from the transcript, give the context before the quotation. In other words, give the point of the witness's evidence before quoting the evidence itself.

6. The Importance of Argument

The recent amendments to our factum rules for civil appeals include a requirement for concise argument in the issues and law section. Although the previous rules did not explicitly provide for argument, they did not preclude it either. Like most of my colleagues, I have always welcomed argument and most good factums contained argument. I find a succinct and focussed argument very helpful, especially in an era of time-limited oral advocacy.

The argument should include three elements for each issue — the controlling law, the pertinent facts and your conclusion. If you are acting for the appellant, you must address where the trial judge went wrong, why the trial judge went wrong and the effect of the trial judge's error, because not every error matters or will give you relief. If you are acting for the respondent you must show why the trial judge was right, or if the trial judge went wrong why the error was harmless. Sometimes respondents are better to concede the error and then show that it did not affect the result.

For example, in a fiduciary duty case, suppose the trial judge found that the defendant Williams had breached his fiduciary duty to the plaintiff O'Neill. The defendant Williams appeals. The respondent O'Neill seeks to uphold the judgment. The appellant Williams' factum might say the following:

First Issue: No Fiduciary Relationship

> Williams submits that the trial judge erred in finding a fiduciary relationship. The elements of a fiduciary relationship are scope for discretion, unilateral exercise of that discretion and vulnerability. In this case the element of vulnerability is missing because (a), (b), (c), etc.

Or, acting for the respondent O'Neill, you might say:

Second Issue: This Court Should Not Interfere with the Trial Judge's Finding of a Breach of Fiduciary Duty

> The appellant Williams contends that the trial judge erred in finding a breach of fiduciary duty. This finding is a finding of fact. Absent manifest error, this court should not interfere. The following evidence reasonably supports the trial judge's finding: (a), (b), and (c), etc. Therefore, no manifest error exists and this court should not interfere with the finding.

In the first example, I told the reader early in the paragraph that I attacked the finding of a fiduciary relationship because the element of vulnerability was missing; then I would have discussed the point. Surely this is better than a bland statement such as: "an appeal court can only interfere with findings of fact if the trial judge made a "palpable and overriding error" or "the following are the elements of a fiduciary relationship: scope for discretion, unilateral exercise of that discretion and vulnerability". In the second example, I told the reader upfront that the trial judge's finding was a finding of fact and that it was reasonably supported by the evidence. Then I would have listed the supporting evidence. In both examples I used point first writing.

Your argument should be focussed, and if it is focussed it will do two other useful things. First, it will avoid the generality problem. One common weakness in

the law section of the factum is that statements of law are too general. They are not specific enough to the facts of the case. For example, if the appeal concerns a claim against a real estate agent arising out of a transaction of purchase and sale that went sour, general statements about the duties of real estate agents are not helpful. Focus on the duty or duties that arise on the facts. Second, a focussed argument will allow for listing, tabulating or grouping relevant facts or points in one paragraph — the (a), (b). (c's), etc. — which can be powerfully persuasive.

Therefore, your factum should contain argument. The level of detail is another matter. For our court you do not need to be as detailed as for the Supreme Court of Canada. The level of detail depends on the case, the number of key issues, and whether we are likely to reserve.

7. Standard of Review

The applicable standard of review should be addressed in the law section of the factum. Often it is ignored. This is not just an administrative law point but permeates every appeal to our court. Remember our role: We do not retry cases; instead, we look for error in the trial court. Thus you have to be conscious of the standard of review in the law section of your factum and address it. You must do

more than identify where the trial judge went wrong or even why he or she went wrong. You also have to ask yourself whether the Court of Appeal can do anything about it.

You can address the standard of review in the law section of your factum in one of two ways: as a stand alone section headed "Standard of Review" or as part of the substantive argument on an issue as I did in my fiduciary duty examples.

If you are acting for an appellant in a criminal case, appealing a decision of a summary conviction appeal court judge, you can only appeal on a question of law. The best factums state upfront what the appellant contends is the error of law made by the trial judge. If you are appealing a damage award, you will recognize that the Court of Appeal has a very limited power of review[3]. Write the law section with this limited review power in mind. Tell us why the damage award is reviewable before you get into the detail. If you are reviewing the exercise of a trial judge's discretion, you need to find an error in principle. To do that, you have to know what the error in principle is (for example, failing to take into account relevant factors) and then state it.

Conversely, if you have a finding of fact in your favour, use it. Itemizing or tabulating in a list the evidence that reasonably supports a finding of fact is a

[3] See *Woelk v. Halvorson*, [1980] 2 S.C.R. 430.

persuasive technique for respondents. If you are attacking a finding of fact, you need a major error to persuade our court to interfere. You need "manifest error" or "palpable and overriding error", which is equivalent to review on a standard of unreasonableness. If no such major error exists, then you must argue your appeal by accepting the trial judge's findings of fact.

Remember this however: though trial judges may not always believe it, we do not go out of our way to overturn them. In colloquial words, we cut them a fair bit of slack. Even if we do not think that their judgment is perfect, we will strive to uphold it if we think that the result is fair or does justice to the case. The lesson for factum writing is to dispense with highly legalistic or minor errors. You need to identify a major error that affects the justice of the result.

8. The Respondent's Factum

Most of my suggestions apply both to the appellant's factum and to the respondent's factum. However, I have a few suggestions that apply particularly to the respondent's factum:

(i) The respondent's factum should be self-contained or free-standing. The judge should be able to read it on its own without having to refer to the

appellant's factum. Therefore, I do not find it helpful when a respondent's factum says "as to paragraph 11 of the appellant's factum, it is submitted that ..." Far better to say, "in paragraph 11 of her factum, the appellant Smith contends that the trial judge misinterpreted s.139 of the *Highway Traffic Act*. Jones submits that the trial judge did not misinterpret this section. The trial judge ... ". Moreover, cross-referencing to the appellant's factum allows the appellant to control the presentation of the case.

(ii) The respondent can make particularly effective use of the overview statement. For a respondent, the overview avoids the stark and often unpalatable choice of accepting the appellant's statement of the facts or re-writing it. Re-writing often seems petty but often a respondent does not like the appellant's gloss. The overview statement allows a respondent to give a factual summary of its position. An alternate technique is to outline the facts relevant to an issue in the law section.

(iii) A respondent should not feel limited by the appellant's statement of the issues. It is entirely appropriate to recast the appellant's statement in less antagonistic terms that reflect the respondent's view of the case. "The trial judge erred in admitting inflammatory photographs" can, in

the respondent's hands, become "the trial judge did not abuse her broad discretion in concluding that certain photographs were admissible".

(iv) A respondent's factum can make effective use of lists. Frequently a respondent can succeed on an appeal by showing that the trial judge's findings of fact are reasonably supported by the evidence. A submission that says: "the following evidence reasonably supports the trial judge's finding of bad faith: (a), (b), (c) ..." is invariably persuasive.

9. Candour

A familiar admonition is that candour is an essential ingredient of good advocacy. This is true both of written and oral advocacy. In the factum candour is essential both in the facts section, and in the law section. Candour in written advocacy takes many forms. Let me suggest four ways in which a factum may lack candour:

(i) Being Unfair to the Record: Because the facts decide the outcome of most appeals we naturally want to refer only to those facts that help our case. But you must be fair to the record. This

is not just an ethical obligation but common sense. Opposing counsel will be sure to point up your misstatements, distortions or omissions. At the same time, however, you do not need to emphasize facts unfavourable to your position. Unfavourable facts can be dealt with effectively in many ways. For example, you can de-emphasize unfavourable facts by your sentence structure or by referring in the same sentence or paragraph to facts that qualify or explain the evidence against your client.

(ii) Overstating Your Claims: These are examples of overstatement: a defendant's conduct was "egregious," or the trial judge's ruling was "a gross miscarriage of justice," or "three witnesses corroborated every single aspect of the plaintiff's evidence". Overstatement is jarring. Be careful about using this form of advocacy in which you are really expressing a conclusion in superlatives. If you do use superlatives then you better have the ammunition to back them up. Otherwise, not only will your argument suffer, so too will your credibility with the court. The right noun or the right verb unqualified is far more forceful than the wrong one arrayed in superlatives. In the same vein, restraint

or understatement is usually more forceful than exaggeration. Appeal to what you hope is the judge's intelligence.

(iii) Facing up to your Weakness or Difficulties: If your argument has a weakness, not only will your opponent address it, the weakness will concern the court. Far better for you to meet it head-on, than to leave it unanswered. Do not fall into the trap of thinking that if you do not address your difficulties, neither will the court.

(iv) Demeaning your Opponent's Case: Do not denigrate your opponent's position either by expressing it weakly or (except in the rare case) by dismissing it as frivolous and without merit. This is a common mistake. You will be far better off to state your opponent's argument fairly — even strongly — and then refute it. Only then will you know that you have a case.

10. Give The Court Credit For Knowing A Little Law

Many factums do not seem to recognize that there is a core body of legal principles and cases that is well-known by the court. These principles and cases are

referred to so frequently, that every member of the court is intimately familiar with them. We do not need four paragraphs on the standard of review of a trial judge's finding of fact or five paragraphs on the summary judgment test under Rule 20. All of us are a bit weary of seeing the admonition that "the defendant must lead trump" although when one appellant did cite this phrase in a recent factum, the respondent effectively replied that the defendant appellant did not lead trump because he had no trump to lead!

We all know about "palpable and overriding error," about genuine issues for trial and, in a criminal case, about error in principle as a basis for reviewing a sentence. If you are going to state such well-known principles, one stand-alone paragraph will do. Better still, simply tell us what is the "palpable and overriding" error or genuine issue for trial or error in principle and then discuss it.

A related problem is that many counsel list far too many cases in their factums. The Court of Appeal storage area is filled with casebooks cluttered with cases never referred to by counsel. My guess is that over 90% of cases cited in most factums are not referred to in oral argument and are not used in our judgments. Listing too many cases shows that you really have not thought enough about which cases will really help you. In most appeals, you can limit the authorities to the following:

(i) the most recent case on the subject, either from our court or from the Supreme Court of Canada. For example, for the standard of review of a finding of fact, refer only to one or two cases such as *Schwartz v. Canada*[4] or *Hodgkinson v. Simms*[5]; if the issue is the application of s.24(2) of the *Charter*, *R. v. Stillman*[6] and *R. v. Feeney*[7] should be enough;

(ii) a case close on the facts;

(iii) a "leading" old case; or

(iv) a case in which the point in issue is fully discussed by a well-respected jurist. We are only human and we are influenced by who wrote the judgment. The Honourable Arthur Martin's opinion in a criminal case is probably more persuasive to us than the views of another judge less experienced in the criminal law.

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[4] [1996] 1 S.C.R. 254.
[5] [1994] 3 S.C.R. 377.
[6] [1997] 1 S.C.R. 607.
[7] [1997] 2 S.C.R. 13.

Of course, if you have a jurisprudential appeal then you may have to refer to more authorities, both in Canada and in other jurisdictions, to develop your point.

11. Quotations From Cases And Statutes

Sometimes it is necessary to refer in your factum to the relevant part of a statute and sometimes it is desirable to quote from a case. If an outside authority can advance your argument in language more convincing than your own, then use it. But long quotations from cases or long extracts from a statute are easy to skim and skip. Try these suggestions:

(i) Keep the quotation or extract short: refer only to what is essential.

(ii) Give the context for the quotation. In other words summarize what the judge can expect or at least entice the judge into the quotation by introductory words. Giving the context increases the chance that the judge will actually read what you have cited.

(iii) Unless the quotation is long, do not block or indent it. Instead, put it in the text, which will also improve the odds of it being read.

12. Writing Concisely

To be persuasive, factums must be concise. Unfortunately many factums filed in our court are anything but concise. This lack of concision takes many forms.

Often factums are just too long. Our court's Practice Direction permits a factum of up to 30 pages (and longer with a judge's order). Many counsel think that they have to fill all 30 pages even in the simplest of error-correcting appeals. They are wrong. With our heavy workload long factums run the risk that, although they will be read, they may not be read carefully and fully digested. I have never heard a judge complain that a factum was too short. John Robinette, one of the greatest advocates our country has ever produced, wrote factums that were almost always less than 15 pages. He knew the point he wanted to make and he wrote simply and concisely. He simply pruned away all the fat.

Why are factums too long? Time and fear are two main culprits. We do not take enough time to write a shorter, more concise factum; and we are afraid of writing too little or of leaving something out. Effective writing requires selection and clear thinking. Conciseness is often a by-product of knowing what your case is about and where you are going.

The facts part of factums often is not written concisely, perhaps because counsel have not clearly framed the controlling issue or issues. Once you have framed the controlling issue, make sure your statement of the facts refers only to those facts necessary for the court to deal with that issue. Cut out the facts that are not needed.

Listing too many issues is another way a factum may lack concision. Almost all appeals have only one or two or, at most, three good issues. Yet, even in ordinary error-correcting appeals, we frequently see counsel listing seven, eight, even ten issues for the court to decide. We can never know the case as well as counsel does and we can spend only a fraction of the time that counsel has spent on it, so you must focus our attention on the one or two issues on which you believe the appeal will turn. Counsel do not always give that question enough thought. Figure out these one or two issues and, in most cases, dispense with the rest. Certainly dispense with legalistic arguments that do not advance the interests of justice and let the minor points go. As the Honourable Sydney Robins, one of my former colleagues, put it: "legal contentions, like currency, depreciate through overissue". Multiplicity hints at a lack of faith and confidence in your major grounds of appeal. Multiplicity may weaken a good case and will not save a bad one. The message is: do not try to make every argument and do not bury your best argument

in the last or second-last paragraph of your factum. Put your best argument upfront, unless the logic of your position requires some modest variation.

Counsel frequently write paragraphs that are too long. They like to cram too much into one paragraph. Try to keep each paragraph to one idea or one topic whose point you state clearly at the beginning and then develop in the rest of the paragraph.

Finally, sentences are frequently too long. Counsel want to put too much into one sentence, usually because they worry about absolute statements and wish to qualify or attach conditions to everything they say. Long sentences are not wrong, but they are harder to understand and retain. They do not work as well in legal writing as in, say, fiction. On the other hand, I am not going to tell you that every sentence should be short because good writing has a rhythm that requires variation in sentence length. Indeed, some of the most beautiful sentences in the English language are long sentences, but they are always characterized by a parallel structure for parallel ideas or by some other device that makes them flow. A reasonable working rule is to use only one subordinate clause in every sentence, unless you resort to one of the devices that make a longer sentence coherent.

13. Language

This topic deserves a paper of its own, preferably by a professional writer instead of by a judge. Language and content are intimately connected. Forceful language makes for more persuasive content. Here are some of my suggestions to help you write your factums more forcefully and thus more persuasively. Or, more accurately, this is my "hit list" of what to avoid:

(i) Avoid using the phrase "it is respectfully submitted" more than twice in your factum. Use it once at the beginning and once at the end of the law section; but not in between. Repeated too often, this phrase disrupts the force and flow of your argument;

(ii) Avoid false intensifiers: "completely wrong", "absolutely" "unfounded", "very serious error", "clearly", "certainly", "it is important to note that", "blatant violation". These false intensifiers usually weaken rather than strengthen the force of your argument;

(iii) Romance the verb. By that I mean use active verbs and I do not include the verb "to be". Active verbs are forceful, and therefore are an important ingredient of persuasive writing. Using active

verbs also means avoiding three practices that detract from forceful writing. First, avoid using too many adjectives and adverbs. Second, avoid nominalizations, that is, avoid changing verbs into nouns. Nominalization is a contagious disease among lawyers. Instead of writing "make an argument", write "argued"; instead of "executed a veto", "vetoed"; instead of "gave consideration" , "considered"; instead of "conducted an investigation", "investigated". Third, avoid excessive use of the passive voice. Lawyers are far too enamoured by the passive. Both the passive voice and nominalization have their place in good writing but limit their use. Nominalization and the passive reflect the lawyer's reluctance to admit someone is doing something to someone else. Lawyers like to conceal action beneath the surface. We need to correct this. Nominalization and the passive can be effective and persuasive but their use should be a conscious choice.

(iv) Avoid the word "not". Unless your tone dictates otherwise, instead of "did not consider", write "ignored"; instead of "did not remember", write "forgot"; instead of "did not allow", write

"prevented"; instead of "not very often", write "seldom"; instead of "did not perform under the contract", write "breached the contract."

(v) Avoid what the late Professor Rodell of Yale Law School called the "backhanded passive": "it is urged that", "it would seem to appear that", "it is suggested that", "it is observed at the outset that", "it should be pointed out that". In other words, forget the windup and make the pitch.

(vi) Avoid needless words. Instead of writing "it is imperative that the court consider", write "the court must consider"; instead of writing "this is a case which addresses", write "this case addresses"; instead of writing "may have the effect of increasing", write "may increase"; instead of "on an annual basis", write "annually" or "yearly"; instead of "in the event that", write "if"; instead of "at this point in time", write "now". On this topic, I highly recommend Bruce Ross-Larson's book, *Edit Yourself*[8]. It contains a long list of what to cut and what to change. I keep this book handy when I am writing reasons.

[8] (New York: W.W. Norton & Company, 1996).

(vii) Although this advice may cause mutiny among lawyers and judges, try to avoid "the fact that" expressions. Instead of writing "the fact that Carter failed to give notice, write "Carter's failure to give notice"; instead of "notwithstanding the fact that", write "although"; instead of "due to the fact that", write "because"; and cut entirely "the fact remains that".

(viii) Avoid the dreaded couplets: null and void, cease and desist, due and payable, free and clear, force and effect.

(ix) Avoid legal jargon. We do not see too many "hereinafters", "hereins", *inter alias*", "the said" . But counsel still write "prior to" and "subsequent to" instead of "before" and "after"; "the construction of a statute" instead of "the interpretation of a statute"; "mandates" instead of "requires"; "utilize" instead of "use"; "terminate" instead of "end"; "necessitate" instead of "need"; "remuneration" instead of "salary, wages or pay"; "adjacent to" instead of "next to"; "provided that" instead of "if"; and "pursuant to" instead of "under". Although harder to detect, this is still jargon. I distinguish, however, between legal jargon and legal terms of art. Parol evidence, summary judgment, and

hearsay evidence are terms of art, and are a necessary part of lawyers' language.

(x) Avoid "it is," "there is," and "there are" clauses. Instead of writing "it is true that the defendant failed to testify", write "the defendant failed to testify"; instead of "there are many cases that deal with adverse possession of islands", write "many cases deal with adverse possessions of islands"; instead of "there were ten people who witnessed the shooting", write "ten people witnessed the shooting."

Generally, I prefer a simple, concise style that uses active verbs, avoids excessive use of adjectives and adverbs, limits the use of the passive voice, and puts the subject, verb and object close to each other.

14. Sentence Structure

The structure of your sentences has a great impact on the persuasiveness of your writing. Here are a few suggestions:

(i) Avoid too many "left-handed sentences." Lawyers like to qualify everything they say. So they begin their sentences with a string

of dependent clauses beginning with "although", or "if" or "even if". Judges are exhausted by the time they get to the main noun and verb. To avoid the left-handed sentence either do a flip-flop by putting the dependent clause at the end of the sentence instead of at the beginning, or put the introductory clause into a separate sentence.

(ii) Remember that the two most important parts of the sentence are the beginning and the end. This has important implications for the points in your factum that you wish to emphasize. Your important points should be at the beginning or end of your sentence, not buried in the middle.

(iii) Conversely, suppose you want to de-emphasize a point or a fact because it is unfavourable to your position. Try putting it in the middle of the sentence or in a dependent clause to subordinate it and give it less prominence, or, dare I say, use the passive voice.

(iv) Use lists – (a), (b), (c) etc. – or even lists within a sentence to make your factums more readable and persuasive.

(v) Vary the length of your sentences and try using a very short sentence in the midst of longer sentences. Short sentences can provide an effective contrast. Winston Churchill gives us a wonderful example of variation in sentence length in this passage from *History of the Second World War:*

> We must take September 15 as the culminating date. On this date the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London. It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters. . . .

15. Making The Factum Flow

To make your factum user friendly you must make it flow smoothly. You will make it flow smoothly if you make it as easy as possible for the judge to understand your chain of reasoning. Judges will understand your chain of reasoning more easily if they see how one sentence connects to the next sentence. A good paragraph, a paragraph that flows smoothly, will provide effective transitions among its sentences.

Three techniques are particularly useful for making your factum flow smoothly. The first technique is to use connecting or transitional words. The English language is full of them. Words such as "since", "because", "thus", and "therefore" express logical relationships. Words such as "however", "although", "but", and "conversely" show contrast or comparison between what has been written and what is about to be written. Words such as "also", "next", "in addition", "first", "second", and "finally" show the progression of the discussion. Words such as "still", "nevertheless", and "notwithstanding" indicate a return to the main point after conceding another point. These transitional words do not always have to occupy the first word of a sentence and not every sentence needs a transition. Judges are smart enough to make some connections themselves. So use transitional words, but do not overuse them.

The second technique is to repeat at or near the beginning of the sentence some of the content of the preceding sentence, using either the same words or an easily recognizable substitute. For example, "s.108 of the *Courts of Justice Act* requires an action for specific performance of a contract to be heard without a jury. This requirement means ...".

The third technique is to organize the information in each sentence so that you put older or familiar information at the beginning of the sentence and new information at the end of the sentence. Williams gives this example:

Original

Some astonishing questions about the nature of the universe have been raised by scientists exploring the nature of black holes in space. The collapse of a dead star into a point perhaps no larger than a marble creates a black hole. So much matter compressed into so little volume changes the fabric of space around it in profoundly puzzling ways.

Revision

Some astonishing questions about the nature of the universe have been raised by scientists exploring the nature of black holes in space. *A black hole is created by the collapse of a dead star into a point perhaps no larger than a marble.* So much matter compressed into so little volume changes the fabric of space around it in profoundly puzzling ways.

Revising the second sentence of the paragraph makes the entire paragraph flow more smoothly. And you will have noticed that this smooth flow was accomplished by using the passive voice instead of the active voice in the second sentence. Indeed, one of the most important and effective uses of the passive voice is to improve cohesion or sentence flow.

16. Editing

Many factums are not properly edited. They end up looking like the first draft instead of the final product. Of course, editing runs up against the time pressures of

getting your factum out. A decent edit, however, can convert a mediocre factum into a very good factum. I strongly encourage counsel to find time to edit.

Here are my editing suggestions:

(i) Remember that you can do different kinds of edits and you should not try to do all of them at the same time. What are the different kinds of edits? You can edit for accurate case citations, typing errors, grammar and punctuation. But you can also edit for tone, for sentence and paragraph length, for proper headings, for clarity and organization and to eliminate wordiness and jargon. Do not do all of these edits at once. Break them up or divide and conquer.

(ii) Edit not just what is on the page, also edit what is not there. In other words, edit the white space. Make sure that your factum provides context before details, that it has headings and point first paragraphs.

(iii) Try one or more of the following:

(a) Use the bottom-drawer technique: leave your draft factum for a few days and then come back to it. You will have a fresh perspective;

(b) Read your draft aloud to yourself. Your ears are often your best guide to whether your factum is clear and persuasive. If it doesn't sound right it needs fixing;

(c) Have someone else read your draft: a colleague, a friend, your spouse. You are immersed in your factum and you need a more objective view.

(iv) The most important suggestion of all: always look to cut. "Read with a pencil". No matter how concisely you think you have written, you can always make your factum more concise. So edit, edit and then edit some more.

Closing

Writing factums puts advocates' reputations and credibility on the line. As I said at the beginning of this paper, judges get to know the good factum writers and the bad factum writers, and to recognize their styles. And, advocates are responsible for the logic and persuasiveness of their reasoning and its implications for the position of their clients. Yet in trying to write decent factums, advocates run up against the pressures of time and of busy practices. One of my main messages

is that taking the time to write a decent factum will pay huge dividends. I hope that my suggestions will help you to write better and more persuasive factums.