Ascendance of the Factum: A Balance of Art and Science

Prepared For: Legal Education Society of Alberta

*Advanced Legal Research*

Prepared By:

**Catrin A. Coe**

For Presentation In:

Edmonton – November 26, 2009

Calgary – December 3, 2009
Ascendance of the Factum: A Balance of Art and Science

Catrin Coe

November 5, 2009

This paper complements a presentation by the author at the Legal Education Society of Alberta’s November/December 2009 Advanced Legal Research Seminar
## Table of Contents

Introduction ............................................................................................................ 3  
The Factum's Three Purposes .............................................................................. 4  
  Pre-hearing – Persuasion ..................................................................................... 5  
  During the Hearing - Providing a Point of Reference ......................................... 7  
  Post-hearing - Assisting Judges with Writing Decisions ..................................... 8  
Rules 538 – 543 and Practice Note C .................................................................... 9  
Part I – Statement of Facts ................................................................................ 10  
  Appellants ........................................................................................................... 11  
  Respondents ......................................................................................................... 12  
  Common Shortcomings ......................................................................................... 13  
  The Issue (Overview) Statement ......................................................................... 13  
Part II – Grounds of Appeal .............................................................................. 14  
  Stating the Issues ................................................................................................. 15  
  How Many Grounds of Appeal/Issues? ................................................................. 15  
  The Nimble Drafter .............................................................................................. 16  
Part III – Points of Law ...................................................................................... 16  
  Standard of Review ............................................................................................. 17  
  Structuring Your Issues (Grounds of Appeal) .................................................... 18  
    Appellants .......................................................................................................... 18  
    Respondents ........................................................................................................ 19  
  Headings ............................................................................................................... 19  
  Common Shortcomings ....................................................................................... 20  
Part IV – Nature of Relief Desired .................................................................... 20  
  Seven Virtues ....................................................................................................... 21
Introduction

You are probably familiar with a variation of this proverb: “why ask the person casting a fishing rod what bait attracts fish when you can ask a fish?”. Translated into our context: “why ask a lawyer what factum-writing techniques work when you can ask a judge?”.

Where possible, I have relied on what judges have said and written about factums. On the other hand, lawyers’ contributions are helpful, too. For example, this lawyer’s concise passage captures how to write a winning factum:

… appellate counsel must know and comply with the applicable rules, master the record, discern viable issues, identify the portions of the record that pertain to those issues, study the law that applies to these issues, select the strongest issues, and state them in persuasive fashion.

Dennis Owens, “Appellate Brief Writing in the Eighth Circuit” (2001) 57 J. Mo. B. 75 at 77

This paper is structured in three parts:

1. **The Ascendance of the Factum** - I first set out to convince you that the factum has become the most important aspect of appellate advocacy (for the respondent and the appellant). If properly planned and written, it can serve three purposes: persuading the panel of your client’s position before the hearing, providing a point of reference during the hearing and assisting the panel with drafting its reasons post-hearing.

2. **A Balance of Art and Science** - the second part of the paper begins with a review of the science, i.e., rules and practice notes, and then shifts to the less tangible or ‘artistic’ aspects of the factum. This component is structured according to the four parts of the factum: Part I – Statement of Facts, Part II – Grounds of Appeal, Part III – Points of Law, and Part IV – Nature of Relief Desired.

3. **Seven Virtues** - I conclude with a list of seven virtues which I gathered by canvassing some of my colleagues, staff lawyers at the Court of Appeal. Although they are at the end of the paper, they were, in fact, its genesis.