Factums

Prepared For: Legal Education Society of Alberta
Court of Appeal Practice

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For presentation in:
Edmonton, Alberta – October 8, 2015
Calgary, Alberta – October 14, 2015

D R A F T #30 **August 24, 2015**

FACTUMS

(Or How to Persuade Three Judges in Seven Hundred Words)

" . . . seek simplicity, . . . avoid verbiage, . . . use familiar words of plain meaning and . . . be natural."

– Rt. Hon. Sir Norman Birkett, address to Faculty of Law,

University of Birmingham, May 7, 1954

1. Factums are Vital

A factum is not a formality, nor a mere preview of a coming attraction. Still less is it mere ritual, like what the bridegroom should wear at the wedding.

A factum **is** the basic argument of the appeal. The judges read the factums before the oral argument, and they read them again later when drafting their decision.

The importance of factums is colossal, almost impossible to overstate. Why? Because a factum

(a) chooses the issues;

(b) gives judges their first impression of who should win; first impressions are very strong;

(c) usually contains more information than 45 minutes' speaking can;

(d) influences whether the judges do any more research of their own;

(e) follows an order which the judges cannot change or interrupt (the way they can disrupt oral argument);

(f) influences whether the judges give an oral judgment or reserve decision; and

(g) keeps speaking: it is far more accessible and memorable than oral argument, if the judges reserve decision.

Many lawyers think that they are very persuasive speaking face to face, but that they cannot persuade in writing. Both propositions are doubtful. In any event, the judges all find factums very important, and they are not going away.

Yet most factums are not very persuasive; some achieve little. The rest of this paper explains why. This paper may sound dogmatic, even harsh. But even good lawyers often file mediocre factums. And always for the same reasons. Some points here sound obvious, but are frequently ignored.

Counsel need to change their basic approach, and to learn what judges want. This means you.

Most of this paper also applies to writing legal argument for any court or tribunal.

2. Who Should Write the Factum

Many counsel start with a grave error.

There must be a single lawyer in command of the file. Yet that lawyer delegates factum-writing to a junior. The junior is not even involved in planning or strategy, nor informed of that. The lawyer in command therefore abdicates writing. He assumes that the factum is only a formality, or a tentative preview. Long after, he realizes that the junior's filed factum does not properly mesh with his ideas.

That whole approach is often fatal. Sometimes the most junior nurse performs the brain surgery.

Instead someone who is well informed must write a very persuasive factum. True, the best author is the person in the firm who writes the most clearly and persuasively. But he or she must be involved in the key decisions about the appeal, and fully understand the strategy adopted.

Dividing the writing between two people is dangerous, and unlikely to save time.

3. Be Clear

(a) Why Be Clear?

A factum must be clear and simple. From its first sentence, it must also **appear** clear and simple.

It will not persuade unless it is clear and simple. If it is unclear or difficult, it may annoy readers too. They will race ahead, looking in vain for landmarks. A factum

should usually be clear enough that someone with no legal training can understand it.

Why should a factum be easy to read? The judges can read difficult prose; but why expect them to swim through tangled weeds to help a drowning litigant?

(b) **Arrangement**

Use some clear arrangement. Do not hop back and forth between topics the way novels and movies now do. Make the scheme obvious by a table of contents and headings. And make the text's arrangement follow that plan.

Nor are you writing a mystery novel. So start each topic by telling your conclusion. Then explain how you get there.

Headings help that. They should reveal more than the topic: they should give the conclusion. Use informative titles for issues and arguments, as headings and in the Table of Contents. Not bland vague titles. Informative titles work better if they suggest the answer, so long as they are not too brash.

(c) **Style**

Usually be polite; avoid inflated purple prose. But do not use legalistic or formal style.

Make your writing strong, clear, and less stuffy. How? Write more like the way you speak. (With shorter sentences of course.) Spoken English uses strong verbs and short simple words. Today it rarely hides behind complex qualifications and old-fashioned phrases.

Read your draft factum out loud to a friend or relative, preferably a non-lawyer. Both of you will hear which parts of the draft are living creatures, and which are stone lions.

Do not be defensive, shy, or apologetic. Do not say "It may be argued that", or "It is fair to say that he would have", or "The respondent respectfully differs from that assertion.". Do not start an important sentence with exceptions and qualifications. Never dance around your conclusions.

Most lawyers write indirect complicated sentences. Lay people think that that is a legal tradition, even an age-old plot. Today, it also imitates academic writing in learned journals.

This generation has found yet another way to write puzzling prose. Lawyers write in code, using many unfamiliar acronyms and defined terms. Rarely is there a reason to do either.

Instead, write very simply and directly.

(d) **How to be Clear**

Use the present tense and the active voice. Give no conditions, no qualifications, and never write in the subjunctive mood. Do not say, "On most occasions, on the neurological ward, it would have been the senior resident who would have been summoned, if anyone were." Say, "Usually the senior doctor comes."

Sometimes you need conditions. Then leave them to the end of the sentence. Do not write, "If permission is oral and by an agent, may an invitee act on it at once?" Write instead, "May an invitee act at once on oral permission by an agent?"

Wield active verbs, not gerunds or nouns. Do not say "The Reasons filed here are marred by the melding of disparate elements." Instead write "The Reasons mix up unrelated topics."

The smoothest path to easy reading is shorter sentences and paragraphs. Not all the sentences need be short; varying sentence length adds impact. But shorter **average** sentence length helps a lot. A sentence of more than 30 words is a very bad sign. And words should not **average** more than two syllables.

Your computer may already have a program which tests how easy or hard it is to read a document. Many "grammar checkers" do that; they check far beyond grammar.

Such a program will tell you exactly what parts of the draft make it hard to read. Long sentences and jargon commonly boost the difficulty score. Experiment.

Such a program also tells you how many years' education it takes to understand your draft. Re-edit your document until your computer says that a reader needs only seven or eight years' education to understand it.

(e) **How to Fix Long Sentences**

If a sentence is too long, how can you fix it? Here are four common ways.

- drop some contents:

(a) irrelevant details

(b) unnecessary conditions and qualifications

(c) preambles or apologies

- split it into two or three sentences
- use a list (in point form) or a table instead
- subdivide that whole part of the factum in two or three separate topics, so that any sentence talks about one thing only

With a little practice, it takes seconds only to turn a long sentence into two or three short ones. After a while, you will get used to writing short sentences at the outset.

Here is an example of shorter sentences:

Do not write this: The learned trial judge reviewed the evidence bearing on this topic, and though he accepted the evidence and conclusions of the independent industry testing agency on the relevant topic, at the end he found himself not satisfied that Acme General Construction Ltd. was really responsible or liable for the owner's final decision, which was to replace the brass transverse stress brace described in the specifications with a different less expensive and lighter titanium rod, which decision was made after the second contractor's fabrication had begun on the site of the two-storey warehouse building in question.

Instead write this: The trial judge reviewed all this evidence. Though he accepted the testing agency's conclusion, he found Acme not responsible. It was the owner who decided to use different material. It decided only after the fabrication contractor began work.