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The Factum: Tips & Strategies

Appellate Advocacy

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The Factum: Tips & Strategies

Dane Bullerwell

Oral argument and the factum were once considered equals. No longer. Today, everyone knows the factum is ascendant. Factums are where appeals are won and lost.

These are some of my favourite factum-writing tips and strategies – which I hope will help you deliver a better written product.[1]

[1] The usual disclaimer applies: views expressed in this paper are mine, not my employer's. I gratefully acknowledge the able assistance of Sakshi Sharma, student-at-law at the Court of Appeal of Alberta (Calgary) – but any errors are mine alone.

A. Big-Picture Thoughts

1. Factums – not oral argument – win appeals.

Why is written argument so important? Justice John Laskin highlights four key reasons:

- Heavy Court caseloads;
- Strict time limits for oral argument;
- Less time for pre-hearing research by judges; and
- A shift towards short, oral decisions, issued immediately following argument.[2]

If you file a weak factum, don't count on saving your appeal through your powers of oration. Judges form their first – and most lasting – impression of your case from your written materials. Justice Bastarache once acknowledged what all judges admit during candid moments: "It is all but impossible for us judges to come into a hearing without a preliminary view."[3] Appellate judges will keep an open mind before oral argument. But it's better to have forward momentum moving into the hearing – instead of clawing out from under your lackluster written submissions. Focus your efforts on this vital first look: the factum.

2. The Court uses your factum throughout the appeal.

- *Immediately after filing*: Your factum provides the Court with its first glimpse at your facts and your issues. If your factum catches someone's attention – for good reasons or bad – it could prompt additional pre-hearing research.

- *When materials are distributed:* Factums are distributed to the panel about a month before the hearing. This is when the Court first digs into your case. Initial impressions are formed. Tentative views are sometimes voiced.

- *Before the hearing*: Most judges re-read your factum immediately before argument.

- *If the Court reserves:* Oral argument is fleeting; the factum is forever. Judges often refer back to your factum when writing their decisions. And remember that judges are busy. The panel might not start working on its decision until several weeks after the hearing. Your factum is a roadmap to which the Court can easily return.

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[2] The Honourable Justice John I. Laskin, "Forget the Windup and Make the Pitch: some suggestions for writing more persuasive factums", online: <www.ontariocourts.ca/coa/en/ps/speeches/forget.htm>,, originally published in the Advocate's Society Journal: (1999) 18:2 Adv J 3 at 3. [Laskin, "Forget the Windup"].

[3] Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 97.

3. If "it just doesn't write," it might not be worth appealing.

Pulitzer Prize-winner David McCullough explained why writing is a challenge: "Writing is thinking. To write well is to think clearly. That's why it's so hard."[4] Writing a factum hones your thinking. It sharpens your understanding of the facts and the law. And it helps you develop your legal position. As you write your way through a legal problem, you think your way through the problem. But what happens when you get your head around your appeal – only to find yourself staring at a dead end?

Justice John Sopinka once estimated that advocacy will make the difference in about 25% of appeals. The corollary of his estimate is that three-quarters of appeals are either "sure winners" or "sure losers" – no matter how brilliant your factum. If the outcome of these appeals is a foregone conclusion… why are they in the Court of Appeal? Because nobody likes losing. Losing prompts something like the five stages of grieving: disbelief, anger, bargaining, depression, and (sometimes) acceptance. Somewhere between "anger" and "bargaining" lies the impulse to launch an appeal.

But good lawyers know appeals aren't always wise. Appeals involve come with hefty costs. They eat up litigation budgets. They delay proceedings. They add uncertainty and stress for your clients, their families, and their businesses. Even if you win the appeal, the lower court could reach the same result after a re-hearing. And if your client is sophisticated litigant – with an interest in how the law develops – remember how unfavourable law hidden inside a forgotten trial decision can quickly metastasize into a hard-to-overturn pronouncement from the Court of Appeal. For even the litigant who has the least to lose by appealing, the criminally accused, the process can often delay his parole.

Because of these risks, the most important decision made in any appeal is *whether* to pursue the appeal. But the decision to appeal is often made quickly – as that stunning loss still burns your ears. You usually have incomplete information when you dash the notice of appeal over to the Registry. You haven't fully analyzed the legal issues or the record. As a result, you sometimes launch an appeal only to discover fatal weaknesses as you work on your factum.

This happens to judges too. They run into cases where they can't write a decision that supports their desired outcome. There's an expression for this: "it just doesn't write." What happens when you're working on your factum, but it just doesn't write? Many lawyers put their heads down and soldier on. They churn out the best arguments they can – while awaiting the inevitable and inglorious defeat. Perhaps they don't want to feel as though they wasted time

[4] Bruce Cole, "The Danger of Historical Amnesia: A Conversation with David McCullough" *Humanities* 23:4 (July/August 2003), available online: <www.neh.gov/about/awards/jefferson-lecture/david-mccullough-biography>.