HOW TO MAKE YOUR PITCH: THE ARCHITECTURE OF A GOOD FACTUM

TBLA FALL CONFERENCE

THUNDER BAY

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Five topics

Your credibility: the hidden persuader

Overviews

Writing the facts

Argument

Writing for on-screen readers

1. YOUR CREDIBILITY: THE HIDDEN PERSUADER

Aristotle's *ethos*

Not overt, but permeates everything you do and will do

Although judges don't play favourites, an advocate's justified reputation for candour, fairness, and good judgment has an intangible but real persuasive force. (Justice Tom Cromwell)

Your reputation and judges as gossips

Even if you lose the case you are on, your reputation for trustworthiness will stand you in good stead for your next case

But once lost, credibility is hard to win back

Five ways to gain the court's trust in your written advocacy

(i) Be fair and honest with the record

No misstatements of facts, evidence, or law

Don’t put a “spin” or “gloss” on your case at the expense of accuracy

(ii) Meet your difficulties head on

Manage your difficulties; don't ignore them

- "Nail it up on the side of the barn for everyone to see. Then proceed to show that it is neither as large nor as immovable as it first appeared" (John Cartwright CJC)

If you admit a weakness before your opponent points it out, judges see you as more credible (Cialdini. *Pre-persuasion)*

Manage bad facts

Put them in context

Juxtapose them with good facts

Minimize their importance by your sentence and paragraph structure

- In the middle
- Dependent clause (“although”)

Show they are irrelevant

The persuasive power of the right concession

Address decisions against you

Acknowledge them

If you can, distinguish them, or

Show they don’t affect your position, or

Show why they were wrongly decided

(iii) Use plain language and write in a respectful tone

No legalese or unnecessary jargon

Not shrill, harsh, or antagonistic

No “charged” words to describe an opponent’s argument:

- Absurd, frivolous, misleading, disingenuous, false etc

Avoid false intensifiers: words ending in -ly

- Absolutely, totally, certainly, surely, remarkably, etc.

Persuasion science

Persuasion is not a boxing match

- A persuader is a teacher or helper→ moving judges step by step to the desired result

An advocate who adopts a more tempered, reasonable tone is more likely to connect with judges

A too aggressive one-sided tone undermines persuasion by pushing judges away

(iv) Don’t oversell

Overstatement is jarring to judges

- The trial judge’s decision is a travesty of justice
- The plaintiff’s appeal to fairness borders on the ludicrous
- The defendant’s submission is still looking for a legal theory to support it

What is a judge’s likely reaction?

(v) Write a concise factum

Why write 30 pages when 20 will do?

Have the courage of selection

Get the core of your case out in your factum; save the elaboration and nuances for oral argument

Conciseness is a persuasive strategy

Especially for trial judges who have limited time to read your factum

Justice Rothstein on long factums

The first thing I do when I pick up a factum is see how many pages I have to read. If it is 30 pages long, I get discouraged. If I find the pages quite dense, I usually count the number of lines on a page, and if I see more than 30, I am not a happy camper. And if I notice that a lawyer is meeting the 30-line limit by using very narrow margins and a font that is so small even an insect couldn't read it, I become dejected and resentful. *(It's English, But What's Your Point?)*

Stratas JA on concise factums

Unnecessarily lengthy, diffuse submissions are like an unpacked, fluffy snowball. Throw it, and the target hardly feels it. On the other hand, short, highly focused submissions are like a snowball packed tightly into an iceball. Throw it, and the target really feels it. Shorter written submissions are better advocacy and thus are more helpful to the court.

Two goals of factum writing: Simple sells

"Simple arguments are winning arguments. Convoluted arguments are sleeping pills on paper." (Marvin Catzman)

Judges are attracted to factual summaries and arguments that are simple and have carefully and intelligently selected the right amount of detail

Justice Estey: The lure of a clear and simple solution is almost irresistible

Don’t play hardball (Ian Binnie)

“Winning counsel think themselves into the chairs of the judges, and come up with workable solutions, not hardball negotiating positions”

2. OVERVIEWS

The most important page of a factum is page one

Why? Two reasons

1. Context for the rest of your factum

2. Your overview gives judges a first impression of your credibility as a writer

Context matters

The procedure is actually quite simple. First you arrange things into different groups. Of course, one pile may be sufficient depending on how much there is to do. If you have to go somewhere else due to lack of facilities that is the next step, otherwise you are pretty well set. It is important not to overdo things. That is, it is better to do too few things at once than too many. In the short run this may not seem important but complications can easily arise. A mistake can be expensive as well. At first the whole procedure will seem complicated. Soon, however, it will become just another facet of life. It is difficult to foresee any end to the necessity for this task in the immediate future, but then one can never tell. After the procedure is completed one arranges the materials into different groups again. Then they can be put into their appropriate places. Eventually they will be used once more and the whole cycle will have to be repeated. However, that is part of life.

Context before details

The paragraph you will read will be about washing clothes. The procedure is actually quite simple. First you arrange things into different groups. Of course, one pile may be sufficient depending on how much there is to do. If you have to go somewhere else due to lack of facilities that is the next step, otherwise you are pretty well set. It is important not to overdo things. That is, it is better to do too few things at once than too many. In the short run this may not seem important but complications can easily arise. A mistake can be expensive as well. At first the whole procedure will seem complicated. Soon, however, it will become just another facet of life. It is difficult to foresee any end to the necessity for this task in the immediate future, but then one can never tell. After the procedure is completed one arranges the materials into different groups again. Then they can be put into their appropriate places. Eventually they will be used once more and the whole cycle will have to be repeated. However, that is part of life.

The principle of context before details

Rooted in the research by cognitive psychologists and neuroscientists on how the reading brain best understands, absorbs, and retains detailed information

Before you tell judges the details, first tell them why they matter and how they are relevant

The most important principle for clear and persuasive writing

Improves judges' comprehension and recall

An overview or introduction is the context for the details in the rest of your factum

"Introductions are the most significant point at which readers need a context before details"

- Ed Berry, *Writing Reasons*, 5th ed at 5

Information to enable judges to read your factum more efficiently and intelligently

Judges want you to answer five questions

What is this case all about?

What specific or “deep” issues must I decide?

Tell me a little story to put the issues in context?

How do you want me to decide the issues?

Why should your client win?

[How do you rebut the case against you?]

[Is there any procedural history I should know?]

What is this case all about?

Today's judges are impatient readers

They want your help and they want it fast

What's the theory or theme of my case?

WDWTW

1-3 pages (in most cases)

What specific or deep issues do I want the court to resolve?

The deep issue: The ultimate, concrete question judges need to answer to decide a point (Bryan Garner)

"And what does that turn on?"

End of the road question

An example: constructive dismissal

The issue in this case is whether Sarah Jones is entitled to damages equal to the bonus she would have received under her employer's long-term incentive plan?

- And what does that turn on?

First, would Sarah Jones have been entitled to the bonus as part of her compensation during the reasonable notice period?

If so, second, did the terms of her employment contract or bonus plan unambiguously take away or limit that common law right?

- The deep issues

See *Matthews v Ocean Nutrition* 2020 SCC 26

Medical malpractice: Informed consent

Jones sues Doctor Smith for medical malpractice after suffering a perforated bowel during a diagnostic laparoscopy for suspected cancer.

Issue: Is Dr Smith liable in negligence because he didn't obtain Jones' informed consent to the operation?

- And what does that turn on?

Did Dr Smith give Jones information he knew or should reasonably have known was material for his patient to make an informed decision whether to undergo the surgery?

- And what does that turn on?

Did Dr Smith disclose to Jones the significant risk of a perforated bowel from the surgery?

And did he discuss less invasive options?

- The deep issues

Eliminate what is not in issue

Jones sues Dr Smith for medical malpractice after suffering a perforated bowel during a diagnostic laparoscopy for suspected cancer.

Jones concedes Dr Smith did not breach the standard of care during the surgery.

The only issue is informed consent: Did Dr Smith disclose to Jones the significant risk of a perforated bowel from the surgery and discuss less invasive options?

Why is it important to identify the deep issue(s)?

For the court:

- Focus on the questions the court has to decide
- Easier to appreciate the significance of the facts

For the advocate

- You will focus your argument
- You will have a map for the rest of your factum
- You will write a more concise factum

Listing the deep issues: which do you prefer?

This case raises three issues: first, …;

second, …; third, ….

OR

This case raises three issues:

- 1 …
- 2 ….
- 3 …

The advantages of an indented list

Easier for judges to remember

A clear map for the rest of the factum

You have choices about how to frame the deep issues

State them

Question

Your submission

Your ground of appeal

Why should my client win?

A lawsuit is a clash of competing stories

Introduce your “justice” story

- A result that is fair, reasonable and makes common sense

Seize the moral high ground

Judges want to do the “right thing”

Give the court a reason to want to find for you; your case should not be purely legalistic

First impressions matter

Psychological studies confirm that first impressions are

- Formed quickly
- Powerful
- Hard to change

From the overview judges will form a first and likely lasting impression of your credibility as a writer

No unnecessary clutter

Sometimes what makes for good writing is what is not there

“You can’t tell it all at once. Alot of the art of beginnings is deciding what to withhold until later, or never to say it at all.” (Kidder and Todd: *Good Prose: The Art of Nonfiction*)

Write an overview that “whets the appetite of the judge to read on”

3. WRITING THE FACTS

Story telling

Organization

Context

Headings

The facts and storytelling

A lawsuit is a clash of competing stories

Your aims:

- Tell a story that supports your legal argument
- Shows your position is just and legally correct

The facts usually matter more than the law

Judges are trying to do justice, and reach a result that makes common sense

They are powerfully influenced by the equities of a case

Justice lies in the facts

The leeways of precedent

If you write a compelling statement of the facts, in most cases the law will take care of itself

Organization of the facts: three possibilities

Witness by witness

Usually a sign of laziness

Court reporter syndrome

Doesn’t mesh with the issues

Repetitive

Ineffective, except in a very simple case

Chronology

Best when sequence matters: What happened when

Stories don’t have to begin at the beginning

Two problems with chronology

- May not mesh with the issues
- Kitchen sink problem

Thematic

Facts under topics relevant to the issues

On appeal, facts under the grounds of appeal

Especially useful when the facts are long and complicated

An example of a thematic organization

Defendant is charged with an environmental offence—a spill into a watercourse

Main defence: due diligence

- Defendant took all reasonable steps to prevent the harm

Long trial; 18 witnesses

Topic headings

The defendant's pollution control plan

The defendant's equipment

The defendant's maintenance of the equipment

The defendant's employees: their hiring and training

The operation of the equipment on the day of the spill…

Overall story not chronological; but likely chronological within each topic

Thanks to Justice David Stratas for this example

Three advantages of a thematic organization

Clearer

More concise

Respects cognitive science principle of “proximity”

- Judges want information that belongs together kept close together

Things you can do at the beginning of your statement of the facts

Begin with your most important facts

In a longer factum begin with a brief summary

Tell the court what key facts are not in dispute

Facts in the facts section and facts in the argument section

In the facts section: an early opportunity to persuade

In the argument section by issue: facts take on their persuasive power from their legal context→ proximity principle

"The evidence only becomes truly meaningful, and memorable, when it is close to the issues to which it belongs." (Berry)

A defendant's or respondent's statement of the facts: controlling the story

Extended overview
- Good way to recast the story

Key facts and trial findings you rely on in the facts section

Factual details you rely on in the argument section
- Likely more persuasive
- Proximity

The facts and context

In the facts, typically the paragraphs are narrative

You are telling a story; you are not necessarily making a point

The narrative still needs context: what the judges should expect and look for

Avoid a “data dump”

The judge's question: "Why are you telling me all this?"

We don't read passively

Readers absorb and retain the details better when they first know why they matter and how they are relevant

When they have a context for them

Don't write like Louise Penny

Pratt v ABC Ltd and Hunt

From the facts section of a plaintiff's factum, describing, in a wrongful dismissal action, the deteriorating relationship between the plaintiff and the defendant's store supervisor

6. Initially, Pratt and Hunt had a good working relationship…

7. In April 2022 Hunt gave Pratt her first performance appraisal. He evaluated her favourably…

8. But soon after, the good working relationship began to deteriorate...

9. In May Pratt went on a week-long course and another employee was responsible for ensuring that the temperature logs were maintained…

10. In June Pratt used the company's open-door policy to have a private meeting with the district manager. But Hunt found out about the meeting…

11. In early July at a meeting of all employees, Hunt told Pratt she was stupid…

12. In late July Hunt again berated Pratt in front of other employees, telling her she was an "idiot"….

13. Then in early August…

Create context

6.The evidence shows that at first Hunt and Pratt had a good working relationship, and he evaluated her favourably….

7. But from May 2022 onward until her dismissal in September of that year, their relationship deteriorated badly. Two incidents appear to have precipitated the deterioration: the May temperature log incident, and the June open door meeting.

8. The temperature log incident…

9. The June open door meeting…

10. After these two incidents, Hunt's verbal abuse of Pratt escalated. Three examples of his abuse stand out.

11. First..

12. Second…

13. Finally…

JUDGES LIKE NUMBERED LISTS

Headings and sub-headings

The reader's brain craves headings

The brain's attention system

- We notice things that stand out

Headings that matter

- Case-specific
- Facts as well as argument

Four advantages of case-specific headings and sub-headings for judges

Break information into manageable pieces

Visibly announce your organization

Provide context: help readers predict what comes next

Create white space

But: too many will overload judges

Your headings should be specific, informative, and a single sentence of no more than 15-20 words: Compare

The working relationship between Pratt and Hunt

The good working relationship at the beginning

The deterioration of the relationship starting in May

The May temperature log incident

The June open door meeting

Hunt's verbal abuse of Pratt from July onward

4. ARGUMENT

Choices

IRAC (Issue/Rule/Application/Conclusion)

Law school exams

[I]SPAC (Issue/Submission/Principle/Application/Conclusion)

Factums

Judges want point first

BLUF: Bottom line up front

Why?

- Point first is more convincing
- Easier for judges to grasp your analysis

State your point in a single, clear sentence

Then discuss it

Don’t be a point last writer

Two ways to write point first

Issue heading/ point first sentence

- Use a question for the heading
- [ISPAC]

Point first heading

- [SPAC]

Thunder Bay v CNR

1906 Agreement for the construction of a bridge across the Kaministiquia River

Railway gives the City “the perpetual right to cross the bridge for street railway, vehicle and foot traffic…”

Railway agrees to “maintain the bridge in perpetuity”

In 2013 CNR closes the bridge because of a fire

Reopens the bridge for railways and pedestrians, but not for cars and trucks

City seeks declaration CNR breached the Agreement

First issue: Did the parties intend that “vehicle traffic” in the 1906 Agreement include cars and trucks? [I]

Thunder Bay submits the court should interpret the Agreement broadly and find the parties intended vehicle traffic to include any kind of vehicle used today. [S]

The intent of the parties must be derived from the words the parties used and the context in which they used them…[P]

First, the words of the 1906 Agreement…

Three contextual considerations support the City’s position….[A]

Thus CNR breached the 1906 Agreement by failing to reopen the bridge for vehicular traffic. [C]

First issue: Thunder Bay submits the parties intended "vehicle traffic" in the 1906 Agreement to include cars and trucks? [S]

Under *Sattva,* in interpreting a contract the court must determine the intent of the parties…[P]…

5. WRITING FOR ON-SCREEN READERS

"Skim reading is the new normal"

- Maryanne Wolf, *Reader, Come Home*
- *The Reading Brain in a Digital World* (2018)

Reading patterns on screens differ

- Word spot, zigzag, and F patterns

Can't use a physical highlighter

Today most judges will read your factums on screens

Writing suggestions to help judges who read your factums digitally

Appearance matters

Writing is visual

Design your factum to be easy to navigate

Lots of white space

Help judges find the information they need

Topic sentences: context or point first
- Essential for on-screen readers

Short headings and sub-headings

Indented lists

Relatively short paragraphs
- Big blocks of text on screens are daunting

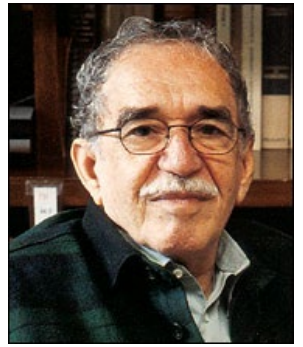
Conclusion: Look at how things look

Lawyers spend much of their time thinking about what to say and how they should say it. Relatively little time is spent considering how best to organize the material on the page. A good-looking document will help the reader get the point quicker and retain it longer. A well-organized easily-accessible reader friendly document is simply more persuasive. Cornflakes in grey boxes don't sell well.

- Barbara Morris, Writing instructor

Concluding words from William Zinsser (*On Writing Well)*

Writing is hard work. A clear sentence is no accident. Very few sentences come out right the first time, or even the third time. Remember this in moments of despair. If you find that writing is hard, it's because it is hard.



Five books I recommend

Armstrong, Terrell, Reich, *Thinking Like A Writer: A Lawyer's Guide to Effective Writing And Editing* (4th ed)

Steven Stark, *Writing to Win*

Stanchi and Berger, *Legal Persuasion*

Bryan Garner, *The Winning Brief*

The Honourable Thomas Cromwell (compiled), *Effective Written Advocacy*

John Laskin

K — How to Make Your Pitch: Persuasive Written Advocacy on Appeal

The Honourable John I. Laskin[1]

1. Introduction: Some Essentials

The importance of written advocacy is now a given. In appellate courts the factum or brief is the advocate's first chance to persuade. And in most appellate courts the time for oral argument is limited. During the pandemic and beyond, the importance of written advocacy may increase as judges and advocates debate limiting oral advocacy in some appeals and eliminating it altogether in others. Even now, in many appeals written advocacy is more important to the result than is oral advocacy.[2]

Still, though I have long subscribed to the importance of written advocacy, oral advocacy on appeal has a role to play for advocates, the parties, and the court. I sometimes analogize to a baseball game: written advocacy takes the advocate into the seventh inning; oral advocacy is the closer where the advocate puts the finishing touches on the argument and answers the court's questions.

But my focus here is on written advocacy—in Ontario the factum. Although I recognize that the rules differ from province to province, I will use as my template the civil rules for factums in the Court of Appeal for Ontario.

Before giving you my specific suggestions for a court of appeal factum, I will offer some general comments on factum writing and what judges are looking for.

When you write an appellate factum, though others such as opposing counsel or your client will be interested in what you say, you have only one audience that matters: the judges hearing your appeal. When you write your factum you must think of that audience. In other words, you must write for your readers. And you must take into account that your readers know nothing about the case you know inside and out.[3]

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[1] I thank Leslie Paine, who graciously agreed to read a draft of this article. Leslie is an outstanding appellate advocate at the Crown Law Office, Criminal. She made numerous helpful suggestions, all of which I incorporated. I would also like to thank John Bossy of Thomson Reuters for his careful edit of this article and for his suggestions.

[2] Typically, a factum is written months before the appeal is argued. Yet an appellate argument evolves. Advocates should continue to think about their appeal after they have written their factum.

[3] In *Style: Toward Clarity and Grace* (Chicago: The University of Chicago Press, 1990), Joseph Williams writes at xv: "What counts most in comprehending a text is how much we know about its content . . . since a writer usually overestimates how much readers

These readers of your factum are mainly looking for your help so they can sensibly resolve your appeal. They want you and your opposing counsel to put the case as persuasively as possible because doing so will give the court the best chance of reaching a sound result. To put your case persuasively you should try to write a factum that is readable—clear and easy to get through and understand; that is concise—no wasted words; and that is coherent—not treating each part as a self-contained unit, but instead flowing like a river from the beginning to the end.

Each of us writes differently. Each of us has our own style of writing. But when you write your next factum, think of these words by Joseph Williams, in his superb book *Style: Toward Clarity and Grace*:[4]

> All of us who are committed to excellence in prose have a common end: a style that communicates effectively, even elegantly. That style, by and large, is one that is readable, precise, and forceful.

With this brief background, I will address six general topics that apply to factum writing on appeal: thinking and the writing process; the cardinal rule of advocacy; simplicity; conciseness; the advocate's credibility; and the purposes of an appellate factum.

(a) Thinking and the writing process

"The first step in the writing process is not writing at all; it's thinking. Think about your audience, your 'pitch', and the ultimate goal."[5] Reflection is a key part of composition. You should have a good idea of what you want to say before you begin to write. The process of writing should not be a voyage of discovery. So before you put pen to paper or type a word on your computer or iPad, think about your appeal. In doing so, you might ask yourself three sets of questions.

The first set of questions I call the what/why/how questions asked in that order. What is this appeal all about? Did the trial court err and, if so, does its error matter? Why should your client succeed? Can you seize the moral high ground? Judges want to do the right thing but you must give them a reason to want to find for you. Although they want to be legally correct, they also want to do justice. In short, they want to reach a result that feels "right" to them. How

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know, a writer should give readers more help than he thinks they need." [Williams] In his book *The Sense of Style* (New York: Penguin Books, 2014), Steven Pinker calls this overestimation "the curse of knowledge" at 59-63.

4 *Ibid.* at 147. Williams' book is excellent and has heavily influenced my own writing. I recommend it enthusiastically to anyone who wants to improve their writing.

5 Justice Susan Magotiaux, "Why Writing Matters in Criminal Cases" (Paper for the National Criminal Law Program, 2016) [Magotiaux]. Before being appointed an Ontario Court of Justice judge, Justice Magotiaux was a first class appellate counsel for the Crown.

should I get there? Do I have a factual and legal basis to support my position? John Morden, a former Associate Chief Justice of the Court of Appeal for Ontario, whom I had the privilege to serve under, made persuasion seem deceptively easy by reducing it to two simple propositions: first make the court want to decide in your favour and then show it how to do so.[6] In other words, the why and the how.

The second set of questions is related to the first. What is the theory of your appeal? And what is its theme? Your argument should be anchored in a theory, an organizing principle that is consistent with the facts and the law, that is credible and logical, and that tells a "justice" story.[7] Your theme, not necessarily explicitly stated, is the pivotal element of your theory and should reflect the fairness, morality, and justice of your position. Your theory and theme should run throughout your factum, so it will influence how the judges view your case.

The last set of questions concerns what kind of appeal you have and what the court is likely to do with it. Generally, appeals fall into one of two categories: error correcting or jurisprudential. Most appeals are error correcting. If you have an error correcting appeal, give the court a simple and easy path to the desired result. Resist any temptation to turn it into the next *Donoghue v. Stevenson* or *Hunter v. Southam*. If, however, you do have a jurisprudential appeal, you may have to write the argument section of your factum differently. You may have to consider social policy, administration of justice concerns, and the implications of your position for related areas of the law. Think of analogies. Read around your case by consulting a relevant text or law review article.

Finally, you should consider whether the court is likely to decide your appeal right after or within a few days of the oral hearing, or whether it is likely to reserve its judgment. If you think the court is likely to reserve you may want to write a more expansive factum.

Having thought about your appeal you can now turn to writing your factum. Your aim, of course, should be to write a factum that is clear. But clarity can be an elusive goal. It has two aspects: substantive clarity and cognitive clarity. Substantive clarity lies in the factum writer's head: Is my legal analysis logically correct? Have I defined that tort point precisely enough? Does my analysis produce a just result? Cognitive clarity lies in the reader's head. Can I transform my analysis into prose that is readable, coherent, and ultimately persuasive.[8] Your aim then is to create clarity based not just on logic and precision, but on

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6 "The Partnership of Bench and Bar" (David B. Goodman Memorial Lecture, 1982), 16 L. Soc. Gazette, 46 at 72.

7 See Armstrong, Terrell, and Reich, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, 4th ed. (New York: Practising Law Institute, 2021) at 215 [Armstrong].

8 See Armstrong, *ibid.* at 31-32. By coherent I mean "flow": A persuasive factum is one

how judges will process what you have written. This article focuses on both aspects of clarity. It looks at factum writing from both the advocate's and an appellate judge's perspective.

When I wrote judgments I followed the writing paradigm for advocates suggested by Betty Flowers, who works with one of the leading American writing instructors, Bryan Garner, at his writing institute, LawProse. For Flowers, the writing process is sequential. She breaks it down into four steps, each reflecting a different personality: Madman-Architect-Carpenter-Judge.[9]

The Madman takes all the ideas you have thought about and jots them down. The Architect prepares an outline. The Carpenter writes a first draft. And the Judge improves and edits the draft.

For me the Architect step, the outline, was critical and I always did one. Some who do an outline before writing a draft list only a few points. My outlines were detailed. They contained my headings and sub-headings and the facts and points I wanted to make under each. Finishing an outline had a psychological impact on me. I felt my judgment was about 75 per cent done. The Flowers paradigm may not work for everyone. Some advocates (and judges) prefer just to draft and then impose a structure at the end—a sort of reverse outline. I encourage you to try the Flowers paradigm. You may find it works well for you.

(b) The Cardinal rule of advocacy

The cardinal rule for all appellate advocates is to change places—mentally—with the judges hearing their appeal. Advocates are immersed in their appeal; the judges who will hear it know nothing about it. How will the judges like the story of your appeal told? What will concern them about your position? What facts will be important to them? Try as best you can to see your draft factum from the judges' perspective, to visualize how they will react to it.

In his brilliant Dubin Lecture, *In Praise of Oral Advocacy*, Justice Ian Binnie summed up the cardinal rule:

> Winning counsel think themselves into the chairs of the judges, and come up with workable solutions, not hardball negotiating positions.[10]

Although Justice Binnie was speaking about oral advocacy, his advice also applies to factum writing. How then do advocates give effect to his advice? One way to do so, in the words of former judge Richard Posner, is to "reduce the costs of persuasion."[11] Minimize the legal distance judges must travel to agree

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that flows from sentence to sentence, from paragraph to paragraph, and from section to section.

9 Bryan Garner, *The Winning Brief* (New York: Oxford University Press, 1999) Tip 1 [Garner].

10 *Ethos, Pathos, and Logos* (Toronto: Irwin Law, 2004) at 25 [Binnie].

with you and minimize their resistance to being moved.[12] In practical terms, make the court as comfortable as you can with your position. Aim for a reasonable or "workable" solution to the dispute.

Individual and institutional reasons underlie this advice. As Benjamin Cardozo reminds us in his famous lectures on *The Nature of the Judicial Process*,[13] each judge has their own philosophy of life. Many unseen forces guide judges' thoughts and actions—their likes, dislikes, instincts, emotions, habits, and convictions. All these forces tend to make judges resistant to radical changes in their beliefs; instead, they look for consistency between their existing beliefs and any new information presented to them. The less they have to travel to agree with you and the smoother the journey to get there, the more likely you are to persuade them.

Almost every court of appeal judge I know is a "judicial minimalist."[14] Appellate judges prefer to say no more than they have to in order to decide the dispute in front of them. They don't mind leaving some things undecided. They like to decide "one case at a time." Why? Because they worry about the unanticipated consequences of their decisions. And because they live in a world of collegial decision making and want to make it easier for their colleagues on the panel to agree with them. Effective advocates can appeal to judicial minimalism by putting forward the narrowest ground on which the court can decide in their favour and by not asking the court to make overly broad and unnecessary pronouncements.

(c) Simplicity

Simple sells. My friend and wonderful, former colleague Marvin Catzman was fond of quoting the advice given by a former, prominent American judge: "Simple arguments are winning arguments; convoluted arguments are sleeping pills on paper."[15] Good advocates make complex matters seem simple, straightforward, and logical. In saying that I don't mean that advocates should oversimplify their arguments or "dumb them down." I mean that they should uncomplicate them, scale down their complexity.

The cognitive psychologists tell us people like to reduce big problems into simpler sub-problems.[16] Judges are no different. Judges are attracted to factual

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11 *Overcoming Law* (Cambridge: Harvard University Press, 1995) at 500-501.

12 Posner's advice translates into the equation: persuasive burden = distance x resistance.

13 *The Storr Lectures* (New Haven: Yale University Press, 1921).

14 The term coined by Cass Sunstein in his influential book on decision making in the United States Supreme Court, *One Case at a Time* (Cambridge: Harvard University Press, 1999).

15 Kozinski, *The Wrong Stuff*, 1992 BYU L Rev, 325 at 326.

16 Alan J. Parkin, *Essential Cognitive Psychology* (East Sussex: Psychology Press, 2000) at 282-286; Jonathan Baron, *Thinking and Deciding*, 2nd ed. (Cambridge: Cambridge University Press, 1994) at 102-103.

summaries and legal arguments that are simple and that have carefully and intelligently selected the right amount of detail. Justice Estey summarized judges' attraction to simplicity in a single sentence: The lure of a clear and simple solution is almost irresistible.[17]

(d) Conciseness

Conciseness is a relative term. Writing concisely does not mean writing superficially. And conciseness does not mean short. It means no wasted words. To argue your appeals successfully some factums need to be longer than others. Also, sometimes you may have to add words—for example in an overview or to provide context—to speed judges' ability to absorb what you have written.

But too many advocates write factums—usually the facts section—that are far longer than necessary. These advocates treat the Ontario Court of Appeal's 30-page maximum[18] as a minimum, even in a simple error-correcting appeal. Yet the pace of life is much more frenetic these days than it used to be. Many more items vie for our attention in any given hour than ever before. Like everyone else, judges live in this accelerated culture. They have or think they have a lot to do, with many competing demands on their time. To prepare for a week of appeals they have a lot of up-front reading. As important as your appeal is for your client or other individuals, it is likely only one of many the panel has for that week. Judges want your help but they want you to help them quickly. For judges reading your factums usually less is more.

One other consideration makes writing concise factums even more important today: the information and technological "revolution" has changed the way we read. Many judges now read your factums not on paper but on screens—desktops, laptops, tablets, even smartphones. Screen reading has meant shorter attention spans, less patience, perhaps even for judges. It has also likely meant, in the words of the well-known author Maryanne Wolf, that "skim reading is the new normal."[19] Worse, faced with a long text, many readers will say, TL; DR: too long; didn't read. So if you want judges to focus on and absorb what you have written, shorter is almost always better.

Why then do advocates write lengthy factums? The two main culprits are probably time and fear. The well-known line—I am sorry I wrote you such a long letter, I didn't have time to write a shorter one—applies to factum

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[17] The Honourable Willard Estey, *The Frontiers of Litigation* at 4 [typescript from author's private collection].

[18] Unless a party obtains an order for a factum longer than 30 pages. In *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2020 ONCA 532, affirmed 2020 CarswellOnt 14922 (C.A.), Roberts J.A. discussed the rationale for the 30-page limit: to focus counsel on the issues.

[19] Maryanne Wolf, *Reader Come Home: The Reading Brain in a Digital World* (New York: Harper Collins, 2018).

writing.[20] It takes thought, time, and hard work to write a concise factum. Conciseness is also a by-product of knowing what your case is about and where you are going.

And some advocates are afraid of leaving anything out. Admittedly, there is a tension between thoroughness and conciseness. When you write your factum invariably you will be confronted with a mass of trial evidence. You worry about how much you should include. Yet not all that evidence will matter for your appeal. Often, very little of it will matter. In a medical malpractice appeal where fifteen expert witnesses testified at trial, but only two on standard of care, the sole issue on the appeal, you should not be summarizing the evidence of the other thirteen experts.

You have to sift, sort, and discard what you don't need. You must have the courage of selection. You don't want to tax the absorption capacities of your panel. Choose carefully the specific details you will include and omit. Don't write your factum as if it can do everything for you. Get the core of your case out in your factum and save the elaborations and nuances for oral argument.

Think of conciseness as a persuasive strategy.[21] Length and persuasiveness are usually inversely related. A shorter factum has great credibility with a judge. It shows you have worked on your argument, pruned away the fat, and honed it to its essentials. So why write 30 pages when 20 will do?[22] The judges hearing your appeal will thank you.[23]

One last point on conciseness. Don't do what some advocates did when I was on the court—cheat on margins, font size, and spacing between lines to avoid going over the 30-page limit. The rules have margin, font, and spacing requirements for a reason. Follow them.[24]

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[20] Some attribute the line to Mark Twain; others to Blaise Pascal.

[21] I heard this line from the Honourable Marshall Rothstein, who was of course a great judge but also a great teacher of advocacy. I can't remember the advocacy program in which he said this line, but I have always remembered it.

[22] In his wonderful article, *It's English, But What's Your Point?,* Justice Rothstein wrote with his usual wit: The first thing I do when I pick up a factum is to see how many pages I have to read. If it is 30 pages long, I get discouraged. If I find the pages quite dense, I usually count the number of lines on a page, and if I see more than 30, I am not a happy camper. And if I notice that a lawyer is meeting the 30-line limit by using very narrow margins and a font that is so small that even an insect could not read it, I become dejected and resentful. See *Effective Written Advocacy,* compiled by The Honourable Justice Thomas A. Cromwell (Aurora: The Cartwright Group, 2008) 5.

[23] Justice David Stratas of the Federal Court of Appeal used a particularly effective simile to argue for concise factums: Unnecessarily lengthy, diffuse submissions are like an unpacked, fluffy snowball. Throw it, and the target hardly feels it. On the other hand, short, highly focused submissions are like an iceball. Throw it, and the target really feels it. Shorter written submissions are better advocacy and thus are more helpful to the court. *McKesson Canada Corporation v. Canada*, 2014 FCA 290 at para. 24.

Finally, if you have one of those rare appeals that calls for a long factum, consider including a table of contents at the beginning. A well-constructed table of contents will give judges a good guide to your argument and enable them to navigate the rest of your factum. The table of contents should be easy to read, and ideally should track your headings and sub-headings.

(e) The advocate's credibility

Although not overt, your credibility permeates everything you do as an advocate. In saying this I am simply affirming what our greatest rhetorician, Aristotle, said over 2000 years ago when he made *ethos*—credibility—one of his three modes of persuasive discourse.[25] Your credibility is built on two pillars, trust and expertise. Thus: credibility = trust + expertise.[26]

Judges will trust appellate advocates who in writing their factums do the following six things. First, they are fair to the record, scrupulously accurate in their summary of the facts and their statements of the law. Advocates may want to put their gloss on the facts but should not do so at the expense of accuracy. Misstating the facts or the law will undermine your credibility with the court, not just for the appeal you are arguing but likely as well for your future appeals.[27]

Second, trustworthy appellate advocates don't oversell or overstate their position. Overstatement is jarring to judges. Yet it can creep into your factum because you have become so convinced of the righteousness of your argument. Not every error of the trial judge is a travesty of justice. Not every argument of your opponent is frivolous and vexatious. This form of advocacy, which amounts to writing conclusory superlatives, is unpersuasive. Understatement, in which you appeal to the judges' intelligence and leave them a little to do, is far more effective. So give the judges the facts and the law and then leave the characterizations to them.

Third, trustworthy appellate advocates show candour by facing up to their weaknesses and difficulties. They do not ignore, but instead manage bad facts, adverse findings of the trial judge, and law contrary to their position.[28]

Fourth, they write in a tone and use language that are respectful, not shrill, sarcastic, or preachy. And they avoid using "charged' words, such as absurd, misleading, disingenuous, egregious. For example, they don't write, "The

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[24] These rules help create white space on the page. White space is critical for readability, especially today when so many of us read on screens.

[25] The other two modes are *pathos* (emotion) and *logos* (reason). See Edward P.J. Corbett, *Classical Rhetoric for the Modern Student,* 3rd ed. (New York: Oxford University Press, 1990) at 22-24; 37.

[26] Harry Mills, *Artful Persuasion* (New York: AMI Publications, 2001) at 14 [Mills].

[27] Judges like to gossip and an advocate's reputation for untrustworthiness can spread like wildfire in a small court.

[28] I discuss ways to manage these later in this paper.

appellant's reliance on these cases is misguided," but instead write, "The cases the appellant relies on do not apply." Charged words betray insecurity about one's argument. When advocates substitute shrillness for persuasiveness they lose judges' respect and tempt judges to look for ways to support the opposing argument.

Fifth, trustworthy advocates do not demean the opposing party or the opposing party's counsel. If you belittle your opponent you denigrate yourself. A lawsuit is a clash of ideas and stories, not personalities. Attack the other side's argument, not the other side personally.

Sixth, they respect the standard of appellate review and don't ask the court of appeal to retry the case.

The second pillar of the advocate's credibility is expertise. A mastery of the relevant facts, the relevant law, and any statutory scheme in issue all bear on the advocate's expertise.

An advocate's credibility with the court of appeal is the advocate's most valuable asset. Even if you don't succeed on the appeal you are arguing, your reputation for trustworthiness and expertise will stand you in good stead on your next appeal. Conversely, if you lose the court's trust by the way you write your factum you will find that trust hard to win back.

(f) The purposes of an appellate factum

I end this introduction by looking at the purposes of an appellate factum, both from the perspective of the advocate and the judges. From an advocate's perspective, a factum serves three main purposes:

- Most important, the factum is the advocate's opportunity to persuade appellate judges when their minds and hearts are most open to persuasion. By the time the judges walk into court for oral argument, the factums (together with the other appeal materials) will almost always have given them a leaning about the appeal, sometimes tentatively held, sometimes strongly held. In short, your factum will give the court an initial impression and sometimes a lasting impression of your appeal.
- Your factum should provide a roadmap for your oral argument.
- If the court reserves, your factum will become a silent advocate for your position.

For judges your factum serves at least five purposes:

- Together with your opponent's factum, your factum gives the judges an initial understanding of the appeal, each side's position, and the issues they must resolve.
- Your factum will help judges better prepare for the oral hearing. Together with the compendium, it will signal what to read before the hearing—the key pieces of evidence and the important case law.

- Your factum provides a resource judges can draw on to question not only you but your opponent about each side's argument. Judges will use a good factum to probe the weaknesses and implications of each side's position.
- Your factum may be a ready resource for a judge giving an oral decision or a short written decision within days of the hearing.
- If the court reserves its judgment, your factum may be an important resource for the judge writing the reasons. When I wrote judgments I made heavy use of a good factum.

The listing of the purposes of a factum emphasizes the importance of written advocacy on appeal. Obviously, a good factum doesn't guarantee success on every appeal. No matter how brilliant your advocacy there will be some appeals on which you cannot succeed. Even the best advocates can only play the hand they have been dealt. But in a significant number of appeals a good factum can make the difference between winning and losing. You may be able to overcome a bad factum with a persuasive oral argument but it will be an uphill struggle. My dominant message: don't squander this opportunity to persuade.

2. The Overview

Ontario's civil factum rules require both the appellant and respondent to write a "*concise*[29] overview describing the nature of the case and the issues". I considered the overview and then the facts to be the two most important parts of the factum. A good overview will capture the judges' attention and establish your credibility. When I prepared for an appeal the first two things I read were each side's overview. I wanted to understand right away what the appeal was all about and what was the debate I had to resolve. Each overview gave me the context for the details in the rest of each factum and allowed me to read all the appeal materials more intelligently. Although I will discuss the principle of context before details in The Facts section, overviews are the most significant point in a factum where readers need a context.

Generally, a good overview should do four things:

- State the core of your appeal;
- Begin to persuade, to gain the court's empathy for your position. Use the overview to introduce your "justice" story, and the reasonableness, fairness, and common sense of your argument;
- Create a credible voice; and,

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[29] My emphasis. As I discuss later in this section, most overviews should be one page to at most two pages long.

- Using the issues, provide a roadmap for the rest of your factum. A good overview will make judges "smart", so they can better absorb the rest of your factum.

The critical importance of an overview reflects the notion that first impressions count with readers. The cognitive psychologists call the influence of first impressions "priming." Priming is a process in which a reader's response to later information is influenced by exposure to previous information. Priming plants a "seed" in the reader's brain. The seed causes the reader to form an impression, which the reader then uses to interpret later information. An overview should give your readers, the judges, a "feel" for your position, to see it the way you want them to see it.[30]

What specifically do judges want you to tell them in the overview? At least the following five ingredients.

(a) What is this appeal about in a nutshell?

Judges want to know right away what the appeal is all about. What is the big picture? In some appeals there will be what Chief Justice McLachlin called the "controlling idea" of the appeal[31] or what Justice Ian Binnie called the "defining question."[32] The controlling idea is really the theory or theme of your appeal. It transcends the specific issues you intend to argue and will structure the debate for the court. If you can state it in a memorable sentence or two your factum will be off to an excellent start. But for a respondent it may be as prosaic as: "This appeal is about respecting the findings of fact and credibility made by the trial judge after a thorough and scrupulously accurate review of the record."

The parties may not agree on the controlling idea. In his Dubin Lecture, Justice Binnie gives an example, using the case of *R. v. Sharpe*.[33] The trial judge thought the defining question was freedom of expression; the Crown thought it was the criminalization of child pornography for the protection of children. As Justice Binnie noted, "the eventual outcome was greatly influenced by which aspect emerged as dominant."[34]

I learned that the controlling idea can drive the result in one of the last appeals I argued. The case was *Adler v. Ontario*,[35] in which my clients, a group

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[30] See the excellent article by Kathryn Stanchi, "The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader" (2010) Oregon Law Review Vol. 89, No. 1, p. 305 at 306-310 [Stanchi].

[31] The Chief Justice gave this advice in 1997, in her keynote address at the first Written Advocacy program, jointly sponsored by the Advocates' Society and Osgoode Professional Development.

[32] See Binnie, *supra* note 10 at 22.

[33] 2001 SCC 2.

[34] See Binnie, *supra* note 10 at 22.

[35] 1994 CarswellOnt 2211 (C.A.), affirmed 1996 CarswellOnt 3989 (S.C.C.).

of Jewish parents, sought public funding for Jewish day schools equivalent to the public funding of Roman Catholic schools. The case was argued well after the *Charter* had come into effect, and I put the controlling idea this way: Does the government's refusal to fund Jewish day schools deny the appellants their freedom of religion and equality rights? The government's lawyer, Robert Charney (now Mr. Justice Charney), a terrific constitutional advocate, put the controlling idea differently: Should the Court give effect to the constitutional bargain, crucial to Confederation, which guaranteed the minority rights of Catholic denominational schools in Ontario? The Court agreed with him and so I lost.

(b) What specific issues must I decide?

The most important thing you can do for the court is to get the issues right. First, you must decide what issues to argue. Acting for an appellant you have to decide whether a trial judge's error really matters, whether it tainted the judge's legal analysis or the justice of the result. Some seeming errors fall into the "who cares" box and should not be pursued on appeal.

Justice George Finlayson, a fine judge and colleague, said that in almost every appeal there are no more than three good issues, and often just one.[36] I agree with him. Counsel who list many issues, hoping one will find favour with the court—a "shot gun" approach to advocacy—show a lack of faith and confidence in their major grounds of appeal. Also, listing more than three or perhaps four issues, will try a judge's patience and will lose the advantage of simplicity.[37] As Justice Sydney Robins, another great judge and former colleague, said, "legal contentions, like currency, depreciate through overissue."[38] So have the courage of selection. Let the minor points go.[39] And be wary of unnecessarily subdividing issues. That kind of over road mapping sends the wrong message to the Court: that your appeal is complicated, when your goal should be to simplify it.[40]

Next, you have to frame the issues you intend to argue in the best possible way. Getting the right answer depends on asking the right question. Frame the issues persuasively, but fairly. The late Justice John Arnup, a superb appellate judge and teacher of advocacy, urged counsel to spend a lot of time framing the

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[36] George Finlayson, "Appellate Advocacy in an Abbreviated Setting" in *Ethos, Pathos, and Logos*, *supra* note 10 at 260.

[37] Rarely, you may have an appeal that raises many issues. If you do, try to group them into broader categories so you end up with a list of three or four issues.

[38] "Appellate Advocacy" *The Advocates' Society Journal* (October 1997) 13.

[39] Or perhaps as Justice Cromwell has noted, the reason counsel list so many points is because they don't have one good one. See "Effective Written Advocacy in Factums" in *Effective Written Advocacy*, *supra* note 22 at 61.

[40] As appellant, if you unnecessarily sub-divide an issue, a respondent can score points with the court by showing that the appellant's three issues are really one issue.

points they intended to argue: draft, prune, polish, rewrite, and polish again.[41] You can frame an issue by stating it, by putting it in the form of a question (inviting a "yes" or "no" answer), or by your submission, or by a ground of appeal. Where appropriate, your framing of the issue should incorporate the standard of review. However you do it, if you are raising more than one issue—unless the court's jurisdiction is in question—start with your strongest point, the one that gives the court the easiest ground to sustain your position. Number your issues and aim to state them in clear, concise, and positive sentences. And try not to put too many words or information into the framing of an issue; otherwise judges may have difficulty following what you have written.

Perhaps most important, in framing an issue try to define it as specifically or as precisely as possible. As a writer, defining the issue precisely will help you focus on the facts that matter and help you write a more concise factum; for judges, precision will help them better appreciate the significance of the facts and the questions they must resolve. So, avoid defining an issue too broadly, and usually avoid defining it in terms of the ultimate relief you seek. Typically the real debate is over a narrower question. To get at a precise definition of an issue think of the terms used by two influential American writing instructors: Stephen Armstrong, who uses the term "end of the road question",[42] and Bryan Garner, who uses the term "deep issue." In Garner's words: "Essentially, a deep issue is the ultimate, concrete question that a court needs to answer to decide a point your way."[43]

Garner has a test to get at the deep issue. State the issue, even broadly, and then keep asking yourself "and what does that turn on" until you get to the bottom line.[44] In other words, when you can no longer usefully ask "and what does that turn on", you have arrived at the deep issue. Here is an example taken from a recent Supreme Court of Canada case, *Matthews v. Ocean Nutrition*,[45] in which an employee who was constructively dismissed sought a bonus as part of an award of damages. Suppose you define the issue as follows:

> Is Sarah Jones[46] entitled to damages equal to the bonus she would have received under her employer's long term incentive plan?

That formulation is too general to be helpful. It defines the issue in terms of the relief Sarah Jones asks for. But if you apply Garner's test—"and what does that turn on"—you find that the court must resolve not one issue but two:

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41 John D. Arnup, "Advocacy on Appeal" (Bar Admission Course Lecture, 1971) [Arnup].
42 He used it in several of the many lectures I was fortunate enough to hear.
43 Garner, *supra* note 9, Tip 8 at 49.
44 *Ibid.*, Tip 8 at 49.
45 2020 SCC 26.
46 I have changed the plaintiff's name.

> First, would Sarah Jones have been entitled to her bonus as part of her compensation during the reasonable notice period?
>
> If so, second, did the terms of her employment contract or bonus plan unambiguously take away or limit her common law right?[47]

Those are the two deep issues and they should be on page one of your factum.[48]

Often you can get at the end of the road question by excluding what is not in issue—take it off the table—and adding the word "because". Suppose you claim that after arresting your client, Green, the police breached his right to counsel under s. 10(b) of the *Charter*. Assume the police advised Green of his right to counsel and Green said he wanted to speak to his lawyer, but the police failed in their duty to implement Green's right. If you submit that the police breached Green's right to counsel under s. 10(b) of the *Charter* you will have stated the issue too broadly to be helpful to the court. More helpful would be: Green submits that the police breached his right to counsel under s. 10(b) of the *Charter* because they did not give him a reasonable opportunity to speak to his own lawyer.[49]

Here is one final and simple example. Suppose as respondent you seek to uphold a trial judge's finding that a municipal by-law was invalid because it was passed in bad faith. You would not simply submit that "the trial judge correctly held that the by-law was invalid." Instead you would add "because" to get at the deep issue: "The trial judge correctly held that the by-law was invalid because it was passed in bad faith." The deep issue will enable the court to focus on the facts that matter.

A respondent should not automatically accept the way the appellant has characterized the issues. Instead, counsel acting for a respondent should ask four questions. First, do I agree with the way the appellant has framed the issues? Second, do I agree with the order in which the appellant has listed the issues?[50] Third, is there an issue the appellant did not raise on which the court could dismiss the appeal? Fourth, have I stated the respondent's position positively?

The respondent is not bound by the order in which the appellant lists the issues or the way in which the appellant characterizes them. Acting for the respondent if you think one issue will decide the appeal for your client then begin with it, even if the appellant listed the issue third or didn't list it at all.

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[47] The Supreme Court answered the two questions "yes" and "no" and thus held the plaintiff was entitled to the bonus.

[48] Sometimes you have to ask "and what does that turn on" several times to get to the deep issue. Always anchor your statement of the deep issue to the facts of your appeal.

[49] See for example, *R. v. Bartle,* 1994 CarswellOnt 100 (S.C.C.).

[50] Of course, it will be easier for the court if the respondent answers yes to these first two questions.

And if you are acting for the respondent, do not automatically adopt the way the appellant has framed an issue. Here is a simple example. In a dispute over whether the trial judge erred in admitting evidence obtained after a warrantless search, the appellant may submit "the trial judge erred in admitting the evidence under s. 24(2) of the *Charter*". Taking advantage of the standard of appellate review, the Crown will undoubtedly submit "the trial judge reasonably balanced the three *Grant* factors and her decision to admit the evidence is entitled to deference on appeal.

John Arnup gives us an excellent example of how a respondent should not and should frame an issue. He advises not to say, "The respondent asserts that the appellant's argument on *the Statute of Frauds* is erroneous." Instead, be positive: "The respondent submits that the *Statute of Frauds* does not apply where there are acts of part performance, as were proved in this case."[51]

Finally, not only should you identify the deep issues and put them in your overview, you should put them in a way judges can easily remember them. So, instead of writing the issues as part of your text—the appellant raises two issues: first . . .; second . . . —try using a numbered, indented list. In a numbered list, each issue will stand out enough to stick in a judge's mind.

(c) Tell me a little story to put the issues in context

The issues provide the context for the rest of your factum, but the issues themselves need a context—a little story. Your little story should reflect what happened at trial, your underlying theory and theme, and the justice of your position. You can tell a brief human story—who did what to whom—or a legal story, or a combination of the two. Ask yourself what information will prepare the court to understand the facts and any relevant procedural history. In other words, you want to tell enough of a story so the judges can appreciate the significance of what follows, but not too much of a story that you unnecessarily clutter the overview with details better left for the rest of the factum. Sometimes what makes for good writing is what is not there. Frontload but do not overload your overview.

Of course, the appellant's story and the respondent's story will almost always differ. The appellant will try to tell a story that shows the equities in its position. The respondent will use the overview to try to change the way the court views the appeal.

Should you begin your overview with your little story, the controlling idea, or the issue(s)? You should make a judgment call, depending on the nature of your appeal. However you start, try to grab the judges' interest in the first few paragraphs. Don't begin with boring "tombstone" information about the claim

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[51] Arnup, *supra* note 41 at 25.

or charge, the proceedings at trial, and the result.[52] You want the panel to grasp the core of your case quickly.

(d) What relief do you seek and why?

The "what" is obvious. Also give the "why"—the "because" and rationale for your position—as you want to persuade the court from the outset that the equities are in your favour. Your argument should not be purely legalistic. Give the court a compelling reason to find for your client. The "why" may include a rebuttal of the other side's main argument.

(e) Where is my map for the rest of your factum?

Judges like roadmaps. Your roadmap will come from the issues. And as I have said, a numbered list of the issues is easiest to remember. When the judges read the argument section of your factum they will expect the issues you have listed in the overview to be stated in the same order and in the same words. Also, often you can crystallize your map for the court by stating in the overview what is not in dispute. By doing so you reduce the judges' workload and enable them to focus on the core of the appeal.

In addition to these five essential ingredients, some appeals may have a procedural history you may want to include in your overview.

How long should your overview be and should you write it first or last? In almost all appeals your overview should be a page to a page and a half, at the outside, two pages. As the rules require, it should be concise. A four- to five-page overview will lose its punch, lead to unnecessary repetition, and give judges a sense of déjà vu. An appeal of unusual complexity may call for an overview longer than two pages but lengthy overviews should be the exception.

Judges also write overviews. Some write them last. I always wrote mine first, though I polished it at the end. By writing it first I knew where I was going and was better able to organize the rest of my reasons. I urge factum writers to take the same approach. Even if you don't write the entire overview first, at least get down any controlling idea and the specific issues.

Write your overview in accessible language—no legalese or jargon and few, if any, acronyms. Pretend you are writing for your next-door neighbour who doesn't have a law degree. Humanize your client and even the other side by using the parties' real names or a meaningful designation (mother, father, lender, borrower, landlord, tenant). Real names allow judges to more easily keep track of who is who. I put two exceptions to this suggestion: if your client is unsympathetic or the opposing party is very sympathetic, stick to appellant and respondent; and don't personalize your client and dehumanize the other side by

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[52] Magotiaux, *supra* note 5 at 5.

using your client's real name and appellant (or respondent) for the opposing party.

Finally, try to make your overview interesting. You want the judges to look forward to reading the rest of your factum. Keep your sentences and paragraphs relatively short, especially at the very beginning of the overview. Use short or easy to understand words and active verbs, and maintain a respectful tone. Readers initially react to the language of a document before its substance. So use language that engages judges. In the memorable phrase of Chief Justice Dubin, write an overview that "whets the appetite" of judges to read on.

3. The Facts

When judges first pick up your factum to read it, they probably know something about the law; they will know little or nothing about the facts. The facts, however, will be what makes your case interesting. And, in most appeals the facts matter more than the law. In his Goodman Lecture on appellate advocacy, Justice Sydney Robins said in words I subscribe to: "The facts assume transcendent importance as a determining element in the decision of cases."[53]

I sometimes call this transcendent importance of the facts, the paradox of appellate advocacy. The significance of the facts to the outcome of appeals seems to fly in the face of *Housen v. Nikolaisen*[54] and deference to a trial judge's findings of fact and credibility. Many facts, however, are neutral, and not the subject of findings. Even those that are the subject of findings can be put in a different context. Most important, judges are powerfully influenced by the equities of a case. Judges are trying to do justice, to do the right thing, to reach a result that is reasonable and makes common sense. And justice and the equities ordinarily lie in the facts.

In saying this I don't suggest appellate judges ignore the law and precedent or disregard them in favour of their own beliefs. Many legal standards, however, are framed in general terms and many cases fall between precedents. There is a lot of play in the joints, a lot of leeway for appellate judges to reach a result they consider just. The law and precedent guide, but rarely do they control.[55]

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[53] "Appellate Advocacy" *The Advocates' Society Journal* (October, 1997) 12; Ian Scott, the best advocate I saw in my years at the bar, echoed Justice Robins opinion: "Most cases on appeal are decided by the judicial view of the facts. If judges have a sympathetic view of the facts, any seeming difficulties the law presents can be avoided." See The Honourable Ian G. Scott, *Factum Writing* [typescript from author's private collection]. My father, similarly, believed that the facts drove the result of most appeals. In a speech to the Lawyers' Club in 1975, reflecting on his years on the Ontario Court of Appeal, he said: "The cases coming before us were open ended, with the ultimate decisions being very much at large." See Bora Laskin, "The Common Law is Alive and Well . . . and, Well?" (1975) 9 Law Soc. Of Upper Canada Gazette 92.

[54] 2002 SCC 33.

[55] See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little

Even emotion plays a role in persuasion. An appeal to a judge's emotions is also an appeal to a judge's values, which underlie those emotions. Emotion—*pathos*—was one of Aristotle's three modes of persuasive discourse.[56] Justice William O. Douglas of the United States Supreme Court once famously remarked that: "Ninety per cent of every decision is emotional. The rational part of us supplies the reasons for supporting our predilections."[57]

Recent studies in neuroscience show that emotion plays a role in decision making. In the brain, emotional and cognitive or rational pathways overlap; they are intertwined.[58] In his acclaimed book *Thinking, Fast and Slow*, Daniel Khaneman wrote, "an important advance is that emotion now looms much larger in our understanding of intuitive judgments and choices than it did in the past."[59] And more recently, in their book *Legal Persuasion: A Rhetorical Approach to Science*, Linda Berger and Kathryn Stanchi commented, "the science is decisive that emotions, experiences, and cultures are a critical part of decision making and persuasion."[60] Not that advocates should appeal directly to a judge's emotions. Persuasion works best when it is invisible, not obvious. But advocates can evoke emotion by a skillful presentation of the facts.

The Ontario rules require an appellant to summarize concisely the facts relevant to the issues. Your summary should logically support your legal argument, show why your position is just, and guide judges to the desired result. If you write a compelling statement of the facts, usually the law should follow easily. I now turn to the specific elements of a persuasive summary of the facts.

(a) Organization

When you summarize the facts you should be telling a story. At bottom, a lawsuit is a clash of competing stories and competing underlying theories and themes. If your story is organized well, storytelling can be a powerful tool for advocates.[61] You don't want to tell a story for its own sake. You need to know

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Brown, 1960) 62-120; 219-222; In his excellent book *Writing to Win* (New York: Doubleday, Main Street Books, 1999), Steven Stark said at 62: "Arguments based on precedent aren't terribly persuasive in our culture." [Stark]

56 See Paul Perell, "Written Advocacy" (1993) 27 L.S.U.C. Gazette 5.

57 See William O. Douglas, *The Court Years, 1939-1975* (New York: Random House, 1980) 8. 33. Justice Douglas attributes the quote to Chief Justice Charles Evan Hughes.

58 Stanchi, *supra* note 30 at 314-315.

59 Daniel Khaneman, *Thinking Fast and Slow* (New York: Farrar, Strang and Giroux, 2011) at 12 [Khaneman].

60 Linda Berger & Kathryn Stanchi, Legal Persuasion: A Rhetorical Approach to Science (Milton, Oxfordshire: Routledge, 2018) 28 [Berger]. Many rhetoricians have emphasized the important role of emotional appeals to persuasion. See Edward P. J. Corbett, *Classical Rhetoric for the Modern Student*, 3rd ed. (New York: Oxford University Press, 1990) at 86-94.

61 Catherine Cameron and Lance Long, *The Science Behind the Art of Legal Writing*

what story to tell. So, before you write the facts you should know what you are going to argue. Try to answer these five preliminary questions: What facts do I need to show why my client should succeed?; What facts do I need to support my legal argument?; From whose perspective should I summarize the facts—that of my client or a neutral observer?[62]; What factual findings of the trial judge should I include?; And how should I begin my summary of the facts?[63]

The last question is important. In the first paragraph or two of your summary you want to prime the judges' impression of the factual basis of your appeal, to get them to see it your way. You may want to begin with your strongest facts. Or, you may feel that an introductory background paragraph will best orient the judges to your position. In deciding how to begin, as I said earlier, first impressions count.[64]

Then you must decide how best to organize your story. You may not be able to change the facts but you can control how they are presented. Organization is a key to clarity and persuasiveness. Generally, aim for a narrative that matches the issues you intend to argue, the logic of your analysis, and the justice of your client's cause. Consider the options, their pluses and minuses. You have three basic choices: witness by witness, chronological, and thematic.

(i) Witness by witness

Jim Smith testified . . . Cathy Miller gave evidence . . . Except possibly in a simple two or perhaps three witness case, setting out the facts witness by witness is ineffective. You turn yourself into a court reporter. Your factual story will likely be repetitive and will bear no relationship to the issues you intend to argue. And the important facts you rely on will be buried in the narrative. Rarely, if ever, use a witness-by-witness summary.

(ii) Chronological

Setting out the facts chronologically seems like the natural way to tell the story of your appeal. Begin at the beginning and follow the facts through to the end. Chronology has been ingrained in most of us from the time we were children, when we were read fairy tales that started "once upon a time . . ."

(Durham, North Carolina: Carolina Academic Press, 2015) at 71, 103 discuss the numerous studies that show narrative—storytelling—is a superior vehicle for conveying information [Cameron].

62 Summarizing the facts from your client's perspective (or, if you act for the Crown, from the victim's perspective) will enable the court to understand your client's experience.

63 See the excellent article "Arguing the Facts: Some Suggestions for Drafting the Facts Part of a Factum" by Justice John B. Laskin of the Federal Court of Appeal (my cousin!), in *Effective Written Advocacy*, compiled by The Honourable Thomas A. Cromwell, *supra* note 22 at 127-138.

64 Stanchi, *supra* note 30 at 335.

Chronology works best when sequence matters: when what happened when is crucial to your narrative and argument. However, if you use chronology don't use it by default. Make it a conscious choice because you think it is the best way to summarize the relevant facts. And if you do use chronology, try using relative times—the following day, three months later—instead of exact dates, unless the exact date is important.

Often, however, chronology is not the best way to organize the facts for three reasons. First, it may not mesh with the issues you are arguing. Indeed, when sequence is not what matters most, chronology may obscure rather than clarify what you want to convey. That may be especially the case when the facts are complex or voluminous. Second, chronology may prevent you from beginning with your strongest facts. Third, advocates who use chronology tend to throw in every imaginable fact. So if you do summarize the facts chronologically, edit ruthlessly.

Finally, even using chronology, your story doesn't have to begin at the beginning and end at the ending. Stories can start and finish where you want them to. So if you use chronology, also make your beginning and ending points a conscious choice.

(iii) Thematic

Often a thematic organization of the facts is best. By thematic I mean the facts are summarized and clustered under topics related to the issues or under the issues or grounds of appeal themselves. A thematic organization may simply impose a thematic structure (using headings) on a story largely told chronologically. But more often it will depart from chronology. When it does so, the facts under each topic will likely be chronological.

My friend Justice David Stratas of the Federal Court of Appeal has an excellent example of the persuasiveness of a thematic organization. A company is convicted of an environmental offence—a spill into a watercourse. The trial was long and many witnesses testified. Acting for the company on appeal you want to show the trial judge erred by failing to give effect to your client's due diligence defence. Using a thematic organization you could set out the facts under topics related to this defence. Your topic headings might be:

- The defendant's pollution control plan
- The defendant's equipment
- The defendant's maintenance of the equipment
- The defendant's employees: their hiring and training
- The operation of the equipment on the day of the spill . . .

In Justice Stratas' example I think it is evident that a witness-by-witness or chronological summary of the facts would be ineffective.

From a reader's perspective, a thematic organization offers the benefits of "proximity", a principle of structural clarity. Readers like closely related

information and ideas kept together—and conversely, information that belongs elsewhere, kept separate. Thus, for judges, proximity improves both clarity and comprehension.[65]

From an advocate's perspective, usually a thematic organization will be clearer, more concise, and more persuasive. It will be clearer and easier to absorb because it will mesh with the issues. It will be more concise because likely you will have eliminated unnecessary facts and focused only on those facts that matter for each topic. The other usual structural option, chronology, tempts the writer to include unnecessary details. And a thematically organized summary of the facts will be more persuasive because it will correspond with how judges like information presented, and will allow you to begin your story with your most important facts.

Often when you summarize the facts you will have to decide between chronology and theme. Or, you may opt for a combination of the two. Decide what works best for your appeal.

(b) Context before details

The principles of context before details and point first (the latter of which I discuss in the next section) are the two most important principles of clear and persuasive factum writing.[66] Paragraphs and sections of your factum that begin with a context for the details that follow tell judges what to look for and expect in the rest of the paragraph or section, what the discussion of the details will be about, and why the details matter. The idea behind context is that judges and other readers absorb information best if they understand its significance as soon as they see it.

Here is a simple example to show the persuasive power of context:

0, 1, 1, 2, 3, 5, 8, 13, 21, 34, 55, 89

Unless you have some expertise in mathematics, you may well ask: "Why are you telling me all this?" I will answer: "Here is a set of numbers starting with 0,1 in which the next number is the sum of the two proceeding ones."[67] This one sentence of context makes the meaning of the series of numbers clear. Contexts control meaning.

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[65] Mads Soegaard, *Laws of Proximity, Uniform Connectedness, and Continuation*, online: The Interactive Design Foundation <www.interaction-design.org> (Aarhus, Denmark: 2020); and see Edward Berry, *Writing Reasons: A Handbook for Judges*, 5th ed. (Toronto: LexisNexis, 2020) at 27 [Berry]; see also John McPhee, "Structure" *The New Yorker* (14 January 2013) online: <www.newyorker.com/magazine/2013/01/14/structure>.

[66] The two principles are related, but not quite the same. Point first is one way of providing context; but you can provide context without making a point.

[67] The series of numbers is the Fibonacci Sequence.

Why do readers always need contexts? The rationale comes from cognitive psychology and neuroscience, how our brains process, absorb, and retain detailed information.[68] The research by cognitive psychologists and neuroscientists has shown that relevant context is needed to fully understand a passage of prose. Readers absorb and remember details better when they first know how they matter and why they are relevant[69]—when they have a context for them, or to use a metaphor, when they have a container for them. With a context or container they will read more efficiently: they will read faster yet retain more.

Put differently, the principle of context before details helps satisfy a reader's need for clarity. As I said in discussing the writing process, to create clarity, the logic of your analysis—substantive clarity—is not enough. For cognitive clarity your readers need context.[70]

When judges read the facts section of your factum they don't read it passively. They are continually asking you, notionally of course, why are telling me all this detail? So, when you write the facts section of the factum, avoid a data dump—a blizzard of facts, one after another, with no signposts. You have to provide some context.

In the facts section you are telling a story, not necessarily making a point. But, as I have said, your story, your narrative, still needs context. You can provide that context in several ways: by a topic sentence, or two, or even three;[71] by a heading; or by a question (and in the argument, by your point). You need not provide that context at the beginning of every paragraph, but you should provide it when you are about to offer your readers new information, typically

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[68] One of the earliest and most famous studies on the power of context is by two cognitive psychologists, John Bransford and Marcia Johnson, "Contextual Prerequisites for Understanding: Investigations of Comprehension and Recall" *Journal of Verbal Learning and Verbal Behaviour* 11 (1972) 717-26. The authors' main conclusion was that "relevant contextual knowledge is a prerequisite for comprehending prose passages." In a more recent study, "Contextual Alignment of Cognitive and Neural Dynamics" *Journal of Cognitive Neuroscience* (2015) 27(4) 655-664, a group of neuroscientists (after conducting fMRI brain scanning) similarly concluded, "participants' comprehension ratings confirmed that valid contextual cues facilitated understanding of the text."

[69] Stephen Armstrong introduced countless Canadian lawyers and judges, me included, to the persuasiveness and clarity of context. See the superb book on legal writing he has now co-authored with Timothy Terrell and Jarrod Reich, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, *supra* note 7, especially chapter 2: "A Writer's Principles: Beyond Logic to Coherence". The authors now prefer the word "focus" to the word "context." I still prefer "context."

[70] See Stephen Armstrong, "Creating a Clear Organization: Why Logic is not Enough, in Effective Written Advocacy" compiled by Cromwell in *Effective Written Advocacy*, *supra* note 22 at 15-34.

[71] "The topic sentence is the example par excellence of context-first writing." See Edward Berry's superb book, *Written Reasons*, *supra* note 65 at 55.

at the beginning of longer paragraphs, or sections or subsections of your summary of the facts, and before the block quote of a witness' evidence that you choose to include. In one sense your summary of the facts will need continual introductions. One likely by-product of providing context is conciseness. When you give your readers context for the details you are going to write about, you may find that some of the details are unnecessary.

How much context should you provide? Enough to help judges grasp the details that are coming next. Suppose you are summarizing the evidence of two eyewitnesses to a stabbing in a shopping mall. If you write only: Fred Durant, a security guard, testified . . . Then Lloyd Davis, another security guard, gave evidence . . . you are providing no context at all. If you write: Two eyewitnesses to the stabbing in the Mall testified for the Crown . . . you are providing a little context, but probably not enough to be helpful. However, you can sharpen the context before the detailed evidence by writing: The appellant stabbed the victim with a pocket-knife inside the Pavillion Mall. Two security guards at the Mall—Fred Durant and Lloyd Davis—witnessed the stabbing and testified for the Crown. Their accounts were consistent. Durant testified . . .

You can also effectively provide context by an internal roadmap. Suppose you are summarizing the facts about a store manager who verbally abused an employee. You could start with a context sentence, something like the following: From June onwards until her dismissal, Hunt's verbal abuse of Pratt escalated. Three examples of his abuse stand out. First . . . Second . . . Third . . . Judges like a numbered roadmap.

I like mystery novels. But mystery writers engage their readers by providing no context or a misleading context. Don't write your factums the way mystery novelists write their books.

(c) Headings and sub-headings

I believe in the value of in case-specific headings and sub-headings.[72] Most advocates use them in the argument section of their factums, but fewer use them in the facts sections, where they are just as important. In the argument section of your factum, headings and sub-headings should be just that, argumentative, or point first. In the facts section they should provide needed context for the details that follow.

Headings and sub-headings benefit both factum writers and judges. For writers, strong, case-specific headings can lead judges to see your story and your argument in the most favourable light for your client. They may also help you diagnose problems in the way the facts or the argument has been organized. For judges, headings and sub-headings have four advantages:

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[72] For complex appeals, a table of contents listing the headings and sub-headings may help judges find quickly what they may be looking for.

- They show explicitly the organization and logical progression of your argument, and provide signposts along the way.
- They impose a simple, visual structure on the detailed information in your factum; and today's readers crave visual clarity.
- They "chunk" the information in your factum. Lengthy blocks of text deter readers, and headings and sub-headings break up the text into digestible pieces.[73]
- They create white space on the page, which will lighten the look of your factum and make it more inviting to read. Judges don't like to be visually overburdened.

Your headings and sub-headings should be one sentence long, ideally 15 words or fewer, but no longer than 25 words. In the facts section they should be specific enough to be informative. Compare these three headings: The mitigation evidence; Gordon tried to mitigate his loss; To try to mitigate his loss Gordon applied for six jobs but did not get an offer. Only the last heading is strong enough and specific enough to be persuasive and helpful to the court. One final point about headings and sub-headings: don't overdo it. Too many will make your factum appear too choppy.

(d) Bad facts and adverse findings

Few, if any, appeals are so one-sided that you won't have to confront some facts or findings against your position. Effectively dealing with them is one of the hallmarks of a skillful and credible advocate. The one thing you should not do with bad facts or adverse findings central to the appeal is ignore them. If you do so as appellant, the respondent will point them out.[74] If you do so as respondent, the court will point them out. Instead, you should acknowledge and manage them. In the words of former Chief Justice Cartwright:

> Nail it up on the side of the barn for everyone to see. Then show it is neither as large nor as immoveable as it first appeared.

You have at least four strategies to give effect to the Chief Justice's advice. Limit the impact of bad facts by using other facts to put them in a different context. Neutralize them by juxtaposing them with "good" facts and findings. Show that they are irrelevant or don't affect the justice of the result. Or de-emphasize them by your sentence and paragraph structure: put them in the middle of a sentence or paragraph, put them in the passive voice, or put them in a dependent clause—for example a clause beginning with "although"—which

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[73] I discuss "chunking" in the section on indented lists.

[74] In his book *Pre-Suasion: A Revolutionary Way to Influence and Persuade* (New York: Simon & Schuster, 2016) Robert Cialdini notes that if you admit a weakness before your opponent points it out, you will be seen as more credible.

carries less weight than an independent clause.[75] In rare cases you can persuade an appellate court to overturn a trial judge's finding of fact or credibility by showing it is unsupported or contrary to the evidence. In most appeals, however, you must accept the trial judge's findings and the facts that go with them.

If you have one of those rare appeals where you seek to overturn a trial judge's finding, use a respectful tone. Appellate judges have a job to do and, where appropriate will overturn a trial judge's finding. But appellate judges are also aware of the sensitivities of some trial judges to being overturned.

Finally, even the "right" concession can be quite persuasive. When I make this suggestion I think of the famous Buckley's ad for its cough syrup: "It tastes awful but it works great." That ad was successful because of the concession in it. You don't want to concede something that will undermine your appeal.[76] But an appropriate concession will narrow the debate for the court, show your candour, and enhance your credibility with the judges.

(e) The respondent's summary of the facts

The Ontario rules require a respondent to state the facts in the appellant's summary it accepts as correct, those it disagrees with, and then to add a concise summary of any additional facts it relies on. At times that can be a difficult challenge for respondents. An appellant gets to control the story and put its "gloss" on the facts. A respondent in one sense may agree with the appellant's summary but in another sense may not like the appellant's gloss. When acting for the respondent, how then should you approach the facts section of your factum?

There are two things you should not do: dispute petty differences; and restate the facts in their entirety when there are no major differences between the appellant's summary and your view of the facts. Starting your summary with, "The respondent accepts the facts stated by the appellant, subject to the following additions and clarifications," followed by a complete restatement of the facts is not faithful to the court's factum rules. If the appellant's summary is generally reasonable, the respondent should simply accept it. If the appellant has omitted or misstated key facts, then the respondent should deal with those facts but otherwise accept the appellant's summary. Restate the facts only when the appellant has omitted many important facts, misstated the facts, or put too

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[75] See section 6 of this article.

[76] However, you have an ethical obligation to concede that a trial judge's finding in your favour reflects a clear error in law. In *R. v. Latoski*, 2005 CarswellOnt 3898 (C.A.), in responding to an appeal of a conviction for attempted murder, Leslie Paine, a superb appellate counsel for the Crown, known for her honesty and candour, conceded that the trial judge had misdirected the jury on the *mens rea* for attempted murder. The Court set aside the conviction for attempted murder and substituted a conviction for a lesser offence.

much of a gloss on them. And if you do restate the facts then tell the court why you are doing so.

Acting for the respondent you have at least three other options to get your client's side of the story out. First, you can recast the story in a slightly extended overview. Second, you can limit your summary in the facts section to the key facts and trial findings you rely on. Many Crown factums I read used this option effectively by setting out the key facts thematically, under each issue or ground of appeal. Third, you can save the factual details you rely on for the argument section where they will likely have more impact because they will be tied to your submissions. Or a respondent may use a combination of all three options.

Finally, although a respondent's factum must respond, try to ensure it stands on its own, so the judges do not have to flip back and forth between your factum and the appellant's factum. Try not to say, "the respondent accepts the first three sentences in paragraph 8 of the appellant's factum, but adds . . ." Instead, briefly say what in paragraph 8 you accept and disagree with, and then add any facts you say were missing.

(f) Visual and other aids

In some appeals you can help the court absorb your argument better by using visual aids in your factum. You have many visual aids to choose from: diagrams, sketches, charts, tables, graphs, maps, pictures, flow charts, chronologies, timelines, pie charts, Venn diagrams etc. You may also choose to use a video (or audio) clip, which can be embedded or hyperlinked in your factum.

Visual images will help judges understand and remember your points in a way that writing cannot. They will organize or highlight information in a way that is more memorable and digestible. In her excellent, recent article, *Visuals Matter*, Jennifer Brevorka refers to one study that concluded an average person recalls 87 per cent of information presented visually, but only 10 per cent of information presented in words.[77] In a factum, "seeing a case makes it come alive to judges."[78] And with many judges now reading on screens and with the size of screens shrinking, as smart phones, iPads, and laptops replace desktops, visuals will break up small text and help keep an impatient judge's attention.

A visual aid could be an actual trial exhibit or may be "created." If the visual aid is an exhibit, take advantage of electronic filing and link it to your appeal materials. Today, with all the tools available, creating a visual is not all that difficult, even for someone like myself who has little technological expertise.[79] A few examples of effective visuals include: a diagram to show interlocking corporate holdings or complex corporate transactions in a fraud case; a sketch

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77 "Visuals Matter" *The Advocates' Journal*, vol 40, no 1 (2021) 23.

78 *Ibid.* at 23.

79 Joseph Regalia, *An Eye for Legal Writing: Five Ways Visuals Can Transform Your Briefs and Motions*, Appellate Advocacy Blog (May 25, 2019).

to show neighbouring properties in a boundary dispute; a chronology to show relevant dates and events in an appeal on whether an accused was tried within a reasonable time; a chart to show income earned in successive years in a tax case; and a map to show the location of cell phone towers where their location was an issue on appeal.[80] When I was on the court, in sentence appeals often the Crown used a one-page chart, setting out recent trial and appeal decisions on the offence in question, the role of the accused, the sentence imposed, and other pertinent information. Just by looking at the chart I had a firm view of the sentence appeal.

If you decide to use a visual aid in your factum, four considerations should govern its use. First, keep the visual simple; if it contains too much information—if it is too "busy"—it will lose its impact. Second, introduce the visual by explaining why it is there-provide some context or the point of the visual. Third, use a visual to supplement or enhance what you have written, not to replace your written words. So don't shirk your writing by overusing visual aids.[81] Last, make clear to the court whether your visual aid is a trial exhibit or is created. And if it is created, make sure it is faithful to the trial record or the case law. Counsel should not use a visual aid to "manufacture" evidence.

As well as these visual aids, a pithy quote from the evidence of a key witness can humanize your summary of the facts and make it come alive for the judges. A witness' words can be more forceful than your own words. But as with most of my suggestions, don't overdo it.

(g) Facts in the facts section and facts in the argument section of your factum

In the facts section of your argument you must summarize the facts. But in the argument section you also have to refer to facts because your argument is the application of the law to the facts. So you will have to decide what facts go where. Putting your key facts in the facts section gives you an early opportunity to persuade. If you wait to put them in the argument section you lose that early opportunity. On the other hand, facts take on their persuasive power from their legal context.[82] So although you want to avoid too much repetition, I see nothing wrong with putting important facts in both sections of your factum.

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[80] *R. v. Hamilton*, 2011 ONCA 399.

[81] You will also have to decide where to put your visual aid. Best is in the body of the factum close to the text it is associated with. But if you are concerned judges might have some initial resistance to your visual, you could put it in an appendix.

[82] The principle of proximity. See *supra* note 75 and my discussion of how a respondent may deal with the facts.

4. Argument

The Ontario Court of Appeal's factum rules call for the appellant to list each issue raised and a concise argument for that issue, and for the respondent to state its position on each of the appellant's issues together with any additional issues followed by a concise argument. Argument is the application of the law or legal principles to the facts or findings of fact.[83] What ingredients go into a persuasive argument? I will discuss six: the standard of review; point first writing; show, don't tell; quotations and citations; indented lists; and appeals involving a statutory provision.

(a) The standard of review

You should address the standard of review because it arises in every appeal. The Court of Appeal does not retry cases. It looks for reviewable error in the trial court. Both parties should use and rely on favourable findings of fact and credibility, as they are entitled to deference on appeal.

You can address the standard of review in two ways: in a separate paragraph or section, or by issue. If you choose to deal with it separately, in almost every appeal you do not have to cite *Housen v. Nikolaisen*[84] at length; instead accept that every judge on the Court of Appeal is familiar with it. A simple statement of the standard, correctness or deferential, and which standard applies to which issue, will ordinarily suffice.

If you choose to address the standard of review by issue, you can often do so more persuasively by incorporating it into your submission:

> This Court should not interfere with the trial judge's finding of a breach of contract. That finding is a finding of mixed fact and law, which is entitled to deference. The appellant has failed to show that the finding was tainted by a palpable and overriding error. Thus appellate intervention is not justified.

(b) Point first writing

By now most readers of this piece will be familiar with point first writing. As I said earlier, I consider the principle of writing point first and the more general principle of giving the context before the details to be the two most important principles of clear and persuasive factum writing.[85]

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[83] Argument is essentially a syllogism. See Chief Justice Richards' (Saskatchewan Court of Appeal) excellent article, "Writing effective briefs" *The Advocates' Journal* (December 2012) in which he gives this example at p. 9:
Major premise: Damage is an essential element of the tort of negligence.
Minor premise: Mr Smith's actions resulted in no damage to Ms Jones.
Conclusion: Therefore, Mr Smith's actions were not negligent.
The syllogistic structure of argument is supported by the mathematical theory of transivity: If A = B and B = C, then A = C. See Cameron, *supra* note 61 at 34.

[84] 2002 SCC 33.

Some advocates write point last because they think judges need to understand what the facts are and how the argument develops to appreciate the point. Or because they think that putting the point up front will make the conclusion redundant. These concerns have some validity but they are far outweighed by the advantages of point first writing.

When you write point first you tell judges right away your submission on an issue or the finding or conclusion you are asking for. Writing point first is more convincing and easier to read for the first time. Because judges know immediately the point you are making, they know where you are going and will more easily follow and grasp your discussion of it. So don't back into your point; except in rare cases (which I refer to below), do not be a point last writer.

In practice, you can effectively write point first in one of two ways. One way is to begin with a context heading for the issue, usually in the form of a question, followed by a paragraph that begins with your point. Your point can be in a single sentence, or if you need them, more than one:

> First issue: Did the appellant have a reasonable expectation of privacy in his girlfriend's apartment?
>
> The Crown submits that he did not because he did not meet the test in *Edwards*.[86]
>
> In *Edwards*, the Supreme Court said that a reasonable expectation of privacy is to be determined on the totality of circumstances, including ownership or control of and ability to regulate access to the place.
>
> On this record, three considerations show that the appellant did not have a reasonable expectation of privacy in the apartment: he was just a visitor, without a key; he did not contribute to rent or household expenses; and he had no authority to regulate access to the apartment.
>
> Thus, the appellant had no standing to challenge the constitutionality of the search or the admissibility of the evidence seized.

For this way of writing point first I use the acronym *ISPAC*:

> *I-Issue (context)*
> *S-Submission (point)*
> *P-Principle (or rule)*
> *A-Application or Analysis (details)*
> *C-Conclusion or point reiterated (optional)*

The other way to write point first is to begin with a point first heading.[87]

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[85] Point first writing is one way of providing context before details.
[86] 1996 CarswellOnt 1916 (S.C.C.).
[87] Point first headings are also called argumentative headings.

First issue: The appellant did not have a reasonable expectation of privacy in his girlfriend's apartment because he did not meet the test in *Edwards*.
Edwards states . . .

For this way of writing point first I use the acronym *SPAC*: *Submission/Principle/Application/Conclusion*. Many advocates prefer this second way of writing point first—in which the point also serves as the context—because it gets a judge's attention more quickly.

Whichever way you choose to write point first, these are my two basic templates.[88] In some complex appeals they may need to be modified. For example, you may want to make a series of sub-points to support your main point. In that case write point first sub-headings, which will allow the judges to follow your argument.

I conclude this section with five other points. First, in the two examples of point first writing I did not begin the submission with "it is respectfully submitted." Using that phrase extensively is no longer advisable. It will disrupt the force and flow of your argument. Even once at the beginning of your argument and once at the end may be one time too many.

Second, in both examples I used the word "because" to sharpen the point. "Because" is one of the most persuasive words in an advocate's arsenal of words. Indeed, three well-known social psychologists have said it is the one word that will increase your persuasive power.[89] Advocates can use "because" to give the "why" for their submissions, as I did in the above examples, or to refine the issues they are arguing, as I did in the section on the overview.

Third, both parties should first tell the court why their client should win, before telling the court why the other side should lose. This advice applies to respondents even though they are responding to the appellant's issues. A respondent should not let the appellant define the debate. Thus, a respondent's focus is two-pronged: first, show affirmatively why it should succeed on an issue; second, show the flaw in the appellant's argument.

Fourth, in complex appeals, where, for example, you have obtained an order for a factum longer than 30 pages, you might persuasively begin the argument section with a point first mini overview of your submissions before discussing each issue. Or, where your appeal is governed by a statutory or legal framework, you may want to begin the Argument section with that framework. Judges may want this additional context to better understand your position.

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[88] In law school, I was trained to use the acronym IRAC: Issue/Rule/Analysis/Conclusion. IRAC is a context first/point last way of writing. For factum writing, in almost every appeal, IRAC is unpersuasive. See Stark, *supra* note 55 at 9 and 128-130. Steven Stark also criticizes IRAC and tells lawyers not to back into their conclusions. He uses the acronym CRAC: Conclusion, Rule, Analysis, Cases.

[89] Goldstein, Martin, and Cialdini, *Yes!* (New York: Simon & Schuster, 2008).

Finally, there may be a rare case where you consciously choose to write point last. For example, you may have an appeal in which you are asking the court to dramatically change the law or take a dramatically different view of the facts. In other words, you will be taking the judges out of their comfort zone. In that kind of appeal putting your point up front might alienate the judges. Instead, you may want to lead the judges through your argument before making your point. The "drama" of the buildup may be more persuasive. If you do write point last, still you should begin with some context. But almost always point first is better than point last.

(c) Show, don't tell

Many tensions exist in factum writing. One tension advocates have to balance is the tension between simplicity and detail. You want to write a factum that simplifies the appeal for the judges. But you also want to write a factum that has enough specific details to persuade. Generalities, general or abstract propositions of law, even general factual descriptions do not persuade. Judges are persuaded by specifics, by details, but by the right amount of detail. Specific details persuade but too many of them can be tiresome to read. So, advocates have to find the sweet spot. The overall goal, however, should be "show, don't tell."

Here is a simple example of telling and showing:

Tell: Ms Williams tried to sell her house but could not find a buyer.

Show: Ms Williams listed her house with three different agents and each time reduced the price, but still could not get a single offer.

I think you will agree that the "show" is more persuasive than the "tell."

If you have an appeal that calls for it, think in terms of analogy. Show how your case is similar or dissimilar to another case or another factual situation.

(d) Quotations and citations

Quotations. A short, pithy quote from a case can add force and emphasis to your argument. But before you quote ask yourself whether a paraphrase would be just as effective. Paraphrasing allows you to keep control of your writing. If, however, Justice Moldaver said something in words that are memorable or instructive, then quote him. Three caveats. Don't make the quote too long[90]; don't turn your argument into a string of quotations; and before you quote give the context for it or the point of the quote.

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[90] Long, block quotes are a real turn-off. Judges will tend to skim over them. If you are tempted to use a long block quote, think of Elmore Leonard's advice: "Try to leave out the parts that readers tend to skip." E. Leonard, "Writers on Writing" *New York Times* (July 16, 2001).

The last caveat is worth expanding on. When Justice Cory was on the Ontario Court of Appeal he wrote a still well-known decision on the interpretation of standard form insurance policies: *Wigle v. Allstate*.[91] Simply writing: "In *Wigle v. Allstate* Cory J.A. said," followed by a block quote of 15 lines of text is reader unfriendly. It prompts William Safire's memorable acronym MEGO: my eyes glaze over.[92]

You can improve the likelihood the block quote will be read by beginning with a context sentence: "In *Wigle v. Allstate* Cory J.A. discussed the interpretation of standard form insurance policies," followed by the quote. That context sentence is better than nothing but is probably too vague to be helpful. Much better is to introduce the block quote with its point: "In *Wigle v. Allstate* Cory J.A. emphasized that any ambiguity in a standard form insurance policy should be construed against the insurer. He said . . ." If you introduce the quotation with the point, judges are more likely to read it because they will know why you have included it; and even if they don't read it they will remember the point.

But having written the point of the quote you will likely find you can dispense with it altogether.

> Equality of bargaining does not exist in a standard form insurance policy. In *Wigle v. Allstate* Cory J.A. confirmed that any ambiguity in this type of policy should be construed against the insurer.

Or, instead of dispensing with the quote altogether you could persuasively incorporate a snippet of it:

> Equality of bargaining does not exist in a standard form insurance policy. In *Wigle v. AllState* Cory J.A. held, "it was reasonable and equitable to conclude that if the standard form is ambiguous, any ambiguity should be construed against the insurer."

Citations. In a jurisprudential appeal and perhaps in an appeal where you want to show that the weight of appellate authority supports your position, likely you will want to cite a number of cases. But in a simple error correcting appeal, limit the number you cite; the leading case or the most recent case on the subject from the Supreme Court of Canada or your Court of Appeal, a case close on the facts, or a case where your point is fully discussed by a respected jurist. You might add one or two citations to this list. However, the courage of selection applies to citing authorities. Don't cite 20 cases when two or three will do.[93]

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[91] 1984 CarswellOnt 26 (C.A.).

[92] *New York Times* (September 6, 1973).

[93] The great American appellate lawyer, John Davis, wisely said: "Use citations to fortify the argument, not to certify the lawyer's diligence." See "The Argument of an Appeal" (1940) 26 ABA J. 895.

For example, in a routine appeal concerning section 8 of the *Charter*, listing a string of section 8 cases from the Supreme Court of Canada beginning with *Hunter v. Southam* sends one of two wrong messages to the court. Either it signals you haven't really thought about what authorities you need for your argument so you just listed in your factum as many as you could think of; or it signals you think this is a big legal case when, in fact, it isn't. Doing either undermines your credibility. And chances are high that none of these unnecessary authorities will be referred to in oral argument or appear in the court's reasons.

Finally, though you should carefully limit the number of cases you cite, you must cite relevant authority against your position. You have a professional and ethical obligation to do so. You may be able to distinguish any contrary authority, show it doesn't affect your position, or even show it was wrongly decided.

(e) Indented lists (numbered, lettered, or bullet points)

Say you want to set out a number of factors relevant to one of your arguments. You could set out the factors in a paragraph, something like the following:

> To decide whether John Grant was an employee or an independent contractor the court must consider what level of control he exercised over his activities, whether he provided his own equipment, whether he hired his own helpers, what financial risk he took on, whether he had any degree of responsibility for investment and management, and whether he had an opportunity for profit.

Judges may find it hard to grasp and remember these factors when they are densely packed into a block of text. You can change the look of the paragraph by using a lettered, numbered, or bullet point list:

> To decide whether John Grant was an employee or an independent contractor the court must consider *six* factors:
>
> - What level of control he exercised over his activities
> - Whether he provided his own equipment
> - Whether he hired his own helpers . . .

Indented lists implement a principle of cognitive psychology called "chunking."[94] By chunking cognitive psychologists mean organizing detailed information into distinct, visual, and digestible items called "chunks." Chunking enhances clarity and enables readers to retain more information in their working

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[94] See Thalman et al, "How Does Chunking Help Working Memory" (2019) *Journal of Experimental Psychology Learning Memory and Cognition* 45(1); Matheson and Hutchison, "Working Memory and Cognitive Load" (2021) LD@school, online: <www.ldatschool.ca>.

or short-term memory. In other words, it reduces a reader's cognitive load. The advantages of chunking are why our telephone numbers are chunked into three units of numbers and why our credit cards are chunked into four units of four numbers instead of sixteen uninterrupted digits.

Indented lists appeal to judges. They stand out; they create visual clarity and white space; and they chunk information into digestible pieces. In short, they deliver information in a way that can be grasped quickly and easily. A respondent's counsel seeking to uphold a trial judge's finding of fact or credibility can make effective use of an indented list. Set out the finding and indent in a list the pieces of evidence that support it. If the court dismisses the appeal you may find that your indented list makes its way into the panel's reasons.

If you do use an indented list, try to keep the list items parallel. Each item in the list should start with the same part of speech and have the same structure. And, in my example, my sentence introducing the list said six factors. Always be specific. Avoid "several", or "a number of". Finally, though indented lists are persuasive, too many will make your factum appear cluttered.

(f) Appeals involving a statutory provision

Some appeals may raise a question about the interpretation and application of a provision in a statute. Some may involve statutes the Court of Appeal is unlikely to be familiar with. Especially in those latter cases you can help the court by incorporating into your factum a section that discusses the statutory scheme as a whole, how it works, and how the provision to be interpreted fits into the scheme. Help the court by "reading around" the provision in issue, so the judges don't wish they could call the regulator.[95] Also consider including the French versions of the provisions you refer to.

5. Relief Requested

The last substantive part of the factum asks the appellant and respondent to state the order each asks for, including any order for costs. In most cases the order sought will be straightforward. Typically, the appellant will ask that the appeal be allowed, the judgment of the trial judge or finding of the jury be set aside, and an order for whatever relief she seeks, including, where appropriate, damages and costs of the trial and appeal. Usually, the respondent will simply ask that the appeal be dismissed with—if appropriate—costs.

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[95] Of course, this suggestion reflects the Supreme Court's approach to statutory interpretation. ". . . the words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See *Rizzo &Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

At times the successful party may want incidental relief accompanying the main relief it seeks. And sometimes one of the parties may want more complicated relief. For example, faced with a challenge to the constitutionality of a statute, the Crown may ask, in the alternative, that if the court declares the statute unconstitutional, the declaration of invalidity be suspended for a period to permit the government to fix the problem. If you are asking for incidental or more complicated relief, ensure that the Court of Appeal has jurisdiction to grant it.

Although not required in this part of the factum, I see nothing wrong with summarizing in a pithy sentence or two your overall submission on the appeal. Come back to where you started by restating your key point or theory. Leave the court with a final thought: "The trial judge made a palpable and overriding error in finding that Barbara Green gave her informed consent to the surgery. That finding is not supported by any evidence in the record. Thus, Barbara Green asks that her appeal be allowed . . ." Judges will remember the last thing you write and they read in your factum. So, end with a bang.[96]

6. Words, Sentences and Paragraphs

Language plays a crucial role in persuasion. Language and content are closely connected. Of course, what you say is important. But so too is how you say it. The words you choose, the way you write your sentences, and the way you construct your paragraphs matter. Turgid prose and wordy syntax will detract from the clarity and persuasiveness of your logic.

In a general sense I believe in writing in plain language. Plain language does not mean "dumbing down". It means no legalese, no Latin phrases, no unnecessary jargon. But it means more than that. It means writing in a way that is clear, concise, and straightforward, that helps your readers absorb and understand information quickly and easily. Why write, "Brown exited his vehicle and fled on foot," when you can write simply, "Brown left his car and ran."

Many books and chapters in books contain excellent advice on what words and phrases to use and not to use, and on how to craft effective sentences and paragraphs. I encourage you to consult some of those books. In this article I will offer five suggestions each for writing words, sentences, and paragraphs.[97]

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[96] Where you position your message affects its influence. Judges are likely to absorb and retain what you say first and last. Psychologists call these effects primacy and recency effects. See Mills, *supra* note 26 at 137-138.

[97] I have relied on two recent articles I wrote, which are published in *The Advocates' Journal*: "Persuasive Sentences" (Spring 2020) Vol 38, No 4; "Persuasive Paragraphs" (Spring 2021) Vol 39, No 4.

(a) Words

Winston Churchill once said: "There is no more important element in the technique of rhetoric than the continued employment of the best possible word."[98] So you should choose your words carefully. Choose words that engage judges. And make every word count. Don't drown judges in a sea of words. Clear away the clutter. The more economical your sentences, the more powerful your message. Here are my five suggestions.

(i) Prefer short, everyday words

Again take Churchill's advice: "Short words are best."[99] Or, George Orwell's: "Never use a long word when a shorter one will do."[100] According to one writing instructor, less than 20 per cent of your written vocabulary should consist of words of three syllables or more.[101] One or two-syllable words have a richer pattern of sound and more stressed syllables, giving your sentences more force. So write "do" instead of "accomplish", "show" instead of "demonstrate", "use" instead of "utilize", "need" instead of "necessitate", "part" instead of "component", "start" or "begin" instead of "commence", and so forth.

(ii) Limit your use of adjectives and adverbs by using strong nouns and vivid verbs

In factum writing some adjectives and adverbs may be needed, but many are not. Don't unnecessarily sprinkle them throughout your writing. Let strong nouns and vivid verbs do most of the work.

Too many adjectives will detract from your factum's persuasiveness. You can eliminate many adjectives by using a strong, descriptive noun. For example, try "landmark" instead of "important place", "celebrities" instead of "famous people", and "boor" instead of "rude person." Also, watch for and cut an adjective that simply restates the noun it modifies: final outcome, end result, future plan, past history, armed gunman.

The suggestion to use strong nouns means ordinarily you should avoid using abstract or general nouns such as activities, circumstances, instance, condition, facilities and the like—unless you are using an abstract or general noun to de-emphasize an unfavourable fact. If you are writing about a car accident your client caused, you may want to refer to your client's car, not his 2021 Porsche.

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[98] The Scaffolding of Rhetoric (November 1897) [unpublished pamphlet]. The great novelist Joseph Conrad similarly said, "He who wants to persuade should put his trust not in the right argument, but in the right word. See "A Familiar Preface" in Christopher Morley, ed., *Modern Essays* (New York: Harcourt, Brace and Company, 1921).

[99] Brainy Quote, online: < www.brainyquote.com > . The full quote is: "Short words are best, and old words, when short, are best of all."

[100] *Inside the Whale and Other Essays* (London: Penguin, 1962) 156.

[101] Walker Gibson, *Tough, Sweet and Stuffy* (Bloomington: Indiana University Press, 1966).

Just as the adjective is said to be the enemy of the noun, the adverb is the enemy of the verb. Don't use an adverb to prop up a wimpy verb. Instead of writing "he ran quickly," try a vivid verb, "he darted" or "he sprinted"; instead of "she cried loudly," try "she wailed" or "bawled;" instead of "she vehemently stated", try "she insisted." And don't use an adverb to express a meaning already contained in a verb: rudely insulted, awkwardly stumbled, completely destroyed, screamed loudly. In contrast, a good adverb can change the meaning of a verb as in the title of Roberta Flack's song, "Killing Me Softly."

(iii) Use concrete words

Use words that activate judges' senses—words they can see, hear, taste, smell, and feel. Concreteness is a powerful technique of clarity and persuasiveness. Judges will understand and retain information better when it is expressed in concrete language that allows them to form visual images. The law is already full of necessary abstractions: relevance, administration of justice, constructive trust, and many more.[102] So when you can, be concrete. Paint word pictures for judges. A good writer would not write "she felt sad", when the writer could activate a reader's senses by writing "she had tears streaming down her face." An advocate should not write, "when the accident occurred it was a cold day," but instead, "when the accident occurred it was four degrees below zero and snowing." In a criminal case, acting for the Crown, instead of writing: "The accused was armed with a gun as he accosted the victim;" try "The accused grabbed the victim's arm and poked her in the back with his gun."

Justice Stratas knows the power of concreteness. Here is the metaphor he used to explain the standard of appellate review, that awkward, abstract phrase "palpable and overriding error":

> When arguing palpable and overriding error, it is not enough to pull at the leaves and branches and leave the tree standing. The entire tree must fall.[103]

That is good writing. But a word of caution: a poor metaphor or simile is worse than no metaphor or simile.

(iv) Avoid false intensifiers and throat clearing phrases

By "false intensifiers" I mean words ending in -ly: clearly, absolutely, certainly, surely, totally, obviously, completely, etc. Some advocates may think these words strengthen their prose; usually they have the opposite effect. They

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[102] In the still influential book, *Language in Action* (New York: Harcourt, Brace, 1941) S. I. Hayakawa coined the term "ladder of abstraction". He meant that good writing should go up and down from abstract to concrete. As law already has many unavoidable abstractions my advice is to be concrete when you can.

[103] *South Yukon Forest Corp. v. R.*, 2012 FCA 165 at para. 46; approved *Benhaim v. St Germain*, 2016 SCC 48 at para. 38.

amount to "yelling" on the page and suggest your point is not compelling on its own.[104] Use them rarely, if at all.

How often do we all begin a sentence with throat clearing phrases: "it is important to note that," or "it may be observed at the outset that," or "it should be pointed out that." Except in rare cases, delete them all.

(v) Trim verbosity and wordy syntax

Verbal clutter may obscure the substance of what you have written and will likely annoy the judges you are writing for. In addition to eliminating throat clearing phrases, shorten stretched connections and simplify wordy prepositions. Change "at this point in time" to "now"; "in the near future" to "soon"; "despite the fact that" to "although"; "due to the fact that"[105] to "because" or "since"; "during the time that" to "while"; "in the event that" to "if"; "on an annual basis" to "annually", "pursuant to" to "under" or "by", "with regard to" to "with", "as to" to "about", "in order to" to "to", and so on. I recommend you buy Bruce Ross-Larson's excellent handbook, *Edit Yourself*,[106] which contains a list of words and phrases to change or cut.

The preposition "of" and the prepositional phrase "on the part of" can create some verbal clutter. Usually you can save words and improve the flow of your sentence by using the possessive. Instead of writing, "Jones contends that delays on the part of Smith prejudiced the defence", write, "Jones contends that Smith's delays prejudiced the defence."

Wordy, convoluted, or indirect syntax[107] can also be problematic. For example, instead of writing, "Another case which is illustrative of the approach in the case law is *R v A.R.*" (15 words), write, "*R v A.R.* also illustrates the approach taken in the case law." (11 words). Try to trim verbosity by getting rid of unnecessary words.

(b) Sentences

No sentence, and indeed no paragraph in your factum is an island to itself. Each should be linked to other sentences and paragraphs in a smooth and digestible order so that you create a coherent and logical flow. But sentences are the building blocks of factums. Your advocacy depends on writing clear and persuasive sentences. Here are my five suggestions.

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[104] See Armstrong, *supra* note 7 at 255.

[105] "the fact that" is one of my least favourite phrases. You can almost always find a better substitute.

[106] (New York: W. W. Norton, 1996).

[107] Syntax means the arrangement of words to form a sentence.

(i) Write sentences that average 20 words or fewer over the whole of your factum

The advice one sometimes hears to write only short sentences is bad advice for advocates. Persuasive writing has a rhythm to it, largely achieved by varying the length and structure of your sentences. A well-balanced, long sentence can be easy to read, even elegant. And sometimes you may need to write a longer sentence to convey closely related thoughts. When you do write a long sentence, "chunk" it with appropriate punctuation. Don't ask judges to read too many words without a break.

Too many long sentences, however, can be hard on judges. A continuous series of long sentences puts unreasonable demands on judges' working or short-term memories. Justice Ruth Bader Ginsburg gave this advice to litigators about sentence length: "Judges simply don't have time to ferret out one bright idea in too long a sentence."[108] What counts, however, is not the length of any one sentence but the average length over your entire factum. Different writing instructors give a different number for the average. I prefer Bryan Garner's number: 20 words or fewer.[109] So write some five- to six-word sentences, some 30-word sentences, and many sentences in between. If you find you have written too many long sentences, try to divide a few of them into two or more shorter sentences. The period is a good friend.

A very short sentence at the end or beginning of a paragraph of longer sentences can be especially persuasive. It will stand out, emphasize your point, and grab a judge's attention. Suppose you are acting for an employer, responding to an appeal in which a wrongfully dismissed employee argues that the trial judge awarded an inadequate period of notice. You might write:

> The appellant's argument rests on the premise that an employee's position in the hierarchy of the company is an irrelevant factor in setting the period of reasonable notice . . . *That is not the law*.

Or, after a paragraph discussing the law in your favour, you could begin the next paragraph with:

> *This case is no different*.

Even an occasional fragment—no longer shunned by modern writers—can pick up the pace of your writing and command a judge's attention to important information.[110] Again, as with most of my suggestions, use this technique in moderation.

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[108] Remarks on Appellate Advocacy (1999) 50 SCL Review 567 (1998-1999).
[109] Garner, *supra* note 9, Tip 20.
[110] Bruce Ross-Larson, *Stunning Sentences* (New York: W.W. Norton & Company, 1999) at 26.

(ii) Put the noun or thing doing the action in the subject position, usually at or near the beginning of the sentence

The first five or six words of every sentence are important for readability. Most readers of English want the subjects of verbs to name the main characters in the story, these main characters to be flesh and blood, and to appear early in the sentence. And when you write about abstractions turn them into virtual characters by making them the subject of the verb.[111] Here is an example that violates this advice:

> It is necessary to make a determination as to whether Craig's conduct is malicious, vexatious, and oppressive. It is clear on reading the materials that there are ongoing, acrimonious issues concerning parenting and support.

These two sentences are flabby and ineffective because each begins with a throat clearing phrase—it is necessary; it is clear—which appears to be the subject of each sentence when the real subjects lie elsewhere. This revision is much better:

> The Court must determine whether Craig's conduct is malicious, vexatious, and oppressive. The materials show ongoing, acrimonious issues concerning parenting and support.

This example also shows that you should avoid beginning sentences with "it is."

(iii) Keep the subject, verb, and object together

Your readers will expect that the grammatical subject of the sentence will be followed immediately by the verb, and then by the object. They will want to know quickly who the subject is and what the subject is doing. In other words, your readers will expect the core of your sentences to be together. If you separate them, some of your readers' brainpower will be taken up trying to put them together. Here is a simple example of a subject-verb split: "The evidence of Williams and Small, contrary to the Crown's position, shows that the accused acted in self-defence." The fix is easy: Just move the dependent clause to the beginning or end of the sentence. "Contrary to the Crown's position, the evidence of Williams and Small shows that the accused acted in self-defence."

But sometimes to avoid a core split you have to divide the sentence in two or, as in the following example, recast it.

> A *claim* for reliance damages in breach of contract cases, where the contract has been unprofitable, *may be allowed* for expenses that are truly wasted.

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[111] George Gopen, *The Sense of Structure: Writing from the Reader's Perspective* (New York: Pearson, Longman, 2004) xi-xiv [Gopen].

A fix: Where a plaintiff has proved a breach of contract, but the contract has been unprofitable, *the plaintiff may still claim reliance damages* for wasted expenses.

I put three caveats on this suggestion. First, a split of a few words is unlikely to bother most judges. The longer splits, however, you should try to fix. Second, a subordinate clause that is defining must necessarily follow the subject: Jones, who was wearing dark clothes and a hoodie, quietly slipped into the house. Third, in rare instances you may want to write a core split to pause the judge for emphasis. But make that a conscious choice.

(iv) Write sentences that mostly use active verbs

Of the various parts of a sentence, the verb is the most important. As F. Scott Fitzgerald said: "All fine prose is based on the verbs carrying the sentences. They make sentences move."[112] Strong, active verbs create action, reveal the actors, and save words. So, write sentences like the following:

Smith contends that the police searched his apartment without a warrant.

The trial judge dismissed the defendant's motion for summary judgment.

Sarah earned $60,000 the year her employer fired her.

For vigorous, clear, persuasive factum writing the verbs in your sentences should almost always be in the active voice—where the subject performs the action. But not always. My "but" sentence invites a brief discussion of the passive voice, nominalizations, and the verb to be.

(A) The passive voice

The corollary advice to use active verbs, which is often given, is never use the passive voice. I do not think that is good advice. The better advice is never use the passive voice needlessly because it has its persuasive and strategic uses in factum writing. Here are three:

- "Jones was murdered." The passive voice is used because the agent of the action is unknown or because the perpetrator doesn't want to admit to the killing.
- "The complainant was bludgeoned to death by the accused." The passive voice allows the writer to place the focus on the victim or the receiver of the action.
- "Some astonishing questions about 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

[112] F. Scott Fitzgerald, "To daughter Scotty, Oct. 20, 1936" *A Life in Letters* (New York: Simon & Schuster, 1994).

> marble. So much matter compressed into so little volume changes the fabric of space around it in profoundly puzzling ways."

This example comes from Williams' book, *Style: Toward Clarity and Grace*.[113] Look at the second sentence, which uses the passive voice. The passive makes the entire paragraph flow because it enables the writer to link the information at the end of the first sentence with the information at the beginning of the second sentence. This link is critical for flow.[114] Try revising the example by putting the second sentence in the active voice.[115] I think you will find that the paragraph loses its flow. Creating flow is usually more important than avoiding the passive voice.

Still, some advocates are wedded to the passive voice because they think it removes them from the action and makes them appear more impartial. That is wrong thinking. Advocates are in the persuasion business. In the words of the excellent American judge Patricia Wald, unnecessary use of the passive "sanitizes and institutionalizes (lawyers') writing and often anaesthetizes the reader." In probably the most famous speech in America in the 20th century, Dr, Martin Luther King said (in 1963), "I have a dream." Imagine if he had said, "A dream has been had by me."[116] If you use the passive voice make it a conscious choice and for a good reason.

(B) Nominalizations

A nominalization—sometimes called a zombie noun[117] because it cannibalizes an active verb—is the noun form of an active verb. Typically, zombie nouns end in -ion, -ance, -ence, -ment, or -ing. Lawyers use them far too much. "The trial judge took the evidence into consideration", is a sentence with the zombie noun "consideration." The active voice will reduce words and increase persuasiveness: "The trial judge considered the evidence." Similarly, don't write "the respondent made reference to two cases", when you can write "the respondent referred to two cases', or "the police conducted an investigation of the complaint", instead of "the police investigated the complaint."

Nominalizations do have their strategic uses, especially for linking or summing up previous information: "In 2015 the Supreme Court decided . . . In 2018 it decided . . . And again last year it decided . . . These *decisions* . . ."

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[113] Williams, *supra* note 3 at 47-48.

[114] The information at the end of the first sentence is "new" information, which then becomes "old' or "familiar" information at the beginning of the next sentence. See Armstrong, *supra* note 7 at 360-65 for a full discussion of this important technique.

[115] The collapse of a dead star into a point perhaps no larger than a marble creates a black hole.

[116] Stark, *supra* note 55 at 22-23.

[117] The Australian professor Helen Sword's wonderful term. See her TED talk, "Stylish Academic Writing" (October, 2012).

Look for zombie nouns in your writing. Change almost all of them to active verbs.[118]

(C) The verb "to be"

The verb "to be"—is, was, are, were—is the weakest verb in the English language. Be-words lack muscle. When you overuse them, you weaken your writing.[119] Often a be-verb is combined with a zombie noun: "Gordon was in violation of the court order." (Gordon violated the court order.) Here is an example of a sentence that combines all three vices I have discussed and adds a fourth, an unnecessary "there was": "There was an intention by Harris to breach the contract." (Harris intended to breach the contract.)[120]

We cannot eliminate the verb to be—I used it in the first sentence above. Sometimes it is effective: "The appellant's argument is wrong." But where you can, try to change the verb to be to a concrete or vivid verb.

(v) Manage the structure of your sentences

The structure of your sentences plays a major role in persuasiveness. In his excellent book, *The Sense of Structure*, George Gopen says that the structure of a sentence is far more important than its length or the words used.[121] Where you place information in a sentence will have a good deal to do with how judges process what you have written. The English language should move easily and smoothly toward its final point. Thus you should put important information, information you want judges to remember, at the end of your sentences. Note the difference in emphasis between "Socrates is wise, but old" and "Socrates is old, but wise." The corollary of this suggestion is never end a sentence with a date or time unless the date or time is significant.

The beginning of a sentence is also important, but not as important as the end. The middle of a sentence is the least important part of the sentence. The middle is where you should put your least important information or "bad" facts, which you wish to de-emphasize. You can also de-emphasize bad facts or adverse findings by using the passive voice or by taking advantage of the hierarchy of grammatical importance. Put an adverse finding in a dependent clause, for example, a clause beginning with "although," which will have less weight than an independent clause.

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[118] If you must choose between a nominalization and the passive voice, choose the passive voice. So write, "The CRA has rules governing how dividends are taxed", not "The CRA has rules governing the taxation of dividends." See Garner, *supra* note 9, Tip 32.

[119] *Ibid.*, Tip 29.

[120] An unnecessary "there is" or "there are" is often found in legal writing. "There are two cases that address the appellant's submission," instead of, "Two cases address the appellant's submission."

[121] Gopen, *supra* note 111 at 9.

(c) Paragraphs

Paragraphs give readers a rest and help writers assemble their thoughts. A factum without proper paragraphing would be daunting to read. Here are my five suggestions for writing persuasive paragraphs.

(i) Each paragraph should have three basic attributes: unity, development, and coherence

Unity means that each of your paragraphs should have one main idea or point; the subordinate information in the paragraph should be linked to that main idea or point to give the paragraph a single purpose. Try to avoid writing paragraphs that contain more than one main idea and thus pack too much information into a block of text. Development (or discussion) means that the main idea or point is supported by examples, evidence, factual details, or argument. Coherence means that the sentences in the paragraph connect logically together and flow, so that the whole paragraph hangs together.

Each paragraph should begin with a topic sentence. Usually the topic sentence should be the first sentence of the paragraph. It will provide a focus and tell judges what the paragraph is about. The remaining sentences in the paragraph will play a supporting role. And don't end a paragraph with what should be the next paragraph's topic sentence.[122]

(ii) Vary the length of your paragraphs but mostly write relatively short ones

Bryan Garner recommends that advocates strive for an average paragraph length of no more than 150 words, and preferably an average of under 100 words, typically consisting of three to eight sentences.[123] Garner's guidelines resonate with me for three reasons.

First, relatively short paragraphs are more readable. Paragraphs break information into "chunks" and today's judges and other readers like their chunks relatively short. Second, and related, reading is visual. The words on a page catch your eyes before your brain. A lengthy block of text can discourage a reader—even a judge—and may encourage skimming. Third, relatively short paragraphs create white space on the page, making your factum more inviting to read. Graphic designers say white space persuades. It creates the appearance of a less dense document. It makes what you have written look good and what looks good usually reads well. Creating white space, which has always been important, is even more important today as so much of our reading is on screens.

From having read many factums I can say a paragraph that takes up more than half a page is a real turnoff. A succession of long paragraphs is even worse.

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[122] See Garner, *supra* note 9, Tip 16.

[123] *Legal Writing in Plain English* (Chicago: University of Chicago Press, 2001) at 72-73. Armstrong, *supra* note 7, recommend eight to ten relatively short sentences or nine to twelve lines of type.

You may have to write a long paragraph to discuss fully the paragraph's main idea. So in that sense a paragraph should be as long (or as short) as it needs to be to discuss the paragraph's main idea. But if you have to write a long paragraph, follow it up with a shorter paragraph. And if your draft paragraph contains two main ideas, try breaking the paragraph into two shorter ones. On the other hand, don't overload your factum with a succession of very short paragraphs. Too many short paragraphs will be as irritating as too many long ones are wearisome. Variation is the key.

(iii) Use explicit transitional or connecting words, explicit roadmaps, and effective repetition to create flow and continuity within and between paragraphs

Creating flow within and between paragraphs is critical for writing a persuasive factum. Three techniques to create flow are explicit transitions, roadmaps, and repetition.[124]

English has lots of transitional words. Used wisely they can effectively bind your sentences together by showing the logical relationships between them. Here are the various purposes for which transition words are used and lists of the well-known words:

- *For exceptions, contrasts, or concessions to what has been said*: still, but, yet, however, instead, although, though, even though, even so, despite, nevertheless, to the contrary, in contrast, otherwise
- *To continue what has been written*: and, similarly, further, also, in addition, additionally, as well, moreover
- *For cause or effect or a conclusion*: thus, so, accordingly, therefore, consequently, in sum
- *To orient in time*: next, later, then, after, subsequently, meanwhile, until, while, finally
- *To add to the last thought*: and, too, also, moreover, besides, furthermore, in addition
- *To point back*: this, that, these, those[125]

This list contains "heavy" (longer) and "light" (shorter) connectors. Prefer the lighter connector because it will allow judges to move more easily from one sentence to the next. Also, although these explicit connectors can improve flow, don't overuse them or you risk undermining the flow you are trying to create. Judges don't always need an explicit word to make the connection.

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[124] Another technique is linking "old" and "new" information. See my example of the use of the passive voice to create flow with this technique.

[125] Shorter transition words add speed to your writing. See Ross Guberman, *Point Made* (New York: Oxford University Press, 2014) 223, 227. And starting a sentence with "and" or "but" is entirely appropriate. Great writers do so all the time.

Explicit roadmaps make your paragraphs coherent and their logic explicit: "In finding the appellant liable the trial judge made two errors. First . . . Second . . ." Judges like numbered lists because they help them keep track of your arguments. And judges appreciate a number count. Avoid "several" or "a number of." Be specific.

A less explicit but also an effective way to provide a roadmap and improve flow is to repeat words or concepts. Here is a simple example:

> Section 108(2) of the *Courts of Justice Act* *requires* that an action for the specific performance of a contract be tried without a jury. In practice this *requirement* means . . .

The advice one often hears to go to a thesaurus to vary your word choice is not always good advice. If you use two different words for the same concept (and one is not an easily recognized synonym of the other) you risk leading judges to think you mean two different things. In factum writing wise repetition is a good thing.

(iv) Put your most important information at the end and beginning of a paragraph, and your least important information in the middle

The suggestion I gave for sentences also applies to paragraphs. Readers remember best the end of things, next best the beginning of things, and not nearly as well what comes in the middle.[126] Put your best stuff at the end and beginning of a paragraph, and the stuff you don't want to emphasize in the middle.

A paragraph's first sentence or two—the topic sentence or sentences—should introduce judges to the paragraph's main point or idea and signal what to expect in the rest of the paragraph. But factum writers should also focus on the last sentence or two of a paragraph. Don't end a paragraph with minor details. Ask yourself what idea you want to remain in a judge's mind as the judge leaves the paragraph and moves onto the next one.

(v) Use the rule of three with a parallel structure

A sentence or series of sentences in a paragraph dispensing information in chunks of three can have a magical effect on readers. Here are two famous examples:

- . . . government of the people, by the people, for the people . . .[127]
- Never in the field of human conflict was so much owed by so many to so few.[128]

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[126] Gopen, *supra* note 111 at 52-55.
[127] Lincoln's Gettysburg Address.
[128] Winston Churchill's tribute to the Royal Air Force in his Speech to the House of Commons, August 20, 1940.

Words and ideas grouped into threes are more appealing and easier to remember. Our brains are pattern-seeking machines. Three is the smallest number we need to create a pattern, the perfect combination of brevity and rhythm.[129]

In my two examples Lincoln and Churchill also used a parallel structure. Parallelism is the use of words, phrases, or clauses of similar structure and length. Parallelism streamlines the delivery of information and satisfies a reader's craving for balance and rhythm. A parallel structure will help make your ideas and points stick with a judge. Here is a more relevant example of parallelism:

> Credibility goes to the truthfulness of a witness's evidence. Reliability goes to its accuracy.

And here is an example where the rule of three and parallelism are combined:[130]

> He had no regard for the law.
>
> He had no regard for the judicial system.
>
> And he had no regard for telling the truth.

In his terrific 2018 Dubin Lecture, "*What A Great Orator Can Teach Us About Advocacy*,"[131] the Honourable Tom Cromwell gave an example of persuasive writing, combining repetition, parallelism, an indented list, and the rule of three:

> The defendant has reviewed the record in detail. But the Court should first take note of what the record does not contain.
>
> It does not contain evidence of X.
>
> It does not contain evidence of Y.
>
> It does not contain evidence of Z.
>
> These are matters essential to the defence's appeal. On these three matters the record is silent.

7. Editing

Before you file your factum with the court, one important task remains: edit your draft. Editing is an essential part of the writing process. As Justice Louis Brandeis famously said: "There is no great writing, only great rewriting."[132]

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[129] See Stephen P., "Understanding Arguments: The Rule of Three" Elite Educational Institute, online: < www.eliteprep.com > (December 4, 2017); "How to Use the Rule of Three in Writing" *Master Class for Business*, online: < www.masterclass.com > (2021).

[130] Berry, *supra* note 65 at 96-98.

[131] The great orator was Churchill.

Clear writing partly comes from a lot of revising—reshaping, tightening, and refining the argument; improving the flow; tinkering with your words and sentences. The difference between an edited and unedited factum may be the difference between winning and losing your appeal.

You have choices: you can edit your own factum, you can have a colleague edit it, or you can do both. Editing your own draft has disadvantages. We tend to fall in love with our own prose. And we are too close to our own writing. We wrote the draft so we know how it hangs together, how it is organized, what information is most important.

But your readers—the appellate judges—don't have this advantage. What seems clear to you may not be as clear to the judges who will hear your appeal. A colleague can bring distance and objectivity to the editing of your draft factum. Your colleague will look at your draft more like a judge would—as a first-time reader—and will bring a fresh look and needed criticism of what you have written.

If you edit your own draft factum, here are 10 editing suggestions;

1 Before you begin to edit put your draft away for at least 24 hours, preferably two days. Why?—because you will return to your factum with fresh eyes and a fresh perspective and will see things that need to be fixed, which you may not have seen if you had edited immediately. Taking a break between finishing your draft and editing will help turn you from a writer into a reader.
2 Even if you typed your factum on a computer, edit on paper because sometimes we read carelessly on a computer screen. Double space your paper copy and change the font (a monospace font, such as courier, is recommended).
3 Read your draft aloud to yourself. Often your ear is a more reliable guide than your eye. If your prose doesn't sound right it probably needs fixing.
4 Read your factum as a whole to get a general sense of it. When you do so, ask yourself: Does it hang together? Does it flow or is there a disconnect between the parts? Have I got the right issues and stated them precisely enough? Are the tone, length, and basic approach appropriate?
5 Do not try to edit for everything all at once. Focusing on the big picture and the small picture at the same time is difficult. If you try to do both you will miss some things. So edit in stages. When you do so, think of the editing process as an inverted pyramid. First fix the big things: the overview, the organization of the facts, the argument. Then tackle the smaller things: verbs, sentences, paragraphs, word choice, and verbosity.
6 Edit your draft reading only your headings and sub-headings. As you do so ask yourself whether a judge could skim them and know where your factum

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[132] Quotefancy.com [The exact source of this quote is unknown.]

is headed and why you should succeed. Do you have the right headings in the right places? Are there too many or too few? Are they specific enough to be helpful?

7 Edit not only for what you have written, but as well for what you have not written, what is not on the page. Especially in the editing process you will pick up the absence of context and point first sentences. Focus on the beginning of sections and subsections, the beginning of longer paragraphs, and the beginning of any block quotations. Have you put context before details where it is needed and is it specific enough? Should a point last sentence at the end of a paragraph be moved to the beginning of the paragraph to make it a point first sentence?

8 Make sure you have enough white space on each page to make your factum inviting to read. If a page is too dense because one or more paragraphs on it are too long, try splitting a lengthy paragraph into two shorter ones. To keep the flow you may have to rewrite or rearrange the sentences in each new paragraph.

9 Do a "technical" edit for correct grammar, spelling, punctuation, and citations. And look for any typographical errors. Filing a factum with any of these errors can leave a poor and lasting impression with the Court of Appeal.

10 My last suggestion is the most important. Always look to cut. Trim the fat from your factum. Get rid of unnecessary facts, shorten a wordy analysis, rewrite convoluted sentences. The novelist Stephen King used this equation: 2^{nd} draft = 1^{st} draft—10%.[133] So read with a pencil or pen. Cut, cut, and then cut some more. You can almost always make your factum more concise.

8. Conclusion

One of my favourite books on writing is *On Writing Well* by the late William Zinsser.[134] He had this to say about writing:

> Writing is hard work. A clear sentence is no accident. Very few sentences come out right the first time, or even the third time. Remember this in moments of despair. If you find writing hard, it's because it is hard.

Or, in Samuel Johnson's memorable sentence: "What is written without effort is in general read without pleasure."[135]

When you write a factum you put your reputation and credibility as an advocate on the line. Court of Appeal judges get to know the good factum

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[133] *On Writing Well* (New York: Simon & Schuster, 2000) 282.
[134] (New York, HarperCollins, 1990) 12.
[135] Quoted in Paula LaRocque, *The Book on Writing,* (Oak Park Illinois: Main Street Press Inc., 2003) 86.

writers and the bad ones. Yet in trying to write a good factum, appellate advocates inevitably run up against the pressures of time and busy practices. But finding the time to write a decent factum will pay huge dividends for you and your clients.

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