Some Factum Suggestions

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Appellants

Write for your audience, not your client. You are writing a factum to persuade your audience, the appellate judges. You are not writing to please the person instructing you. The person or entity instructing you may want to include something in your factum, but that is not necessarily what the judges want or need; in fact, that inclusion could repel. As you write your factum, try to understand and accommodate the needs, characteristics and perspectives of your audience, the appellate judges.

Understand your audience, the appellate judges. Appellate judges often have these needs, characteristics and perspectives:

- ***Judges need education about the appeal.*** When the judges pick up the appellant's factum, the judges may know little about the appeal. They may or may not have read the decision below. Either way, they need to be educated about the general facts of the appeal. Do that, near the beginning of the document, and wherever else is necessary. A handful of sentences may be enough.

- ***Judges need context before detail.*** Judges, like most readers, find it difficult to understand and absorb a blizzard of detail when it is thrust upon them without any context. State your point up front, then support it with detail, and only the necessary detail. This form of exposition is often called "point first" exposition. "Point first" exposition should suffuse your factum: it should be your approach for the organization of the factum as a whole, for each section in the factum and, where possible, for each paragraph. A variant of this, which can apply even at the sentence level, is to begin with a concept that is concrete or familiar before introducing new detail.

- ***Judges as practical problem solvers.*** Many judges will ask themselves what the practical problem in the appeal is, whether they can solve it (the standard of review issue, discussed below), and how best to solve it. Judges are attracted by simple solutions that do not create implications. When you have a simple argument and a complicated argument, both of which lead to the same practical result, normally you should favour the simple argument. In deciding between a narrow argument that affects only the parties in the case and a broad, implications-laden argument,

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normally you should choose a narrow argument that accomplishes the objectives of the person or entity instructing you.

- ***Judges as critical, cautious readers.*** Judges are aware that they are receiving submissions from parties who have a strong interest in the outcome. For that reason, they read submissions very critically and cautiously. They tend to have more confidence in, and be persuaded by, objectively-expressed statements, verified by accurate citations, that point to instantly accessible materials. They tend to be cautious about general, vague, unverifiable statements. Overstatements, exaggerations, and inaccuracies – even just a few – confirm to judges that they were right to be critical and cautious, reducing the persuasive value of the factum to naught.

- ***Judges as dispensers of justice.*** Judges strive to achieve just results. Always look at the case from this perspective and ask yourself what arguments, either for or against you, are likely to engage the judges' sense of justice.

Most of the suggestions, below, are practical ways by which you can accommodate these needs, characteristics and perspectives.

Distil and synthesize. Your job is to distil the information in the case and synthesize it down to its essence. You are not writing an encyclopaedia, with every last detail memorialized. Nor are you writing a history of the case, with all of its twists and turns. Instead, try to write a helpful instruction manual, selecting only the detail that is necessary.

Select. To select only the detail that is necessary, you must first decide what facts and arguments you need to include. Work backwards and ask two basic questions:

- Question 1: what relief are you seeking?

- Question 2 (two parts that ideally should be combined into one): (A) why should you get the relief and (B) why should the decision below be overturned?

As a general rule, everything else should be dropped. (But see "Candour," below.)

It's an appeal. There is a judgment below. There is a standard of review that must be applied. This affects the answers to the two questions, particularly the second question. Unless you can show palpable and overriding error, you are stuck with the factual findings and the discretionary rulings made below. Therefore, you should focus on fundamental issues, such as errors of law or significant misapprehensions of principle, always bearing in mind the judges' desire to do justice between the parties.

Edit your arguments. Even after you have engaged in selection bearing in mind the standard of review, you may still have ten different arguments why the decision should be overturned. You should now edit. Arrange the arguments from strongest to weakest. If number one has failed, might number two win the appeal? Perhaps. If number one and number two have failed, might number three win the appeal? Maybe. If number one and number two and number three have failed, might number four win the appeal? Probably not. Running too many arguments gives appellate judges the feeling that the lawyer is throwing mud indiscriminately against the wall to see what sticks. This undercuts the credibility of the case. Another way of thinking about this is to recall that most cases really turn on only one or two critical issues or controlling ideas. The *ratio* of a case is only a sentence or two long, at best. Your job is to identify the controlling idea or hard issue in the appeal, or a couple of controlling ideas or hard issues, and then to develop them.

Do argue. Factums should not be a collection of facts and academic propositions of law. Appeal courts want submissions regarding how the law should be applied to facts: argument is appreciated.

Structuring the argument. Law has its own structure. Usually there is a common law test or statutory recipe to follow. Often that can be the best structure for the argument section of your factum. However, sometimes you do not need to set out the whole test or the statutory recipe. Sometimes you can simply address the particular errors of law or misapprehensions of fundamental principle.

Structuring the facts. Facts have no logical structure. You have to impose a structure on them. What structure? It depends on what is important in your case (see "The facts matter," below). Where chronology matters, chronological order might work best. Where, however, your objective is to show that you satisfy the various elements in a legal test, a thematic approach will probably work best. For example, at trial in a negligence case, you might group the facts under headings such as "brief background," "the event," "duty of care: the damage was foreseeable," "standard of care: the negligent conduct," "damage was caused," and "the damages claim." Of course, your structure may be different in an appeal depending on what the trial judge did. If you are focusing on particular errors of law or misapprehensions of fundamental principle, you need only set out basic facts to orient the judge and then select only those facts necessary to show the particular errors of law or misapprehensions of fundamental principle.

Using headings. As mentioned above, judges need context before detail or, put another way, point first exposition. Headings are key to this. While they are useful throughout your factum, they are especially useful in the facts section. By providing structure over the facts, acting as guideposts, and sending signals, they help to educate the judges about the facts and their significance to your case.

Deploy the facts once, when they matter. Sometimes it makes sense to deploy certain facts for the first time in your argument section. For example, in a negligence appeal, if the judge erred on whether the appellant met the standard of care, the facts relevant to

this issue may be deployed for the first time in your discussion of the standard of care in the law or argument section of a factum. Avoid setting out certain facts in the facts section and then force the judge to read the exact same facts in the argument section. Instead, consider where the facts will be most effective in your factum, and deploy them only where they will have the most impact.

Just the facts. Clinically and objectively expressed detail, arranged in a persuasive way, persuades. Adjectives and statements of opinion about the facts do not persuade. Overstatement repels and annoys.

The facts matter. Yes, you should be concentrating on errors of law or misapprehensions of fundamental legal principle. But the facts still matter – sometimes a great deal. Remember that appeal courts often have some discretion as to the proper principles to be applied and how they apply in your case. The facts can influence the exercise of discretion. The facts tend to highlight the justice of your case, or the lack of justice in your opponent's case. Spend time selecting and arranging the facts, and expressing them in a persuasive way.

Brevity. If you have engaged in selection in a rigorous way, your factum will be brief. This is good. Brief factums are much more persuasive. The ideas in them tend to stick with the judge and register an impact. Long, diffuse factums are not readily absorbed or remembered, and have less persuasive effect.

Candour. You may have selected only the facts and law that are necessary to set up your submissions on appeal. But there may be facts and law that you know will hurt your submissions. Acknowledge this. Deal with the facts and law against you before your opponent deals with them – or worse, before the judge notes your omission and wonders about your credibility!

The overview. The overview or introduction at the start of the factum makes a first impression. Take care to write it well. The overview is not a multi-page summary or headnote of the entire case. Nor is it a place to recite detailed facts that will be read again later. Instead, an overview should only be a brief orientation for the judges who know little or nothing about the case or your position on it, and it should begin the task of persuading them. Specifically, an overview should identify the controlling ideas or hard issues, explain why they matter and begin to explain why they should be resolved in your favour. Ideally, this should be done in only a paragraph or two.

Small things matter. Critical, cautious appellate judges can be reassured and comforted by correct, pinpoint citations that point to specific passages in documents in the record or the books of authorities. This technique can be enhanced by hyperlinks to the references for those who will read the factum on-line. If a legal proposition is trite, you should present it as such: include only one leading case at most. Citing seven cases communicates to the judge that your case is difficult and complex, when in fact it is not. Formatting errors and typographical errors matter: critical, cautious judges worry that a lawyer who cannot spell properly may not have set out the facts and the law accurately

Schedules matter. You should include the full text of all relevant legislation in the schedule to your factum, not just the name and citation of the Act or regulation. In this context, you should include all provisions to which you refer in your factum, all provisions that your opponent will be referring to, any provisions that may be mentioned in oral argument, and any provisions that might give the judge some general context that may assist in understanding the legislative scheme. In some instances, this means that you may decide to include an entire Part of an Act, or even more. If your schedule is long, pagination of the schedule and an index at the start of the schedule is helpful.

Remedies matter. If the appeal is allowed, the appellate court will often render the judgment that should have been rendered. So what is the judgment that should be rendered, and why?

Writing quality really matters. A factum comprised of sentences is like a wall comprised of bricks. If the bricks are bad and are not cemented together properly, the wall will be ugly, off-putting and weak. Sentences that are clear, direct and confident persuade. Sentences that connect firmly and logically with each other persuade. Sentences collected into a short paragraph that expresses a discrete concept persuade. Paragraphs combined in logical order into a section introduced by a heading persuade. Here are some suggestions about sentences, paragraphs and sections:

- ***Sentences.*** Try to make your sentences clear, direct and confident by following these rules:

  (1) Unless there is good reason, use the active voice. ("I hit the ball," rather than "The ball was hit by me.") The active voice is direct and short. In the passive voice, who did the hitting is slipped in as an after-thought, creating an evasive tone. It is potentially a distraction for the reader who is left in suspense until the end of the sentence about who did the hitting.

  (2) Use one word where you can; using strong verbs is one solution. ("She decided to value the shares at $50,000" or, even better, "She valued the shares at $50,000" rather than "She made a decision to set the value of the shares at $50,000.").

  (3) Where possible, restrict your sentences to one idea. (The sentence "The book, 258 pages in length and authored by Bob Smith, was read by Phyllis" could be broken into two very digestible sentences: "Bob Smith wrote a 258 page book. Phyllis read it.")

  (4) Try to connect sentences firmly to each other. Each sentence should pick up on an idea in the previous sentence. Repeating an exact word or concept in the previous sentence can build a strong link: "Mary picked up the book. The book was called X." Avoid

using different words and concepts, even just slightly different words and concepts, in the second sentence: "Mary picked up the book. The novel was called X." The slight shift from "book" to "novel" creates a certain lack of certainty and might create momentary confusion in the reader ("is this novel the same as the book?"). Of course, lack of certainty and confusion is precisely what you do not want to foster in readers you are trying to persuade. Finally, remember that transitional words and phrases such as "therefore," "thus," "in addition," "but," "instead," and "however" can help to guide readers, helping them to move quickly and uncritically from sentence to sentence.

- ***Paragraphs.*** Each paragraph should have one, and only one, discrete idea. Here, you might try to emulate newspaper journalists who write short, modest paragraphs. This achieves clarity and creates plenty of white space, which readers welcome.

- ***Sections.*** Arrange the paragraphs that develop a particular proposition or submission into a section. The paragraphs should be logically arranged for maximum persuasive effect. Make sure you say at the outset what proposition or submission you are developing in the section (the "point first" method of exposition, mentioned above). A heading at the beginning of the section also helps the judges understand the proposition or submission that you are making, and adds to their confidence in it. You should arrange the sections either in terms of necessary order (*e.g.* a proposition or submission can be advanced only after something else has been established first) or in terms of strength. On the issue of strength, remember that the strongest submission may be the least ambitious, most "boring" one: *i.e.* the one that provides the court with the simplest, shortest, most routine, most direct route to the result you want.

Respondents

Most of the points above also pertain to the respondent's factum. However, the respondent has other things to consider.

Avoid repeating what the appellant has said. If the appellant has set out the facts and they are broadly acceptable, say so, and then stop. Do not repeat. If the appellant has set out the facts but given them an unfair spin, identify the unfairness and object to it. It may be very helpful to set out the facts in a manner that emphasizes the respondent's point of view. You may try to do this, but do not just repeat the basically the same facts the appellant set out, with your spin.

Be direct. If the appellant is wrong on an important fact or legal proposition, say so, directly and clinically, without aggression or sarcasm, with supporting reasons and references. Don't beat around the bush.

You may choose your own structure. Whenever possible, set out your response to the appellant's points in the same order as the appellant set them out, taking on their submissions one by one. This may cause you to adopt the headings and structure in the appellant's factum. However, you are not bound to do so. Particularly where the appellant's factum takes a scattergun approach or is unclear, it is often helpful to recast the appellant's grounds of appeal in a more understandable way and to use your own headings and structure. Just make sure that you are responding to the appellant's points and that the judge knows exactly where in your factum to find your response to the appellant's points.

The court below. You won in the court below. Exploit that. To the extent you can, embrace the reasons below, highlighting the standard of review. Identify those portions of the reasons that did justice between the parties. Where the reasons are debatable or shaky, bolster them with reference to the record and case law. Also consider exploring other reasons, not mentioned by the court below, that support the judgment you wish to maintain.