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PREPARING THE FACTUM

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A. INTRODUCTION

Appellate counsel have but two opportunities to convince an appellate court of the righteousness of their position on an appeal.[1] Their first opportunity is in the preparation of their *Factum*. Their second is in the presentation of their oral argument. As appellate courts increasing impose time limitations on the duration of oral arguments,[2] the preparation of the *Factum* assumes an ever increasing importance.[3] The *Factum* is no longer a mere "prop for oral argument".[4] Indeed, given the modern day reality of appellate work, it may well be that the preparation of the *Factum* is the single most important step an advocate takes on a criminal appeal:[5]

(1) Prior to the hearing of the appeal, the *Factum* is likely the primary source available to the Court for information about the upcoming appeal.[6] It not only provides the Court with an outline of the arguments advanced by the party, but it may inspire questions from the Court during the hearing.

(2) A well-prepared *Factum* makes the task of counsel, in preparing for oral argument, much easier and less anxiety filled.

(3) During the hearing of the appeal, the *Factum* provides the Court with a helpful roadmap through the oral argument, and permits less note-taking by the members of the Court, who

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1 The views expressed in this paper are the opinions of the author, and may or may not be shared by the Ministry of the Attorney General (Ontario). The author wishes to gratefully acknowledge the invaluable assistance that was obtained in the preparation of this paper from earlier National Criminal Law Program paper entitled ***Appellate Advocacy: The Written Argument***, authored in 1998 by my friend and colleague Carol A. Brewer.

2 Appellate courts in Canada are beginning to follow the American approach of placing strict time limitations upon oral arguments. For example, in Supreme Court of Canada appeals, the parties are each usually limited to one hour of oral argument, with interveners usually being given 15 minutes for oral submissions. See: ***Notice to the Profession*** (August, 1995). In appeals in the Court of Appeal for Ontario, the Court, after considering the time estimates of counsel, fixes time limits for arguments in appeals against conviction, and has indicated, by its rules, that appeals against sentence, shall be argued, by both parties, within a total of 30 minutes. See: ***Practice Directions*** (1995), 25 O.R. (3d) 496, and (1998), 34 O.R. (3d) 259.

3 In Ontario, written arguments on appeals are of relatively recent invention. It was not until the 1960's that the governing criminal appeal rules were amended so as to require the preparation of a *Factum* on all criminal appeals. See: Mr. Justice D.G. Blair, ***The Court's Use of Factums*** (1987, unpublished paper) at p. 2.

4 This was how the *Factum* was described by John Sopinka and Mark Gelowitz in ***The Conduct of an Appeal*** (2nd ed., 2000), at p. 277.

5 Mr. Justice Laskin, of the Court of Appeal for Ontario, has expressed the view that "in most cases, the factum is more important than oral argument and, in some cases, far more important". Further, he has also indicated that, if he knew in practice what he now knows as a member of the Court, he would have "worked about ten times as hard on [his] factums". See: ***A View From the Other Side: What I Would Have Done Differently if I Knew Then What I Know Now***, [1998] *Advocates Society Journal* 16.

6 While appellate courts also usually have a *Transcript* of the trial proceedings, and an *Appeal Book* or *Record* that contains copies of all of the other relevant documentation, the practical realities of the heavy workload of appellate courts suggests that the *Factum* may be the only document with which the Court is fully conversant.

can focus upon the substantive content of the argument, secure in the knowledge that the necessary pin-point, detailed references to the transcript and the authorities are contained in the *Factum*.

(4) At the conclusion of the oral argument, the *Factum* is an immediate and helpful resource for the Court in the preparation and delivery of oral decisions.[7]

(5) In cases where the court reserves judgment at the conclusion of the oral hearing, the *Factum* continues to act as a "silent advocate", keeping counsel's arguments alive until the case is finally determined.

B. PRESENTATION AND RULE COMPLIANCE

The filing of the *Factum* gives the Court its first impression of the appeal and of counsel. In both respects it is of critical importance that this first impression be a favourable one.

Counsel should not overlook the "visual impact" that a *Factum* may possess. In order to ensure that this impact is favourable, counsel should: (1) organize the *Factum* structurally with headings and other visual clues that make it easy to follow; (2) carefully proof-read the *Factum* so as to ensure that there are no typographical or grammatical errors; and (3) review the photocopying and production of the *Factum* so as to ensure that the copies that are served and filed are easily legible and properly assembled.[8] In short, the "finished product" should quickly reveal that it was prepared by an appellate counsel who pays careful attention to detail.

While the governing court rules with respect to *Factum* preparation may not offer many insightful details to counsel as to how to prepare a persuasive and useful *Factum*, compliance with these rules in the production of the *Factum* is, nevertheless, essential. Non-compliance with any of the governing rules may result, at worst, in the outright refusal of the Court office to accept the *Factum*, or, at best, in distracting the members of the Court from the substantive content of the *Factum* and the arguments of the party that are contained therein.

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[7] It has been suggested on a number of occasions that, at least in Ontario, the Court of Appeal immediately determines approximately **90%** of their criminal appeals from the bench, without reserving judgment to prepare written reasons. See: Mr. Justice D.G. Blair entitled, ***The Court's Use of Factums*** (1987, unpublished paper) at p. 2.

[8] In ***Advocacy*** (1979), 13 *L.S.U.C. Gazette* 27, Mr. Justice J.D. Arnup, in providing appellate counsel with some helpful "pointers" said, at pp. 49-50:

> "Never underestimate the importance of the paper work. In Motions Court and in the Court of Appeal the judges see the papers before they ever see you. They rarely ever see your client. Typographical errors, badly paged appeal books, mistakes in grammar, unorganized recounting of facts, errors in citation of cases - all of these are an unfortunate prelude to your appearance in court. So far as the judge is concerned, you're the one who did it".

C. THE GENERAL APPROACH TO FACTUM PREPARATION

Regardless of the specific criminal appeal rules in question, the preparation of a *Factum* invariably follows one generally accepted formula. It begins with an overview of the appeal. It then proceeds to a detailed statement of the relevant facts, together with pin-point page references to the transcript of the trial proceedings or other relevant evidentiary documentation. Once the facts have been summarized, counsel then frame the legal issues, and outline the "brief" of his or her legal arguments, including specific references to the governing statutory, judicial and/or academic authorities. As a last step, counsel make a specific request for relief. The existence of this general framework, however, leaves counsel with considerable scope within which to: (1) provide the Court with information about the case; and (2) persuade the Court that a certain result should be obtained with respect to the case. There are, accordingly, a wide variety of perspectives on how to draft an informative, helpful and persuasive *Factum*. What follows are just some suggestions that counsel may wish to consider.

D. THE OVERVIEW OF THE CASE

Regardless of whether counsel acts for the Appellant or the Respondent on any given criminal appeal, or whether it is recognized by the procedural rules, it is almost always useful to begin a *Factum* with some type of brief "overview" of the nature of the appeal.[9] This is the opportunity for counsel to provide the Court with their "snapshot" of the case. While this portion of the *Factum* should be relatively brief, counsel can usefully provide the Court with certain basic information such as: (1) the history and general nature of the case; (2) any key pieces of evidence that were adduced; (3) the theories of the Crown and the defence at trial; and (4) the nature of the legal issues on the appeal. By telling the members of the Court, from the very outset, everything that they need to know about the case in a general way, counsel provide the Court with a context within which to understand the significance of any factual summary that follows and the legal arguments that are advanced.[10] In this way, the Court knows, from the

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[9] In Ontario, Rule 16(3)(a) of the ***Criminal Appeal Rules*** requires that the *Appellant's Factum* begin with a part entitled the "Statement of the Case". In this part of the *Factum*, counsel for the Appellant is obliged to identify the Appellant, the Court Appealed from, outline the nature of the charges, describe the result in the trial Court, and outline whether the appeal is from conviction, sentence, order, etc. This appears to be the portion of the *Appellant's Factum* that is best suited for an "overview" of the case.

[10] In the opinion of Mr. Justice Laskin , an overview is "an essential element of a good factum" and is "used by all good counsel arguing criminal appeals" even though it is not required by the rules. See: ***A View From the Other Side: What I Would Have Done Differently if I Knew Then What I Know Now***, [1998] *Advocates Society Journal* 16, at p. 18.

very beginning, what the important issues are (at least from the perspective of counsel).

E. OUTLINING THE RELEVANT FACTS

1. Summarizing the Facts in the Appellant's Factum

a. The Importance of the Factual Summary

After providing the Court with a general overview of the case, counsel for an Appellant is obliged to draft a concise "summary of the facts relevant to the issues on the appeal".[11] Summarizing the relevant facts is, at best, a very time-consuming and labor-intensive exercise, even with respect to trial proceedings that were not particularly lengthy. While mastering the evidence in the case and accurately summarizing the important evidence may seem like tedious work, it is perhaps the most important part of the *Factum*. Most appeals turn not on the resolution of some novel, esoteric point of law, but upon the factual merits of the case. Moreover, it is from the factual summary prepared by counsel that the Court obtains its sense of the relative equities of the case. This can not help but have a profound impact upon the sense of justice that the members of the Court bring to the case, and it will, undoubtedly, have an impact upon how they each assess the relative merits of the various grounds of appeal. Further, as a practical matter, appellate Courts seem much more dependent upon counsel for factual information about cases than they are for legal research and analysis.

b. Summarize All Relevant Facts Fully, Fairly and Accurately

The summary of the facts should be prepared with a clear view to the legal issues that are raised by the appeal. It may well be that an evidentiary matter that consumed considerable time and attention at trial becomes irrelevant on appeal. If so, then there is no need to summarize those matters in any detail.[12] However, the facts relevant to a complete understanding of the legal issues presented on the appeal should be summarized fully, fairly and accurately. In this regard, counsel are obliged to summarize not only the evidence provided by witnesses in examination-in-chief, but also any qualifications arising

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11 In Ontario this is required by Rule 16(3)(b) of the ***Criminal Appeal Rules***. See generally, Alan D. Gold, ***Criminal Appellate Advocacy***, in ***Advocacy in Court - A Tribute to Arthur Maloney Q.C.***, Franklin Moskoff Q.C. (ed.) (1986) at p.91.

12 For example, in a homicide cases there are often many expert witnesses called to testify. Considerable time is frequently spent reviewing the details of their qualifications. On appeal, however, if there is no legal issue raised about the quality of that body of expert evidence, there is little need to summarize the qualifications of these many witnesses.

in cross-examination.

Failing to fulfill this important obligation is problematic in many respects. Summarizing facts incompletely, or in a way that is either misleading or erroneous is, at worst, ethically wrong and, at best, tactically unwise. Appellate courts place considerable reliance upon the diligence, honesty and candor of counsel. If counsel obtains, over time, a reputation for misstating facts, his or her relationship with the Court may be irreparably damaged.[13] More immediately, however, creating a summary of the facts in the *Appellant's Factum* that includes overstatements or misstatements of facts, omissions of important facts, or distortions of evidentiary matters, only serves to provide the Respondent with an opportunity to supplement, clarify, or correct these difficulties in the *Respondent's Factum*. In this way counsel for the Respondent is not only able to demonstrate a superior grasp of the factual nuances of the case, but is able to focus the attention of the court upon the problematic factual aspects of the appeal.

This is not to say that advocacy plays no legitimate role in summarizing the facts in an *Appellant's Factum*. Fairly reviewing some problematic piece of evidence while, at the same time, attempting to minimize its significance is certainly one of the important advocacy tools of the appellate lawyer. Similarly, trying to emphasize some favorable factual circumstance while, at the same time, not inaccurately overstating its significance, is an equally important skill in the repertoire of appellate counsel. Provided that it is done fairly, completely and accurately, counsel is perfectly entitled to portray the relevant facts in their best possible light.

Accordingly, in crafting the factual summary for the *Appellant's Factum*, counsel may be able to ***minimize*** the impact of an adverse factual circumstance or a troubling piece of evidence by employing one or more of a variety of techniques, including: (1) using very passive, neutral, non-emotive language to describe it; (2) including it in a long sentence in the middle of a long paragraph; (3) immediately referring to any qualifications on the relevant evidence; and/or (4) quickly including any "explanation" for it that is found in the evidence. Similarly, in attempting to ***maximize*** the impact of a helpful piece of evidence or advantageous factual circumstance, counsel may employ other techniques, including: (1) using powerful and emotional language to describe it; (2) putting it in a very short paragraph all by itself, with any qualifications or explanations for the evidence in a separate paragraph or footnote;

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[13] In ***The Conduct of an Appeal*** (2nd ed., 2000) at p. 280, John Sopinka and Mark Gelowitz indicate that drafting the factual portion of the *Factum* requires counsel to be "scrupulously fair and candid" with the Court, and that "misrepresenting the facts will not only spoil the case, but also counsel's reputation". Similarly, in ***Written Advocacy*** (1993), 27 *L.S.U.C. Gazette* 5, Paul Perrell observed, at p. 28, that a "judge's lasting resentment and a mind closed to persuasion is the punishment for advocacy that is evasive, misleading, or dishonest".

and/or (3) by subtly repeating it as a theme in variety of different ways.

The goal of counsel for the Appellant in drafting the factual summary for the *Appellant's Factum* should be to concisely summarize the important evidence in the case in a manner that is as favourable to the Appellant as fairly possible, and yet which leaves the Respondent with nothing to usefully contribute, other than to say that the Respondent "accepts" that factual summary as a accurate portrayal of the evidence. If counsel for the Appellant has fully, fairly and accurately outlined all of the important facts, the Respondent is put in the position of either accepting those facts, or appearing petty and unfair by restating certain facts solely for emphasis. The importance of being able to craft a summary of the facts that paints the case for the Appellant in the best possible light, and yet which must be accepted as accurate by the Respondent, should not be underestimated. To a certain extent at least, it makes the *Appellant's Factum* the controlling document in the appeal, in that it is the document which, as the Respondent has acknowledged, contains all of the relevant factual and evidentiary details of the case. It also builds the Court's confidence, faith and trust in counsel for the Appellant personally.

c. Summarize Facts - Do Not Review Evidence

The most effective way to concisely inform the Court about the essential facts of the case is to simply try to tell the Court the "story" of the case. Criminal cases, with their human interest and dramatic developments, seem particularly well-suited to a logical and chronological presentation of the evidence in story form.

The effective use of headings, like fresh chapters in a book, is critical for the organization and presentation of the summary of the evidence. Headings provide the reader with a glimpse of the content and significance of the events that are thereafter described.[14]

The purpose of a factual summary is to summarize the relevant ***facts***. The summary of the facts is ***not*** designed to be a witness-by-witness summary of all of the ***evidence*** that was adduced at the

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[14] Headings can also, themselves, be used to subtly persuade the reader to accept a characterization of a particular body of evidence. Indeed, this is why Respondents should approach the adoption of the Appellants headings with considerable caution. As a Respondent it may be very tempting to simply employ the headings used by the Appellant, but careful consideration should first be given as to whether or not this adoption is tactically wise. For example, if a statement by the accused has incriminatory elements, the Crown would, no doubt, like to review the contents of that statement in an *Appellant's Factum* under a heading called ***The Confession of the Accused***. Employing that same heading in the *Respondent's Factum* would, however, likely be a tactical blunder by the defence, who would be well-advised to create their own new heading entitled ***The Statement by the Accused***.

trial.[15] Counsel may well find a summary of the transcript very helpful in preparing for an appeal, but that is not what is intended by a concise summary of the facts.[16] Virtually the only time that a witness-by-witness evidentiary summary is useful in a factual summary is in appeals involving sexual offences where the witnesses purport to testify about the same alleged events, but provide the trier of fact with wildly divergent versions of those events. In those circumstances, however, it is the nature of the case that dictates that a witness-by-witness account is, at least in part, required. Nevertheless, even in those types of cases, the witness-by-witness accounts are only required for that portion of the alleged events where the witnesses accounts vary.

Like any story, it is often helpful to begin with some type of introductory paragraph or chapter. The purpose of this paragraph of the story is to introduce the Court to all of the important people involved in the case and provide the Court with a glimpse of any important aspects of their personality.[17]

While the "factual summary" of an *Appellant's Factum* is hardly the place for argument, this does not mean that counsel for the Appellant can not organize or group the evidence together in such a way that assists counsel in advancing an argument that is raised on the appeal. Similarly, while it is inappropriate to silently draw inferences in the factual summary as if they were facts, it is perfectly appropriate to expressly draw the attention of the court to the significance of the summarized evidence, especially if its significance may not be readily apparent.[18]

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15 Mr. Justice Arnup noted, in ***Advocacy*** (1979), 13 *L.S.U.C. Gazette* 27, at pp. 45-46, that the Court of Appeal had a "phobia" about counsel providing the court with a witness-by-witness summary of the evidence, "leaving it to the court to figure out what it adds up to". Mr. Justice Arnup observed that, when this format is adopted, "it usually takes three times as long" for the court to master the facts, as "the witnesses all seem to be of equal importance". Moreover, the "persuasive force of the telling is greatly weakened".

16 For example, in a homicide case, there might be a ***dozen*** witnesses who attend at the scene of an alleged crime and who testify, for one reason or another, at the trial. A summary of the ***evidence*** at the trial would attempt to accurately summarize what each of these witnesses said, even if their observations were all, more or less, the same. However, provided that there was little contentious about their evidence on appeal, a concise summary of the ***facts*** might review the basic elements of what all of these individuals observed in one brief paragraph without any repetition.

17 For example, in a murder case where the accused claims he only acted in self-defence, the introduction might well include such important facts as the respective sizes of the accused and the alleged aggressor/victim and their ages and any criminal background that came out before the jury.

18 For example, after outlining a body of circumstantial evidence relied upon by the defence, counsel for the Appellant might then indicate that "the inference the defence asked the jury to draw from this evidence at trial was ..." or "it was the theory of the defence that this evidence demonstrated that ..." or "at trial the defence relied upon this evidence to suggest that ..."

d. Include Helpful and Complete Pin-Point References

Criminal appeal rules typically require that counsel, in preparing a *Factum*, provide pin-point page and line references to the *Transcript* of the trial proceedings or the *Appeal Book*. While this is a time-consuming and tedious task, it is important not to neglect to provide these references.[19] They are, in a number of respects, very helpful to counsel and the Court, especially in cases where the trial record is substantial. First, these references are helpful to counsel for the Appellant as there is often a significant passage of time between the preparation of the *Appellant's Factum* and the argument of the appeal, and the availability of precise and complete references is often very helpful to counsel in preparing for the oral argument of the appeal. Second, such references are helpful to counsel for the Respondent in measuring the accuracy of the factual summary contained in the *Appellant's Factum*. In a sense, such references act as the "proof" that the summary of the facts is accurate. Third, and most importantly, they are useful to the Court in preparing for the appeal, hearing the appeal, and deciding the appeal.

2. The Respondent's Position With Respect to the Facts

One of the most difficult decisions that counsel for the Respondent must make upon receipt of the *Appellant's Factum* is how best to fairly respond to the summary of the facts contained therein. There are essentially three options for counsel for the Respondent:

(1) ***Acceptance:*** The Respondent may indicate a simple ***acceptance*** of the facts as outlined by the Appellant as substantially correct. This does not, of course, prevent the Respondent from making submissions on the facts and their significance in dealing with each of the grounds of appeal,[20] but it does admit that the summary of the facts in the *Appellant's*

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[19] In order to make these references as helpful as possible, they include not only the precise volume, page and line references from the *Transcript* or *Appeal Book*, but they should also attempt to categorize what it is that will be found at the mentioned pages (ie. whether it is "Submissions of Counsel", an important "Ruling" by the trial Judge, some portion of the "Charge to the Jury" by the trial Judge, a "Question from the Jury", etc.). Further, these references should, of course, note where the outlined evidentiary topic can be found in both the examination-in-chief and the cross-examination of the witness (even if the evidence of the witness does not, in any way, change in cross-examination).

[20] This is not an insignificant option to consider. It may well be that counsel for the Respondent can accept, as substantially accurate, the general summary of the facts that is contained in the *Appellant's Factum*, on the basis that, in dealing with each of the grounds of appeal, he or she can there outline the critical facts necessary to fully understand the nature of the argument. For example, if the Appellant has attacked the reasonableness of the jury's verdict, the Respondent may be content to accept the summary of the facts offered by the Appellant, secure in the knowledge that, in addressing the reasonableness of the verdict ground of appeal, he or she will be able to provide his or her own brief, yet pithy, summary of the key evidentiary aspects of the case against the accused. Indeed, given that these factual aspects of the case will be found in the "Legal Argument" portion of the *Factum*, leaving any comments regarding the facts to this portion of the *Factum* may even provide the Respondent with a greater scope to more persuasively combine evidence, facts, inferences and arguments.

Factum is full, fair and substantially accurate.[21] However, if counsel for the Appellant has successfully walked the fine line between presenting the facts in their most favourable light and yet still outlined them in a full, fair and complete fashion, then counsel for the Respondent really has no reasonable alternative but to accept them.[22]

(2) ***Rejection:*** The Respondent may indicate a complete ***rejection*** of the facts outlined by the Appellant as not being a fair, full and accurate summary of the facts of the case. In such a case, of course, counsel for the Respondent is then obliged to create his or her own full, fair and accurate summary of the facts. This course of action, while somewhat drastic, must be contemplated: (a) if counsel for the Appellant has provided the Court with a hopelessly one-sided perspective on the relevant facts of the case; or (2) if counsel for the Appellant has provided the court with a "dictaphone style" witness-by-witness summary of the evidence that will be of limited assistance to the Court. Before adopting this course of action, however, counsel for the Respondent must appreciate that the creation of a new summary of the facts not only requires a substantial investment of preparation time, but also reduces the "space" available for legal argument.[23]

(3) ***Supplementing the Facts:*** The Respondent may indicate a partial or general acceptance of the factual summary provided by the Appellant subject to certain corrections or additions.

More often than not, counsel for the Respondent finds him or herself in the position of accepting at least a significant portion of the factual summary provided in the *Appellant's Factum*, and trying to, in some way, supplement or clarify those facts in the *Respondent's Factum*. In so doing, however, there a number of important considerations.

One of the primary goals of counsel for the Respondent must be to create a "free-standing" or "self-contained" *Respondent's Factum* that does not depend for its vitality upon a close comparison with the *Appellant's Factum*. What this means is that it is not usually very helpful for the Respondent to simply go through each of the paragraphs of the *Appellant's Factum* making observations about what is correct,

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21 One factor that counsel for the Respondent may wish to consider in making a decision about how to respond to the summary of the facts contained in the *Appellant's Factum* is the significance of the facts with respect to the grounds of appeal that are advanced on the appeal. It may be that the grounds of appeal have little to do with the general facts of the case. For example, the grounds of appeal may all relate to some technical argument surrounding the selection of the jury, or the alleged improper exclusion of the accused from the trial proceediings. It may be that, in such cases, the Respondent can accept virtually any recitation of the general evidentiary facts of the case in the *Appellant's Factum*.

22 The unnecessary repetition of facts by the Respondent is guaranteed only to irritate the members of the Court, and will be seen as a transparent attempt to simply emphasize certain aspects of the Respondent's case.

23 This "space" consideration is not an insignificant factor in many cases. In the Supreme Court of Canada the rules create a **40** page limit on the length of *Facta*. In the Court of Appeal for Ontario the rules create a **30** page limit on the length of *Facta* on appeals against conviction. Counsel must always be mindful of the fact that every page that is devoted to an articulation of the facts of the case is one less page that counsel will be able to devote to their legal arguments.

incorrect, or missing.[24] Apart from being very difficult and frustrating to read and understand, such an approach is tactically unsound as it permits the Appellant to control the presentation of the facts by making the *Appellant's Factum* the focal point of the case. The members of the Court must constantly return to the *Appellant's Factum* to fully understand the position of the Respondent.

On occasion, the Respondent will be faced with an *Appellant's Factum* that, while fully and accurately outlining the relevant facts, has cleverly accomplished this task in such a sterile and academic fashion that the cumulative impact or strength of the case for the Respondent has been well hidden. One effective remedy to combat this advocacy technique is for the Respondent to try to restore the full weight of the case in a brief "overview" of the case. Further, there is nothing inappropriate in doing so in somewhat emotive language. Just as it is no more than effective advocacy for counsel for the Appellant to try to "cleanse" the facts of any emotion by articulating them in a sterile and neutral manner, it is equally sound advocacy for counsel for the Respondent to try to restore some of the emotional impact of the evidence at trial.[25] This is not to suggest that counsel for the Respondent should try to inflame the appellate Court. However, it hardly inflammatory for counsel to simply employ the same type of emotional language that may have been used by the witnesses at trial. Thus, counsel should consider using the actual words used by the witnesses. Setting these words in quotation marks will illustrate that these emotional words are not used by design, but rather simply appear as the most accurate way of describing the evidence. To illustrate this point, compare the following two quite different ways of summarizing the same factual incident:

(1) The Appellant then struck the complainant in the mouth, causing him to lapse into a state of unconsciousness. When he recovered he attended at the hospital and was treated for certain physical injuries.

(2) The Appellant "smashed" the victim in the face with his fist. The force of this blow sent two of his teeth "flying". He "blacked out". When he came to, he was in "great pain" and was "covered in blood". He spent the next two days in the hospital being treated for the many injuries he suffered in this attack.

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[24] There is, however, one exception to this rule. If there are statements in the Appellant's summary of the facts which are, at best, misleading, or, at worst, simply inaccurate, then the Respondent is duty bound to correct them so that the Court is not misled. This can really only be done by specific reference to the offending paragraph in the *Appellant's Factum*. Before attempting such "corrections", however, counsel for the Respondent must ensure that the "correction" is scrupulously accurate.

[25] Paul Perell, in ***Written Advocacy*** (1993), 27 *L.S.U.C. Gazette* 5, observed, at p. 7, that it is "not wrong for an advocate to appeal to emotion", and that "the controlled appeal to emotion is a part of advocacy and persuasion, and it has always been so".

F. OTHER MEANS OF COMMUNICATING INFORMATION (CHARTS, DIAGRAMS, ETC.)

All counsel, regardless of whether they are acting for the Appellant or the Respondent, should try to take advantage, when the opportunity presents itself, of employing communicative means other than the written word to convey factual information to the Court. Accordingly, when necessary or useful, counsel should not hesitate to include, in their *Factum*, things such as maps, charts, diagrams, graphics and other technological means of presenting the facts of the case in the most persuasive and comprehensible light. This can be a very helpful and compelling way of dealing with certain specific issues. For example, when trying to summarize conflicting identification evidence, it may be very helpful to include a chart outlining what each of the identification witnesses may have said about the physical features of the accused. In this way, the Court can see, at a glance, both the similarities and the differences between the testimony of the various witnesses. Similarly, in cases where it is alleged that there has been a violation of the constitutional right to be tried within a reasonable time, guaranteed by s. 11(b) of the *Charter of Rights*, it is almost always useful to include a chronological chart outlining, in summary fashion, the sequence of dates that events transpired in the case, and their potential significance on the ultimate outcome of the case. Likewise, in cases involving complex commercial transactions, the best way to illustrate the flow of monetary funds from one limited corporation to another may be by way of graphics depicting the various transactions.[26]

G. PREPARING THE "BRIEF OF ARGUMENT" PORTION OF THE FACTUM

1. Introduction - General Considerations

In drafting the brief of the legal argument for a *Factum*, counsel must consider a wide variety of general issues, including the statutory jurisdiction of the appellate court, the scope of appellate review with respect to an alleged error, the potential impact that an alleged error may (or may not) have had on the outcome of the trial proceedings, and the specific relief that is sought.

2. Framing the Issues on the Appeal

One of the critical analytical and tactical steps in the preparation of a *Factum* is the framing of the issues on the appeal. This is so simply because asking the "right question" is usually the first and

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[26] If counsel, in preparing their *Factum* on the appeal, found it helpful and/or convenient to prepare some type of chart, diagram, map, etc., then it is entirely likely that the Court would find such a device similarly helpful and/or convenient. There is no good reason why the Court should be needlessly deprived of that valuable assistance.

perhaps the most significant step towards arriving at the "right answer".[27] It is in framing the issues on the appeal that it is of critical importance for appellate counsel to fully understand the jurisdiction of the applicable appellate Court, and be cognizant of the governing scope of appellate review. For example, if counsel is involved in an appeal to the Supreme Court of Canada, whose jurisdiction is limited to the consideration of alleged errors on questions of law alone, it may prove to be very difficult for counsel to pursue a ground of appeal that relates to a largely factual question such as whether a statement by the accused was voluntary. Even where there clearly exists the jurisdiction to interfere with decisions reached at trial, the applicable scope of appellate review may very well inform the nature of the issues on appeal. For example, in attacking the propriety of a trial Judge's decision refusing to declare a mistrial, it would certainly be simpler for the Appellant to merely ask whether the trial Judge "erred in failing to grant the mistrial application brought by the defence". However, the Respondent, giving due consideration to the scope of appellate review of such decisions would suggest, perhaps more accurately, that the issue was really whether the trial Judge "abused his or her wide discretion in refusing to grant the mistrial application brought by the defence". Just as in the factual portion of the *Factum*, "headings" can be effectively employed to not only frame the relevant issues and organize the arguments, but also to subtly persuade the Court of the position being advanced.[28]

3. Additional Factual Matters

Once the issue has been properly framed, it is often advantageous to next outline any additional factual details that are necessary for a proper understanding and consideration of the ground of appeal. For example, before detailing the argument with respect to a particular point, it may be useful to outline such matters as: (1) the impugned instructions in the charge to the jury; (2) the nature of evidence whose admissibility is in issue;[29] or (3) the positions of the parties at trial.

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[27] Appellate courts tend to place their own degree of importance on the framing of the issues. For example, in the Supreme Court of Canada, the governing rules require that an entire part of the *Factum* be devoted solely to an articulation of the "Points in Issue". In the Court of Appeal for Ontario the governing rules tend to combine the issues with the legal argument.

[28] For example, if one of the issues on an appeal relates to the admissibility of a statement by an accused person that was allegedly obtained in violation of the right to counsel protected by s. 10(b) of the *Charter of Rights*, it would be more persuasive for the Appellant to use the heading: ***The Police Denial of the Appellant's Right to Counsel*** than the much more "generic" heading ***Section 10(b) of the Charter***.

[29] It may be that, after a pre-trial motion or mid-trial *voir dire*, the trial Judge made important findings of fact after sorting through the conflicting evidence. Instead of a fulsome review of all of the evidence in question, it may be more

4. *Arguing the Appeal in the Factum*

In the past, many experienced appellate counsel viewed the *Factum* as a document designed, essentially, to simply ***alert*** the Court to the ***issues*** to be advanced orally during the argument of the appeal. Accordingly, the details of the argument, for the most part, remained to be fleshed out during the oral hearing. Counsel prepared a brief "notice of appeal" style *Factum*, wherein relatively bald propositions of law were stated, in combination with skeletal assertions as to their application to the factual circumstances of the case, followed by the citation of the relevant authorities.[30] This approach to *Factum* preparation is now, however, simply no longer a viable approach to appellate advocacy. In an era where time limits on oral argument are strictly enforced, and appellate courts face a heavy docket of pending appeals, filing a brief "notice of appeal" style *Factum* is simply a ***missed opportunity***. The modern reality of criminal appellate work now requires counsel, if they are to be effective advocates, to prepare much more detailed *Facta* which outline the basic content of all of their legal arguments in writing.[31] Counsel have been forced to adopt, essentially, a Supreme Court of Canada "Brief of Argument" style legal analysis in their *Facta*. While this requires a much greater investment of time by counsel in the preparation of *Facta*, there are great advantages to this approach:

(1) It forces counsel to carefully and thoroughly think through all of the legal issues on the appeal well in advance of the hearing date, and to fully understand, to the extent possible, all of the potential nuances of the arguments and directions oral argument might take.[32]

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appropriate to simply review these factual determinations.

30 This perspective has an historical foundation. For example, in England it was not until 1983 that the Master of the Rolls suggested that counsel may wish to consider providing the Court of Appeal with a "skeleton argument" in writing in advance of the oral hearing of the appeal. See: ***Practice Note***, [1983] 2 All E.R. 34. In England this "skeleton" written argument was not required in all civil appeals until 1989. See: ***Practice Direction***, [1989] 1 All E.R. 891. In addition this perspective also maintains some current footholds in the governing criminal appeal rules. For example, in Ontario, Rule 16(3)(c) of the ***Criminal Appeal Rules*** requires counsel to prepare a ***"concise statement of the law and authorities"***. [emphasis added].

31 Appellate courts appear to welcome *Facta* which provide more detailed legal arguments. In ***A View From the Other Side: What I Would Have Done Differently if I Knew Then What I Know Now***, [1998] *Advocates Society Journal* 16, Mr. Justice Laskin states, at p. 18:

"When I wrote my factums, I tried to have it both ways: a little bit of argument, but mainly bland statements of law. I now think that was a mistake. Like most of my colleagues, I find statements of law with little or no argument unhelpful and a good, succinct argument very helpful. If it were up to me, I would amend the rules to require argument, but, regardless, we welcome argument. Argument avoids what I call the generality problem. One weakness that we see all the time in the law section of the factum is that statements of law are too general. They are not specific enough to the facts of the case. A focused argument also allows for the grouping or marshalling of relevant facts or points in one paragraph, which can be powerfully persuasive. Therefore, use argument."

32 Further, the preparation of a detailed legal argument will likely generate respect for counsel personally, and for the

(2) It provides the Court with the details of counsel's legal arguments and analysis so that, even before the appeal is argued, its merits can be evaluated and assessed, at least in a preliminary way, by the Court.[33]

(3) It provides the Court with a much more detailed reference document to follow during the course of oral argument, and to assist the Court in the subsequent preparation of its judgment.

(4) In an adversarial system of criminal justice, a *Factum* which contains a more detailed written argument that attempts to persuade the Court of a particular position will, almost by definition, be a more persuasive document than a "notice of appeal" style *Factum*, which does not even attempt to be persuasive.[34]

5. *The Citation and Use of Authorities*

In referring to authorities in support of a legal analysis or argument, counsel should endeavor to ensure that the citations are accurate and complete, and include pin-point page or paragraph numbers directing the Court to the relevant passages.

Some commentators have expressed the view that, unless the specific legal argument being advanced requires counsel to trace a legal development through many authorities, counsel should only cite one or two cases in support of a proposition of law. The concern, apparently, is that the citation of more numerous authorities in support of a position is unnecessary and may distract the Court from the persuasive force of the argument.[35] With respect, this concern seems misplaced. It is difficult to understand how the citation of all of the leading appellate authorities on a particular issue can be unpersuasive or distracting

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position that counsel has advanced on the appeal. The members of the Court will, at a minimum, approach the case with the realization that counsel have devoted the time and attention to detail in an attempt to be of real assistance to the Court in the resolution of the issues raised on the appeal.

33 This has the potential of having a significant impact upon the direction of oral argument. Counsel for the Respondent, being fully advised of the details of the arguments may be forced to concede points. Counsel for the Appellant, seeing the full force of the arguments of the Respondent may be forced to abandon certain grounds of appeal. The members of the Court, seeing the carefully articulated arguments of both sides in advance of the appeal, will themselves be able to better prepare for the appeal. All of this can save valuable court time.

34 As Carol A. Brewer observed in ***Appellate Advocacy: The Written Argument*** (1998), at p. 7:

"The Appellant bears the burden of demonstrating the existence of an error and in showing the prejudice arising from the error. Accordingly, a factum which simply asserts a legal proposition, in the style of a Notice of Appeal, followed by a list of case citations, is unlikely to achieve the desired result. The bald assertion of error is not persuasive. The court needs to be told why what was done was wrong. This is best accomplished by carefully framing the legal issues and closely connecting them to the factual background of the trial."

35 See, for example: John Sopinka and Mark Gelowitz, ***The Conduct of an Appeal*** (2nd ed., 2000) at pp. 280-28; Lee Struesser, ***An Advocacy Primer*** (2nd ed., 1998) at p. 260.

to an appellate court. Indeed, if there are, for example, seven or eight appellate court judgments that stand for a particular legal proposition under discussion, the Court might well wonder why the research efforts of counsel only revealed one or two of those judgments, or how counsel came to select only one or two of those judgments. The ***weight*** of the appellate authorities clearly adds a persuasive element to the argument, and appellate counsel should not hesitate in demonstrating that weight.[36]

If there is one case that, in counsel's view, is directly on point, and controls the outcome of an argument or the appeal itself, wise counsel will focus the attention of the Court on that case in an attempt to demonstrate its persuasive and controlling impact. This can be done by devoting an entire paragraph of the *Factum* to outlining the relevant facts of the case, the holding of the Court and the citation of a pithy quotation from the reasons for judgment. If the issue or the appeal is truly governed by the *ratio* of this authority, this type of close and detailed examination of the authority will demonstrate that in a very persuasive way.

Of course, counsel is ethically obliged to draw the attention of the Court to any contrary authorities that may be unhelpful to their case.[37]

6. The Importance of Any Alleged Errors

It is critical for appellate counsel to appreciate that it is not enough to simply argue about whether or not there was some error at trial. They must each address the potential significance of any alleged error. Of course, according to s. 686(1)(b)(iii) of the *Criminal Code*, a court of appeal may still dismiss an appeal, even where the court is satisfied that there was some error at trial on an issue of law, where the court is satisfied that there was "no substantial wrong or miscarriage of justice" in the result. Accordingly, appellate counsel are obliged to consider and address the potential prejudice that may have flowed from any legal error that may have taken place at trial. Of course, in addressing this issue counsel will have to assess the significance of things such as: (1) any inconsistent position that is taken by the party on appeal; (2) any failure to object at trial to a procedure or jury instruction; and (3) any failure of the

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[36] In addition, it is not always easy to predict what propositions of law will excite the interest of the members of an appellate court. If the Court decides to write a judgment on some topic, it might be of assistance to the author of the judgment to be provided with ***all*** of the relevant appellate authorities. Further, it is not always easy to predict what propositions of law are "settled" enough to merit cursory treatment in a *Factum* with the citation of only one or two authorities. Counsel can not always accurately predict the direction of oral argument and questions from the Court. It never hurts to be well-armed with all of the governing authorities on the issues raised on an appeal.

[37] As to the nuances of this ethical obligation see John Sopinka and Mark Gelowitz, ***The Conduct of an Appeal*** (2nd ed., 2000) at p. 281; E. Cherniak, ***The Ethics of Advocacy*** (1985), 19 *L.S.U.C. Gazette* 145, at pp. 145-146.

accused to testify at trial.

H. THE RELIEF REQUESTED

The final substantive portion of a *Factum* contains the "relief" that is ultimately requested by the party, namely, the specific order that is sought. Often the relief simply flows from the nature of the arguments that are advanced on the appeal.[38] However, on occasion the order requested can become somewhat more difficult and technical.[39]

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[38] For example, if counsel contends, on the appeal, that the verdict of guilt reached by the verdict was unreasonable and/or not supported by the evidence that was adduced at trial, the logical order to request is that the appeal be allowed, the conviction set aside, and an ***acquittal*** entered. It would be a serious tactical error to suggest, in those circumstances, that the Court should order a ***new trial*** in the result. A new trial would just give the Crown another opportunity to gather its case against the accused.

[39] For example, if counsel is responding to a constitutional attack on important legislation, counsel might wish to plead for alternative relief, including a request, if the legislation is struck down as *ultra vires*, that the Court make an incidental order suspending the declaration of invalidity for definite period of time to permit Parliament to fill the legislative void that might otherwise be left in the legislation.