

Legal Writing and Written Advocacy

January 11, 2011

Factums Session 1

Purposes and Overview

Factums

- Generic term = written argument
- Many settings: required by the Rules in some, provided at the discretion of counsel in others
- Almost always welcomed by the Court
- Some examples:
 - At first instance: motions and applications, interlocutory and originating
 - at trial
 - judicial review
 - appeals

Purposes of Factums

- The judge is waiting to be supplied with the “implements of decision”
- Consider purposes at three phases of the process:
 - Before the hearing
 - During the hearing
 - After the hearing

Purposes: Before the Hearing

- Provide the judge with:
 - What you are asking for, the points requiring decision and the relevant facts and law
 - Implant your theory of the case
 - Motivating the court
 - Providing a route consistent with the law and justice to decide in your favour

Purposes: During the Hearing

- Provide the structure of the presentation
- Provide ready reference to key facts and law
- Minimize the need for the court to take detailed notes or refer to other volumes of material
- Facilitate giving an oral decision

Purposes: After the Hearing

- The “gift that keeps on giving”
- Assist in preparing reasons for judgment
- Provide a record of what was placed before the court for decision and what arguments were made

Purposes and Setting

- One size does not fit all:
 - High volume, relatively routine matters
 - After trial
 - Appeals

Purposes: The type of case

- The approach to the factum will depend not only on the setting but on the type of case:
 - Cases requiring a straightforward application of established rules to the facts
 - Calls for a straightforward approach
 - Cases about which side of the line the case falls on
 - Facts and equities very important
 - Cases with a novel point – an issue not settled by authority or on which there is conflicting authority
 - Return to basic principles; academic sources; comparative law

Overview of main sections

- Rules dictate the structure
- Eg: appellant's factum for an appeal in Ontario
 - I – statement identifying appellant, court/tribunal appealed from and stating the result in there
 - II – overview describing the nature of the case and the issues
 - III – concise statement of facts relevant to the issues with reference to the evidence and exhibits
 - IV – statement of each issue raised followed by a concise statement of argument with reference to the law and authorities
 - V – order sought, including disposition of costs
 - Certificate re record and time for oral argument
 - Schedule A – list of authorities
 - Schedule B – text of relevant legislation

Overview

- Provides:
 - A framework that tells readers what they are about to read – that locates it within a familiar context
 - A focus – so readers will know why they are reading this and tells them what to look for
 - The point or conclusion
 - A structure for what is to follow
 - The theory of why you should be successful

Compare

Before

This is an appeal from the order of Master Shluck dated November 30, 2010 in which the learned Master ordered the appellant-plaintiff to pay into this Honourable Court to the credit of this action security for costs in the amount of \$50,000 on or before December 25, 2010 in default of which the action by the appellant-plaintiff would be dismissed

After

The appellant is suing the respondent for wrongful dismissal, alleging that he was fired without cause or notice. The respondent obtained an order for security for costs. The appellant appeals on two grounds: (1.) none of the circumstances in which security may be ordered applies here and (2.) the order is unjust as it will stifle the appellant's meritorious claim.

Facts

- Succinct and relevant
- Always with pinpoint references to the record
- Always candid, accurate and fair

Issues

- How the issues are framed is extremely important
- Provides the structure for the whole argument and – hopefully – the debate and resolution of the case
- May be stated as questions or as assertions, but always with your position

Statement of the Issues

Before

- Did the learned Master err in holding that the appellant by virtue of living in Florida for 6 months per year was a non-resident of Ontario and therefore liable to post security for costs?

After

- Is the appellant liable to post security because he has a seasonal residence in Florida? The appellant says he is not because his permanent home is in Ontario.

Law and Argument

- The relevant law, focused on the facts at hand
- Key is showing how the relevant legal principles apply in this case
- Selection of authority
- Limit direct quotes to key passages and keep them short

Nature of the order requested

- This must be exact and include the requested disposition of costs
- Start with this part of the factum: If you don't know what you want the court to do, you will likely have trouble convincing the judge to do it!