

①

1

Factum Instruction

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2

Factum Instruction

Part I – Good Legal Writing
Part II – Factums: General Principles
Part III – Writing Tricks
Part IV – Advanced Factum Instruction

3

The secret to good writing

- Always write for your audience.
- Judges reading your factum are your immediate audience.

4

The nature of the audience

- Less knowledgeable about your topic than you will be – you must *educate* them

5

The nature of the audience

- They don't know you. Are you smart? Can you be believed? – you must *instill confidence*

6

The nature of the audience

- Overworked – you must *make it easy*

7

The objectives

- Educate
- Instill confidence
- Make it easy

BE CLEAR, DIRECT AND BRIEF

8

Clarity, Directness & Brevity

- Use active, direct verbs
- Wage war on the verb "to be"
- Use one word if you can
- Concentrate on coherence

9

Use active, direct verbs

"It was said by the Supreme Court that the law must be changed."

Better version:

"The Supreme Court said that Parliament must change the law."

10

Use active, direct verbs

Bad version:

"It was said by the Supreme Court that the law must be changed."

- 13 words
- 30 page memo

Good version:

"The Supreme Court said that Parliament must change the law."

- 10 words (-23%)
- 23 page memo

11

Use active, direct verbs

Bad version:

"It was said by the Supreme Court that the law must be changed."

- Who does the saying (the Supreme Court) is slipped in as an afterthought.
- Indirectness, evasion and doubt

Good version:

"The Supreme Court said that Parliament must change the law."

- Who does the saying is said up front.
- Directness, honesty and certainty

12

Use active, direct verbs

Bad version:

"It was said by the Supreme Court that the law must be changed."

- Who must change the law is left entirely hidden.
- Imprecision, evasion

Good version:

"The Supreme Court said that Parliament must change the law."

- Who must change the law is disclosed.
- Precision, candour

13

Use active, direct verbs

~~"You will be made to be moved by
this baseball bat."~~

"This baseball bat will make you
move!"

14

Wage war on the verb 'to be'

When possible, replace the verb "to be"
with an action verb

Am, are, is, was, were, be, being, been

15

Wage war on the verb 'to be'

"Smith's contention is that those shares are
worth \$50 million"

16

Wage war on the verb 'to be'

"Smith's contention is that those shares are
worth \$50 million"

17

Wage war on the verb 'to be'

"Smith values the shares
at \$50 million"

18

Wage war on the verb 'to be'

"Smith's contention
is that those shares
are worth \$50
million"

"Smith values the
shares
at \$50 million"

19

Wage war on the verb 'to be'

**"Smith's contention
is that those shares
are worth \$50
million"**

- 10 words
- evasive, indirect

**"Smith values the
shares
at \$50 million"**

- 7 words (-30%)
- crisp, direct

20

Use one word if you can

**We are more likely to absorb things
that are easy to understand.**

21

Use one word if you can

**A tip:
Write for a neighbour or a family member**

22

Use one word if you can

~~**"He underwent three breath tests by
means of a breath testing device"**~~

"He took three breath tests"

23

Use one word if you can

**"He underwent three
breath tests by
means of a breath
testing device"**

- 12 words
- evasive, indirect

**"He took three
breath tests"**

- 5 words (-58%)
- crisp, direct

24

Use one word if you can

Throat clearing phrases:

Instead:

**"It is important to
note that the plaintiff
lived in Toronto"**

**"The plaintiff lived
in Toronto"**

25

Use one word if you can

Redundant pairs:

Instead:

"If and when we can define and establish our final aims and goals, each and every member of our group will be able to help."

"If we define our goals, every member of our group will be able to help"

26

Use one word if you can

Redundant modifiers:

Instead:

In this world of today, official gov't red tape is seriously destroying initiative among individual business executives."

"Today, gov't red tape is destroying initiative among business executives."

27

Use one word if you can

Meaningless modifiers:

Instead:

"Most students generally find some kind of summer work."

"Most students find summer work."

28

Use one word if you can

Excessive discourse:

Instead:

"It is almost certainly the case that, for the most part, totalitarian systems cannot allow a society to settle into what we would perceive to be stable modes of behaviour or, even more crucially perhaps, stable relationships."

"Totalitarian systems cannot allow a society to settle into stable behaviour or stable relationships."

29

Use one word if you can

Double negatives:

Instead:

"There is no reason not to believe that engineering malfunctions in nuclear energy systems cannot always be anticipated."

"We can assume that malfunctions in nuclear energy systems will surprise us."

30

Use one word if you can

A phrase for a word:

Instead:

"A small sail-powered craft that has turned on its side or completely over must remain buoyant enough so that it will bear the weight of those individuals who were aboard."

"A small sailboat that capsizes must float well enough to support its crew."

31

Use one word if you can

Obvious implications:

"Energy used to power our industries and homes will in the years to come be increasingly expensive in terms of dollars and cents."

Instead:

"Energy will cost more."

32

Concentrate on coherence

- Micro-coherence
- Macro-coherence

33

Micro-Coherence

Mary Brown claims that she wrote the book, "Coming Alive". The novel was about a love affair between two people, Bob and Janice. The man first began romancing the woman in 1984. 16 years ago, their child was born out of wedlock.

34

Micro-Coherence

Mary Brown claims that she wrote the book, "Coming Alive". The novel was about a love affair between two people, Bob and Janice. The man first began romancing the woman in 1984. 16 years ago, their child was born out of wedlock.

35

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INCOHERENCE

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EVEN BETTER COHERENCE

39

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COHERENCE

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45

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COHERENCE

47

Micro-Coherence

Words that help micro-coherence:

Transitional words: "for example", "therefore", "however", "on the other hand", "further", "moreover", "thus", "consequently", "accordingly"

Orienting words: "for the most part", "generally", "historically"

48

Macro-Coherence

The single, most important tool...
... set out the context before the details!

Implement the "point first" principle!

49

Macro-Coherence

Readers absorb information best if they understand its significance as soon as they see it, not afterwards.

50

Macro-Coherence

The husband hit his wife with a metal rod. She bled profusely. She went to the hospital. The doctor sewed up her wound. However, she died from the injury. The coroner conducted an inquiry. He called the husband as a witness. He declined to testify, invoking his right to silence. The husband has no right to silence in the coroner's inquiry in these circumstances.

51

Macro-Coherence

The husband has no right to silence in the coroner's inquiry in the circumstances of this case. In this case, the husband hit his wife with a metal rod. She bled profusely. She went to the hospital. The doctor sewed up her wound. However, she died from the injury. The coroner conducted an inquiry. He called the husband as a witness. He declined to testify, invoking his right to silence.

52

Part II – Facts: General Principles

53

Part II – Facts: General Principles

What to do?

- Do everything so far: educate, instill confidence and inform.

54

Part II – Facts: General Principles

What to do?

- Do everything so far: educate, instill confidence and inform.
- But now you have to **PERSUADE**

55

Part II – Factums: General Principles

Avenues of persuasion:

- The intellectual appeal
- The emotional appeal
- The credibility appeal

MUST DO ALL THREE

56

Part II – Factums: General Principles

- Introductions / Overviews
- Facts section
- Argument section
- Relief sought

57

Part III – Writing Tricks

58

Some spice in your writing

The start and end of a sentence is prime real estate.

“Never in the field of human conflict was so much owed by so many to **so few.**”

59

Some spice in your writing

The start and end of a sentence is prime real estate.

The same is true for the start and end of paragraphs.

60

Some spice in your writing

Repetition of words or ideas (if not overused) can underscore a point.

“We must have government of the people, by the people, for the people.”

11

61

Some spice in your writing

"5. The valuation and buy out of Gartree's interest by the two other parties at 10% greater than fair market value without minority discount is more than fair and, as will be seen below, this has been confirmed by unanswered expert valuation evidence. If the counter-application is granted, Gartree's departure from the parties' joint business will take place on terms that are more than fair, without unnecessary injury to the other two parties or their ongoing, viable joint business. Accordingly, Gartree's counter-application for a valuation and buy out on these terms that are more than fair should be granted and Gartree's application for forced partition and sale of the properties should be dismissed."

62

Some spice in your writing

Repetition of ideas:

"The Respondent obtained information that many hundreds of members, friends and associates of a known outlaw motorcycle gang, the Paradise Riders, were to gather on four weekends on a small property in the middle of the quiet rural hamlet of Caesarea, population 700."

63

Some spice in your writing

**Sentence structures
can emphasize a point.**

Structures leading to climax:

"The plaintiff carefully negotiated the draft contract, frequently amended the draft contract and finally signed the draft contract."

64

Some spice in your writing

**Sentence structures
can emphasize a point.**

Reverse structures (chiasmus):

"He saved others; himself he cannot save"

"Do not ask what your country can do for you; ask what you can do for your country."

"Manulife's representative gave those at the public hearing the impression that the possibility of demutualization was remote and that the policyholders should receive little or nothing for their ownership rights. That was what he did publicly; privately, around the same time, he told Manulife to work on demutualization."

65

Some spice in your writing

Artful modifiers.

Resumptive modifiers:

"The Supreme Court has decided 670 Charter cases, cases that have enhanced our understanding of human rights."

66

Some spice in your writing

Artful modifiers.

Summative modifiers:

"The Supreme Court has decided 670 Charter cases, a mountain of law that no one could have foreseen."

67

Some spice in your writing

Skilful use of detail can persuade.

"The Respondent obtained information that many hundreds of members, friends and associates of a known outlaw motorcycle gang, the Paradise Riders, were to gather on four weekends on a small property in the middle of the quiet rural hamlet of Caesarea, population 700."

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72

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"The Respondent obtained information that many hundreds of members, friends and associates of a known outlaw motorcycle gang, the Paradise Riders, were to gather on four weekends on a small property in the middle of the quiet rural hamlet of Caesarea, population 700."

"The Respondent obtained information that many bikers were to gather a number of times on a small property in an Ontario town."

13

73

Some spice in your writing

Sometimes just a DASH of spice is nice.

"The appellants fail to address how this Court should balance the important needs of public safety, public order, peacekeeping and highway safety on the one hand with the vital constitutional rights of individuals on the other hand – perhaps because they only deal with the latter and never acknowledge the existence of the former."

74

Some spice in your writing

Sometimes just a DASH of spice is nice.

"The Barbados Supervisor of Insurance met privately with Manulife before the public approval hearing, disclosed to Manulife his views in advance of the hearing and received submissions from Manulife. The Supervisor also met privately with Manulife after the public hearing and received submissions. The real business did not take place at the public hearing. It took place behind a closed door – with the Barbados policyholders outside the door."

75

Some spice in your writing

Understatement persuades.

76

Some spice in your writing

Vary the sentence length.

"If Inco's submissions are rejected and relief is not granted in this case, the effect will be that IEB officers will be able to exercise the impugned powers at any time, to any extent, in any manner. The only limits will be at the whim of the IEB officer. This is a concern. Unlike regular police officers, IEB officers are not subject to codes of conduct and the other safeguards found in the *Police Services Act*, R.S.O. 1990, c. P.15, such as complaints/discipline processes and formal inquiries."

77

Some spice in your writing

Use lists.

You are eligible for a bonus at the end of a calendar year if:

- (a) your sales are over \$2,000,000;
- (b) you are still an employee on December 31 of that year;
- (c) your performance review is satisfactory; and
- (d) you have been with the company more than 10 years.

78

Part IV – Advanced Factum Instruction

79

Part IV – Advanced Factum Instruction

- The facts section
- Quotations
- Dealing with case law
- Compressing an argument

80

Drafting the facts

81

The challenge

- ▶ You must impose the structure
- ▶ Judges are convinced by facts
- ▶ Judges don't know the facts

82

The challenge

- ▶ But there is a tension when drafting:
 - brevity matters - BE SELECTIVE
 - you must educate – GIVE DETAIL
 - LOTS OF JUDGMENT CALLS

83

Understand the case

- ▶ Go away and read the record and the law
- ▶ Get a view of the whole case

84

Reflect on the case

- ▶ Be mindful of head and heart
- ▶ Define your objectives
- ▶ What do you need to get there
- ▶ What are the controlling ideas
- ▶ The battle of controlling ideas

85

Present the case

- ▶ Implement point first
- ▶ Develop the controlling idea

86

Present the case

- ▶ Implement point first
 - general story to orient – SELECTIVE
 - maybe some law
 - go to the heart of the controlling idea
 - DETAILED

87

The controlling idea

- ▶ skilful use of detail – use point first
- ▶ be clinical – avoid adjectives
- ▶ citations and explanatory citations
- ▶ use quotes carefully – credibility enhancing

88

The controlling idea

- ▶ headings, headings and more headings
- ▶ remember what's not in the record

89

Bad facts

- ▶ you must deal with them
- ▶ manage them

90

Bad facts

- ▶ some techniques
 - timely deployment
 - juxtaposition with your good facts
 - juxtaposition with their bad facts

91

Respondents

- ▶ must respond - be explicit
- ▶ must tell your own story

92

Some final ideas

- ▶ write early
- ▶ the 70%-30% split
- ▶ charts, diagrams and pictures
- ▶ all of this gets easier with experience

