WRITTEN ADVOCACY IN THE COURT OF APPEAL

Paper included as part of the materials distributed at:
The Advocates’ Society
Professional Development Program: Ready, Set, Litigate!
Halifax, NS
May 6, 2015

J.C. Marc Richard*
New Brunswick Court of Appeal

I. Introduction: the Importance of the Written Submission

Over thirty years ago, the Honourable Gerard V. La Forest, then of the New Brunswick Court of Appeal, addressed the topic of written and oral submissions at a Canadian Bar Association event:

The importance of the written submissions can scarcely be exaggerated. It is, in most instances, the first time we have heard of the case, and it is your first opportunity to persuade us of the justice of your cause. The submissions comprise one of the major sources of information we use in preparing for the hearing. All of us will have read them as well as the appeal book when you appear before us, and on the basis of these, though we try to keep an open mind, we will already have a good idea what the major issues are and, in many cases, will have reached some tentative conclusions. So the written submissions are very important. You are obviously in a better position at the hearing if you have already begun to persuade us with your written submissions before you get there.

Not only does your written submission give you your first opportunity to influence our decision; it remains the most coherent statement of your views when we retire from the courtroom to consider our decision. You should construct it in such a way that the judge could write the decision you are seeking by following it. And, on the assumption that he is leaning the other way, you must,

* This paper is an update of one originally prepared for a presentation at a conference hosted by the Nova Scotia Branch of the CBA titled “Excellence in Advocacy II” in Halifax, NS, in March 2008. In that paper, I expressed indebtedness to Cynthia Kirkby, for her assistance in the preparation of the paper. That indebtedness continues. The revised version of the paper was presented to a continuing legal education session of the Saint John Law Society on November 20, 2013.

© 2017 The Advocates’ Society.
These materials may not be reproduced, published, distributed or posted on-line without the written permission of The Advocates’ Society.
by your argument, put solid roadblocks in his path to try to prevent him from deciding against you.¹

Justice La Forest’s words are just as accurate now, a quarter of a century later. Your written submissions are our introduction to the case, and often our reference materials in writing reserved decisions. What follows are some insights, gleaned from experience and from other experts, to help ensure your written submissions are up to the task.

II. Before Drafting: Think!

Be selective with your grounds of appeal. Justice Laskin of the Ontario Court of Appeal points out that most appeals have, at most, three good issues; any beyond that merely compromise concision and indicate a lack of faith and confidence in the major grounds of appeal. He cites his former colleague the Honourable Sydney Robins for the witticism that “[l]egal contentions, like currency, depreciate through overissue.”²

Justice La Forest reached the same conclusion and advised against advancing frivolous and untenable grounds of appeal: “When one sees thirteen grounds of appeal and the first five have no substance, one can’t help taking the remaining ones less seriously.”³ It is in your client’s best interests, then, to limit your grounds of appeal to only the strongest few.

If you have been granted leave to appeal, consider why. Justice Ian Binnie makes this point about leave to appeal to the Supreme Court, but the advice remains valid:

You might be surprised at how many practitioners apparently fail to reflect on why leave was granted in an appeal that is not as of right. In my short time on the court, there have already been occasions when the legal issue that the court expected to be argued in a criminal case was ignored by the appellant. If the respondent saw the issue, he or she wasn’t about to volunteer it. … There may be all

¹ The Honourable Gerard V. La Forest, “Presentation of Written and Oral Arguments,” in Advocacy Before the New Brunswick Court of Appeal, Edited Proceedings of a Panel conducted at the Mid-Winter Meeting of the Canadian Bar Association, New Brunswick Branch, 4 February 1983, at pp. 15-16.
³ Supra, note 1 at 17-18.
kinds of cases that appear to you to be wrongly decided on the facts that appellate courts can do little about. … If leave was granted, there must be more to your appeal than your overwhelming sense of grievance at the courts below and your desire for vengeance….

Try to discern what aspect of the case intrigued the motion judge. As Justice Rothstein explains, while it may be the result that matters to the client, the Court is more concerned about how to get there: “It isn’t normally going to be useful to argue that the case is limited to its own facts. It is highly doubtful that leave would have been granted for a one-off case in which the principles would not have a broader impact.”

Justice Laskin suggests that appeals generally fall into one of two categories: error-correcting or jurisprudential. Once you characterize your appeal, the distinction will influence how you approach your submissions. The focus in the former is on how to fix the error, while in a submission for the latter “[y]ou should address social policy or administration of justice concerns, and you should consider the implications of your position for related areas of the law.” Avoid overburdening the Court with unhelpful material; “[d]o not make the mistake of trying to turn your error-correcting appeal into the next Donoghue v. Stevenson.”

At this stage, you have limited your grounds of appeal, ideally to only those to which the Court will be most receptive. Justice La Forest adds one further caution: “Make sure the errors you allege would alter the result.” Similarly, Justice Laskin points out that appellate courts are bound by the standard of review: “You must do more than identify where the trial judge went wrong or even why he or she went wrong. You also have to ask yourself whether the Court of Appeal can do anything about it.” It is cold comfort to your appellant-client to be legally right on a point if the desired relief does not follow, particularly when costs do.

Although it seems self-evident, keep in mind that judges are only human too. Justice Laskin elaborates on how to cope with this particular appellate reality:

---

6 Supra, note 2 at 205-06.
7 Supra, note 1 at 16.
8 Supra, note 2 at 212.
Minimize the legal distance we must travel to agree with you and minimize our resistance to being moved. [Make] the court as comfortable as you can with your position. Aim for a reasonable solution to the dispute. Give the court narrow, not adventuresome, grounds to decide in your favour, and narrower, not broader, rules to adopt.

Individual and institutional reasons underlie this advice. As Cardozo reminds us in his famous lectures on ‘The Nature of the Judicial Process,’ each of us has our own philosophy of life, and try as we may to see things objectively we can never see them with any eyes but our own. Many unseen forces guide our thoughts and actions – our likes and dislikes, our moods, instincts, emotions, habits, and convictions. All these forces make judges resist radical change to their beliefs. Judges 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.

One frequently recommended method to create successful written submissions is to imagine yourself not as the writer, but as the reader. “Imagine, if you will, changing places with the judge,” suggests Justice Sydney Robins:

Bear in mind that courts are not filled with demigods. Some judges are learned, some less so; some are keen and perspicacious, others have more plodding minds. In short, judges are men and women and lawyers, like the counsel before them. That they are honest and impartial, and ready and eager to make a correct decision, you may take for granted. You may rightfully expect, and you should expect, nothing less than fair treatment at their hands.

Yet they know nothing about the matter you are putting before them, and they are not stimulated by any interest or feelings towards anyone concerned. They are simply being called upon to perform their function in their appointed sphere. They are waiting to be supplied with the facts and the law upon which they can properly base a decision – they are waiting for you to show them why they should grant the remedy you seek and, if so, how. In short, they are waiting for ‘the implements of decision.’

---

If the places were reversed and you sat where they do, think what it is that you would want to know about the case. How and in what order would you want the story – the issues, the facts, the law – related? What would make your approach to the solution easier? These are questions advocates must put to themselves.\textsuperscript{10}

Those questions answered in your own mind, it is time to begin drafting.

III. Beginning to Write: the Message and the Mechanics

The process of persuasion can be summarized in a deceptively easy manner: make the court want to decide in your favour, and then show it how to do so.\textsuperscript{11} Eugene Meehan, Q.C., reminds drafters to keep in mind the ultimate goal of the appeals process:

Everything that counsel submits should put into the reader’s mind the information and motivation necessary for a favourable decision. Appeal books, factums and everything else are devoted to that goal and nothing less. You’re not writing to entertain, show how smart you are, how many authorities you can cite for one proposition, or even writing to inform. You’re writing to persuade.\textsuperscript{12}

In essence, he says, what you are trying to do is draft the Court’s decision.\textsuperscript{13} Justice La Forest, as already seen, advised constructing your submission “in such a way that the judge could write the decision you are seeking by following it.”\textsuperscript{14} Justice Rothstein, now of the Supreme Court, also makes this point, although he attributes it to a colleague: “Justice Binnie says that you should always plot out and have in mind how the judgment will read. If you can give the Court the legal analysis, you will be doing their work for them and you will be more likely to be successful and see your theory in the judgment.”\textsuperscript{15}

Submissions are indeed heavily relied upon after the hearing, and the more you simplify the judges’ task, the better. This is, in fact, the first basic rule of advocacy according to Justice

\begin{thebibliography}{99}
\item Justice Sydney L. Robins, “Appellate Advocacy”, in Ethos, Pathos, and Logos, supra, note 2 at 193.
\item ibid., at p. 19.
\item Supra, note 1 at 16.
\item Justice Rothstein, supra note 5 at para. 42.
\end{thebibliography}
Arnup, late of the Ontario Court of Appeal: “Everything you do to make it easier for the judge is a plus. Everything you do that distracts the court from the task at hand is a minus.”¹⁶ You are not, however, precluded from framing the “task at hand” as best suits your purposes.

Justice Binnie points out that not everybody will agree on what the argument is about: “A key to success… is to define the issue or issues raised by the appeal in a way that the judges find attractive and that will motivate them to want to write in your favour. It helps, of course, if your argument also lays out a path by which the writing part can be accomplished.”¹⁷ Explain where the lower court erred, why the Court of Appeal should fix it, how it has the authority to do so, and what the appropriate outcome would be.

Many authors and justices advocate stating the issues positively, rather than in the form of a question, to increase persuasiveness: “first issue: the trial judge erred in finding a fiduciary duty” rather than “first issue: whether there was a fiduciary relationship”.¹⁸ Eugene Meehan further recommends making these statements into headings and subheadings, so that the index, which is likely to be read first, shows the logical progression of the argument in a positive manner.¹⁹ This brings us to the mechanics of the message.

Clearly, a drafter would start by checking the Rules of Court in New Brunswick. Rule 62 governs civil appeals, and Rule 63 criminal appeals. Additional details concerning form are found in both Rules. Eugene Meehan suggests, where there is some flexibility in the Rules, that time should be spent making the document attractive, since organization and accessibility make a document more persuasive. “Cornflakes in grey boxes don’t sell well,” according to his analogy.²⁰ Similarly, he says, court-imposed page limits “are NOT an invitation to cram as much as you can onto each page. This tactic defeats the spirit of the page limit, aggravating the judge

---

¹⁷ Justice Binnie, supra note 4 at 247.
¹⁸ Justice Laskin, supra note 2 at 209. See also Lee Stuesser, An Advocacy Primer, 3rd ed. (Toronto: Thomson Canada, 2005) at 393: “The [question-format heading] exudes doubt. The asking of the question raises the question. In contrast, the [statement] heading boldly states the position. There is no doubt raised. There is strength and assurance. Here is a lawyer who has conviction enough to say ‘This is my position, and it should be the law.’”
¹⁹ Eugene Meehan, supra note 12 at 15-16.
²⁰ Ibid. at 3.
and ruining the visual impact of your submissions, and maybe ruining your case.”\textsuperscript{21} As Justice Marvin Catzman of the Ontario Court of Appeal explains, you are welcome to ignore rules on font and spacing and page limits if your goal is to lose an appeal, as it seems to be for so many lawyers, he theorizes, perhaps related to tax write-offs. \textsuperscript{22}

With respect to how you name the parties within the submission, the consensus is to avoid “lazy / easy shortforms like appellant / respondent. The reader will never get into the story if the main players are faceless.”\textsuperscript{23} Justice Laskin recommends “referring to the parties by name or by a meaningful term (landlord, tenant, lender, borrower, father, mother, etc.).” Especially in cases of multiple parties, he suggests, “do not use ‘the respondent by cross-appeal’ or ‘the third party.’”\textsuperscript{24} If your goal is to lose, however, Justice Catzman provides the following advice in Losing Tip #9, “Make Your Factum Read Like \textit{War and Peace}:

Put a little mystery in your factum. A good technique for doing this is to refer to the parties by different names in different places, never twice in the same way. For example, if the appellant is the plaintiff, Leo Tolstoy, refer to him as “the plaintiff” on page 1, “Tolstoy” on page 3, “the appellant” on page 7, and “Leo” on page 10. Another way to add mystery is to introduce new characters, at random, in unexpected places throughout your factum. Be sure to conceal whether your new character is a party, a witness, the trial judge or your daughter’s Grade 4 teacher. Dazzle the court with your footwork. Keeping the judges off balance will only serve to heighten their interest.\textsuperscript{25}

On that same point, non-facetious experts agree that a factum should \textit{not} read like a mystery novel. Rather, drafters should adopt a “point-first” style: “You state your proposition first and then develop it. You may think the judges need to know the facts first or that stating a conclusion first will make the ultimate conclusion repetitive. Forget that. … \textit{[P]ut the conclusion up front.”}\textsuperscript{26} Eugene Meehan agrees: “Avoid writing the factum (or even a paragraph) like a mystery novel,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} \textit{Ibid.} at 12.
\item \textsuperscript{22} Justice Marvin Catzman, “The Wrong Stuff: How to Lose Appeals in the Court of Appeal”, in Ethos, Pathos, and Logos, \textit{supra} note 2 at 284-85.
\item \textsuperscript{23} Eugene Meehan, \textit{supra} note 12 at 4.
\item \textsuperscript{24} Justice Laskin, \textit{supra} note 2 at 210.
\item \textsuperscript{25} Justice Marvin Catzman, “Losing Tip #9: Make Your Factum Read Like \textit{War and Peace}” in Ethos, Pathos and Logos, \textit{supra} note 2 at 298-99.
\item \textsuperscript{26} Justice Rothstein, \textit{supra} note 5 at para. 16.
\end{itemize}
\end{footnotesize}
focusing on the details upfront and revealing only the point or the conclusion at the end. The reader shouldn’t have to figure it out.”  

Justice Laskin provides a more in-depth explanation of “point-first” writing:

We see far too many factums that contain long, meandering paragraphs, in which the point of each paragraph is never stated or, almost as bad, is stated three paragraphs later. This is not reader-friendly advocacy. You can fix this problem in these ways. At the beginning of a paragraph, tell the reader what topic or idea you are going to discuss in the rest of the paragraph. Try to restrict each paragraph to one main idea or topic. Then, in the first sentence or two of each paragraph, articulate the point of the paragraph, usually your conclusion or submission on the issue. The remainder of the paragraph will discuss the submission, elaborate on it, support it, or qualify it. This is point-first writing.

Unfortunately, too many factums contain either point-last writing or no-point-at-all writing. Lawyers seem to resist giving their conclusion up front. They think that readers need to understand how the argument develops, or that readers will not appreciate their point until they are familiar with the relevant facts, or that an anticipated conclusion will make the ultimate conclusion repetitive. As valid as these concerns may be, they do not outweigh the desirability of point-first writing. We absorb and remember information best when we know why it is important and how it is relevant. If we are forced to read a lot of details before we know why they matter, we will skim and skip. Practice point-first writing. The persuasiveness of your factums will increase immeasurably.  

Another oft-offered tip is to be concise (unless you are trying to lose, in which case Justice Catzman implies that you should treat the word “concise” as a typographical error for “verbose”).  

Justice Laskin is of the opinion that, to be persuasive, factums must be concise: “I have never heard a judge complain that a factum was too short.” He identifies the culprits as time and fear: “We do not take enough time to write a shorter, more concise factum; and we are afraid of writing too little or of leaving something out. Effective writing requires selection and clear thinking. Conciseness is often a by-product of knowing what your case is about and where

---

27 Eugene Meehan, supra note 12 at 7. See also Lee Stuesser, supra note 18 at 393: “The factum is not a mystery novel. Do not keep the judges in suspense as to your position. … State your point before you develop or discuss it.”  
28 Justice Laskin, supra note 2 at 208.  
29 Justice Catzman, supra note 22 at 284.  
30 Justice Laskin, supra note 2 at 217.
you are going.”\textsuperscript{31} To help achieve this, the authors recommend avoiding meaningless legalese, limiting sentences to approximately twenty-five words, keeping paragraphs short, and using the active voice unless there is a good reason not to.\textsuperscript{32} This increases the reader’s ability to process the information the first time.\textsuperscript{33} As Eugene Meehan explains, “[d]on’t be academic. Write your law review article after you’ve won the case and changed the law. The key to a good factum is: clarity, brevity and simplicity. No-one has ever been convinced by an argument they didn’t understand (no matter how brilliant it may have been).”\textsuperscript{34} Or, in the words of the inimitable Justice Catzman, here is what not to do:

Counsel who are familiar with foreign languages have a great advantage in the preparation of factums. Emulate, if possible, those languages that drive the reader to distraction waiting for the verb that is never disclosed until the conclusion of the sentence or, better still, the paragraph. Learn to write sentences that go on endlessly, sentences that are filled with dashes and with subordinate clauses that are – by the time the sentence is done – hopelessly unrelated to anything at the beginning. Write your factum out in longhand, then strike out all the periods and substitute conjunctions so that the factum becomes one long, undivided sentence. Now insert, in completely inappropriate places, punctuation marks such as commas, colons, and semicolons, sprinkled in such a way as to make your factum completely incoherent.\textsuperscript{35}

Turning from generalities to specifics, the Rules in New Brunswick require a concise statement of the facts.\textsuperscript{36} It is critical that you in no way misstate the facts, as Justice Sopinka of the Supreme Court of Canada explained:

\textsuperscript{31} \textit{Ibid.} at 217-18.
\textsuperscript{32} See, e.g., Meehan, \textit{supra} note 12 at 11. His rule of thumb with respect to paragraph length, at 18, “is that a paragraph should not be so long that it cannot be read aloud in one breath”. Many of the authorities consulted express particular weariness about overuse of the phrase “respectfully submit…”.
\textsuperscript{33} Mark E. Vale and Donald Quinn, “Appellate Factums: Using a Plain Language Approach” presented at Appellate Advocacy CLE Conference at the University of New Brunswick, 27 September 1991 at 4-6.
\textsuperscript{34} Meehan, \textit{supra} note 12 at 15.
\textsuperscript{35} Justice Catzman, \textit{supra} note 22 at 285.
\textsuperscript{36} Nova Scotia \textit{Civil Procedure Rules}, s. 62.15.(3)(a) (“Concise Statement of Facts”); New Brunswick \textit{Rules of Court}, s. 62.14(2) for appellants (“A concise statement of all relevant facts…”) and 62.19(2) for respondents (again involving the word “concise”). Justice Catzman gives the following anti-advice about the comparable Ontario rule, \textit{supra} note 25 at 298: “The moral is this: be like Tolstoy. Ignore the Rule of Civil Procedure that would have you give ‘a concise summary of the facts relevant to the issues on the appeal’. The rule is far too constricting. Why limit yourself to relevant facts? For that matter, why limit yourself to this appeal? Feel free to wander far afield. Include facts that are relevant to three other appeals in which you are currently preparing factums. Surely, somewhere in all those facts, there will be \textit{something} that catches a judge’s eye.”
The main rule with respect to the facts is that you must be scrupulously fair and candid in presenting them. Misrepresenting the facts can not only ruin the case, it can ruin your reputation. The worst thing to have in an appellate court is a reputation for not being trusted with respect to stating the facts.\(^{37}\)

Justice La Forest acknowledges that there may be room for different inferences based on the facts, but the facts themselves must be set out in a straightforward manner:

> if there are shades of grey or two possible views, don’t pretend it’s absolutely clear your way, though of course you will want to indicate to us why your view is the most probable. If you don’t level with us, we might not fully trust you on other points – not only in this case but in subsequent cases. Besides it could prove embarrassing to you at the hearing. For, usually one of us at least will have examined the evidence before the hearing.\(^{38}\)

The facts are particularly important since the Court wants to see that justice is done in the particular case, not in the abstract. While the statement of facts must be fair, accurate, and complete, it can also be strategic: “Persuasion … is not achieved through misstatement or critical omission. Persuasion is achieved through emphasis. You highlight the favourable and minimize the unfavourable.”\(^{39}\) The manner in which the facts are presented may subtly and implicitly challenge the credibility of the witnesses or the soundness of the inferences drawn by the trial judge.\(^{40}\) Similarly, Justice Laskin recommends an implicit appeal to the emotions of the justices of appeal:

> Emotion has the power to move hearts and minds, even the hearts and minds of judges. The trick, however, is not to make it appear obvious. Persuasion works best when it is invisible. Beginning your argument by telling the court that you are going to appeal to its emotions is not likely a winning strategy. The skill comes in evoking emotion indirectly, not in invoking it directly.

> How do you do that? By a persuasive presentation of the facts. Judges strive to do justice between the litigants and almost always

---

\(^{37}\) The Honourable John Sopinka, Justice of the Supreme Court of Canada, “Appellate Advocacy”, in *Ethos, Pathos, and Logos* at 182.

\(^{38}\) Justice La Forest, *supra* note 1 at 16.

\(^{39}\) Stuesser, *supra* note 18 at 385.

\(^{40}\) *Ibid.* at 386.
The facts show where justice lies. … Even those facts that are the subject of findings at trial can be put in a different light on appeal. The best advocates are the ones who can best spin the facts, who are the best storytellers. And every story needs a theme, often unstated, and usually about the justice or fairness of your cause. A law suit is really a clash of competing stories and competing underlying themes. So think of yourself first as an expert storyteller rather than an expert litigator.41

The law must also be concisely described in the written submission. Justice Sopinka points out that the law and the facts are not two ships passing in the night: “The factum contains a concise statement of the law as it relates to the facts. … They must be woven together so that each supports the other.”42 Justice Laskin identifies three elements that must be included in the section on argument in the written submission:

… the controlling law, the pertinent facts, and your conclusion. If you are acting for the appellant, you must address where the trial judge went wrong, why the trial judge went wrong, and the effect of the trial judge’s error, because not every error matters or will give you relief. If you are acting for the respondent, you must show why the trial judge was right or, if the trial judge went wrong, why the error was harmless. Sometimes respondents are better to concede the error and then show that it did not affect the result.43

Still on the theme of “concision,” give the justices credit for knowing some very basic law,44 and avoid citing too many authorities. Justice Laskin estimates that 90 percent of cases cited in most factums are not referred to in oral argument.45 According to Justice Sopinka, this may look good in the factum, “but it annoys the court because they think they have to read all the cases and then find that half of them do not have anything to do with the point. If there are cases directly on point, just cite the highest authority. If there are two cases of equal authority, cite them both but do not multiply cases in the factum just for filler.”46 Eugene Meehan points out that citing

41 Justice Laskin, supra note 9 at 235-36.
42 Justice Sopinka, supra note 37 at183. Stuesser, supra note 18, makes the same point at 394, although less poetically: “Any argument must be approached as a whole. Mould the evidence into the law, both statutory and common law, and tie the case into broader policy concerns.”
43 Justice Laskin, supra note 2 at 211.
44 Ibid. at 215-16. As an example, Justice Laskin recommends identifying and discussing the “palpable and overriding error” in your case, rather than describing at length the jurisprudential origins of the concept.
45 Ibid. at 216.
46 Justice Sopinka, supra note 37 at183.

© 2017 The Advocates’ Society.
These materials may not be reproduced, published, distributed or posted on-line without the written permission of The Advocates’ Society.
excessive numbers of cases for the same proposition tells the judge one of three things: there is no real authority for your position; you either are unable to distinguish between important pointless precedents or you failed to put in enough thought; or you simply like to make lists.\textsuperscript{47} Be sure, however, to be familiar with the jurisprudence of the court before which you are appearing.

As an officer of the court, and for strategic purposes, confront adverse authority early on. Eugene Meehan points out that the other side will probably cite it anyway, or more embarrassingly the Court may. Further, “[e]ven if you are faced with adverse authority, consider whether your case is one where you should ask the court to make new law.”\textsuperscript{48} Again, be careful to avoid misstatement: “You must treat the court with fairness and candour. If the quote you are including is from the dissent – say so. If the statement was \textit{obiter} – say so.”\textsuperscript{49} Accuracy with the law, as with the facts, will only increase your credibility with the court.

Finally, in your submission on the law, you should make mention of the applicable standard of review, keeping in mind that courts of appeal do not retry cases, but rather look for error in the trial court.\textsuperscript{50} Particularly on a reserved decision, a succinct paragraph on this aspect of the law can only be helpful. You will also want to make sure there is a conclusion, and that it not only outlines the relief requested but also reminds the court why relief is required in your case.\textsuperscript{51}

\section*{IV. After the Drafting: Verifying the Message}

A successful written submission is readily comprehensible on the first reading, and flows logically so that the reader has no choice but to accept it as an accurate statement of the issue.\textsuperscript{52} Since the drafter should, at this point, be well past a first reading, it will be worthwhile to get a fresh perspective. One such method is to set the submission aside for a few days, and then return

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} Eugene Meehan, \textit{supra} note 12 at 12.
\item \textsuperscript{48} \textit{Ibid.} at 12. This would be a jurisprudential appeal.
\item \textsuperscript{49} Stuesser, \textit{supra} note 18 at 395.
\item \textsuperscript{50} Justice Laskin, \textit{supra} note 2 at 212.
\item \textsuperscript{51} Eugene Meehan, \textit{supra} note 12 at 18. Different rules apply if you are attempting to lose the appeal, as Justice Catzman explains, \textit{supra} note 25 at 399: “And conclude your factum as you would a Russian novel. Leave the court guessing whether, where, and how it ends. Never disclose who should win, who should lose, or what should happen and to whom. Who cares? So you lose this appeal. Big deal. It’s the future that counts. Remember that, like \textit{War and Peace}, there will always be a sequel, an \textit{Anna Karenina} waiting just around the corner, in which you can again trot out all your new-found skills and imbue yet another court with complete indifference to the merits of your appeal.”
\item \textsuperscript{52} Paraphrased from Stuesser, \textit{supra} note 18 at 389, who was citing a 1963 article.
\end{itemize}
\end{footnotesize}
to it with fresh eyes; another is to read it aloud, and then fix what sounds wrong. 53 Perhaps the best method is to seek an outside opinion, for a more objective view. Eugene Meehan recommends asking someone who is unfamiliar with the case to read the submission, in particular a non-lawyer. He advises that at this stage you merely listen, rather than talking or explaining: “if you have to talk or explain, whatever you’ve written is not good enough.” 54

Draft, edit, and rewrite until you have a factum that is good enough. Remember that your task, as an appellate advocate, “is to present argument that is persuasive, not burdensome.” 55 While you may be able to overcome a bad factum with a good oral argument, there is no reason to start out at such a disadvantage. The factum is your crack at the judges. 56 Providing the judges with a concise, logical submission will create a favourable impression on the court, and will stand you in good stead for oral argument, which is the judges’ crack at you... 57

53 Justice Laskin, supra note 2 at 224.
54 Eugene Meehan, supra note 12 at 10.
55 Stuesser, supra note 18 at 369.
57 Ibid.