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Fact vs. Fiction: Writing the Facts—Part I

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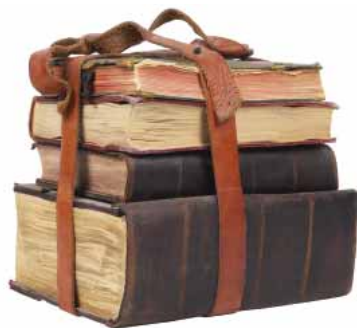
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Fact vs. Fiction: Writing the Facts — Part I

Crafting fact sections in persuasive briefs and objective memorandums is an essential skill all lawyers must learn. A case is never decided on the law alone but rather on how law applies to fact.¹ Given the relationship between law and fact, many judges, professors, and attorneys believe that the fact section is the most important part of a brief.² In a persuasive brief, the fact section “tells the story that makes the fairness of your client’s position evident.”³ Objective memorandums, prepared as intra-office documents, neutrally present the legally relevant facts before offering a recommendation. This two-part column offers some tips to writing persuasive and objective fact sections.

Importance of Facts

According to John W. Davis, the 1924 Democratic presidential candidate, “the statement of the facts is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case far more than half argued.”⁴ The fact section, which is read immediately before the brief’s argument section, becomes the lens through which readers view the argument.

A well-written fact section has a natural progression. It emphasizes the client’s humanity and communicates legally significant and determinative facts. Because judges are, or will become, familiar with the pertinent law, the advocate must demonstrate how the unique facts of the case apply to the law.⁵ If the brief is a meal, the fact section is a first course that sets the

tone for the rest of the meal. A bland fact section will make readers lose their appetite.

Briefs and Memorandums

The persuasive brief and objective memorandum both follow the same general format. Both have questions presented, a fact section, and a discussion. But facts in briefs and memorandums are communicated differently.⁶

State the facts neutrally in an objective memorandum. Take sides in a persuasive brief. In a persuasive brief, some facts are emphasized and others de-emphasized, depending on the theme. This tactic shouldn’t be used in objective memorandums.⁷ In objective memorandums, the reader shouldn’t know from the facts alone what the lawyer will recommend. In persuasive briefs, writers shouldn’t go two sentences without making it obvious which side they represent. In determining which facts to include in the objective memorandum, don’t consider whether the fact is favorable to the client but whether the fact itself is necessary to determine how the case or issue should be resolved.⁸

Example (objective memorandum): “The defendant appeared at the plaintiff’s house six times over the course of two weeks.”

Example (persuasive brief): “The defendant harassed the plaintiff for two weeks by showing up at her home six times.”

Be aware of emotion-laden facts. Facts carrying emotional weight must be dealt with carefully, especially in objective memorandums, and should be included only when they will affect

how the case is handled.⁹ In persuasive briefs, stir the readers’ emotions to help them remember the facts.¹⁰ Choose words with slightly positive or negative connotations rather than with exceedingly strong undertones.¹¹

Example (objective): “The elevator was poorly maintained. There was no warning it was going to break.”

Example (persuasive): “The poorly maintained elevator broke without warning, leaving the eight-year-old child stuck in it for three hours.”

What persuades is storytelling.

The structure of persuasive and objective fact sections also differs. Objective memorandums should begin with the procedural history. Persuasive briefs must first introduce a character with whom the reader can identify and end with the procedural aspects of the case. In neither document should the drafter argue facts or reach a legal conclusion in the fact section. Arguments and conclusions are reserved for the argument section.

Presentation of Facts

A strong fact section will appeal to readers immediately and keep them interested throughout. Selecting which facts to present and their subsequent order is important for the brief’s persuasiveness. Because the fact section is best told as a story, develop a theme that can be carried throughout the fact

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section.¹² The theme is the brief's unifying idea. It allows the reader to view the client's case favorably. It reinforces the advocate's view of the story behind the case. It dictates which facts are selected, where they are placed, and whether they are emphasized or de-emphasized.¹³ Use only people, places, and dates that directly relate to your or your adversary's theme. Including unnecessary information wastes space and burns the reader's brain cells.

There are several ways to choose the theme. The theme can be based on moral or philosophical ideals, policy considerations, or precedent.¹⁴ For example, the theme of a brief about an employment case could be about the immorality of discrimination. Look to the reader's preferences in choosing the theme. The theme must appeal to, and be understood by, a smart high-school senior. Select the theme before writing. Choosing the theme during the writing process is ineffective.

There are three basic categories of facts. First are legally significant or determinative facts.¹⁵ They help determine the reader's decision. If different facts would result in a different decision, those facts are determinative facts.¹⁶ The second category is explanatory facts. These piece together and make sense of the determinative facts.¹⁷ The third category is the coincidental or irrelevant fact. Although these facts relate to the case, they are irrelevant to the theme of the brief or memorandum.¹⁸ They add only color and background.

A useful way to decide which facts are necessary is by comparison to the argument section. Go back and forth between the facts and argument section to decide which facts are necessary for the brief or memorandum. If a fact isn't argued in the argument section, omit it in the fact section. If a fact isn't in the fact section, it should be cut from the argument section.

Include every fact that supports and advances your client's or your adversary's theme.¹⁹ All legally signifi-

cant facts must be included in the fact section, regardless whether they favor or disfavor your client. Withholding legally significant facts might be unethical and may violate court rules.²⁰ Advocates should also include all the opposition's legally significant facts as a straw man. By presenting the opposition's facts, the advocate can later contradict them or argue their irrelevance in the argument section.

The fact section should not be a summary of witness testimony, a list of facts witness by witness, or a series of lengthy quotations. These methods never persuade. What persuades is storytelling.

Once you choose which facts to use, the selected facts must be positioned to maximize persuasiveness. Improperly placing facts will damage the fact section's persuasiveness. Fact sections are organized most often in one of two ways: chronologically or by issue. Chronological order, the more common organizational method, emphasizes clarity.²¹ Sometimes important facts that require emphasis appear only at the end of the chronology. When that happens, present these facts at the beginning of the section.²²

Some writers organize facts by issue when two or more legal questions are involved.²³ Use an introductory paragraph to set out all the issues and the order in which they will be discussed.²⁴ Each issue should be introduced with a topic heading to separate them. Separate the fact section into categories like evidence, witnesses, and testimony.²⁵ In a criminal appeal, the categories could be the arrest, the trial, and the sentence.

Three categories form the structure of the brief's fact section: the beginning, the middle, and the end.

Grab the reader's attention at the beginning of the fact section to make a lasting impression.²⁶ The beginning is where the writer sets up the rest of the fact section. Identify important

people, places, and dates. Introduce the most important characters here so that the reader will identify with them immediately.²⁷ Present favorable facts and those deemed worthy of emphasis at the beginning to force the reader to analyze the facts from your perspective.²⁸

Example: A man you have already described as a community leader and a good father is accused of theft. The reader will infer that he is innocent. When you later argue he is innocent, the reader might agree with you.

Example: A man you have already described as deceitful and depraved is accused of theft. The reader will infer that he is guilty. When you later argue he is guilty, the reader might agree with you.

Unfavorable facts, which should be de-emphasized, belong halfway to two-thirds through the fact section.²⁹ All legally significant facts, even those unfavorable to the client, must be stated in the brief. But you can control where they are placed and how persuasive they are. By placing bad facts halfway to two-thirds through the section, their damaging impact is minimized.

The end of the fact section is where the advocate must place the facts that the reader should remember the most. Facts read at the end will be fresh in the readers' minds when they read the argument section.³⁰

In objective memorandums, the procedural history goes at the beginning to provide context for the rest of the document. All procedural history should go at the end of the fact section in a persuasive brief. In a persuasive brief, procedural history strengthens the merits of your case. For example, if a lower court ruled in the client's favor on a particular aspect of the case but against the client in general, discuss in the appellate brief the favorable part of the ruling and point to facts or omissions that affect the unfavorable part.

If the brief is a meal, the fact section
is a first course that sets the tone
for the rest of the meal.

You're not arguing law. You're setting out procedural facts in a compelling, factual way.

Introducing the Characters

In selecting the theme for the fact section, the advocate also selects the characters through whom the theme applies. An effective fact section begins with the characters with whom you want the reader to identify and sympathize.³¹

The first major character introduced is usually the protagonist, not the villain.³² Think of how characters in a good movie are introduced. Lead with the villain only if your story tells how the villain becomes a protagonist, if the villain is downright awful, or if you want to fool the reader about how the protagonist is really the villain.³³ Select the proper character to introduce first. The character need not be your paying client. The reader will analyze the facts through this character's perspective.³⁴

Communicate your position. How you refer to your client and your adversary has a subtle yet important impact.³⁵ Refer to your client by name rather than as Appellant or Respondent. Calling your client Appellant or Respondent can be confusing, and the reader will not identify with the client.³⁶ Referring to your adversaries as Appellant or Respondent will, however, dehumanize them.

Example: In an abortion case, the opposing parties can use different terms to refer to the unborn. Pro-choice advocates might refer to the unborn as a fetus. Anti-abortionists might use "child." The two terms have different connotations.³⁷

Example: Compare how the parties were presented in the case of Paula Jones against Bill Clinton. The fact section of Mr. Clinton's brief makes it obvious that he is the President of the United States. Ms. Jones's fact section describes her as a \$6.35-an-hour government employee and Mr. Clinton as the former governor of Arkansas.³⁸

Humanizing some clients is difficult. Corporate clients and criminal

defendants might not garner the reader's sympathy. Investigate the corporation's goals to find information associated with human emotion like philanthropy or employing hard-working individuals.³⁹ Present this information at the beginning of the fact section to show the corporate client's human side. For example, "XYZ Corporation, which employs 45,000 people and has provided automobiles for 3.5 million families, is a Delaware corporation with an address of 2345 Main Street, Wilmington, Delaware."⁴⁰ This makes the corporation likable. Focus on specific individuals when the corporation must defend against allegations of wrongdoing.⁴¹ If a senior manager was responsible for an error that cost investors a lot of money, portray the corporation as a victim.⁴²

One tactic to humanize criminal defendants is to make them a proxy for an ideal so that, for example, "holding against the client is a holding against the Fourth Amendment."⁴³ Another technique in the appropriate case is to villainize the complaining witness or police or to portray the client as involved in a "Man Against Self" struggle.⁴⁴ In the case of a drug addict, depict the defendant as a victim of drugs, a nemesis that becomes a character in the story.⁴⁵ Viewed in this light, the criminal defendant becomes the protagonist and the drugs the bad guy. The audience will hope that the defendant's better nature will triumph.⁴⁶

The Legal Writer will discuss other issues about the fact section in Part II, including writing style, visual aids, and ethical considerations. ■

Facts: Foundation of the Appellate Brief, 32 Stetson L. Rev. 415, 417 (2003).

6. Ray & Cox, *supra* note 2, at 151.

7. Berry, *supra* note 1, at 90–91; Ray & Cox, *supra* note 2, at 155.

8. Ray & Cox, *supra* note 2, at 151.

9. *Id.* at 153; Berry, *supra* note 1, at 90.

10. Ray & Cox, *supra* note 2, at 180.

11. *Id.* at 180–81.

12. Berry, *supra* note 1, at 66, 85.

13. *Id.* at 66, 84–87.

14. *Id.* at 66.

15. Berry, *supra* note 1, at 90; Ray & Cox, *supra* note 2, at 168–69.

16. Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing* 207 (5th ed. 2005).

17. *Id.* at 208.

18. *Id.*

19. *Id.*

20. Mario Pittoni, *Brief Writing and Argumentation* 32 (3d ed. 1967); Berry, *supra* note 1, at 84.

21. Pittoni, *supra* note 20, at 32; Berry, *supra* note 1, at 87; Ray & Cox, *supra* note 2, at 153.

22. Elligett, *supra* note 5, at 422.

23. Berry, *supra* note 1, at 87.

24. *Id.*

25. Elligett, *supra* note 5, at 421.

26. Berry, *supra* note 1, at 88.

27. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write a Persuasive Fact Section*, 32 Rutgers L.J. 459, 468 (2001).

28. Berry, *supra* note 1, at 88.

29. Ray & Cox, *supra* note 2, at 171.

30. *Id.*

31. Foley, *supra* note 27, at 468.

32. *Id.*

33. *Id.*

34. *Id.*

35. Berry, *supra* note 1, at 88.

36. Gertrude Block, *Effective Legal Writing* 176 (5th ed. 1999).

37. Berry, *supra* note 1, at 90.

38. Pittoni, *supra* note 20, at 30–31; Berry, *supra* note 1, at 90–91.

39. Foley, *supra* note 27, at 474.

40. *Id.* at 475 (emphasis deleted).

41. *Id.*

42. *Id.*

43. Elizabeth Fajans et al., *Writing for Legal Practice* 188 (2004).

44. Foley, *supra* note 27, at 470.

45. *Id.* at 473.

46. *Id.* at 470.

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1. Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 84 (2d ed. 1999) (noting that "[t]he law arises out of the facts").

2. Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* 167 (2d ed. 2003); Berry, *supra* note 1, at 83–84. The fact section has different names. It's called the Statement of the Case (Petitioner) or Counterstatement of the Case (Respondent) in United States Supreme Court briefs.

3. Ray & Cox, *supra* note 2, at 167.

4. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896 (1940) (quoted in Berry, *supra* note 1, at 83–84); accord Wesley Gilmer, Jr., *Legal Research, Writing & Advocacy* 183 (2d ed. 1987).

5. Gilmer, *supra* note 4, at 183–84; Raymond T. Elligett, Jr. & John M. Scheb, *Stating the Case and*