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Fact vs. Fiction: Writing the Facts—Part II

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Fact vs. Fiction: Writing the Facts — Part II

The *Legal Writer* continues from the last issue, discussing techniques to write fact sections in persuasive briefs and objective memorandums.

Writing Style

Facts the advocate wants to emphasize go at the beginning or end of a paragraph.¹

Unfavorable facts can be de-emphasized by placing them in the middle of the paragraph.² Surrounding unfavorable facts with favorable ones diminishes the negative impact of unfavorable facts. This is known as the halo effect.

Use short paragraphs with few details when factual emphasis is important and long paragraphs with many details to de-emphasize facts.³

Explain in greater detail favorable facts than unfavorable ones.⁴ Place facts requiring emphasis at the beginning or end of short sentences.⁵ Notice in these examples how placing facts is important:

Example: "Jack's on parole, but he's a good father."

Example: "Jack's a good father, but he's on parole."

Word choice, like paragraph and sentence structure, affects how the reader interprets, analyzes, and understands facts. Word choice "pervades all other literary elements: What we call something goes a long way toward what or how a reader will think of that thing."⁶ It's also the most common way that writers reveal their biases.⁷ Lawyers drafting objective fact sections should select words devoid

of obvious bias. Bias damages effectiveness.⁸ *Example:* "The plaintiff was injured when a dog bit him." The word choice in this example is important. Do we call the dog "a 'pet,' a 'guard dog,' a 'Doberman,' or, simply by its name, 'Chocolate?'"⁹

The challenge of successful word choice lies in finding restraint.¹⁰ Consider several factors:

- The word's meaning (denotation).¹¹

- The word's emotional association (connotation).¹²

- Degree of detail: *Compare:* "The plaintiff, who is larger than the defendant, moved toward him." *Versus:* "The plaintiff, who is 6' 3" and weighs 210 pounds, strode toward the defendant, who is 5' 10" and weighs 160 pounds."¹³ The first sentence is less descriptive than the second. The second sentence will garner more sympathy for the defendant.

- Repetition: Repeating words, phrases, and sentence and paragraph structures is an effective fact-writing technique. Repetition, which can be obvious or subtle, "creates a sense of heightened drama, an increased formality elevating the value of the content repeated."¹⁴

- Order of words and phrases: Yoda said it. Cardozo wrote it. Unusual are inversions. Placing words in unusual order draws attention.¹⁵ Begin a sentence with a word or phrase that normally comes at the end.¹⁶ *Example:* "Smiling widely, the children were supervised by their parents as they picked a puppy." Multiple introductory phrases is another unusual order.¹⁷ *Example:* "When Jack walked into the

restaurant, as he did every Friday evening, the waiter ushered him to his table."

- Rhythm: Control pace and tempo.¹⁸ Rhythm conveys a mood and feeling.¹⁹ *Example:* "While driving around town in his new, sleek, red car, Jack saw out of the corner of his eye a small girl run into the street. He slammed on the brakes. The brakes failed. He pulled the wheel and missed her by a hair." By placing the words "new, sleek, red" together, the reader is slowed down, and a sense of anticipation is created. The short second sentence conveys a sense of urgency and fear. The phrases "slammed on the brakes" and "pulled the wheel" speed up the rhythm as the action increases.

Avoid legal jargon. An example of jargon is using grandiose words like "grandiose."²⁰ Use plain, nonsyllabic English. Complicated, unfamiliar language confuses and decreases persuasiveness.²¹ Even the most complex and abstract ideas must be stated simply and clearly.²² Neither persuasive briefs nor objective memorandums are effective "if the reader must pause at every sentence to ponder its meaning."²³ According to Texas Justice Brian Quinn, "the use of legalese or 'six-bit' college words . . . interferes in your communication with the court when the judge is constantly shifting attention from the brief to either a Webster's, Black's Law, or a Latin-to-English dictionary."²⁴

Every memorandum must be checked repeatedly for spelling, grammar, and punctuation errors. These

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mistakes will affect your credibility. Readers will question the contents of a brief or memorandum when the writer makes these mistakes.²⁵ Reading a brief with spelling, grammar, and punctuation errors is like talking to someone who is picking his nose.²⁶ People will assume that a brief with these errors contains mistakes of fact.²⁷ The reader will think that a writer who doesn't care about these types of errors will carelessly fudge the big stuff.

Consider your commas, semicolons, and periods. These devices can slow readers down or speed them up.

Avoid adverbs, adjectives, and all false, cowardly, or boring intensifiers. Use concrete nouns and, even better, vigorous verbs.

Active voice: "According to the witness, Jack signed a contract to sell guns to Jill for \$5000."

By stressing the actor, the active voice focuses on the subject of the sentence.³⁵ Characters become more sympathetic when they're the subject of the sentence.³⁶ The active voice also highlights your adversary's unfavorable actions.³⁷ Use the passive voice when you want to decrease intensity³⁸ or remove focus from the actor³⁹ or when the actor is unknown or already known.

Visual Aids

Visual aids are valuable tools for fact writing. The more complex the case, the more visual aids will clarify and simplify. Choose the graphic that

Focus on the relevant points in the diagram to minimize distraction and confusion.⁴⁹

Record Citations

Lawyers must cite every assertion of fact to the record.⁵⁰ The record is composed of assorted documents, including transcripts, pleadings, affidavits, motions, prior decisions, and depositions. Precise citations require citing to the correct volume, page, and paragraph number in the record. The reader shouldn't have to, and probably won't, search through the record to find documents referred to in the fact section.

Tell the reader how you'll cite the record. For example, at the beginning of the fact section, explain that

Reading a brief with spelling, grammar, and punctuation errors is like talking to someone who's picking his nose.

Avoid embellishments like *italics*, underlining, or **bold font**.²⁸ These techniques suggest that you want to emphasize a fact or idea but don't know how to do so.²⁹ They also shout at the reader and say, "you're stupid." Treat the reader like a smart, busy professional. Express thoughts through content, not style. If a word or phrase doesn't stand out, delete all unnecessary information surrounding it, re-order the words to change the emphasis, or add detail.³⁰ Eliminate embellishments to sound confident.³¹

Advocates are less direct and wordier with the passive voice.³² Use the subject-verb-object formation — who does what to whom.³³ The active voice engages the reader by emphasizing action and making sentences interesting.³⁴

Single passive voice: "According to the witness, a contract was signed by Jack to sell guns to Jill for \$5000."

Double passive voice: "According to the witness, a contract was signed to sell guns for \$5000."

emphasizes meaning best.⁴⁰ Use a map to show the relationship between cars at an intersection in a case about an automobile collision. Pictures and video footage tell the viewer what to watch for.⁴¹ Charts, tables, and graphs communicate complex facts and statistics.

Choosing the graphic to present the facts depends on what information the advocate is trying to provide.⁴² There are several types:

- Pie chart: Compares various amounts that together comprise a whole.⁴³
- Bar graph: Compares changes over time in amounts that comprise a whole.⁴⁴
- Multi-bar graph: Compares relative quantities over time.⁴⁵
- Table: Compares statistics.

Tables can be read from left to right or top to bottom.⁴⁶ Begin with information the reader knows. Move to information the reader needs.⁴⁷

- Diagrams: These include maps, drawings, and blueprints. Make the diagram simple so that the reader can extract the maximum information.⁴⁸

"Numerals in parentheses refer to pages (or folios) of record."⁵¹ Citing page 43 might look like this, according to the Bluebook: (R. at 43.).

For advocates preparing persuasive briefs, record citations are a convincing tool.⁵² Just as omitting or misrepresenting facts will diminish the advocate's credibility, careful and precise citations augment credibility.⁵³ Whenever doubt arises about whether a citation is necessary, err on the side of caution and include it.⁵⁴

If you're uncertain whether you've accurately characterized a fact or idea, quote directly from the record.⁵⁵ Quotations should be used to make a point and to prove you're not making things up.⁵⁶ Some things are best and most memorably said in a witness's words. But too many quotations, or lengthy quotations, will dilute the fact section, bore the reader, and damage continuity.⁵⁷

Show, Don't Tell

In persuasive briefs, an effective fact section persuades readers without letting them know they're being per-

sualed. A good brief allows readers to believe they've reached the legal conclusion without the writer's help. Persuasion is most effective when the writer allows the reader to reach the conclusion.⁵⁸

Example (reader reaches the conclusion): "At the time and place specified in the complaint, the defendant struck the plaintiff from behind with a stick."⁵⁹

Example (writer reaches the conclusion): "At the time and place specified in the complaint, the defendant committed a battery on the plaintiff."⁶⁰

State the facts, not what those facts mean. Let readers determine the meaning of the facts for themselves. To do this, use the "show, don't tell" technique. Thus, write "1 + 1," but don't write "= 2." Save the "= 2" for the argument section or conclusion. To "show" is to describe in concrete, non-conclusory language. To "tell" is to characterize and conclude. The writer must "[l]et the facts themselves answer the question"⁶¹

Be specific and precise. For example, "the baseball was thrown fast" is imprecise. "The baseball was thrown at 95 miles an hour" enhances writing.

Show: "When the Mets won the World Series, Jack jumped up in the air, shed tears, and shouted, 'I can't believe they won! I can't believe they won!'"

Tell: "Jack was excited when the Mets won the World Series."

Show: "The witness testified to X and later to Y."

Impermissible tell: "Because of the witness's contradictions under oath, the witness is incredible as a matter of law."

Keep the Law in Mind

Craft the fact section to fit the law that will be presented in the brief's argument section.⁶² Before reading the fact section, the reader will already have been introduced to the legal issues from the questions presented and the

point headings in the table of contents.⁶³ Many judges will be familiar with the relevant law and will analyze the facts with that law in mind.⁶⁴ If the brief discusses "whether a particular statute applies to your case, marshal the facts that support your point of view that the statute does or does not apply."⁶⁵

Show, don't tell.
Write "1 + 1," but
don't write "= 2."

Ethical Considerations

Legal writers must uphold the ideals of good moral character, integrity, and professionalism.⁶⁶ Never omit facts, misrepresent the lower court's decision, or use quotation marks with references to the record where no witness had used the quoted words.⁶⁷ Evading the truth damages your credibility and the credibility of those associated with you.⁶⁸ Judge Clyde H. Hamilton has explained that "[a] statement of facts that omits relevant facts seriously undermines the omitting party's credibility, leaving the . . . impression that the party does not believe it can win if the judge learns of the omitted facts."⁶⁹ Opposing counsel or the judge will probably catch a misrepresentation of the facts, no matter how small.⁷⁰ Don't think you'll get away with it.

Don't overstate the facts. Understating always succeeds. Overstatement and exaggeration always fail.

State the facts clearly and honestly. Good brief and memorandum writers de-emphasize the irrelevant to stress what it is important. But to be ethical, they write fairly and clearly.⁷¹ An advocate should "[a]im for a fact statement the court could use in its opinion if it finds in your favor."⁷²

Conclusion

It's daunting to incorporate the many effective brief-writing devices into

your fact section. To improve your fact writing, focus on a few strategies at a time rather than all of them at once.⁷³ Work on large-scale organizational techniques like section structure and humanizing your client separately from small-scale ones like sentence structure and word choice.⁷⁴

Focus on choosing and organizing the facts. Determine from your theme which ones require emphasis.

It'll take several drafts to write an effective fact section.⁷⁵ Edit constantly. Even when you believe you've produced your final draft, set it aside for a while and re-read it.⁷⁶ Have colleagues and friends evaluate it.⁷⁷ The final product will be a fact section that will enhance the entire document. ■

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2. *Id.*

3. *Id.*

4. *Id.*

5. Girvan Peck, *Writing Persuasive Briefs* 39–42, 46–49 (1984); Ray & Cox, *supra* note 1, at 172–74, 185.

6. 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, 466 (2001).

7. Ray & Cox, *supra* note 1, at 180.

8. *Id.*

9. Foley & Robbins, *supra* note 6, at 466.

10. Ray & Cox, *supra* note 1, at 180; Peck, *supra* note 5, at 46–49.

11. Ray & Cox, *supra* note 1, at 180.

12. *Id.*

13. *Id.* at 181.

14. *Id.* at 183.

15. Peck, *supra* note 5, at 46–49; Ray & Cox, *supra* note 1, at 179.

16. Ray & Cox, *supra* note 1, at 179.

17. *Id.*

18. *Id.* at 184.

19. *Id.*

20. Lawrence T. D'Aloise, Jr. & Henry G. Miller, 8 Mark Davies et al., N.Y. Prac. Series — N.Y. Civ. Prac. § 16:1 (2008).

21. *Id.*; Charles R. Calleros, *Legal Method and Writing* 240 (5th ed. 2006); Mario Pittoni, *Brief Writing and Argumentation* 31 (3d ed. 1967); D'Aloise & Miller, *supra* note 20, at § 16:1.

22. Calleros, *supra* note 21, at 240.

23. *Id.*

24. Brian Quinn, *Dispelling Misconception*, 62 Tex. B.J. 890, 891 (1999) (quoted in Calleros, *supra* note 21, at 240–41).

25. Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing* 237 (5th ed. 2005).

26. John Gardner, *The Art of Fiction: Notes on Craft for Young Writers* 99 (1984) (cited in Neumann, *supra* note 25, at 237).

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28. Pittoni, *supra* note 21, at 32.
29. Peck, *supra* note 5, at 182–84 (1984); Ray & Cox, *supra* note 1, at 179–84.
30. Ray & Cox, *supra* note 1, at 170.
31. Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. Rev. 250, 269 (2003–04).
32. *Id.* at 269–70.
33. *Id.* at 270.
34. Ray & Cox, *supra* note 1, at 174; Van Patten, *supra* note 31, at 270.
35. Ray & Cox, *supra* note 1, at 174.
36. *Id.*
37. Van Patten, *supra* note 31, at 270.
38. *Id.*
39. Ray & Cox, *supra* note 1, at 157.
40. *Id.*
41. *Id.* at 157–58.
42. *Id.* at 158.
43. *Id.*
44. *Id.* at 159.
45. *Id.*
46. *Id.* at 160–61.
47. *Id.*
48. *Id.* at 161–62.
49. *Id.*
50. Pittoni, *supra* note 21, at 31.
51. *Id.*
52. Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 91 (2d ed. 1999).
53. *Id.*
54. *Id.*
55. *Id.*
56. D’Aloise & Miller, *supra* note 20, at § 16:5.
57. *Id.*
58. *Id.*
59. Neumann, *supra* note 25, at 205.
60. *Id.*
61. D’Aloise & Miller, *supra* note 20, at § 16:5.
62. *Id.*
63. Van Patten, *supra* note 31, at 273.
64. Wesley Gilmer, Jr., *Legal Research, Writing & Advocacy* 183 (2d ed. 1987).
65. D’Aloise & Miller, *supra* note 20, at § 16:5.
66. Gerald Lebovits, *Legal-Writing Ethics — Part II*, 78 N.Y. St. B.J. 64, 64 (Nov./Dec. 2005).
67. Elizabeth Ahlgren Francies, *The Elements of Ordered Opinion Writing*, 38 Judges’ J. 8, 8 (1999); Ray & Cox, *supra* note 1, at 169; Gerald Lebovits, *Legal-Writing Ethics — Part I*, 77 N.Y. St. B.J. 64, 52–53 (Oct. 2005).
68. Ray & Cox, *supra* note 1, at 169.
69. Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C. L. Rev. 581, 585 (1999).
70. Ray & Cox, *supra* note 1, at 169.
71. Wendy B. Davis, *An Attorney’s Ethical Obligations Include Clear Writing*, 72 N.Y. St. B.J. 50 (Jan. 2000); Lebovits, *supra* note 66, at 64.
72. Ray & Cox, *supra* note 1, at 169.
73. *Id.* at 186.
74. *Id.*
75. Pittoni, *supra* note 21, at 32; D’Aloise & Miller, *supra* note 20, at § 16:7.
76. D’Aloise & Miller, *supra* note 20, at § 16:7.
77. *Id.*