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The Fact of the Matter

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I t’s hard to win an argument with a lawyer. Sure, professionally, between adversaries, there is sometimes a “winner” and “loser.” Personally, however, most of us in the legal profession have been told repeatedly, often by a significant other, that it is pointless to argue because we always find a way to defend ourselves, usually by massaging the facts that led to the argument or by applying the rules of the relationship to those facts in a way that somehow makes us look less culpable.

I argue that this occasional inability to admit wrongdoing or accept blame stems from our legal education (see how I adroitly found a way to deflect self-blame?). In law school or on-the-job legal training, we are forced to think creatively, to look at a situation from both sides, and to argue for positions that sometimes we might not individually support. We are taught to use facts to our advantage and to minimize or bury those facts that do not help our arguments. Skillfully using facts is the cornerstone of the legal profession, a fundamental trait that cannot be ignored, avoided, or helped; that we play with the facts and always find a way to win an argument simply comes with the territory.

As lawyers, the fact of the matter is that we cannot change the facts — at least the ones that happened before we met our clients. We wish we could. But the simple fact remains: The past is the past, and, unfortunately, time machines exist only on a Hollywood soundstage. When representing a client, lawyers cannot ignore or misstate a material fact; a lawyer must be honest in her statement of facts. What we can and should do, however, is mitigate the facts — take the wind out of the opposing party’s sails by downplaying and ethically massaging the facts to show the court or reader that these bad facts ultimately do not matter.

Overall, the facts do matter. When faced with a choice between good law and good facts, choose the facts. A judge or jury convinced of the justness of a litigant’s position (based on good facts) will try to find a way around unfavorable law. To help those of you for whom playing with the facts might not come as naturally (says the only child and lawyer with a wink), I offer some pointers on how to adeptly use and characterize facts to better serve your audience and purpose.

**AVOID OVERADVOCATING**

Writing an effective statement of facts is like walking a tightrope. It requires skill and practice, and if you lean too far to one side, you will fall on your face, flat on the ground, and go boom. In a facts section, you must use the facts to persuade the reader without appearing to do so. You want to maintain credibility with your reader. Of course, judges were once lawyers, and they know that you will be trying
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to use the facts to your client’s advantage. So be careful not to go too far. Persuade by presenting the facts in a way that favors your client’s position without being so over the top that you destroy any hope of having the judge believe your characterizations. Avoid obvious appeals to emotion, grand description, dramatic literary devices, and other obvious attempts to manipulate the reader. Subtle persuasion is critical. An effective persuasive technique is one that the reader will not notice. Have I subtly convinced you?

ORGANIZE PERSUASIVELY
When drafting facts, chronological presentation is not always required. Consider where in the factual universe you should begin your story and then summarize the most compelling facts that support your client’s theory of the case. In my first-year legal writing classes, I have my students read the Jack and the Beanstalk fable. I then break the students into two groups, one representing Jack and one representing the Giant. I ask each group to tell me where in the fable they would begin the story if they were writing a persuasive statement of facts. Each year, Jack’s counsel usually starts by providing background: Jack was poor, lived with a single mother, and needed food to support his family. The Giant’s counsel, on the other hand, starts with the Giant being awakened by a home invasion, as Jack bursts in to steal the magic goose. Sometimes it is fine to deviate from the norm; movies do it, why can’t lawyers?

USE ACTIVE AND PASSIVE VOICE AS NEEDED
A writer can influence a reader’s response simply by changing the word in the subject position of a sentence. If a writer wants someone or something to appear to be in charge, to be active in whatever happens, make the person or thing the subject of nearly every sentence. If a writer wants someone or something to appear acted upon, i.e., a passive victim, keep that person or thing out of the subject position. This concept is best illustrated by a story about my former teaching assistant who backed her car into a nun’s car in a Starbucks parking lot. In the accident report, she wrote, “The nun was hit.” Classic way to de-emphasize the bad actor!

EMPHASIZE FAVORABLE FACTS
Not to state the obvious, but as an advocate, a lawyer should emphasize favorable facts and de-emphasize unfavorable facts. Talk about good facts in more detail, using more interesting and vivid vocabulary. Place good facts at the beginning or end of a sentence or paragraph, as readers tend to remember those facts better. Conversely, downplay unfavorable facts by talking about them in less detail, using less interesting vocabulary, and by putting them in the middle of a sentence or paragraph.

The moral of this “story” is that facts do matter. Working with facts is a critical part of advocacy. Judges often read fact sections from both lawyers simultaneously or consecutively, and this technique easily shows judges if one side is playing too fast and loose with the facts. Maintain credibility while zealously representing your clients.

Questions, comments, and suggestions (but only if framed persuasively and supported by accurate facts) are welcome at dspratt@wcl.american.edu.