

writing a persuasive facts section

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Where do we begin?

- In any case we have “good facts” that we want to inform the court about, and “bad facts” that we would prefer to ignore.
- But we can’t simply ignore the “bad facts.”
- So an important question in persuasive writing is what facts we can leave out or “paint” in a particular way that benefits our client.

The rules tell us (or attempt to tell us) what is required in a statement of facts.

Fed. R. Crim P. 47(b) states in part:

- “(b) Form and Content of a Motion. ... *A motion must state the grounds on which it is based* and the relief or order sought.” (Emphasis added).
- So what are the “grounds on which [a motion] is based?” Stay tuned, we will discuss below.

- Local Uniform Criminal Rule 47 for the N. and S. Districts of Mississippi, titled “Motions and Supporting Affidavits.”
- Tells us nothing.

Fed. R. App. P. 28(a)(6) states in relevant part:

- “[A] concise statement of the case setting out the *facts relevant to the issues submitted for review*[.]” (Emphasis added).
- So what are “facts relevant to the issues submitted for review”? Stay tuned, we will discuss below.

Fifth Circuit Rule 28.3(g):

- “A concise statement of the case setting out the *facts relevant to the issues submitted for review* (see Fed. R. App. P. 28(a)(6)[.]” (Emphasis added).
- Pretty much the same as Fed. R. App. P. 26(a)(6).

- So here's what we know so far ... at a minimum, our facts section must include:
 - The “grounds on which [the motion] is based” (Fed. R. Crim P. 47(b)); or
 - The “**facts relevant to the issues submitted for review**” (Fed. R. App. P 28(a)(6) and corresponding Fifth Circuit Local Rule)
- But the Rules do not define the term “relevant.”

- Another good source of information on our ethical requirements to include “bad facts” is found in Rule 3.1 of the Mississippi Rules of Professional conduct.
- This rule states in part: “A lawyer shall not ... assert or controvert an issue ... unless there is a basis in law and fact for doing so that is not frivolous.”

Here's the "Tom definition" of where to begin when deciding which "bad facts" that we must include in a motion or appellate brief:

- Pivotal facts that, *if accepted as true by the court*, would **definitively disprove** our argument.
- By "pivotal facts," we don't need to include each and every minute bit of evidence that supports the prosecution's argument. We must inject an element of common sense into the question of which "bad facts" that must be included in motions and appellate briefs.
- The bottom line is this: There simply is **no bright line answer** to the question of what "bad facts" we must include in a motion or appellate brief.
- We will take a look at the "inclusion of bad facts" issue in the case example below.

Let's look at some clear cut examples of what are "relevant facts" under particular issues:

- For a suppression of confession, relevant evidence includes the fact that the client confessed and any facts proving that the confession was involuntary.
- In a felon in possession case, we cannot leave out the "bad fact" that our client had a gun or that he/she has a prior conviction (so long as those facts are undisputed)
- In a suppression of evidence case, we can't leave out the "bad fact" that incriminating evidence was found.

- It is best **not** to include evidence that is irrelevant to the specific issue we are arguing.
- We don't want to include TMI (too much information).
- Including irrelevant evidence can tend to confuse the reader as to what the real issue is.
- For example, if the issue is violation of a defendant's right to a speedy trial, the relevant evidence is the time line of events proving that over 70 countable days passed since indictment or initial appearance. We don't need to include all the gory facts about the crime itself.

- Let's consider where we obtain our "facts relevant to the issues."
- This is as important as the actual writing of a persuasive facts section.
- That is true because we must have an evidentiary basis for our facts before we can include them in a pleading.

- For motions in district court, we have multiple sources, including but not limited to:
 - Documents already filed, such as the indictment;
 - Police reports, which often but not always contain information favorable to our clients;
 - Hearing transcripts if any have been transcribed; and
 - ***discovery provided by the prosecution.*** In addition to “bad facts,” the discovery usually provides “good facts” as well.

- For briefs in the Fifth Circuit, we are limited to the record on appeal, which typically consists of:
 - Hearing transcripts (plea, sentencing, motion(s)).
 - Trial transcript.
 - Presentence Investigation Report (“PSR”)
 - Evidence entered as exhibits during any hearing or trial.
 - Evidence entered as exhibits to any motion filed in district court.

Before going to our case example, lets consider a few general tips in persuasive writing as a defense attorney.

All of these ideas came from our friend, AAFP Greg Park.

Refer to the AUSA's as "the prosecutor" or "the prosecution." Don't refer to the AUSAs as "the government." Here's Greg's reason why not:

I decline to refer to prosecutors as "the government." Every time a defense attorney does so they are wrapping their adversary in the American flag and giving them undue credibility. They are prosecutors. Nothing more. If you are an AFPD or CJA attorney, you are employed by, or being paid by, the "government" too, which sometimes renders the people we represent suspicious. So, I choose not to split hairs and instead call prosecutors what they are.

Don't refer to the person you represent as "the defendant." Here's Greg's reason why not:

By the same token, you never, ever, call the person you represent "my client." (I decline to say "the defendant" for the same reason.) It makes you look like a paid mouthpiece. And never refer to them by their first name. Treat them with formality and respect. If you don't respect them, then you can't expect the court or a jury to do so either. It is Mr. ____ or Ms. ____.

- On limited occasions, I (Tom T.) do break Greg's "first name" rule, but I never refer to the client as "the defendant."
 - Client very young;
 - More than one person with the same last name.

Case example:

- *US v. John Doe* (all names changed to protect the innocent)
- The court convicted Mr. Doe of drug crimes and white collar crimes and sentenced him to a lengthy prison term.
- After his release from prison, the prosecution charged Mr. Doe with three supervised release violations:
 - 1: Breaking the law: Charged in Jackson Municipal Court with domestic violence against his daughter, Jane White.
 - 2: Breaking the law: Charged in Jackson Municipal Court with malicious mischief (vandalism of Jane White's and James Black's cars; Mr. Black is Mr. Doe's son).
 - 3: Breaking the law: Charged by the JPD with sexual battery of his daughter, Jane White.

- Our first task in motion preparation or appellate brief preparation is determining our “theory of the case” or “theory of the argument.”
- This involves both a legal component and a factual component.
- The theory of the case should be based on facts that are in evidence that satisfy the legal test applicable to our issue.
- In Mr. Doe’s case, the prosecution’s primary witness, Jane White, was not a good witness. She made numerous inconsistent statements and gave testimony that was inconsistent with other nontestimonial evidence entered in the case.
- Theory of our case:
 - The district court erred because the prosecution failed to prove, by a preponderance of the evidence, that Mr. Doe violated conditions of supervised release.
 - The factual basis for this theory is that Jane White simply was not credible.
 - This is a credibility of the witness issue, which is very difficult to win.

The court conducted a revocation hearing.

Go to the first handout, titled “Memorandum.”

- This is an abstract of the supervised release revocation hearing.
- Contains all facts, both bad and good because we need to know what the prosecution is going to base its arguments on.

All facts highlighted in yellow appear in the facts section of our case example brief.

All facts in red type are “bad facts” that I believe must be included:

- p. 361
- p. 362
- p. 370-71
- p. 371-72

All facts in purple type are “good facts” (client friendly facts) that I believe the prosecution does NOT need to include in its brief:

- p. 391
- p. 392
- p. 412
- p. 418
- p. 424
- p. 454

Go to the first handout, which is excerpts from the *US v. Doe* appellate brief.

- We want to tell our client's story, as well as tell the story of our argument, but avoid being overtly argumentative in the facts section.
- I always begin with telling the client's background, unless there is absolutely nothing good about the background. Mr. Doe's life story did present some relatively good background information.
- p. 1, "Mr. Doe's background:
 - Fatherless home like many inner-city kids.
 - Didn't meet biological father until Mr. Doe was 32.
 - Had five half-brothers.
 - Education ended in 9th grade.
 - No problems with drugs or alcohol.
 - Solid job history.
 - Employer said he could come back to work.

Let the court know that you are not bringing up the client's difficult past to make excuses. Rather we bring it up to put the client's actions in proper context. In Mr. Doe's case, he did not have the advantages of a typical middle-class upbringing.

- See verbiage highlighted in green on handout.

- Know your reader.
- If possible, know the propensities of the person you are trying to convince.

NY Times article dated June 4, 2013, by Ethan Bronner states:

“The complaint, against Judge Edith H. Jones of Houston, who sits on the United States Court of Appeals for the Fifth Circuit, asserts that at a speech at the University of Pennsylvania Law School in February she said that blacks and Hispanics were more prone than others to commit violent crimes and that a death sentence was a service to defendants because it allowed them to make peace with God.”

Page 2, heading number 2, “The alleged supervised release violations.”

- We can’t hide this bad fact ... it is what Mr. Doe is charged with.
- We softened the court up with good facts about Mr. Doe’s background first, so now it’s time to go ahead and get this information into the brief.
- Use the word “alleged” when referring to the violations at issue.

Page 2, heading number 3, “Facts about the alleged supervised release violations and evidence presented at the revocation hearing.”

- Make your hearing descriptive, but not argumentative in the “Facts” section of the brief. Argument comes later in the “Argument” section.
- The same goes for the general presentation of facts. That is, don’t argue in the “Facts” section, just present the facts. That’s not to say that you can’t emphasize and point out favorable elements in the “Facts” section. Just don’t come to conclusory statements such as, “the court should rule for Mr. Doe because”

Pages 2 - 3, heading number 3a, “Introduction.”

- If we have multiple issues or sub-issues, I like to make a brief introduction to give the court a general roadmap of where we are going.
- In Mr. Doe’s case, we have three alleged violations, so I made a brief introduction.

Pages 3 - 4, heading 3b, “facts about the alleged domestic violence charge.”

- First paragraph summarizes the “purported” facts supporting the allegation.
- Second paragraph points out conflicts in Ms. White’s story.
 - No argument, just a statement of the conflicting information.
- The paragraph at the bottom of p. 3 and the top of page 4 states facts about the problem with Ms. White’s explanation for the above conflict.
 - Last sentence states: “This is the first of several inconsistencies in Ms. White’s testimony.”
 - Not argumentative, just a statement of fact regarding the number of inconsistencies in Ms. White’s story. It helps tell our factual story.
- First full paragraph on page 4 points out more inconsistencies.
 - Ms. White stating that Mr. Doe was a great dad.
- Second full paragraph on page 4. The state court dismissed the domestic violence charge.

Pages 4 – 6, heading 3c, titled “Facts about the alleged malicious mischief charge.

- First paragraph on page 4 gives introductory background facts.
- First full paragraph on page 5 states Ms. White’s testimony about a video recording of the incident, then we point out that the prosecution never entered any video into evidence.
- Next paragraph on page 5 states testimonial evidence that Mr. Doe had an alibi.
- Next paragraph on page 5 pertains to one of the alleged victims, Mr. Black. Mr. Black did not believe that Mr. Doe committed the vandalism.
- The last full paragraph on page 5 addresses both good and bad facts
 - The charge was dismissed in municipal court.
 - But the order states Mr. Doe must pay restitution.
 - We can’t simply ignore that fact because the prosecution relies on it heavily.
 - But we rebut the fact in a later paragraph below.
- The paragraph beginning on page 5 and ending on page 6, and the first full paragraph on page 6 pertains to Ms. Wells’ testimony. Ms. Wells was Mr. Doe’s attorney on the state court charge.
 - She testified that Mr. Doe voluntarily paid restitution, and that it was not required by the court.
 - She testified that the municipal court dismissed the malicious mischief charge.

Pages 6 – 10, heading 3d, titled “Facts about the alleged sexual battery charge.

- First paragraph, first sentence, gets in a subtle “jab” aimed at Ms. White.
- Paragraph beginning on page 6 and ending on page 7 points out inconsistencies in Ms. Doe’s testimony.
- The full paragraph on page 7 states another witness’ testimony regarding the untruthfulness of Ms. White’s allegation.
- The paragraph beginning on page 7 and ending on page 8 gives conflicts in Ms. White’s own testimony about when Mr. Doe allegedly began sexually abusing her.
- First full paragraph on page 8 gives more witness testimony regarding the impossibility of Ms. White’s rendition of events.
- Second full paragraph on page 8 is more of the same, plus evidence about Ms. White’s prior demeanor around Mr. Doe.
- The paragraph beginning on page 8 and ending on page 9 involves Ms. White’s changed testimony when she realized that her testimony did not pass muster factually.
- First full paragraph on page 9 and the two following paragraphs deal with Ms. White's allegation that Mr. Doe impregnated her.
 - Her testimony is conflicting and factually impossible.
- Paragraph beginning on page 9 and ending on page 10 points out more inconsistencies about Ms. White’s sexual history.

Pages 10 - 11, heading number 3e, titled “The district court’s ruling.”

- First paragraph is both the court’s and the prosecutor’s admission that Ms. White gave inconsistent testimony.