THE SECOND DRAFT

ARTICLE

Introducing First-Year Legal Writing Students to the Multifaceted Nature of Facts

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Introduction

Each Fall, legal writing professors introduce students to the structure and format of the interoffice memo. The memo, of course, is the product we ask students to create to show their mastery of producing a written legal analysis. Before the Discussion section of the interoffice memo, however—the section in which that analysis is communicated—there is the Statement of Facts. I have not spent much time instructing students on the Statement of Facts beyond providing them with strategies for organizing facts clearly and effectively. In the Fall semester, the dearth of instruction on how to present facts is likely a result of the "facts" coming from either an assignment memo or a collection of documents from which it is relatively simple

to glean them. In the Spring semester, when students move on to persuasive writing, they receive additional instruction on presenting facts in a compelling way, such as employing storytelling techniques, considering diction, and paying attention to placement of facts in the sentence depending on whether that fact should be highlighted or minimized. Overall, though, my teaching is focused on enabling students to develop the skills they need to apply the law to facts. In many respects, the facts are a given. But then, this past semester, a student asked a question I have not been asked before: "What is a fact?"

I admit, I was thrown. What a question! A foundational question. A question, it turns out, that inspired me to reconsider how I introduce my first-year students to facts in the legal setting. In the simplest terms, facts are the things that happened before the problem arrived on the lawyer's doorstep. They are the events and circumstances that give rise to the legal issue. At a definitional level, a fact is a thing that "actually exists; an aspect of reality."[1] I think of a fact used in a written legal analysis as something taken from somewhere—a medical record, a police report, a contract, a witness's deposition testimony. It is, in some sense, a retelling of an event based on a reliable source. Yet the question of *what is a fact* is complicated by facts in the legal world being different from facts in other areas,[2] and by the influx of misinformation, disinformation, and AI hallucinations. In teaching students to write facts sections – in either predictive or persuasive documents —I generally allow them to assume the facts are factual. This is because my primary focus is on teaching them how to use and analyze facts considering a particular area of law. For my students to be effective advocates, however, they also need to understand how facts are categorized and established in the legal profession, and the relationship between lawyering and facts. Although much of this understanding will occur later in students' legal education as they learn evidentiary rules and

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[1] *Fact*, BLACK'S LAW DICTIONARY (12th ed. 2024). Black's Law Dictionary expands on this definition: "Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and the holding of opinions." *Id.*

[2] *See, e.g.*, Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 106 (1996) (observing that "[l]egal facts are different from facts in other disciplines. In law, findings of fact are usually not empirically verifiable, nor do they necessarily correspond to something real; they are either simply the factfinder's findings or assumed from the jury's general verdict.").

work through case strategy and development, it feels to me essential to acquaint them with the dynamic nature of facts in the legal field as early as in their first-year writing class.

1. Categorizing facts

Early on, we train students to differentiate between relevant and irrelevant facts. In the broadest sense, this is the ultimate classification of facts in a legal context. But within the realm of relevant facts, categories are myriad. I teach students to recognize certain categories of relevant facts. Of course, there are *legally* relevant facts, facts that present legal issues or influence the outcome of a legal analysis.[3] In addition, facts can be characterized as background, emotional, or procedural, and these characterizations guide how facts are organized and presented in a memo or brief.[4] Students also learn to recognize when there are *not* facts relevant to a legal claim – an absence of fact. Beyond these categories, however, are additional kinds of facts to which students should at least be introduced.

Courts classify certain facts as *historical*. An historical fact is "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation."[5] The United States Supreme Court has referred to historical facts as the events occurring that give rise to the legal issue,[6] or "basic" facts such as those "addressing questions of who did what, when or where, how or why."[7] There are also *inferential facts*, facts that are "neither directly observable nor directly measurable, but must be 'demonstrated' by inferences drawn from historical facts."[8] When resolving issues of statutory interpretation, courts may consider *legislative* facts, facts that

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[3] *See, e.g.*, Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like A Lawyer*, 29 U. MEM. L. REV. 1, 19 (1998) (defining "legally determinative facts" as "facts [that] will raise legal issues or will influence the outcome of your analysis of a legal issue.").

[4] *See, e.g.*, Joan Malmud Rocklin, Robert B. Rocklin, Christine Coughlin, and Sandy Patrick, AN ADVOCATE PERSUADES, 256-61 (2016).

[5] *Fact*, BLACK'S LAW DICTIONARY, *supra* n. 1.

[6] *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.").

[7] *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018).

[8] *See* Smith, *supra* n. 3, at 21.

explain "a particular law's rationality and that help[] a court or agency determine the law's meaning and application."[9] Courts may also refer to facts as *adjudicative*, meaning the fact is a "controlling or operative fact, rather than a background fact; a fact that is particularly related to the parties to a proceeding and that helps the tribunal determine how the law applies to those parties."[10]

2. Establishing facts

In addition to introducing students to the ways in which facts are categorized, students should also begin to understand the various ways of establishing facts in legal proceedings. Facts can be admitted, such as in an answer, in a response to a request for admission, or by a lack of a response, such as in a failure to counter a fact set forth in a statement of material facts in support of a motion for summary judgment.[11]

Facts can also be established when they are found by a factfinder, either a judge or a jury. A judge can hear evidence and make factual findings in a court ruling or order. Judges have significant leeway in determining what evidence is deemed "fact" and are given great deference in those determinations, as a recent Connecticut Superior Court decision makes clear: "As the factfinder in a court trial, the court is free to believe some, all, or none of the evidence and testimony of the witnesses."[12]

The jury's role as fact-finder is grounded in a principle that sounds simple but is often quite messy in practice: in a jury trial, the judge decides questions of law, and the jury decides questions of fact.[13] While it is beyond the scope of this article to dive into the quagmire this principle presents, for

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[9] *Fact*, BLACK'S LAW DICTIONARY, *supra* n. 1.
[10] *Id.*
[11] *See* D. Conn. L. Civ. R. 56(a)(1) ("Each material fact set forth in the Local Rule 56(a)1 Statement and supported by the evidence will be deemed admitted (solely for purposes of the motion) unless such fact is controverted by the Local Rule 56(a)2 Statement required to be filed and served by the opposing party in accordance with this Local Rule, or the Court sustains an objection to the fact.").
[12] *See Hunte v. Yale New Haven Hospital*, NNH-CV21-6110213, at 2 (Conn. Sup. Ct. Dec. 12, 2025).
[13] *See, e.g.*, Elizabeth Thornburg, *Law, Facts, and Power*, 114 PENN ST. L. REV. PENN STATIM 1, 4 ("Because there is no clear line between questions of law and questions of fact, court decisions that turn on the distinction are a morass of inconsistency.")

the purpose of considering what a fact is, it is generally accurate to say a fact is found by the jury on the basis of evidence presented before it.[14] In determining the facts, jurors in Connecticut—like those in many other states—may take notes and, in certain circumstances, may even ask questions of witnesses.[15] In some instances, jurors may even be able to go to the scene of the incident giving rise to the lawsuit in aid of their making factual findings.[16]

In addition to finding facts, evidentiary rules allow for the court to take notice of certain facts. For example, Federal Rule of Evidence 201 provides for judicial notice of an adjudicative fact: the court may "notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[17] Judicial notice is premised on the assumption "that certain factual determinations are not subject to reasonable dispute and thus may be appropriately resolved other than by the production of evidence before the trier of fact at trial."[18] Thus, a fact can be "accepted as true without formal evidentiary proof" as long as there is a "high degree of indisputability" regarding the fact.[19]

3. Lawyering and facts

In addition to being introduced to the many ways in which facts can be characterized and the different mechanisms by which facts can be found in legal proceedings,[20] students should also begin to think about the lawyer's relationship with facts.

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[14] *See, e.g.*, CONN. PRAC. BOOK § 16-9 ("The judicial authority shall decide all issues of law and all questions of law arising in the trial of any issue of fact, and, in committing the cause to the jury, shall direct it to find accordingly, and shall submit all questions of fact to the jury, with such observations on the evidence, for the jury's information, as it thinks proper, without any direction how the jury shall find the facts.").

[15] *Id.* at § 16-7.

[16] *Id.* at § 16-12.

[17] Fed. R. Evid. 201.

[18] Michael H. Graham, HANDBOOK OF FED. EVID. § 201:1 (10th ed. 2024).

[19] *Id.*

[20] In my course, consistent with many first-year legal writing programs, I focus primarily on facts in a litigation context. Establishing and characterizing facts in the administrative and transactional contexts are a bit different.

First, students should recognize the difference between allegation and fact. Since an allegation has yet to have been established through the legal process, it is not factual for legal purposes. Further, allegations may or may not be things that *actually exist*. While procedural and professional rules may provide some safeguards against the knowing presentation of false information,[21] these rules are not foolproof, as any trial attorney who has cross-examined a witness lying through his teeth knows. And, even if a false statement is not made deliberately, the shortfalls of human memory and recollection inevitably impact its veracity.[22] In addition, a plaintiff is generally free to amend the complaint to conform what has been alleged to the evidence gathered during the discovery process and to clarify and further detail the specific allegations against the defendant. Thus, a court may allow a pleading to be amended before, during, or even after trial to conform to the proof as long as the facts arise from facts already alleged and there are no new causes of action.[23]

Students should also be aware of the importance of context and purpose when thinking about facts. The "facts" for the purposes of an interoffice memo are not necessarily the same as the "facts" that could be alleged as undisputed in a motion for summary judgment. Nor are they necessarily admissible under the relevant evidentiary rules. This distinction may not matter at the time the memo is written, but the lawyer must understand development of facts on a timeline and develop a litigation strategy with an awareness of what kind of evidence will be needed—and admissible—to establish the facts later in the case.

Further, although my students do write about issues with competing versions of facts in a litigation setting in the Spring semester, it would serve them well to more fully consider the concept of competing facts in the

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[21] *See* Fed. R. Civ. P. 11; Model Rule of Professional Conduct 3.3.

[22] *See, e.g.,* Mark V. Bennett, *UnSpringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know about Cognitive Psychology and Witness Credibility*, 64 Am. U.L. Rev. 1331, 1335 (2015) (Observing that "the 'truth' of what actually happened in the past is a more elusive concept than what it might seem at first blush. There is often a huge gap between perceived truth and objective truth. Witnesses can be truthful, but for many reasons mistaken.").

[23] *Town of New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 433, 485-6, 970 A.2d 592, 628 (2009); *Franc v. Bethel Holding Co.*, 73 Conn. App. 114, 132-33, 807 A.2d 519, 534 (2002).

work of the lawyer overall. In many circumstances, key facts of a case can be easily proven (for instance, the plaintiff in a medical malpractice action was intubated at 11:00 p.m.). Both parties may agree to that fact. In this instance it becomes the role of the lawyer to establish the importance, or lack thereof, of the fact. For example, when the key question in the malpractice case is whether the standard of care required the plaintiff to have been intubated earlier than 11:00 p.m., the plaintiff's lawyer will argue that there was such a requirement and it was breached, and the defendant's counsel will argue that intubating at 11:00 p.m. was appropriate.

Much of my recent contemplation about facts is well beyond the scope of a first-year legal writing class, and there is more to consider that I have not addressed here, such as burdens of proof, general versus special verdicts, findings of fact versus conclusions of law, and standards of review, for instance. Yet, despite the extremely complex and lengthy answer to the questions *what is a fact*, I am persuaded that it is worthwhile to give new law students a glimpse of that answer. Students will be well-served by beginning to understand the multifaceted nature of facts in the legal field and will be better positioned to develop the curiosity, healthy skepticism, and deliberation essential to effective lawyering.