

Bridging the Gap: 3 Quick Tips for the Week – 1 Nov 2019

Judge Rob Shuck

Circuit Judge, 4th Judicial Circuit

1. Facts matter.

Apply more factual analysis in your briefs and oral arguments. Ask yourself what the judge is likely asking: "Why should the Court give more weight to your evidence versus your opponent's?"

Judges routinely read multi-page briefs where there were just a few lines of facts. Recently, a substantial brief had just one single line of fact analysis. One line! Remember your analysis is the application of case facts to the law. We routinely read wonderful law review articles disguised as pleadings. Retired Judge LTC Jacob D. Bashore wrote a great article on improving your motions practice. This article may be found [here](#).

(Chief Trial Judge note: also remember that facts should not contain editorial comments. Phrases like "the accused violently..." or "the victim timidly" are argumentative. You are unlikely to get your opponent to agree to stipulate to your facts if you sensationalize them. Think Joe Friday from Dragnet: Just the facts!)

2. Assert control over witnesses from the very beginning.

Witnesses are nervous and will wander! Government counsel need to control witnesses from the moment they enter courtroom to testify. For example, "SGT Smith, please approach the witness stand, turn and face me. Please raise your right hand ... [memorize the oath]." Stumbling through this process makes a poor first impression.

(Chief Trial Judge note: don't underestimate the value of rehearsing with your witness in the courtroom. Their testimony should not be the first time they are inside the courtroom. Put them at ease to the maximum extent possible.)

3. "Good Soldier" Books

Ask yourself, how do these documents/photographs advance my sentencing theme, or am I presenting it *pro forma*? Instead of merely printing out every document in your client's Official Military Personnel File (OMPF), use select documents to advance your sentencing theme. For example, if your theme involves good character of prior service consider adding the DA Form 638, Recommendation for Award as opposed to (or in addition to) the more often presented Army Award Certificate. The award write-ups offer a much more detailed account of why the Soldier received his or her award versus only generic language typically found on most award certificates. How can you tell if you have met your theme goal? Hand the selected documents to someone unfamiliar with your client and get their unbiased first impressions. Did your desired theme resonate with them, or do you need to continue editing?

(Chief Trial Judge note: letters of support are helpful and we read them carefully. Ensure they don't contain damaging information, or if they do and you need the letter to advance your theme, explain it somehow. And have the author sign the letter.)