Key Considerations

Winning Your Appeal with Your "Statement of Facts"

By Melinda S. Kollross

The Statement of Facts can make or break your appellate brief. Seize this opportunity by adhering to certain principles.

What is the first thing that comes to your mind when you hear the words "appellate brief"? For most people, lawyers and non-lawyers alike, the answer has something to do with legal argument and analysis. But there is another aspect of the appellate brief that can have as much—and sometimes more—influence on whether an appeal is won or lost. That is the "Statement of Facts," the section where the brief writer gets to tell the client's story to the reviewing court. Much more than just a bland recitation of who, what, where, when, and why—an effective Statement of Facts should convince the court of the merits of your position and make the court want to rule in your favor before reading the first word of legal argument.

Creating a Compelling Statement of Facts

My favorite part of appellate brief writing is drafting the Statement of Facts. Here, the entire appellate record—common law pleadings, transcripts of proceedings, evidentiary and demonstrative exhibits—is synthesized to present a cohesive picture of the case. Exactly what that picture looks like, and how persuasive its effect, depends on the facts that the brief writer has to work with, his or her artistry, and the following key considerations.

Know and Follow the Rules

Most courts have specific rules governing the content and the format of appellate briefs, including the Statement of Facts section. For example, Federal Rule of Appellate Procedure 28(a)(6) requires the appellant's brief to contain "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record." Fed. R. App. P. 28(a)(6). Until

■ Melinda S. Kollross is a senior partner of Clausen Miller PC in Chicago, and co-chair of the firm's Appellate Practice Group. Licensed in Illinois and New York, she handles post-trial and appellate litigation for savvy clients nationwide and has litigated more than 150 appeals in state and federal reviewing courts, which includes participation in two appeals before the United States Supreme Court. Ms. Kollross' practice includes commercial litigation, first-party property, liability insurance coverage, and liability defense. She served the DRI Appellate Advocacy Committee as the 2017 DRI Annual Meeting chair.

recently, Rule 28(a) required a "Statement of the Case" separate from a Statement of Facts. That changed in 2013. As explained in the comments to the 2013 amendments, the previous requirement "generated confusion and redundancy." Fed. R. App. P. 28 advisory committee's notes to 2013 amendments. The current Rule 28(a) requires one "statement," much like Supreme Court Rule 24.1(g) (which requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix…."). This permits but does not require the lawyer to present the factual and procedural history chronologically. *Id.*

The California Appellate Rules state that an appellant's brief must provide "a summary of the significant facts limited to matters in the record." Cal. App. R. 8.204(a)(2)(C). In Illinois, the Statement of Facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6). The local rules of the Illinois Appellate Court, Third District, further provide that the Statement of Facts "shall not exceed fifteen pages." Ill. App. Ct. Third Dist. Local Rules, Admin. Order No. 39. The New York appellate courts require "a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with supporting references to pages in the appendix." N.Y. C.P.L.R. 5528(a)(3). The New York First and Second Departments additionally require the statement of facts to note if proceedings on the judgment or order appealed from have been stayed pending a determination of the appeal. 22 N.Y. C.R.R. §§600.10(d)(2)(iii) and 670.10.3(g)(2)(iv).

Appellees or respondents, in contrast, are usually only required to provide a Statement of Facts (known as a "Statement of the Case" in the federal courts of appeal) to the extent that they are dissatisfied or disagree with the appellant's statement. *See, e.g.,* Fed. R. App. P. 28(b)(3). While it is technically permissible for an appellee or respondent to provide a less than complete Statement of Facts, or to omit it entirely, the appellant will rarely if ever state the facts in the manner that is the most advantageous to their opponent. Thus, the appellee or respondent should prepare their own Statement of Facts, presenting a clear and compelling story in support of whatever is being challenged from below. Doing so also ensures that the court has the facts at hand without having to refer back to the appellant's brief, a disruptive and distracting situation that is easily avoided by placing all salient facts in the appellee or respondent's own Statement of Facts.

Always consult the rules before drafting your Statement of Facts to ensure that it meets all the applicable requirements. Even minor rule violations detract from the persuasiveness of your fact statement. Major violations may result in the Statement of Facts section or the entire brief being stricken—or arguments being deemed waived or forfeited.

Organization Options

Unless the rules state otherwise, the Statement of Facts can be organized in whatever manner best suits your case.

Chronological

Generally, a story told chronologically is the easiest to follow. Organizing the Statement of Facts chronologically makes good sense in many instances, especially for cases involving a single accident, event, or transaction and the resulting litigation. Chronological order is particularly useful when the timing or sequence of events is critical, such as cases involving the statute of limitations, timeliness of service, late notice, known loss, estoppel, or laches.

Modified Chronological

Sometimes it may be advantageous to start your Statement of Facts somewhere other than with the chronological beginning. For example, an appellee or respondent may wish to "set the record straight" by immediately pointing out significant inaccuracies or omissions in the appellant's Statement of Facts. Doing so can provide a powerful indictment of the appellant's credibility, and it allows the appellee or respondent to explain why they are presenting their own Statement of Facts for the court's consideration.

Complicated cases may benefit from including explanatory material up front, in the form of an "Introduction," "Background," "Overview," or similar section. The Statement of Facts in insurance coverage appeals often begins with a description of the subject policy or policies and quoted language from the key provisions at issue. This introductory material provides a useful framework for understanding and analyzing the chronological facts that follow.

Chronological order is particularly useful when the timing or sequence of events is critical, such as cases involving the statute of limitations, timeliness of service, late notice, known loss, estoppel, or laches.

By Issue

When there are a number of discrete appeal issues, the Statement of Facts might be structured as a series of mini-stories, which discuss the facts pertinent to each issue, rather than as a single, chronological tale. This device works particularly well when a significant amount of background information is needed to present a complete and compelling view of the issues from your client's perspective. Appeals involving alleged discovery violations, evidentiary rulings concerning the admissibility of expert opinions on technical or scientific matters, certain jury instruction errors, excessive compensatory damages awards, or punitive damages awards, to name a few, might warrant this approach.

Use of Subheadings

No matter which organizational approach you take, your Statement of Facts will be more easily followed and understood if you use subheadings to guide the reader along. Appellate judges frequently note how difficult it is on the eyes (and the mind) to read page after page of narra-

tive facts without the break and direction that subheadings provide. Do yourself and your readers a favor. Include descriptive subheadings throughout your Statement of Facts to let the reader know where you are going next. Indeed, the comments to the 2013 Federal Rule of Appellate Procedure 28 amendments expressly authorize the use of subheadings, explaining that the Statement of the Case "should be concise, and can include subheadings, particularly for the purpose of highlighting the rulings presented for review." Fed. R. App. P. 28 advisory committee's notes to 2013 amendments.

Failing to provide necessary record references—or including facts outside the record—can result in the reviewing court striking the Statement of Facts or the entire appellate brief.

In addition to providing direction, subheadings can perform a powerful persuasive function. Consider three possible subheadings for the same factual description of a pedestrian–car collision: (1) "The Accident"; (2) "Plaintiff Darts into Street Without Warning"; or (3) "Defendant Hits Plaintiff While Speeding." Assume that each subheading is supported by the record. Which would you select for the defendant's Statement of Facts? Which would you select for the plaintiff's? If you chose number 2 for the defendant and number 3 for the plaintiff, you are well on your way to writing a winning Statement of Facts. As this simple exercise illustrates, well-crafted subheadings can make the same facts read very differently.

Finally, subheadings can give time-pressed judges a quick overview of your case without forcing them to read every word of text. This is a valuable opportunity: use it to your advantage by incorporating meaningful subheadings that tell your client's story in a compelling but highly condensed fashion.

Choosing Content: The Good, the Bad, and the Ugly

You will want to adhere to four principles when you choose content: (1) respect the record; (2) paint a fair and complete picture; (3) highlight the equities; and (4) address bad facts and lessen their effect.

Respect the Record

Only facts of record may be considered on appeal. The Statement of Facts must accordingly be limited to the content of the record on appeal. In most jurisdictions, the parties are required to provide record references for every fact stated in an appellate brief. *See, e.g.,* Fed. R. App. P. 28(a)(6). Facts outside (termed "dehors") the record cannot be included unless they are a matter of common knowledge or public record of which the court can take judicial notice. This is a fundamental tenet of appellate practice and not just a technical rule.

Failing to provide necessary record references—or including facts outside the record—can result in the reviewing court striking the Statement of Facts or the entire appellate brief. Even if no sanction is imposed, playing fast and loose with the record destroys credibility. Do not go there.

Paint a Fair and Complete Picture

The appellate court learns about each case by reading the parties' Statement of Facts. Unless there have been previous appeals, the appellate court has no historical knowledge of the matter. Thus, the savvy brief writer will use the Statement of Facts to tell the court every fact that it needs to know to reach the desired outcome on appeal. This is the place to answer clearly and completely "who, what, where, when, and why" in an interesting and informative way. While key facts can be reiterated in the "Argument" section, they should not appear for the first time there.

The amount of factual detail needed and desired will of course vary from case to case, depending on the appeal issues and the contents of the record on appeal. However, it is not unusual for a thorough, effective Statement of Facts to run as many or more pages as the Argument section of an appellate brief (unless limited by rule, as in the Illinois Appellate Court, Third District). Remember, you are educating the judges about the subject matter of your case and laying the groundwork for all of the legal arguments which follow. Appellate judges are generalists; do not assume that they know much about the procedure involved in a medical malpractice action, the way that a particular piece of machinery operates, or how a service contract is typically drafted or performed in a given industry.

The reviewing court likewise did not sit through days, weeks, or months of trial. The appellate brief writer should accordingly provide a comprehensive review of the trial proceedings to argue persuasively that a trial error was prejudicial, or that a jury verdict was against the manifest weight of the evidence. Such arguments cannot be best supported by the appellant or most effectively refuted by the appellee or respondent with only a scant, cursory recitation of facts. Equally unhelpful is a one-sided Statement of Facts, which only presents the plaintiff or the defense side of the case. Strive for a full and fair description of the salient facts. The appellate court expects and deserves as much.

Of course, the salient facts do not include "everything but the kitchen sink." You must be selective in deciding which facts are necessary and relevant to the court's consideration of the issues on appeal. The appellee in a federal court of appeals may rightly criticize an appellant's freewheeling fact statement on the ground that it is not "relevant to the issues submitted for review." Fed. R. App. P. 28(a) (6). Most state court rules likewise require facts pertinent to the issues to be determined.

Do not be concerned if your Statement of Facts is far longer than your opponent's. Many attorneys, especially those who rarely do appellate work, underestimate the importance of the Statement of Facts and therefore give it short shrift in comparison to the legal argument portion of their brief. That is a mistake. Experienced appellate practitioners understand that although phrased in neutral terms, a well-written

Statement of Facts serves as an argument in support of their position. Always view it as such.

Highlight the Equities

In addition to providing essential information concerning the basic "who, what, where, when, and why" of your case, the Statement of Facts should also demonstrate how the equities favor the result that you seek. Comb the record for facts showing why fairness and justice dictate that the decision below be affirmed or reversed. Weave this information into your Statement of Facts so that the court wants to rule in your favor before it even reaches the legal argument portion of your brief.

Take a simple pleadings case, for example. The plaintiff has had numerous chances to amend the complaint but still failed to state a cause of action. A dismissal with prejudice was finally entered, and the plaintiff has appealed. You represent the defendant. Your Statement of Facts should start at the beginning and walk the court through each amendment. Describe what was changed in each complaint. Detail each ensuing motion to dismiss. Discuss how long the matter has been pending, how many motions to dismiss have been filed, how many hearings held. Leave the court with a definite impression that the equities favor your client: it is fair and just for the litigation finally to come to an end. Now you have set the stage for your legal argument in support of an affirmance.

Address Bad Facts and Lessen Their Effect

As an advocate, it is tempting to focus on the "good" facts that favor your client's position and ignore any "bad" facts that undermine it. Resist the temptation! At the appellate level, it is unlikely that your opponent, a panel of three to nine appellate judges (depending on the court), and their staff of law clerks and research attorneys, will all remain blissfully unaware of any significant bad facts in the record as long as you do not mention them in your Statement of Facts. The reality is that bad facts will almost certainly come out—and it is better for the court to learn about them from you than from your opponent or from the court staff. Indeed, there are at least three significant benefits to mentioning any material bad facts in your Statement of Facts.

First, mentioning bad facts builds credibility and trust. The court will appreciate your candor in presenting a fair and complete factual description rather than playing hide the ball by omitting bad facts and hoping that no one notices. Sharing a strong rapport with the court benefits your legal arguments as well.

Second, including bad facts in your brief lessens their effect. You now control the manner in which the bad facts are disclosed, and you can put your own spin on them in the process. Conversely, mentioning bad facts yourself takes the wind out of your opponent's sails; your opponent can no longer spring a "gotcha" moment by revealing facts that you did not want the court to know.

Third, disclosing bad facts shows confidence in your position. Hiding bad facts on appeal looks weak; acknowledging them projects strength and conviction in the merits of your legal arguments.

Conclusion

The Statement of Facts can make or break your appellate brief. Devote as much time, attention and space to it as needed to present your client's story effectively to the appellate court and to persuade the court that the equities lie in your favor. Keep in mind that the reviewing court has not lived with the case for months or years as the attorneys and trial judge may have. These judges come to the case fresh, with no historical knowledge of the personalities, proceedings, and issues involved. It is your job to select and to state the facts fairly but persuasively in favor of the outcome that you seek. Telling a complete and compelling story in the Statement of Facts enables each party essentially to argue their case twice: once in the facts section and once again in the argument section. Seize this opportunity to increase your chance of success on appeal. FD