STATING THE CASE AND FACTS: FOUNDATION OF THE APPELLATE BRIEF*

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THE IMPORTANCE OF FACTS

Appeals focus on legal errors.[1] They are not a place to attempt to retry the facts.[2] But that does not dictate that counsel ignore the importance of the facts in their briefs. Our common-law legal system is fact driven. A difference in the facts may empower the advocate to distinguish the client's case from what appears to be a determinative adverse precedent.

The facts should neither be something counsel rushes through to write the argument section of the brief, nor an afterthought. The brief's statement of the facts stands as an integral — and often crucial — part of the appellate process. Just as well-written facts may make the case, poorly written or misleading factual statements may condemn the brief to defeat and discredit its author. This Article offers suggestions on effectively conveying

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1. Paul R. Michel, *Effective Appellate Advocacy*, 24 Litig. 19, 19 (Summer 1998).
2. *Id*.

the facts in an appellate brief. The same principles should apply in a trial court brief.

STATEMENT OF THE CASE

After counsel has reviewed the record, identified issues, and reviewed the Rules,[3] it is time to prepare the Statement of the Case. In some instances, it may be advisable to combine it with the Statement of the Facts. Unlike the federal rules, Florida's appellate rules leave this to the writer's discretion.

The appellant's Statement of the Case should be completely objective, and never slanted. The appellant should show the appellate court that it has jurisdiction, what the disposition was in the lower tribunal, at what point the order appealed from was entered, and whether the case was a jury or nonjury trial. Particularly, if timeliness of the appeal may be an issue, the appellant should mention the date the order being appealed was entered and the date the notice of appeal was filed. If a timely filed and authorized motion under Rule 9.020(h) postponed rendition, the appellant should relate that to the date the notice of appeal was filed.

The appellee should make any necessary corrections, but if none are needed, the appellee should indicate agreement with the appellant's Statement of the Case.

Counsel should include only those dates and details necessary to the issues on appeal.[4] Counsel should not clutter the Statement of the Case or Facts with unimportant dates or pleadings. In most appeals, the date the plaintiff filed the complaint is irrelevant, as are the dates of the answer and various motions. The brief should not recite motions, discovery, or other activities that do not bear on the appellate issues. For those rare cases in which multiple dates or events are important for either substantive or procedural issues, counsel may consider including a chronology to assist the court.

3. We refer to the Florida Rules of Appellate Procedure as "Rules," and the Federal Rules of Appellate Procedure as "FRAP."

4. Leonard I. Garth, *How to Appeal to an Appellate Judge*, 21 Litig. 20, 24 (Fall 1994).

Counsel must cite to the record for assertions in the Statement of the Case or Facts.[5] Counsel should not make the judge or the judge's law clerk forage through the record to find documents or testimony referred to in the Statement. Rule 9.210(b)(3) requires references to the appropriate volume and page number of the record or transcript.[6]

APPELLATE JUDGES EMPHASIZE THE FACTS

Several appellate judges note that they begin to focus and analyze the issues when reading the Statement of the Facts. While the advocate cannot change the facts, he or she can show how they relate to the case law. Judge Leonard I. Garth of the Third Circuit observes that courts are usually familiar with the relevant case law, and they look to counsel to educate them on how those apply to the facts of the case before them.[7]

While one must do so within the limits discussed below, other judges urge that the facts be written so the judge reading the facts wants to rule for the party.[8] And they recommend that the party's theme or themes permeate the brief, including the Statement of the Facts.[9]

Selecting the Facts

Judge Paul R. Michel of the United States Court of Appeals for the Federal Circuit emphasizes that appellate judges "need to grasp the essential facts."[10] Just as for the Statement of the Case, advocates should be selective in including facts relevant to the points on appeal.[11] Judge Michel warns that if judges face an "avalanche of unnecessary information," they "may miss the issues, facts and authorities" that matter.[12]

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5. Fed. R. App. P. 28(a)(7) (2002); Fla. R. App. P. 9.210(b)(3) (2002).

6. *E.g.* Fed. R. App. P. 28(e) (stating that counsel must clearly refer to the original record or an appendix when making an assertion in the brief).

7. Garth, *supra* n. 4, at 23.

8. Judge Ralph Adam Fine of the Wisconsin Court of Appeals urges such a writing of the facts, and cites an article by Judge Patricia M. Wald. Ralph Adam Fine, *The "How-To-Win" Appeal Manual* 9 (Juris Publg. 2000) (citing Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 12 (1999)).

9. *Id*. at 34.

10. Michel, *supra* n. 1, at 19.

11. *Id*.

12. *Id.*

Fairly Stating the Facts: Ethical and Professional Issues

Judges also warn of the dangers when counsel misstates the facts.[13] In his article, *Let Us Be 'Officers of the Court'*, Judge Marvin E. Aspen, Chief Judge of the United States District Court for the Northern District of Illinois, observes that, "[j]ust as lawyers gossip about judges," judges discuss lawyers and share stories of unprofessional conduct.[14] Counsel cannot expect to succeed with factual misrepresentations.[15] As one court summarized,

> Misrepresentation of the record on appeal is poor strategy. Alert opponents will detect the error. An appellate panel of three judges assisted by a staff of able law clerks will confirm what the opponents point out or will itself uncover the defects. The vice of misrepresentation is not that it is likely to succeed but that it imposes an extra burden on the court.[16]

Appellate courts have criticized counsel for deleting critical language from the record,[17] omitting material facts,[18] mischaracterizing the appealed decision,[19] and using quotation marks with references to the record where no witness had actually used the quoted words.[20] Several sources offer a more detailed discussion of these and other ethical issues in appeals.[21]

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13. Marvin E. Aspen, *Let Us Be 'Officers of the Court*,' 83 ABA J. 94, 95–96 (July 1997).

14. *Id*. at 96.

15. *In re Boucher*, 837 F.2d 869, 871 (9th Cir. 1988) (stating that misrepresentations will be uncovered by either opposing counsel or the court).

16. *Id*.

17. *E.g. Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486 (Fed. Cir. 1984) (assessing costs against an attorney for deleting "critical language in quoting from the record" in his appellate argument).

18. *E.g. Hays v. Johnson*, 566 S.2d 260, 261 (Fla. Dist. App. 5th 1990) (assessing attorney's fees against counsel for failing to include material facts in a petition for child custody).

19. *E.g. Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 943 (Fed. Cir. 1990) (assessing sanctions against appellant's attorney who disregarded precedent and facts in making his argument for appeal).

20. *E.g. St. Lucie Harvesting & Caretaking Corp. v. Cervantes*, 639 S.2d 37, 39 n. 1 (Fla. Dist. App. 4th 1994) (criticizing an attorney's repeated use of a word in quotation marks when the word was not a quotation and was a critical issue on appeal).

21. *E.g.* Darby Dickerson, CLE Presentation, *The Credibility Factor: Ethics, Professionalism, and Appellate Briefwriting* (Stetson U. College of L., July 27, 2000) (copy on file with the *Stetson Law Review*).

Fairly Stating the Facts — The Presumptions

Unlike trial proceedings, the appellate lawyer faces different issues and a different standard. To set forth the facts properly, counsel must appreciate the rules that accompany the party's position on appeal and the applicable standards of review.

When the parties reach the appellate court, there is usually no longer room for a dispute in facts. Case law establishes that all facts and inferences must be construed in favor of the party who prevailed before the factfinder.[22]

This rule can sometimes produce an interesting dynamic. Consider a party who has prevailed before the jury, but then appeals the trial court's new trial order. The appellate court will afford discretion to the trial court's factual findings relating to its new trial order, such as whether an improper argument influenced the jury.[23] But can the appellant assume the jury decided factual disputes in its favor? Probably not, given the appellee's ready response that the trial judge's order suggests this may have resulted from the actions that the court reasoned warranted a new trial.

Other situations produce clearer results. An appellant appealing a summary judgment or a directed verdict is entitled to have all disputed facts and inferences construed in the appellant's favor.[24] There are exceptions, such as an order granting the directed verdict after the jury returned a special verdict that included specific factual findings.[25]

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22. *E.g. New Nautical Coatings, Inc. v. Scoggin*, 731 S.2d 145, 146 (Fla. Dist. App. 4th 1999) (stating that when the trial court makes "no specific findings of fact in the final judgment," the facts are construed in favor of the appellee); *Winn Dixie Stores, Inc. v. Benton*, 576 S.2d 359, 360 (Fla. Dist. App. 4th 1991) (resolving that all conflicting facts shall favor the appellee).

23. Even with new trial orders, in which appellate courts typically afford great discretion to the trial court's ruling, appellate courts accord less deference when the trial court based the new trial order on a legal ruling. *Heckford v. Fla. Dept. of Corrections*, 699 S.2d 247, 250 (Fla. Dist. App. 1st 1997); *Tri-Pak Machinery, Inc. v. Hartshorn*, 644 S.2d 118, 119 (Fla. Dist. App. 2d 1994). One might question why the appellate court does not review such questions of law de novo, as it would with other legal issues.

24. *E.g. Frenz Enter., Inc. v. Port Everglades*, 746 S.2d 498, 502 (Fla. Dist. App. 4th 1999) (reviewing grant of motion for directed verdict); *Krol v. City of Orlando*, 778 S.2d 490, 492 (Fla. Dist. App. 5th 2001) (reviewing grant of motion for summary judgment, with the evidence construed in favor of the appellant).

25. *E.g. Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed. Cir. 1991).

Judge Chris W. Altenbernd of Florida's Second District Court of Appeal observes that counsel for the appellee in an appeal from a summary judgment should think carefully about disputing the appellant's statement of the facts.[26] The more an appellee disputes the facts, the more likely the appellate court may conclude there is a dispute in material facts that precludes a summary judgment.[27]

Fairly Stating the Facts — The Rules and the Tone

The appellant's Statement of the Facts should be a fair and objective explanation of the events, illuminating the key issues in the appeal. As with the Statement of the Case, Rule 9.210(b)(3) requires that counsel cite every factual assertion to the record. More briefs are stricken for failure to comply with this rule than for any other reason.[28] Courts have sanctioned counsel for misstating facts.[29]

The appellant can relate the facts favorable to its position, but should not ignore material adverse facts. As noted, the appellant must bear in mind the rule that disputes in the facts and inferences drawn from the facts are generally construed in favor of the prevailing party in an appeal from a judge or jury trial. If a fact is disputed, note it up front. There may be situations when counsel, while recognizing that fact disputes will be deemed resolved against its party, wants to discuss a conflict in facts; for example, counsel may want to show how an alleged error may have affected the outcome. Counsel should note that such a conflict exists and the purpose for discussing facts the jury may be deemed to have rejected.

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26. Chris W. Altenbernd, Gary L. Sasso & George A. Vaka, CLE Presentation, *How to Prepare for an Oral Argument* (Stetson U. College of L., July 26, 2000) (copy on file with the *Stetson Law Review*).

27. *Id*.

28. *See e.g. Island Harbor Beach Club, Ltd. v. Dept. of Nat. Resources*, 471 S.2d 1380, 1381 (Fla. Dist. App. 1st 1985) (explaining that the court struck a "brief containing a thirteen (13) page statement of the case and facts, with only seven (7) references to the record on appeal"); *Dowell v. Sunmark Indus.*, 521 S.2d 377, 378 (Fla. Dist. App. 2d 1988) (indicating that the court struck a brief because the "brief contained very few record citations, set forth facts in an argumentative manner, and included references to matters not contained within the record on appeal").

29. *E.g. Hutchins v. Hutchins,* 501 S.2d 722, 723 (Fla. Dist. App. 5th 1987) (stating that sanctions were imposed on counsel who "acknowledged the misleading nature of the language quoted" in a brief).

The facts are not the place to editorialize, and emotionally toned words are out of place. For example, assertions that "the evidence justified the jury's verdict" belong in the argument section. A well-written Statement of the Facts should convey this to the reader without having to say it. Leave any rhetoric for the Argument. Of course, counsel should not include argument in the Statement of Facts.[30]

Ordering the Facts

The best order for counsel to present the facts may vary with the case. The appellant may consider giving an overview of the case and then grouping the facts by topic to coincide with the issues he or she intends to argue, while avoiding unnecessary repetition. If the appeal focuses on evidentiary issues, the appellant may want to group by category (for example, hearsay evidence admitted; excluded witnesses). The court may find topical headings helpful. Counsel should not simply use the order of appearance of witnesses during the trial.

In *Beatty v. State*,[31] the court denied a request to file an enlarged brief, struck the brief, and criticized counsel's organization of the statement of facts:

> It is requested that a brief of 65 pages be allowed. We have examined the brief and find that 40 pages are used for the statement of facts. It appears this was accomplished by starting at the beginning of the trial transcript and summarizing the testimony of every witness who testified.
>
> It appears the testimony is included without regard to the issues on appeal. It is also virtually impossible to obtain an overview of the factual situation which should be the purpose of the "statement of facts."
>
> We can only assume this method is used because it is easier than setting forth the facts in a logical, more readable fashion. We have little control in most cases as to the method used by appellate counsel in stating the facts, but

30. *See Williams v. Winn-Dixie Stores, Inc.*, 548 S.2d 829, 830 (Fla. Dist. App. 1st 1989) (striking appellant's brief for, among other things, including argument in the statement of facts).

31. 621 S.2d 678 (Fla. Dist. App. 2d 1992).

> given the opportunity in this instance to comment, we have no intention of encouraging the practice used here.[32]

Judge Ralph A. Fine of the Wisconsin Court of Appeals, in his *"How-To-Win" Appeal Manual*, includes an excellent example showing why a chronological recitation of events is nearly as bad as using the witness-chronology approach.[33] He observes that, early on, Associated Press writers used a chronological style.[34] He quotes from a report authored on April 15, 1865, that begins by reporting President Lincoln and his wife attended the play *American Cousin* at Ford's Theater.[35] Eventually the reader learns that someone shot the President, producing "excitement . . . of the wildest possible description."[36]

If the appeal is one that has a crucial fact or facts, let the reader know at or near the beginning. Suspense may work for legal novels. It is not the correct approach for briefs.

Completing the Facts

The late Chief Judge James E. Lehan of Florida's Second District Court of Appeal cautioned: "Don't omit facts from the statement of the facts and include them for the first time in your argument. You should be able to rely completely upon your own statement of facts in writing your argument."[37]

Writing the facts should, as with the rest of the brief, be an ongoing process as the writer edits and revises the brief. Counsel should review the facts after preparing the argument to confirm that all necessary facts are included, and to eliminate any unnecessary facts.

The Appellee's Statement of the Facts

The appellee should check the appellant's Statement of the Facts carefully and correct any material errors, pointing to the record to support any corrections; otherwise, the appellee should

32. *Id*.
33. Fine, *supra* n. 8, at 34–35.
34. *Id*. at 35.
35. *Id*.
36. *Id*.
37. James E. Lehan, Judge, CLE Presentation, *Good Appellate Brief Writing* (Sarasota County B. Assn., Oct. 27, 1989) (copy on file with the *Stetson Law Review*).

note acceptance of the statement. The court is not obligated to make an independent review of a transcript to determine whether the appellee was remiss in accepting the appellant's factual statement. As Judge John R. Beranek of Florida's Fourth District Court of Appeal observed in *Overfelt v. State*,[38]

> When the appellant states the facts, it is the responsibility of the appellee to point out the specific areas of disagreement in the appellee's statement of the facts. If the appellee, as occurred in this case, concedes that the appellant's factual statement is correct, then this court will not make an independent inspection of the transcript to determine whether the [appellee] was remiss in accepting the opposing factual statement.[39]

Given that the appellee can argue to affirm the result in the court below on alternate grounds,[40] the appellee should include any additional facts needed to support its argument based on those alternate grounds.

Writing Style for the Facts

A detailed discussion of writing style is beyond the scope of this Article. There are excellent books on legal writing style.[41] Using active voice and writing in short, declarative sentences makes for easier and clearer reading. Counsel should avoid legalese, like "hereinafter," "notwithstanding," and other words that long ago disappeared from normal English discourse.[42] Sprinkling one's writing with adverbs and adjectives weakens the writing. Most sentences stand stronger without such modifiers.

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38. 434 S.2d 945 (Fla. Dist. App. 4th 1983).

39. *Id*. at 949.

40. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 S.2d 638, 644 (Fla. 1999).

41. *E.g.* Bryan A. Garner, *The Elements of Legal Style* (Oxford U. Press 2002); Bryan A. Garner, *The Winning Brief* (Oxford U. Press 1999); Tom Goldstein & Jethro K. Lieberman, *The Lawyer's Guide to Writing Well* (McGraw-Hill Publg. Co. 1989).

42. In tongue-in-cheek comments to an audience, United States Justice Antonin Scalia remarked: "It is essential . . . that one write as pompously as possible, using words and phrases that have long since disappeared from normal English discourse." *Obiter Dicta*, 76 ABA J. 41, 41 (Dec. 1990).

Referring to the Parties and the Record

Judges often read numerous briefs on the same day. Advocates should not refer to the parties as "appellant" and "appellee." Think how easy it is to become confused when reading several briefs that describe parties as "appellant," "appellee," "cross-appellant," and "cross-appellee." It is simpler for the court to understand the factual scenario when one uses "plaintiff" or "defendant." It is even better to use descriptive references. For example, in a construction dispute, it is much better to identify the parties and then refer to them as "homeowner" and "builder." Likewise, "husband" and "wife" have particular meanings in domestic relations cases.

Counsel should tell the court in the Preliminary Statement or Statement of the Case or Facts how it will refer to the parties. Beware of confusing abbreviations. For example, if one party is Always Fair Mutual Automobile Insurance Company, consider using "the Insurer" or "Always Fair," rather than "AFMAIC." At the same early point in the brief, counsel should tell the court how it will cite the record and other items, such as the opposing party's brief or an appendix.

CONCLUSION

The appellate brief's Statement of the Case and Facts can catch the judge's attention, introduce the party's theme and show the court that the writer's side should prevail. Or these sections can confuse the reader, discredit the writer, and condemn the party to losing. Some appeals do present only issues of law with simple, uncontested facts. But in many cases, how the advocate develops and presents the facts can be the turning point in the appeal.