

**BRIEF WRITING: ADVANCED TECHNIQUES FOR
WRITING A STATEMENT OF FACTS**

ROGER TOWNSEND, Houston
Fulbright & Jaworski

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By Roger Townsend

I. IMPORTANCE

After the issues presented, the statement of facts is, perhaps, the most important part of the brief. For one thing, it convinces the court of the justice of your client's position. For another, most experienced appellate judges have some idea as to the applicable law, but they do not know the facts of your particular case. A persuasive statement of facts will make the appellate judges want to decide in your favor, without reading any more of your brief.

In preparing the brief you should spend almost one-half of your time in learning the facts and drafting the statement of facts. The law very often can take care of itself, but the statement of facts is the heart of the appeal. If you get the court more receptive to your position by the phrasing of the statement of facts, the court is going to be much more receptive to the legal arguments that you are making. Even with a tough argument on the law, you at least will have the judges leaning: the judges will be looking for ways around the legal problems, rather than automatically stopping at them.

Although the statement of facts is a key part of the whole brief, the Texas rules do not specifically encourage it as a separate section preceding the argument. Yet a survey of all Texas appellate judges revealed that they welcome a separate statement of facts section before reaching the argument, provided it is fairly short and has record references.

II. HONESTY AND ACCURACY

In writing the statement of facts, you always are bound to the record. You must, therefore, know the record completely. A major pet peeve of appellate judges is the assertion of facts without record references. Avoid irritating them by having a record reference for every fact. The only way to do this is to read the record. You may have been the trial lawyer and think you know what the facts are. But you still must review the record to plug in those record references. Reading the record also is a good practice because your memory will fail. Nevertheless, you can write your brief from an abstract prepared by a trustworthy associate, provided the final draft is cite-checked to the record and provided you personally review key record references.

The abstract of the statement of facts or transcript is similar to a deposition summary, but more focused. You generally will have some idea what the issues on

appeal are going to be, and you know to look closely at the court's rulings during the trial. The amount of detail is a matter of personal preference and work habits, but the abstract should be more than a mere index to the testimony. Otherwise, you will have to refer constantly to the actual testimony itself. I prefer to work from the abstract itself, resorting to the actual record only for critical points, choice quotations, and for cite-checking.

Computers are helpful for lengthy records, because they allow word and phrase searches. They also save time in verifying the record references. Nevertheless, placing the testimony on a computer retrieval system does not substitute for an abstract. And in large cases, you may have mini-abstracts arranged by topics, lists of witnesses with their testimony summarized generally, and checklists of proof for the elements of the various causes of action and defenses.

Guidelines for Abstracting a Statement of Facts

1. Include the court reporter's index at the front of the abstract.
2. Note the name of the witness and type of examination (*e.g.*, direct, cross, voir dire, bill of exception) in capital letters.
3. Note all rulings on exhibits, motions, and objections in capital letters.
4. Identify where parties rest in capital letters.
5. Be especially sensitive to whether something is occurring outside the presence of the jury and note it in capital letters or underlining.
6. It often is helpful to read the statement of facts and exhibits once, underlying key matters, before dictating the abstract. Then you can place the matters in context and edit what goes in the abstract.

The statement of facts should not be exaggerated or loosely paraphrased, and quotations should be limited in the statement of facts. Particularly pithy phrases can be quoted, but by-and-large, use accurate paraphrasing. The statement of facts *must* be accurate, objective, and have record references for every assertion. No exceptions exist for this requirement.

If the specific facts in your case are bad, you will need either (1) to manipulate the level of linguistic abstraction until you reach facts that can be stated in your favor, or (2) to show procedural barriers to the decision impelled by the facts. Unfavorable facts can also be neutralized either by placing them in context or by stating them in footnotes. You must be candid about bad facts, using good facts to offset them. If the unfavorable facts cannot be refuted, you can ignore them, but you should then consider dismissing your appeal.

III. MATERIALITY

A great statement of facts is comprehensible, is interesting, neutralizes unfavorable facts, and satisfies the curiosity of the court on peripheral facts (such as who was the judge below). To achieve such a statement of facts, there are certain techniques. One technique is to draft the statement of facts after you have sketched the arguments you wish to make; this ensures that you raise only facts that are material to the argument.

Given the volume of cases before the court, you should edit, trim, and reduce the statement of facts as much as possible. Adding needless details in the statement of facts weakens your brief. Appellate judges have a tendency to try to recall every fact that you state. When you give them immaterial facts, you distract them from the key facts. If there are inferences to be drawn or more details that have to be given, work those into the argument later in the brief.

Omit not only all immaterial facts, but also all immaterial details about the material facts. Nearly all cases can have their material facts stated in no more than four pages. More details than that are simply more than most judges can absorb. Think of the judge reading the brief at home after having just read four other briefs. She has a large amount of information to assimilate at one sitting. All these facts are new to her, even though you have lived with the case for several months or years. The judge has a natural reaction that everything you are telling her is important. When you provide needless details, you overwhelm the judge. The information cannot then be assimilated, and the key facts that show the justice of your position become lost in the torrent of details.

To quote Sherlock Holmes: "It is of the highest importance . . . to be able to recognize, out of a number of facts, which are incidental and which vital. Otherwise your energy and attention must be dissipated instead of being concentrated." If you cannot state the facts within four pages, you should question whether the facts you are stating are really material.

Excessive length is frequently generated by the addition of too many needless details, such as dates: "On or about such and such date this happened." Usually the dates are irrelevant, although in some cases a certain contract issue may depend on when an offer expired or an acceptance occurred. But it truly does not matter on what day an automobile accident occurred or when a contract was entered into, unless you have a statute of limitations or pre-judgment interest question. The same is usually true about colors of things, what the weather was like, and the parties' full names.

Similarly, when writing a statement of facts, never simply list the witnesses and describe their testimony. Instead, you should highlight the key facts and skip contextual or unnecessary details. Because credibility is an issue primarily for the jury, the name of the witness and his expertise generally is irrelevant to the appellate court.

It is likewise useful to use last names or labels for the parties, rather than procedural phrases such as appellant or appellee. "Plaintiff" or "defendant" is better, and probably best is "the widow," "the bank," "the insurance company," and the like. For ease of comprehension, jargon should be explained. You also can consider attaching a glossary as an appendix in a substantively technical appeal.

IV. ORGANIZATION

Another consideration for an effective statement of facts concerns its organization. If the appeal is a simple case, or if you have successfully interrelated the issues into a thematic presentation, usually the chronological statement of facts is best. If you have a large case with disparate issues that cannot be thematically related, then the facts can be marshalled topically. For a lengthy statement of facts, topic headings can be useful.

It is useful to summarize the critical facts in the first paragraph. Then, in subsequent paragraphs, state the key facts in a topic sentence, adding details in the remainder of the paragraph. As Sherlock Holmes--that famous brief-writer--said: "Each fact is suggestive in itself. Together they have a cumulative force."

V. TELL A STORY

A good statement of facts should be like a good short story. It should have a cast of characters and a plot. The statement of facts must answer the same questions that a short story answers: Who did what to whom? And when, where, how, and why did it happen? As in a story, the characters and action must have a setting both in time and place. The relationship between the characters should be explained. There are even dramatic opportunities to develop the characters. Naturally there will be conflict; if not, then there would have been no lawsuit! And there should be a resolution of the conflict, usually the verdict or judgment. Irony is particularly useful here.

These points are obvious. But more subtle lessons of storytelling can further improve the statement of facts. You have a choice of who are the major characters and who are the minor characters. This choice can be important when you wish to show that another party should bear the brunt of the liability, rather than your client. As Charles Dickens clearly understood, the names used to describe the characters can also advance the story. Do you choose to call the plaintiff "the plaintiff," "the appellant," "Mrs. Smith," or "the widow"? Do you choose to call the defendant "the defendant," "the appellee," "BFD Corporation," or "the insurance company"?

But you have even more tools at hand. You cannot tell every fact; you must select which facts to emphasize. Your selection will depend in part on the issues raised

in the argument section of the brief. You will wish to present primarily only those facts material to the legal arguments.

Yet other facts can establish the background that the reader needs to place the action and characters in their proper context. And atmospheric facts can affect the reader's emotions and grab the reader's attention. To select these facts, you must have a theme for the statement of facts. This theme should flow from the theme of the appeal. It should implicate values that will move the court to want to decide the case in your client's favor. Some examples of statements of facts that support the theme of the appeal are provided at the end of this paper; they will be discussed orally at the workshop.

To support this theme, you have other available tricks. One of my favorites is to manipulate the level of abstraction until you reach a level that will support your client. For example, is the car that ran the stop sign simply a car with bad brakes, or is it a rusty 1966 Pontiac Bonneville that has been converted into a low-rider by a previous owner? Is the adhesion contract simply a written instrument or is it a twelve-page, single-spaced form agreement with the critical provision about rights of repossession in fine print on the back of the seventh page? By varying the degree of specificity of the language, you can almost always find a better way to tell the story that is both accurate and helpful to your client's position.

More sophisticated techniques are also available. You can select the point of view of the narrator. Generally, telling the story in the third person as a disinterested observer will be most effective in a legal brief. But there are instances when the witnesses can be allowed to speak for themselves with devastating effect.

You can also control the order in which to tell the facts. The juxtaposition of facts that may not have been directly related at trial can present the case in a new light to the appellate court. Events that occurred at widely different times can be made to look sinister by their being related together in the statement of facts. This juxtaposition is not to be used to mislead the court, and you must be careful not to imply overtly a relation that does not exist in the record. But marshalling facts to tell a story that the jury may have constructed for itself is not improper.

Use the standard of review in writing the statement of facts. If it is in your favor, you can draw reasonable inferences from the facts in the record. Similarly, you can afford to admit the presence of disputed facts if you represent the appellee and the jury has decided in your favor. The same is true if you represent the appellant from a summary judgment, judgment n.o.v., or the like. Or you can ignore the evidence favorable to the adverse party when there has been a clash in the evidence.

Finally, in editing the story, you should not forget symbolism. A short story creates a lasting impression not merely because it is interesting, but because the story has relevance to its readers' lives. Similarly, the statement of facts must come alive for

its readers. The appellate court wants to do justice in this case, but by applying a rule that will do justice in similar cases. Thus, the facts must speak beyond the present case, at least in their connotations. You should pay particular attention to your diction to select words that are both accurate for this case and suggestive of values that may arise in future cases.

VI. STYLE

You should further consider the style of the statement of facts. The statement of facts should be different from the argument, because your credibility as an advocate is at stake. You can add certain background facts to show the justice of your position, but you should avoid the use of emotional words in a statement of facts (though you can use them in the argument); instead, use clarity and organization to be persuasive. The clever use of conjunctive adverbs, such as "although," "nevertheless," and "however," can also be effective.

A few other standard stylistic tips deserve mentioning. Use nouns and verbs, rather than adjectives and adverbs. Use verbs to express actions. Choose a word and stick with it; elegant variation does not belong in legal writing. Prefer short words and relatively short sentences. Start sentences quickly, saving lengthy clauses for the end. Observe proper emphases by saving important information for the end of the sentence. Keep a consistent topic in your paragraph. Use the passive voice whenever it permits a consistent topic or you wish to hide the actor. In writing consecutive sentences and paragraphs, always let the reader see what is coming next by skillfully using transitions. Employ consistent words and phrases throughout the brief to emphasize points and to improve cohesion.

VII. CHECKLIST FOR WRITING THE STATEMENT OF FACTS

1. Abstract the testimony.
2. Note key points in the abstract.
3. Use the key points to outline the evidence by topics.
4. Use the topics to identify themes.
5. Identify relationships among the themes.
6. Group the related themes.
7. Identify a goal for the statement of facts and an approach to achieve that goal.
8. Identify stylistic techniques to achieve the goal.
9. Revise the group of related themes to match the techniques.
10. Prepare a topical outline of themes.
11. Organize the abstract by topical themes.
12. Cut and paste, or dictate, a draft from the reorganized abstract to follow the topical outline of themes.

13. Edit the draft by reviewing the record and exhibits to add quotations, improve transitions, and draft headings.
14. Shade the style of the draft using advanced writing techniques.
15. Revise grammar and carefully consider diction.