



Litigation Practice Tip - March 2022

Nothing but the Statement of Facts

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It's hardly original to observe that cases are often won or lost on their facts, but facts don't exist in a vacuum. You have to (1) discover them; (2) present them; and (3) write about them effectively in a brief. This article will focus on the latter task, discussing both the overall organization and content of statements of facts.^[1]

The Statement should tell a story logically, generally chronologically. The Statement should read like a story, keeping the reader's interest. But unlike a movie with lots of flashbacks and unexpected plot twists, a brief must tell a story that's clear from the outset and proceeds logically.

In most cases, that means first reporting what happened to bring the parties to court, and then what happened once the litigation began. As for the former, telling the story chronologically almost always makes the most sense. And that usually means reconstructing the story from a jumble of oral or written testimony; avoid unthinkingly summarizing that testimony in the order it had been presented.

Look for ways to highlight the most emotionally compelling facts and evidence.

While as noted below, you should provide a terse summary of the unfavorable facts, you should find ways to highlight favorable facts, particularly those that are emotionally compelling. Quotes from your client, about your client, or concerning the plight of others similarly situated are often the most effective way of doing that. Once you locate that quote or fact, make sure not to bury it in the middle of a long section. Sometimes, it is most effective for it to be the last thing the judge reads before getting to the argument.

Break up lengthy Statements with subheadings written in non-argumentative sentences. As with the argument portion of your brief, you can enhance the brief's overall readability, clarity, and persuasiveness by breaking up the Statement with thoughtful subheadings.^[2] The reader should get a good idea just from the Table of Contents what happened outside of court and then in court from your side's perspective.

As is now the practice with major appellate law firms, write the subheadings in sentences rather than fragments. For example, suppose you are writing an opening brief in an appeal from a denial of a preliminary injunction. You could describe that denial under a heading such as "**Trial court proceedings**" or the slightly more descriptive "**Denial of preliminary injunction.**" But it would be much more effective to write (if true) "**Trial court finds that balance of harms favors plaintiffs, but denies preliminary injunction based on a single sentence in an appellate opinion.**"^[3] Just with the use of a heading in a factual Statement, the brief has emphasized that the plaintiffs have already won half the battle; and started to cast doubt on the trial court's ruling.

But note that the sample heading does *not* say "Trial court . . . *erroneously* denies

preliminary injunction.” Statements of fact, including headings, must not be argumentative.

Never ask a judge to take your word for an important fact. Every factual statement in a brief must be supported by a citation to evidence – usually a declaration, exhibit, or portion of a transcript – that the court can readily locate. Case law uniformly holds that when “an appellant’s brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made.” *In re S.C.*, 138 Cal. App. 4th 396, 406 (2006). The same is true for litigation in the trial courts, where over-burdened judges and staff are even less likely to search the record to verify a fact stated in a brief.

Two limited exceptions come to mind. First, you can sometimes cite to very well known facts that will not be disputed, such as, in the early 2020s, the existence of a pandemic. And second, you cannot and thus need not provide a citation for a negative, such as “no witness testified seeing the defendant fire the gun.”

Strive to be accurate as if your case and your reputation depend on it. (They do.). Never misstate or even overstate a material fact. While judges will be annoyed with an attorney for overstating the holding of a cited case, they might attribute it to misunderstanding or over-zealous advocacy. Not so with inaccurately stating a critical fact; that can doom your case and future cases with the same judge and opposing attorneys. Make sure to get the facts right.

Do not ignore unfavorable facts. In the same vein, it is important, and often required by applicable rules, to report evidence unfavorable to your case. But at the same time, it is permissible to downplay that evidence in non-argumentative language. For example, an appellate brief defending an attorneys’ fees “catalyst” award against the DMV could say, “two mid-level DMV officials testified that the change in policy was caused by intervening legislation, but each official acknowledged she had no policy-making role, and neither expressly denied that the litigation was a substantial factor in the change. [cite to record]”

Limit the Statement to include only the facts important to your proceeding. When you are initially drafting the Statement, the goal might be to include any fact that could prove important. But in the editing process, particularly if you now know what the legal arguments will be, cut out the unnecessary facts. For example, if the sole issue in an unlawful detainer brief is whether the landlord properly served the tenant, you don’t need five pages on the condition of the apartment. One thing to look for is whether the recitation of specific dates is necessary. Sometimes, dates are important, but most often they are not, and they make the brief both less readable and more confusing. (“Why is the author telling me that something happened on Oct. 1, 2020? Should I try to remember that date?”) Similarly, if the case has progressed in the trial court or is on appeal, a lot of the earlier proceedings (e.g., demurrers) have become irrelevant and need not be reported.

Cite applicable law sparingly to the extent necessary. Sometimes a Statement needs to include a brief summary of the governing law so that the judge will understand the relevance of the facts governing the client’s case. (Medi-Cal cases, for example, often need that summary.) But keep that portion of the Statement as brief as possible, and save the detailed explanation for your argument.

[1] As for no. 1, we hope you enjoyed Western Center’s 2021 Discovery Academy. And for a good Tip on presenting facts, see Bob Newman’s August 2021 Litigation Practice Tip, [Declarations and Personal Knowledge: Do the people really know what they are talking about?](#)

[2] For a refresher, see last month’s [13 Tips on Organizing Your Brief](#).

[3] As readers may have guessed, some of the examples in these Tips are taken from my past cases, but not always in the way you might think. The above more effective example is a heading I would have written had I known better rather than the one I actually wrote.

As always, if you have any questions about this Tip or want some help editing your facts, please feel free to reach out to [me](#).



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