

EVERYTHING YOU NEED TO KNOW ABOUT PREPARING STATEMENTS OF APPEALABILITY, THE CASE AND THE FACTS IN CRIMINAL APPELLATE BRIEFS

Acknowledgments

This training module is vastly borrowed material from the AOC 2000 Appellate College lecture materials. The materials have been updated to reflect more current cases and modified to fit appellate practice in the Third and Fifth District Courts of Appeal where indicated.

Introduction

A criminal appellate brief always begins with three required statements: 1) the Statement of the Case, 2) the Statement of Appealability, and 3) the Statement of the Facts. For many advocates, preparing this part of the brief can be sheer tedium. Yet, experienced appellate counsel know that although arguments are not won and lost here, the benefit of drafting and editing quality preliminary statements will serve to focus the reader and set the stage for the arguments. Once the target audience (appellate justice or clerk) has finished reviewing the table of contents and the three statements, he or she generally has a pretty good idea what's at stake in the appeal, how it will be argued, and why the judgment should be reversed. The arguments that follow give them a basis to do so.

It takes careful work to put together well-crafted and effective Statements. Some panel attorneys, especially in the more complex, long-record cases, worry that they can never be fully compensated for the time necessary to write effective statements, especially fact statements. Statewide guidelines for compensation for Statements of the Case and Facts are a combination of ½ of the record review time, but with a guideline “maximum” of 10 hours. However, if the statements are unusually long – and appropriately so for the issues being raised – compensation over guideline time may be recommended by the appellate project attorney. The guiding factors for the recommendation are a combination of the level of detail in the statements and whether such detail is appropriate to the case and related issues raised. Thus, experienced appellate writers do not spend a lot of time including proceedings or facts that are irrelevant to the issues raised on appeal, and some simply resign themselves to taking their lumps rather than sacrificing the quality and effectiveness of the facts statement in a long record, complex case where a fair amount of editing to make them reader friendly may be necessary.

Prefatory Note on References to the Record on Appeal

Rule 8.204(a)(1) requires that statements “support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” Courts of Appeal have often emphasized the importance of this rule and voiced their displeasure with noncompliance. (See, e.g., *Landfield v. Gardner* (1948) 88 Cal.App.2d 320, 322-323, *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.)

Two sets of issues arise as to the use of record references in the Statements of the Case and Facts. First, how to make shorthand references to the various parts of the record; and second, how meticulous one must be in making record references.

On the first point, where there is a single sequentially numbered clerk’s transcript and a single sequentially numbered reporter’s transcript, one can simply refer to these as “CT” and “RT” without need of a specific explanation. If, as is often the case, there are multiple augmentations, supplements, or multiple volumes with separate numbering, some additional shorthand references are needed, with a footnote alerting the reader to this. For example:

As separate notices of appeal were filed after conviction in the two trials, the clerk’s and reporter’s transcripts on appeal from the first trial, Court of Appeal No. C012762, and from the second trial, Court of Appeal No. C013188, are separately numbered. For the sake of brevity in nomenclature, appellant refers to the record from the first trial simply as “RT” and “CT,” and to the record in the second trial as “2RT” and “2CT.”

This can be also used to distinguish transcripts of trials and probation revocation hearings, and the primary record (“CT” or “RT”) from the augmented record (“ACT” or “ART”).

As to the second point, many excellent advocates, and most appellate projects, recommend putting in record references for virtually every sentence in their Statements of the Case and Facts, believing this to be the most accurate and complete way of complying with rule 8.204(a)(1). A minority put record references at the end of each paragraph, especially in the Statement of Facts, on the belief that this greatly improves the flow and

quality of the writing. What ultimately matters is whether the references are precise and accurate, and whether the reader – appellate judge, clerk or adverse party – will be able to find the matter stated in the pages provided. Regardless of which path you follow in your own writing, it is always important to pinpoint record references carefully. It will never do to follow a long paragraph, or series of paragraphs, with sweeping references to many pages of the record (e.g., “RT 21-49”). In fact, a non-complying brief may be not be filed or subject to other sanctions. (Cal. Rules of Court, rule 8.204(e).)

At the same time, it is rarely, if ever, necessary to refer to *line* numbers, as opposed to page numbers, in the brief. This limitation not only saves an enormous amount of time for you the writer, but also improves the readability of the Statements.

The Statement of Appealability

Rule 8.204(a)(2)(B) states that the appellant in his opening brief must “state that the judgment appealed from is final, or explain why the order appealed from is appealable.” Most criminal appellate advocates add a separate preliminary “Statement of Appealability” before the Statement of the Case that parrots the language of Rule 8.204, and indicates that the present appeal lies under Penal Code section 1237, subdivision (a). This dull and routine method is generally sufficient but necessary since the court clerks look for it before accepting the brief for filing.

Another approach, which seems to better fit the narrative flow of the three Statements, is to situate the separate Statement of Appealability *between* the Case and Fact Statements. Again, the clerks will look for it in one of these two places and in the table of contents before accepting the brief for filing.

Finally, more attention to the appealability statement is required if the appeal is after a plea of guilty or no contest, or follows a post-judgment order. The Statement of Appealability in this situation should explain, where pertinent, that either:

- (1) the appeal is made after a plea but is limited to matters occurring after entry of the plea which do not challenge the plea, and thus lies pursuant to rule 8.304(b)(4)(B);
 - (2) a certificate of probable cause has issued as to issues which occurred prior to the plea or which challenge the plea and the appeal is proper under section 1237.5;
 - (3) the appeal concerns denial of a motion to suppress evidence, and is thus proper pursuant to Penal Code section 1538.5, subdivision (m) and rule 8.304(b)(4)(A);
- and/or

(4) the appeal is of an order after judgment affecting the substantial rights of the defendant (e.g., denial of a request for presentence credits) and is proper under section 1237, subdivision (b).

The Statement of the Case

The Case and Fact Statements are also required by rule 8.204(a)(2)(A) and (C), which calls for a statement that will “state the nature of the action, the relief sought in the trial court, and the judgment or order appealed from” and “provide a summary of the significant facts limited to matters in the record.”

In a criminal case, the purpose of the Statement of the Case is to give the Court of Appeal a quick overview of pertinent procedural facts and events in the trial court. There is never any reason to include everything which transpired below. In the vast majority of cases the Statement of the Case should be no longer than a page or two. But there are certain items which should always be included in the Statement of the Case; and there is other significant procedural background which can sometimes be effectively added in for tactical reasons.

A. The Essentials: A Chronological History of the Case

While there is no set formula for a Statement of the Case, a set of basic ground rules should almost always be followed. The Statement of the Case should be organized in chronological order. Begin with the content of the charging information or indictment, then move to the next relevant event, describing the procedures below in the same sequence they occurred, ending with the filing of the Notice of Appeal. If you follow this format, the clerk or judge who reads your brief will get an immediate, easy to remember, general overview of the case.

Bear in mind that in the typical case, the clerk or assigned justice who reads your brief has not read the record on appeal. The Statements of the Case and Facts provided in the appellate briefs – yours and the Attorney General’s – will usually be their sole source of information about what happened in the case. If your Statements of the Case and Facts are concise and easy to follow, you will be more likely to get, and keep, the court’s attention.

1. Charges Alleged Against Your Client

The Statement of the Case should always tell the court what charges were alleged in the Information, including any enhancement allegations, with citations to the relevant code

sections. Prior convictions, probation ineligibility allegations and the like should normally be summarized as well for a complete picture.

Keep this section short and easily understandable. For example, if the information alleges several counts, state what charge is alleged in which count. If several different enhancements are alleged, state what enhancements apply to what counts. Though it is not always possible, summarize when you can. For example, if the information alleges three counts of robbery and use of a deadly weapon only as to count one, you need not separately describe each count. Simply state that the information charged appellant with three counts of robbery and that personal use of a deadly weapon was alleged as to count one. If there are a great number of charges (e.g., 40 counts), a chart detailing the charges and enhancements is helpful to the reader.

Some care must also be taken with respect to amendments to pleadings, especially in cases with many counts and enhancing allegations. Frequently there will be one or several amended informations filed, and the charges on which a client is tried may differ in significant particulars from the original charges. It will rarely, if ever, be effective to spell out the details of all the individual informations and subsequent amendments. Absent some need to dwell on the amendments to the pleadings (e.g., if there is a preserved appellate issue concerning untimely amendment), it is probably best simply to note that the client was charged by the original information on such-and-such date, then relate how he went to trial on the charges in the third amended information, which can then be detailed:

A second amended information filed on August 30, 2002 charged appellant with two counts of robbery (Pen. Code, sec. 211), one count of attempted robbery (Pen. Code, secs. 664/211), two counts of assault with a firearm (Pen. Code, sec. 245, subd. (a)(2)), and one count of discharging a firearm with gross negligence (Pen. Code, sec. 246.3), with a firearm use allegation (Pen. Code, sec. 12022.5) on all charged counts. (CT 7-9.)

Some attorneys include a note to the effect that “appellant entered a plea of not guilty to the charges at arraignment in superior court on such-and-such a date,” however, this is considered an unnecessary fact.

Since the Court of Appeal is familiar with the applicable codes, there is no reason to recount the elements of the crimes described in the information. Just state the name of the offense and the applicable code section, and refer to the pages in the clerk’s transcript where the pertinent accusatory pleading is found, e.g. “One count of assault with a firearm (Pen. Code, sec. 245, subd. (a)(2)). (CT 7.)”

2. How the Conviction Came About

Next, describe what procedures resulted in appellant’s conviction(s): a jury trial, a court trial, or a plea. Give the date on which these events occurred. If appellant pleaded guilty as part of a plea bargain, briefly summarize the important terms of the bargain. In more complicated situations – e.g., a slow plea, guilty pleas as to some but not all charges, etc. – some care is required in explaining the unusual circumstances.

3. Verdict

If appellant had a jury trial or court trial, state the verdict. If the result was conviction on all counts, simply state that without repeating each charge. Briefly explain when charges were dismissed, or if appellant was acquitted on some charges and convicted of others. For example:

After deliberating for nine hours over three days, the jury found appellant not guilty for the robbery and receiving stolen property charges involving victims Smith and Jones (counts 3 and 4), and guilty on all other charged crimes and found the firearm allegation true. (RT 450, 514, 537-542.)

4. Sentence

Next, describe the sentence imposed and the date of sentencing. There is some question whether you need to detail the specifics of the sentence in the Statement of the Case (e.g., that the court imposed a four year middle term, with three consecutive one third middle terms, etc.). Many writers always do this. However, if no claim of sentencing error will be raised in the brief, this serves no important purpose; and sometimes care must be made not to delve into details which might alert the court or the Attorney General about a

possible unauthorized sentence. For example: “Mr. Smith was sentenced to state prison on August 3, 2003, for a term of 20 years, 8 months.” Even where a limited claim of sentencing error is raised, it is usually not necessary to spell out all the sentencing details. Occasionally, where sentencing error is a primary or particularly key issue in the appeal it may be worthwhile to give a succinct summary of some of the sentencing details in the Statement of the Case. Normally, the more exacting details of the sentence – e.g., the reasons stated by the court for sentence choices, the interrelation of various complex sentencing schemes, etc. – should be saved for the sentencing arguments in the issue portion of the brief.

5. Notice of Appeal

Finally, your Statement of the Case should usually conclude with a notation of the fact that a timely notice of appeal was filed, giving the date and appropriate record reference.

B. Optional Case-by-Case Matters

1. Motions

If you are raising the denial of a specific motion as error on appeal – e.g., pretrial motions to suppress or sever, trial motions such as *Wheeler* or mistrial motions – the Statement of the Case should identify the nature of the motion, the date it occurred, and the court’s ruling. Only scant detail need be included here as a more thorough discussion of the procedural history of the motion belongs in the introduction to the argument on this point. There is rarely any reason to mention motions decided favorably to the defense, or ones where the rulings do not give rise to an issue on appeal.

2. Extraordinary Events

During the course of a criminal trial any number of events might occur which could give rise to an issue on appeal: e.g., defendant being forcibly removed from the courtroom or compelled to be tried in jail clothes, a juror being excused for illness or misconduct, a lawyer being held in contempt, etc. Where these form the basis for an issue on appeal, they should be briefly mentioned in the Statement of the Case. Wait until the argument section of your brief to describe the underlying facts in detail.

There is usually no need to recount here the ordinary trial events (e.g., objections to the admission of evidence), which form the basis for a claim of error on appeal. This is better handled in the first part of the argument of the issue. A tactical exception can lie where

there is only a single issue on appeal, or a primary one; in such cases, you can sometimes use the Statement of the Case as an introduction to the argument.

3. Close Case Indicators

You can often include procedural events which indicate the case was close to begin building a showing of prejudice. For example, you can mention that the jury deliberations were long (i.e., “After deliberating for over thirteen hours over three days, the jury found appellant guilty of first degree murder. (RT 248-259.)”); that the court stated its difficulty in deciding a particular issue (i.e., “After opining that the evidence presented a ‘very close case,’ the court denied the new trial motion. (RT 26.)”); or that there was a previous hung jury (i.e., “On January 26, 1992, the court declared a mistrial after the jury deadlocked at 9 to 3 in favor of acquittal. Retrial began on March 5, 1992. (CT 185.)”) These comments should be made sparingly, and are no substitute for the need to emphasize these favorable procedural facts in your discussion of prejudice in the argument portion of the brief.

C. Events Which Are Rarely Included

1. Municipal Court Proceedings

As a general rule, the proceedings in municipal court – filing of the complaint, the preliminary hearing, etc. – have no bearing on the appeal and it is bad form to mention them in the Statement of the Case because they are useless facts. As with all general rules there are exceptions. You need to note if your client pled guilty to a felony in municipal court that was certified to superior court for sentencing, with appropriate references to the record. Motions brought and denied in municipal court occasionally merit mention when they form part of the basis for an appellate issue. For example, if your client brought an unsuccessful motion to suppress evidence at the time of the preliminary hearing, pled guilty in superior court, and is appealing the denial of the suppression motion, the municipal court proceedings must be cited.

Sometimes the fact that certain events occurred in municipal court is critical to raising a particular error on appeal. For example, if *Brady* error occurred in the case, you may want to mention that an appropriate discovery motion was filed in the municipal court case. The fact that a *Faretta* motion or a *Marsden* motion was brought in municipal court may strengthen your argument that denial of the same motion in superior court was error. There are countless possibilities depending upon the peculiarities of the facts in a particular case. The rule of thumb is: don’t include it unless it is relevant to an issue you are raising on appeal.

2. The Names of the Players

It is normally not necessary or proper to include the names of the judge, the prosecutor or the defense attorney in the Statement of the Case. Some people believe it is usually not a good practice to do this in the Argument portion of the brief either, contending it's better not to personalize the court's errors. Another view is that it is proper to bring names in if you believe that personalizing the error or ineffectiveness will help your chances on appeal, e.g., where a negative reputation of prosecutor, judge, or defense counsel precedes the misdeeds in your case, or where you're really going to be hitting the villain in the piece hard for misconduct, malicious error, or ineffectiveness; however, these should be rare cases.

Also, where there are multiple players involved, e.g., issues concerning various substitutions of attorneys in the case, or multiple judges, it helps the reader if you identify the individuals involved for clarity's sake.

D. Common Errors

1. Too Much Information/Not Enough Information

While it is important to keep your Statement of the Case as short as possible, it is equally important to provide sufficient information to apprise the court of the basic nature of the case and the critical events at or before trial. Section A, above, lists information which should always be included. Before filing an opening brief check your Statement of the Case to make sure these essentials are included.

Sections B and C above outline the various information which may or may not be included in your Statement of the Case depending on the particulars of your case. As emphasized earlier, the operative rule is, do not include procedural matters in the Statement of the Case unless there is a specific reason to do so. A Statement of the Case which includes irrelevant procedural details will be boring at best and extremely irritating at worst.

2. Overly Verbose Descriptions

Remember, the Statement of the Case is not a mere toss-off; rather, it is the judge or clerk's first entree into your client's case and the arguments by which you hope to persuade them to reverse the judgment. Thus, as with the entire brief, the Statement of the Case requires careful editing as to content and form. Keep an eye out for long or overly detailed descriptions of the procedures, and delete them (or move them to the introductory part of your substantive arguments) when you find them. Your reader is more likely to

become interested in the Statement, and therefore read and absorb it, if your writing is clear, succinct, and to the point.

The Statement of Facts

As counsel for appellant in a criminal case you have the burden of persuading two of three judges to reverse either the verdict of twelve citizens after jury trial, the verdict of one of their brethren after court trial, or a sentence imposed on an individual convicted of a crime. Your first shot at meeting that burden is the Statement of Facts in the opening brief. Indeed, the court's understanding (or lack of understanding) of the facts may determine the outcome of the case.

The primary purpose of the fact statement is to let the court know what the case is about. A well crafted fact statement does much more. It is the means by which you take control of the case by setting up the legal issues you will be raising on appeal – by humanizing your client and/or mitigating the crime, by demonstrating the inadequacies of the prosecution's proof or the reasons why particular errors were prejudicial, and by establishing your credibility with the court.

A. Get Organized

The first step towards creating a persuasive Statement of Facts is to read the record carefully and to take comprehensive notes with page citations. That way, you will not have to re-read the record as your notes will suffice. If possible, read the record all in one sitting or, with a long record, in one block of time. Most appellate lawyers agree that the best practice is to take careful, even copious notes when you read the trial portion of the record. You need to decide whether you are better served by handwritten notes or computer-typed ones (or post-it notes for really short record cases). Although there are advantages and disadvantages to each choice, most attorneys find the computerized method is by far more useful and efficient.

There are two principal theories about when to write the Statement of Facts. Many practitioners (including the authors of the original essay) recommend that you write a rough draft of the factual statement as soon as you have completed reading the record, while the facts are fresh in your mind. In such a draft, you should err on the side of overinclusiveness, then edit out irrelevant matters and refine your language after you have had the chance to formulate the issues and do your legal research. If you cannot do a rough draft right away, do it as soon as you can. The longer the span of time between the reading of the record and the writing of the facts, the more likely it is that you will waste

precious, and perhaps unbillable, time rereading portions of the record. It is also more likely that you will forget details or nuances that you originally intended to include.

Other practitioners believe that the best Statement of Facts will be written after you have figured out, at least tentatively, what issues you will be raising on appeal, as the shape of the issues affects how you will organize your fact statement. For example, if lots of evidence was presented as to the identity of the perpetrator, but your issues on appeal all have to do with the instructions on homicide, you will need only the briefest summary of the identification evidence, and will want to pay a lot of attention to the circumstances surrounding the killing. If you choose to draft your fact statement when you are writing the rest of your opening brief, it is even more imperative that you make very careful, detailed notes when you review the record, which will hopefully be adequate to refresh your mind about the details of the case after the all-too-often long delay between review of the record and preparation of the opening brief.

Finally, whichever of these two approaches you utilize, when your notes fail you or confuse you on some key point (or when you can't read your own handwriting), *always* go back to the record itself to find out what actually happened or was said.

B. Matters Usually Excluded From the Statement of Facts

In most cases, the Statement of Facts summarizes the facts *of the offenses* presented at the trial, not an account of the trial proceedings. The content of pretrial motions, arguments held outside the presence of the jury, opening and closing statements, discussions of jury instructions, the text of jury instructions, and the sentencing hearing and/or matters included in the probation report ordinarily are not included. If you plan to raise an error which occurred during one or more of the proceedings just mentioned, the most common practice is to describe the predicate facts in the argument section of the brief where that error is argued.

As with everything, there are exceptions to this rule. If your client pled guilty after the preliminary hearing, then your factual statement will probably be a summary of the *probation report*, since this is the source of facts which the trial court had and considered when it imposed sentence. If your client pled guilty and you are only appealing the denial of a pre-plea motion to suppress, then you can construct your fact statement from the evidence produced at that motion. When the facts come from a source other than the usual trial proceedings, this should be specified to the court, perhaps in a footnote so the reader will understand why such detail is included in the statements section.

The facts generally should not include lengthy verbatim quotes from the record. A sentence or key phrase may occasionally be quoted directly. But where the precise

wording of a witness's testimony or ruling or jury admonition by the court is necessary to explain the basis of a legal error, the specifics of that testimony or ruling, including crucial verbatim quotes, are more appropriately presented in the argument section of the brief where the error is raised.

C. Be Clear, Concise and Engaging

It is almost impossible to persuade a reader of anything with dull, dry writing. Likewise, when a fact statement is too long, complicated or confusing, all hope of persuasion is lost. It is thus very important to make your Statement of Facts as understandable, short and interesting as possible.

Unlike the sterile procedures outlined in the Statement of the Case, the human situations played out in trials of criminal cases are inherently interesting, sometimes even gripping. A well-written statement of facts succeeds when it concisely tells the story of the case in a humanizing, compelling manner.

In complex, long-record cases, it will often be impossible and unwise to edit the facts down to keep the Statement relatively short. Never leave out important details for the sake of brevity. When a complex, long-record case necessitates a lengthy fact statement (i.e., more than 10-15 pages), it is all the more important to make the discussion as clear, readable, and "novelistic" as possible.

1. Avoid Witness-By-Witness Summaries

The best approach to organizing a factual summary is to provide a chronological description of the underlying facts of the case (i.e., the facts of the offense(s) charged and the defense(s) presented). The worst approach, generally speaking, is a chronological description of how the evidence was presented at trial. In other words, avoid writing a seriatim, witness-by-witness summary of trial testimony. Very often witnesses are called out of context or out of order at trial. A chronological rendition of trial testimony that was out of sequence in the first place creates a confusing, sometimes misleading and usually very uninteresting picture of the facts of the case. There is nothing worse than having to leaf back and forth between the pages of a Statement of Facts just to figure out what happened. Although this is usually the way record notes are taken, it is unwise to leave it as is since the "witness-by-witness" account is a frequent pet peeve of appellate judges and their law clerks, and is almost always a bad idea for you and your client.

This is not to say that a witness-by-witness summaries are always unwise. Some cases lend themselves to this approach. For example, there may be three testifying eyewitnesses in the case, who describe very different events in their testimony and gave very different descriptions to the police. In such a case, it is almost impossible to give a chronological summary of what they saw collectively, and a witness-by-witness account serves to emphasize the differences in their testimony. In other cases, you can strengthen your factual summary with witness-by-witness accounts of discrete portions of the trial evidence (e.g., eyewitness testimony concerning the shooting incident, or divergent psychological evaluations of your client), with the rest of the fact statement organized into a chronological summary of the evidence. For example:

The three eyewitnesses to the robbery gave very different descriptions of the robber to the police. Ms. A said [A description]. (RT 1-2.) Ms. B stated [B description]. (RT 10-12) And, finally, Mr. C, who never saw the face of the robber but was certain that he saw clothing that [C description]. (RT 20.)

With that said, it should be reemphasized that it is almost always best to organize the facts so that your summary comes as close as it can to simply telling a story.

2. Use Heading Subsections When Helpful

It is often a good idea, especially in factually complex cases, to break down your factual summary into subsections to enhance the reader's ability to remember what happened. For example, when an insanity defense is presented you may want to summarize the evidence of the crime under one subsection heading and the evidence regarding appellant's mental illness under another subsection.

In longer, more complex record cases, you can help keep the reader's attention by breaking your fact statements up into chronological "chapters": e.g., "Background to Crime," "Planning the Crime," "The Crime," "After the Crime," "Police Investigation and Arrest of Appellant."

Finally, as suggested above, in cases where several witnesses testify to the same events, but each offers a different version, you can enhance your reader's understanding of the factual conflicts at trial by presenting the testimony of each witness under a separate subsection heading (i.e., Joan Jones' testimony; Sam Smith's testimony).

3. Identify the Players

An important function of the Statement of Facts is to clearly identify the various players in your case so the reader can keep track of them. (The idea here is to produce an Amy Tan short story; not a Tolstoy novel.)

In most cases this is relatively simple because there are only a few people involved; your client, two eyewitnesses, the arresting officer, the officer who took your client's statement. When there are many players, however, make sure to carefully identify them. If four of the witnesses are members of your client's family and they all have the same last name, identify who they are initially so that the reader knows who testified to what. Sometimes, after initially identifying the players by name, a more streamlined and less distracting factual summary can be produced if you refer to them thereafter by first or last names, or by their roles – e.g., the bartender, the bouncer, the arresting officer. However, when you do this, remember to be consistent throughout the brief.

One important personal-style consideration is how to identify your *client* in the fact statement. Many advocates use the generic “appellant” to refer to their client. Others find the generic term too impersonal and instead make some effort to humanize the client by referring to him or her by name in the fact statement. A “Mr.” or “Ms.” before the name can humanize the client in a formal way; a first name, especially with a juvenile or younger client, has the same effect in an informal way. And, in the Third and Fifth District case, use only the letter of the last name for a minor – whether a client, a witness, or a dependency child. Our courts consider the last name for any minor a matter of confidentiality. Both CCAP and the courts regard this remiss as a substantive error in briefing by the panel attorney, regardless of the reasoning behind it.

A second concern about identifying your client arises in cases where identity is the key issue; trial attorneys called this the “SODDI” defense – Some-Other-Dude-Did-It. In such instances, it is advisable to *not* automatically refer to the perpetrator as “appellant.” When identity is not clearly established by eyewitness testimony or the defendant's admission, it is far more useful to describe this person as “the robber,” “the shooter,” or “the attacker.”

4. Be Complete

When organizing your factual statement, be sure to provide an honest and complete picture of what happened at trial. You must include all relevant facts, regardless of whether they are good or bad for your client. If your client presented an alibi, but some portion of that alibi was disputed by a prosecution rebuttal witness, you must include that rebuttal testimony. If you do not, the Attorney General surely will, and you will lose

credibility with the court. The rule with relevant “bad” facts is not to omit them; rather do what you can to mitigate them.

Along the same lines, make sure you don’t inadvertently omit facts which are favorable to your client. If that same rebuttal witness admitted on cross-examination that he or she was offered a favorable deal in a pending case after agreeing to testify against your client, that fact should be in your brief because it suggests the witness’s rebuttal testimony was unreliable.

5. Omit Unnecessary Details

Most readers quickly lose interest with writing that contains useless details. Irrelevant details add nothing to your brief and can seriously detract from its persuasiveness. It is rarely necessary, for example, to include the exact address of the scene of the crime, or the direction in which the perpetrator fled when he ran from the store, the titles and ranks of the arresting officers, the chain of custody of evidence, or the exact location items of evidence were found at the crime scene.

Sometimes the entire testimony of witnesses that is critical for purposes of trial, is completely irrelevant on appeal and should be excluded wholesale. This frequently occurs with expert testimony. For example, pages of expert ballistic testimony, which established that your client’s gun was the murder weapon, can be excluded from the facts on appeal if there is no dispute about the expert’s conclusion. A simple statement that expert testimony established that the bullet found in the victim came from appellant’s gun will suffice. (And here is the exception to another rule: namely, you can reference to scores of pages of transcript, “RT 180-241,” for this curt factual summary.)

If a series of witnesses testify to the same general events (for example, three friends of the defendant all testify that he was with them at a party at the time of the burglary charged against him), don’t laboriously detail the testimony of each. Instead, summarize the testimony of one witness, then note that two other witnesses reported the same thing; or note that “Witnesses A, B, and C testified that . . .” Either way, note the names of the witnesses and cite the appropriate part of the record.

Of course, there will always be a tension between the need to be complete and the imperative of avoiding unnecessary details. The best approach is to err on the side of over-inclusiveness in your first draft of the fact statement, then whittle it down appropriately later on, when you know precisely which issues are being raised on appeal and which factual matters are significant in the case.

6. Do Not Present Your Client in a Bad Light

Always be vigilant about the manner in which you refer to your client or the manner in which you characterize the facts of your case so that you do not unnecessarily portray your client in a bad light. For example, if your client screamed obscenities at the judge and trial counsel when a motion was denied, that irrelevant fact should be excluded. Although it occurred at the time of the motion, it adds nothing to your later legal argument that the motion was improperly denied.

If your client was convicted of strangling a 70-year-old invalid with drapery cords then repeatedly hit her in the head, it is pretty hard to minimize the atrociousness of the crime, but you can avoid maximizing it. For example, rather than saying, “The evidence established that the 70-year-old victim, an invalid for 20 years, was forcibly strangled with a curtain cord and then bashed repeatedly on the head,” break up the information and use less colorful language. Describe the age and health of the victim in one portion of your facts, and save the description of the cause of death for a later portion. Then state simply that the victim was strangled and was hit several times, or words to that effect. You will still have a complete and accurate factual summary, but you will minimize the shock value of those facts.

Along these lines, don’t leave out information that makes your client look good. If your client testified to an alibi which was corroborated by two witnesses who said the same thing she did, don’t exclude any mention of those witnesses just because the content of their testimony was the same as your client’s. At minimum, you should state that two witnesses corroborated your client’s testimony, identify the witnesses and make appropriate citations to the record.

7. Never Use Police Jargon

Police officers often use stilted and tortured phrases in their testimony. This police jargon has no place in an appellate brief. The police officer in your case might testify, for example, that he “responded to the scene” and immediately “exited his vehicle” so as to “detain the black male subject.” Don’t write it up like that; change it to normal English and recount that the officer “arrived at the street corner, got out of his car and grabbed hold of appellant, detaining him.”

8. Identify the Source of the Evidence, Defense or Prosecution

It is almost always a good idea to specify when the source of facts summarized comes from defense, as opposed to prosecution witnesses. Many experienced criminal appellate advocates break down the statements into “Prosecution Evidence” and “Defense Evidence” sections. Others avoid this separation when it detracts from effective story

telling and/or a succinct and focused presentation of the facts. If you don't separate out prosecution and defense evidence (and rebuttal, surrebuttal, etc.) into separate subheadings, you should find other ways of advising the court that the testimony being summarized came from a defense witness. (Examples: "Joe Smith, called as a defense witness, saw no blows struck by appellant at this point in time." "Officer Sanchez, called as a rebuttal witness, testified that Mr. Defendant told him that he had never been afraid of Mr. Victim.")

D. Always Be Accurate

It is extremely important to be accurate when summarizing the facts of your case. Appellate clerks and justices rely on the factual summaries contained in the briefs in deciding the case. If they discover your summary is not accurate they will disregard it and will likely rely entirely on the Attorney General's rendition of the facts. Once that happens you've lost your ability to persuade because you've lost both your credibility and the court's attention.

1. Never Distort or Exaggerate the Facts

As mentioned earlier, a proper Statement of Facts includes the bad facts as well as the good. It is equally important not to distort, exaggerate or mislead the court about the facts you include. If an eyewitness testified that he or she is positive your client was the robber, you must say an eyewitness identified your client. You need not emphasize that identification by repeating that the witness stated he or she "would never forget that face" or was "one hundred percent sure, no doubt about it." However, it would be highly improper to mislead the court by suggesting that the witnesses's identification was equivocal when it wasn't. Distortions – whether accidental or on purpose – rarely go unnoticed by the court and are sometimes specifically commented upon, often in an opinion footnote. If the opinion is incorrect, consider whether a petition for rehearing should be filed.

The same is true of facts helpful to the defense. If an eyewitness testified he or she believes your client was the perpetrator, but is not absolutely sure, don't exaggerate that testimony by claiming the witness was "unable to identify appellant." Give an honest description of the testimony. Save your characterization of that testimony (i.e. that the witness could not positively identify appellant) for the argument portion of your brief.

2. Stay Within the Record: Never Present Matters in Your Factual Summary Which Are Not Part of the Record on Appeal.

Rule 8.204(a)(2)(C) of the California Rules of Court provides that factual summaries must “provide a summary of the significant facts limited to matters in the record.” Never run afoul of this rule. At minimum you will incur the distaste of the judge and/or clerk who reads your brief and lose your credibility. At maximum you run the risk of opposing counsel filing a motion to strike your brief and or the offending portions of your brief.

E. Be Persuasive, Not Argumentative

The Statement of Facts is not the place to affirmatively argue the merits of your case. This includes the use of argumentative adjectives and adverbs in the fact statement. At the same time, a well thought out and carefully organized factual summary can present the facts in such a persuasive manner that you will be effectively “arguing” your case between the lines. Don’t write, “The officer recklessly swung his baton, striking appellant in the head.” Instead, you can convey the same thing by sticking to the facts adduced in the testimony: “Moments after appellant put his arms behind his head, Officer Jones hit him in the head with his baton.”

1. Organize the Facts To Emphasize Good Points and Downplay Bad Ones

In your zeal to avoid being argumentative, you should avoid the opposite trap: making a fact statement read like respondent’s sufficiency of evidence argument. A fact statement need not be presented “in a light most favorable to the prosecution”; rather, it must be an accurate, thorough, fact-based summary by an advocate on behalf of his client. If you have a case in which various witnesses offered conflicting evidence, don’t summarize the conflict in a way which favors the prosecution’s proof on the counts of conviction. Instead, emphasize the conflicts in the manner you organize the facts. You can persuasively show how this makes the prosecution’s evidence weak and the ultimate verdict questionable without ever arguing these points.

For example, if a damaging prosecution witness testifies to a series of things, some of which were impeached by testimony presented by another prosecution and/or defense witness, you can, in effect, “argue” that this witness should not be believed merely by the *manner* in which you put together the factual summary of this evidence. After each of the items claimed by such a witness you can immediately note the contrary testimony presented later at trial:

“Ms. White testified the burglar was 6 feet tall and weighed over 200 pounds. (RT 3.) Prosecution witness Jones, and defense witnesses Green and Wilson all agreed the man was of slight build, no taller than 5’5”, no heavier than 150 pounds. (RT 44, 98, 101.) Ms. White claimed the burglar

had a large gun in his hand. (RT 3.) None of the other witnesses saw a gun. Green and Wilson were sure the burglar had no weapon. (RT 98, 101.) Jones did not see the burglar's hands, but believed he would have seen a gun had the burglar been brandishing one. (RT 44.)”

2. Avoid Editorial Comments and Personalities

Editorial comments about the weight or sufficiency of the evidence have no place in your factual summary. (“Ms. Wilson, a patently incredible witness, stated that. . . .”) Characterizations of the personalities or actions of the players at trial are equally improper. (“After repeatedly badgering defense witness Smith, the prosecutor finally elicited testimony that. . . .”) Instead, make the same points through the careful use of key points of testimony and/or juxtaposition of facts, and save the choice judgmental comments for proper argument.

Pay attention as well to the manner in which you describe the various players at trial, trying to avoid lending undue respectability, and therefore credibility, to a witness you want to discredit. For example, if a police officer testifies he or she is the detective in charge of the Sonoma County Narcotics Eradication Task Force, you should just call him or her “officer.” There is no need to emphasize the accomplishments or titles of such witnesses.

For the same reason, it is also a good stylistic point to refer to the prosecutor as “the prosecutor,” never “the People.”

3. Use the Facts to Set Up Your Legal Arguments

When you sit down to write the final version of your factual summary you will know what legal issues you plan to raise. Make sure that your facts include those items of evidence necessary to set the scene for your legal arguments. If you plan to argue the evidence was insufficient to sustain the conviction, for example, your factual statement will generally need to be somewhat detailed since you want the Court of Appeal to have a comprehensive knowledge of the entire record when it determines the merits of your issue. The same rule holds true for most claims of trial error, where you will often need to summarize the entire factual record in the case to argue that the case against appellant was not strong. If you plan to challenge the trial court's denial of a motion to exclude certain evidence, your factual statement should include the testimony or exhibits which resulted in introduction of the offending evidence at trial, sometimes combined with an indication about the defense objection (if there was one). But remember that it is usually inappropriate to highlight procedural facts, e.g., a defense objection, into a fact statement.

Do it obliquely: “The letter, admitted over defense objection, detailed the codefendant’s advice to the appellant about handling police inquiries. (RT 445.)”

When there is no dispute about a particular event, you can simply concede that event on appeal. For example, in a mistaken identification case where there is no disagreement that the crime occurred and the argument on appeal concerns faulty eyewitness identification instructions, don’t belabor the details of the crime. Describe it generally, concede it if appropriate, and focus instead on the specific conflicts between the descriptions of the perpetrator or other facts which indicate the identification was unreliable.

Conclusion

This article outlines all the important “do’s and don’ts” in preparing the introductory statements, giving some sense of various options employed by different advocates where there is not a uniformity of views. Hopefully, these ground rules and suggestions will help clarify styles that are important preliminary work in writing effective opening briefs.

Ultimately, though, you will develop (or have already developed) your own stylistic way of approaching many of the matters addressed in the article. You might, for example, put together very effective fact statements which rarely vary from a witness-by-witness format. After experimenting with a “chronological summary” approach, you may decide that your own style works better for you, and is far less time consuming. But at least you will return to this style knowing that it displeases many appellate judges and clerks, and knowing that your burden to create an effective, thorough and crisp factual summary may be greater because of the style you have chosen.

More ink (or is it toner?) has probably never been spilled on this small subject of introductory statements in an opening brief. But no subject in appellate advocacy receives less attention for all its importance to quality brief-writing. If, as some believe, cases are generally won or lost with the opening brief, the Statements of Appealability, Case and Facts (with emphasis on the latter) are the crucial first salvos in which you must strive to effectively summarize the procedural and factual underpinnings of the appeal, establish your own skill and credibility as an advocate, and make significant steps toward demonstrating that an injustice deserving redress occurred in your client’s case. Here’s hoping the foregoing discussion is helpful to you in this key part of your appellate work.