

Writing the Statement of Facts

# Gain Credibility While Accurately Telling Your Client's Story

By Mary Massaron Ross

Writing an effective statement of facts is one of the most difficult aspects of advocacy. But it is critically important to the success of a brief. It is often the first-read section. And, as such, it establishes the tone and credibility of the author. Judge Aldisert recognized this and cautioned that “appellate judges may form their first, and probably their most lasting, impression of your side of the case from your statement of facts.” Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Advocacy*, 155 (1992).

To create a good first impression, an advocate will benefit from following three rules for writing an effective statement of facts. Frederick Bernays Wiener, *Effective Appellate Advocacy*, 38 (2004). The first, not surprisingly, is that “you must be accurate.” *Id.* The second rule is to “grasp your nettles firmly.” *Id.* at 39. In other words, the advocate must “[d]raw the sting of the unpleasant facts by presenting them yourself.” *Id.* at 39. Third, the advocate should “[n]ever argue or editorialize in your Statement of Facts.” *Id.* at 40. By following these three rules, the advocate will gain the court’s respect from the outset.

An advocate who slants the facts loses credibility with the court, a handicap from which it is difficult if not impossible to recover. All too often, an advocate says more than can be readily supported in the record, whether by failing to use appropriate qualifiers, employing heightened rhetoric, or adding conclusions that are subject to debate. Even a slight overstatement will cause the reader to pause to question it. The well-respected authors, William Strunk, Jr. and E. B. White, warn against a loss of credibility that comes with exaggerating the facts:

When you overstate, the reader will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in his mind because he has lost confidence in your judgment or your poise.

William Strunk, Jr. & E.B. White, *The Elements of Style*, 72–73 (3d ed, 1979). To avoid evoking this negative response, an advocate should not characterize or draw conclusions from the facts. For example, the statement of facts offered on behalf of a police officer in a Fourth Amendment excessive force case should not contain text characterizing the situation as highly dangerous and fast-moving. Doing so will detract from the writer’s credibility. Instead, the advocate can carefully select facts to show the danger confronting the officer as circumstances rapidly changed. In reading the factual recitation, the reader should be drawn to the conclusion that it was dangerous and rapidly evolving by the careful selection and ordering of the facts. If a characterization or evaluation is to be used at all, it should be presented by quoting the officer’s statement about his own perception of the situation, rather than as an authorial intrusion into the statement of facts.

Outstanding factual recitations are carefully ordered. The word choice is precise, accurate and evocative. If done well, the reader will accept the story with sympathy for the advocate’s client, without being suspicious of either the client’s position or the advocate’s rendition of the facts. Steven D. Stark provides a potent example of just such writing, which gains strength from both word choice, the ordering of the facts and a novelistic foreshadowing to capture the reader’s interest:

It is undisputed that Jesse Lowry was singled out for an undercover, warrantless entry into his home solely on the basis of a vague, stale, and unsubstantiated rumor. This rumor began to interest the Jamestown police in the fall of 1984....

Steven D. Stark, *Writing to Win: The Legal Writer*, 98–99 (1999). Stark recommends asking two questions before starting the statement of facts:

Given my client, what do I want to argue?

Given that argument, where is the best place for me to begin my story?

*Id.* at 98. Examples of good writing to study as models for the statement of facts can be found in David Grambs' *The Describer's Dictionary* (1993).

Stark uses the example of the Goldilocks story to further illustrate the application of these principles. *Id.* at 98. Goldilocks' attorney would tell the story of a young girl who is lost in the woods and has become tired and hungry. Opposing counsel, on the other hand, would tell the story from the perspective of the bears, who return to their home to discover signs of entry, broken furniture and a person in one of the beds. The facts would be the same but the effect would be very different. According to Stark, the story from the bears' point of view should not ignore Goldilocks; nor should Goldilocks' version neglect to mention the broken furniture and half-eaten food. *Id.*

Ernest Hemingway's spare style, with its short declarative sentences, use of strong nouns and verbs, and absence of parenthetical clauses, adjectives and adverbs, and abstractions or judgments of any kind, can be used as a model for style in the factual portion of a brief. Hemingway explains, "I'm trying in all my stories to get the feeling of the actual life across—not just to depict life—or to criticize it—but to actually make it alive." *Ernest Hemingway on Writing*, 33 (Larry W. Phillips ed, 1984). Hemingway said of his writing, "Some days it went so well that you could make the country so that you could walk into it through the timber to come out into the clearing and work up onto the high ground and see the hills beyond the arm of the lake." *Id.* at 36. If the statement of facts can do that, the advocate will have succeeded.

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