

The Art of Appellate Advocacy - Walking in cow pastures

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A comic strip I read recently showed a man on "a quiet stroll in Euphemism Country" about to enter a cow pasture when he saw a sign that read "Caution: Bovine-related material ahead." Some of you may think you know where I'm going with this, but the large majority is likely wondering how this has anything to do with the practice of law, much less the purported subject of this column, appellate advocacy. This is why The Daily Record pays me the big bucks, because the answer is not what most of you think. Bovine-related material has a lot more to do with writing a Statement of Facts than initially meets the eye.

The Statement of Facts is a key section of the brief and can significantly influence the reader's point of view if it is done well. Before I proceed any further, however, I'd like to be clear about one thing so that no one is led astray: Beginning a discussion of the facts in your brief with a recitation of a comic strip ordinarily will not have a persuasive impact on a judge. At least, not a favorable one. On the other hand, it may gain the reader's sympathy by making the judge think that you have lost your mind and that a vote for your client will enable you to get the help you need, so I am not advocating an absolute rule about how not to begin this section of the brief.

The comic strip described above may appear to have little to do with effective brief writing, but there are several ways in which it is relevant. For starters, its placement in the first sentence of this article, as well as its subject matter, serves the purpose of illustrating that words of introduction play a key role in defining the reader's expectations about what will follow. There is only so much you can do in that department in the Statement of the Case and the Question Presented sections of the brief, but not so in the Statement of Facts. This is where the real story in your case can be found. In telling that story, however, remember that the reader does not need to venture very far in this section of the brief before expectations begin to take shape about what that story will look like.

Every Statement of Facts in a case is like a cow pasture, and an early misstep can establish an impression that will be difficult to clean up, so, as the sign in the comic strip warns, proceed with caution and watch where you're going.

One common misstep is to make a statement in this section of the brief that does not include a citation to the record extract. A much more serious one is to make a statement that is unsupported by the citation that is provided. The first kind of misstep is evident immediately and will be met with increasing skepticism if it is repeated. The second kind is uncovered when the reader learns that the citation given does not support the statement. Both can be avoided by taking extreme care in making sure that the record is cited for, and that it actually supports, every factual statement that comprises the story that is told in this section of the brief.

Remember also that the same case often has different stories to tell, even from the viewpoint of the same party. The story on appeal should be told only with facts that

directly relate to the legal issue the appellate court has been asked to decide, i.e., in the Question Presented section that immediately precedes the Statement of Facts.

The story established in a multi-count complaint, for example, will not be the same story if the motion to dismiss is granted and the dismissal of the fourth count is the only aspect of the trial court's decision that is appealed. The story described in the initial pleading when the case is filed will also change as the action proceeds through discovery, and it will likely have a different look if the case goes to trial. The appellate judge does not need to know about everything. Just the facts necessary to decide the appeal will do.

How much detail?

The comic strip's reference to Euphemism Country is also useful to remember when describing the facts in your case. In the world of appellate litigation, it may be true that you can't change the facts, but there is always room — and, sometimes, lots of it — in which you can dress them up. Your case may have its share of what might be found in the cow pasture — is there any case that doesn't? — but that doesn't mean it's everywhere. Be creative in setting forth the facts, good and bad, especially the bad. Bovine-related material happens, and if you don't mention it in your brief, the other side will, so avoid appearing as if you are trying to hide something and deal with it.

As a general rule, detail the good facts and paraphrase the bad ones. If you represent the plaintiff in an automobile tort action, for example, you might quote the key portions of the plaintiff's testimony in which she stated that she entered the intersection 10 seconds after the traffic light turned green, that the defendant sped through the left side of the intersection, that the light facing the defendant's direction was red, and that the defendant did not attempt to brake or avoid the plaintiff's car but rather slammed into it at a high rate of speed.

If you represent the defendant, however, it might be sufficient to state simply that the plaintiff testified that the defendant drove through the intersection, hit the plaintiff's car, and injured the plaintiff. Some lawyers believe — and I don't necessarily disagree — that more detail at this stage of the brief can be harmful and that it's best to address the specifics in the Argument section. Each case obviously needs to be evaluated individually to make that kind of judgment call, but the point is to acknowledge in some way in the Statement of Facts the bad fact that you know the other side will pound on in their brief.

Ignoring that fact is like taking a stroll in a cow pasture with a blindfold on and hoping you don't step in something. You could get lucky and come out smelling like a rose. But it would really stink if you didn't.

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