

The Art of Appellate Advocacy

January 12, 2007

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How to state your facts but not ruin your marriage

Most normal people would probably agree that my daughter's smug prediction that my marriage is doomed — and will be over by no later than the end of this month — has absolutely nothing to do with the subject of appellate advocacy, much less with today's planned discussion of items to think about in writing an effective statement of facts. But this column, as many of you well know by now, is anything but normal.

I'd like to point out before proceeding any further that my daughter's prognostication was not based on what you might expect to be the source of such a dim view of my marriage's likelihood of continued success. My wife and I hardly ever argue, for example, and rarely have, ever since I learned shortly after we tied the knot that she's always right.

I've also been completely faithful, unless you consider that downloaded picture of Halle Berry on my cell phone to be an act of infidelity. And money is not an issue between us either — I do just fine on the monthly allowance that my better half gives me.

So what, you may ask, prompted our little Nostradamus wanna-be to announce last July that my wife and I would last no more than another six months before signing the divorce papers? Rather than make her marital forecast following a fight, an affair, or any of the other typical events that figure prominently in a couple's parting of the ways, she did so solely on the basis of the news we shared with her at the dinner table: that her mother and I would be working in the same law firm.

Well, perhaps I'm tempting the fates by saying this, but absent some unforeseen calamity at work in the next few weeks that vastly alters the present status quo, my daughter needs to think about her own future if her plan is to pursue a career as a soothsayer.

Which brings me to the subject of today's article.

Reliable barometer

To the extent that the success or failure of any marriage can be predicted, some factors carry more weight than others. As far as barometers of successful legal writing go, one of the most reliable predictors of a brief's likelihood of success is the statement of facts. Here are a few checklist items to consider to ensure that the statement of facts is a significantly better predictor of your brief's success than was the basis for my daughter's cheery prophecy about my marriage.

Checklist item #10: Use the statement of facts to create favorable reader expectations. Always be aware that the statement of facts is a complement to the immediately preceding section in Maryland appellate court briefs containing the questions presented, and that it presents a key opportunity to prepare the judges in as favorable a manner as possible for the next part of the brief, namely, the summary of argument and the argument itself in which you set forth your brilliantly compelling reasons explaining why the court has no choice other than to rule your way.

No fact is neutral unless you allow it to be, so make sure that you use the facts to advocate your position.

Advocacy in this portion of the brief does not mean argument, but it does mean that the facts should be organized and presented to maximize their relevance and significance. Facts will likely have a greater impact if they are structured in a way that sets up and furthers the theme of the brief.

Checklist item #11: Keep it interesting by telling a story. Use the facts to tell a story that captures the reader's attention. One way to do this is by using the issues as a filtering device so that you lay out a narrative of only those facts which are pertinent to the legal questions that the court has been asked to decide. Discussing facts that have little or nothing to do with those questions will confuse rather than inform your reader, so be sure that each fact set forth in this portion of the brief is relevant and has some connection with the arguments that you advance.

Use different witnesses and exhibits in telling your story, but be sure that the story moves in a forward direction. That story generally is told from a chronological perspective with respect to the underlying facts, meaning, you can describe events sequentially using a variety of sources: testimony, documentary exhibits, pleadings, etc. Don't discuss events, then describe the testimony given at a deposition or at trial: use the testimony as part of the overall narrative.

A witness-by-witness summary of testimony rarely accomplishes the goal of setting out an engaging account of facts that the reader will want to follow. Such an approach is repetitive and unfocused, and is much more likely to lose rather than capture the judge's interest because it forces the reader to figure out the relevancy of the summarized testimony. If several witnesses said that the light was green, then state that fact rather than recount the testimony of each witness.

Checklist item #12: Discuss relevant statutory provisions in the statement of facts. Remember also to include in this section of the brief a discussion of the pertinent statutes if your case involves a question of statutory interpretation.

"Legal" facts are as much a part of the story as are the substantive events that give rise to the controversy in question. Including those facts here gives the reader a concrete sense of the legal context and a more complete appreciation of the other facts' relevance in your case.

This approach also eliminates the temptation that overcomes many brief writers who feel compelled to begin the argument portion of the brief with an introduction that describes the applicable statute, rather than with an opening paragraph that forcefully argues from the outset why the appellate court should affirm or reverse the trial court's decision in your case.

Next month, I'll probably discuss a few more checklist items for this important part of the brief. Unless it turns out that I've seriously underestimated my daughter. Because if I have, you're going to hear a lot about how you should never work with your spouse.

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