

The Art of Appellate Advocacy

By Andrew H. Baida
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Minding your Ps and Qs

I don't know how it works for other columnists in this newspaper, but the process I undergo before coming up with something to write about typically involves, first, wading through a number of partially formed thoughts and ideas that wildly ricochet off one another with hyper-frenetic abandon; second, chaotically grabbing one of them before it quickly returns to the murky depths; and, finally, converting it into an article. Today's piece, which is a continuation of last month's column about items to consider in writing the statement of facts, originated in precisely such a haphazard way.

The impetus for this article is one of those special parent-child moments that, for some of us, occurs just once in a lifetime. The moment took place as I was sitting at the kitchen table with my then-3-year old daughter, who, after finishing her snack, announced from her booster seat that she was still hungry by demanding, "I want more peaches!"

Manner-conscious father that I am, I told her she needed to ask politely by using the magic word. Without missing a beat, she responded, "I want more peaches, now!" Seeing a teaching opportunity suddenly present itself, I said to her, "I'll give you a hint — it begins with the letter 'p'." Seeing the same opportunity, she immediately replied with a victorious smile, "I want more peaches, now, Poopyhead!"

Now some parents might not take too kindly to being called a Poopyhead. Some parents might put the child in time-out, or take away Internet privileges for a week, or maybe they would assume a serious demeanor and say to the child in a stern parent voice, "It's not nice to call Daddy a Poopyhead." But not this father. I was the proudest Poopyhead you ever saw.

A sense of what to expect

The Mastercard moment I had with my daughter was priceless, not because it let me know how well she knew her ABCs, but because it put me on notice of what I could expect from this child in the months and years that lay ahead.

Which brings me to the supposedly real topic of today's article. Although I'm not sure I've ever seen a statement of facts I would call priceless — at least, not in a good way — this portion of the brief, like my daughter's response to the suggestion that she say "please," offers a telling glimpse into what's around the bend, and provides the writer with the very valuable opportunity to give the judges a good sense of what to expect later in the brief, namely, in the argument.

Hence the reason for today's first checklist item:

Checklist item #13: Virtually every brief should have a complete statement of facts. I am aware that, for some people, there may be some tension between this checklist item and Maryland Rule 8-504(a)(4). The problem is not with the first part of this rule, which states that the appellant's brief shall contain "[a] clear concise statement of the facts material to a determination of the questions presented." The problem is with the second part of the rule, which provides that, in contrast to the appellant's brief, "the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief." In my view, you are doing your client a disservice if you don't include a complete statement of facts in your brief, regardless of whether your client is the appellant or the appellee.

I have written a lot of appellee briefs and have edited hundreds more written by other lawyers, and I can't recall any that did not have its own statement of facts or that should have used the fractured approach suggested by the second part of Rule 8-504(a)(4).

For starters, "additional facts" in the appellee's brief will always be "necessary to correct or amplify" the statement of facts written by the appellant. Why, you may ask? Because the appellant is going to include only those facts that, as set forth in the first part of Rule 8-504(a)(4), are "material to a determination of the questions presented," and those questions, if the lawyer for the appellant does his or her job properly, will always be written in a manner favorable to — here's a shocker — the appellant, not the appellee.

That's why, in my opinion, you need to write a complete statement of facts when you represent the appellee, because virtually every case has two stories to tell — yours and the other side's — and unless you've bribed or

blackmailed your opponent or are involved in a "friendly suit," the appellant's story is going to be very different from yours.

The only way to counter your adversary's selection and arrangement of the facts effectively is to tell the entire story from your client's perspective, not just portions of it, in a narrative form that embodies the necessary corrections and amplifications referenced by Rule 8-504(a)(4). Isolated corrections and amplifications are confusing, ineffective, and, worst of all, risk forcing the judges to pick up your opponent's brief in the middle of reading yours to understand what you are talking about. And why on earth would you want them to do that?

Checklist item # 14: Deal with, don't hide, bad facts. The smartest way to manage bad facts, which every case has, is to address them. If you ignore them, the other side will not, and that is not what you want to happen, especially if it comes up at oral argument where you are confronted with an irate judge who accuses you of trying to mislead the court.

You can deemphasize a bad fact by discussing it at the beginning of a sentence that ends with a good fact, i.e., "Although Mr. Jones confessed to the murder, he did so only after the police removed one of his fingernails with pliers, as Officer Jones admitted." Okay, that was kind of gross, but the point here is that no matter how you do it, make sure that you deal with unpleasant information that you know is going to come to light, with or without your input.

Checklist item # 15: Include a summary of the key parts of the court decision that has been appealed. The statement of facts is the last section of the brief that the judges read before proceeding to your argument. Discuss the decision being reviewed on appeal to highlight either the core error you are asking the appellate court to correct or the major flaw in your opponent's argument. So, if the decision is written or transcribed, summarize its pertinent portions.

And by the way...

In case anyone out there is wondering, yes, my wife and I are still married, despite my now-18-year old daughter's prediction (related in last month's column) that we would be divorced by the end of January after working together for six months. Who's the Poopyhead now?

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