

Appellate Tips for Trial Lawyers

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Appeals can be a minefield for those who don't regularly practice in the appellate courts. This series of short articles, provided by members of the Association's Appellate Courts Committee, will help you find your way. Although the articles focus primarily on California state court appeals, much of the guidance will apply in any appellate court.

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Appellate Tips for Trial Lawyers: Summary of Facts

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All litigation is storytelling. The summary of facts in an appellate brief is litigation storytelling in its purest form. The statement of facts in a party's principal brief (the appellant's opening brief or the respondent's brief) is the advocate's golden opportunity to take the jigsaw pieces of evidence presented in the trial court – through multiple witnesses and exhibits – and assemble them into a cohesive picture. Appellate briefing allows the attorney to actually write a short (nonfiction) story that explains who the parties are, what happened to them, what they did, and what created the conflict that ultimately brought them to a courthouse.

Because appeals are ultimately resolved on issues of law, attorneys may be tempted to shortchange the statement of facts in favor of the argument section of the brief. That is a mistake. Appellate decisions turn on issues of law, but courts don't decide those issues in a vacuum. Courts apply the law to the facts. The courts can look up the law, but they look to the parties to tell them which facts in the record are pertinent, and to put those facts in context. And just as the party who tells the most compelling story in the trial court is most likely to win, the party who tells the best story has the advantage in the appeal. The "best story" is usually the one that (a) depicts the evidence in the record accurately, (b) comports with common sense, and (c) leaves the reader with the sense that the party telling the story is the one who deserves what he or she seeks on appeal.

Here are some rules and guidelines for telling that story:

1. The Statement of Facts Isn't Just a Good Idea - It's the Law

An appellant must include a "summary of significant facts, limited to matters in the record" in the appellant's opening brief. (Cal. Ct. R. 8.204(a)(2)(c).) The rules don't require a respondent to summarize the facts in the respondent's brief. But the respondent is entitled to do so, and should. A respondent who allows the appellant's summary of the facts to govern the appeal forfeits crucial territory in the appellate battle.

2. Every Fact Must Come from the Record

With rare exceptions (such as judicially-noticeable matters), a party must draw every fact set forth in the brief from the record. (Cal. Ct. R. 8.204(a)(1)(C), (a)(2)(C).) Further, the historical facts in the brief (as opposed to the procedural history) must come from the evidence in the record. Pleading allegations and attorney arguments can only be used to the extent they qualify as the opposing party's admissions. ([Banning v. Newdow, 119 Cal.App.4th 438, 453 \(2004\).](#))

(One exception: Appeals from dismissals following demurrer or judgment on the pleadings, where the complaint's allegations are the relevant "facts.") . Cite argument only where the relevant fact is that the argument was made.

3. Show Your Work

The briefing party must support any reference to a matter in the record by citing the volume and page number of the record where the matter appears. (Cal. Ct. R. 8.204(a)(1)(C).) The brief author should use a consistent system of abbreviations for the components of the appellate record, and define the abbreviation for the court the first time it is used. (E.g., "1Clerk's Transcript ['CT']:211" for the first reference to the clerk's transcript.) The court may disregard any point that is not supported by references to the record. ([In re S.C., 138 Cal.App.4th 396, 406-407 \(2006\).](#))

4. Mind the Standard of Review

The standard of review for the points raised in the appeal dictates the minimum facts that must be included in the brief's fact summary. For instance, if an appellant contends that the record does not contain sufficient substantial evidence to support a result, the appellant's opening brief must summarize all of the record's evidence on that point. (In re S.C., supra, 136 Cal.App.4th 396, 414-415.) Failure to do so forfeits the contention. (Ibid.) The standard of review also guides the brief author in choosing the facts to emphasize. A party appealing a summary judgment will want to emphasize any issues of fact the appellant contends exists and are material, while the respondent will want to focus on the undisputed facts and on showing that any factual disputes are immaterial. Further, since appellate courts disregard summary judgment evidence that the trial court excludes the parties must exclude that evidence from the summary unless the appellant is challenging the evidentiary rulings. ([Lopez v. Baca 98 Cal.App.4th 1008, 1014-1015 \(2002\).](#))

5. Tell a Story - a Good One

Stories are more persuasive than unorganized masses of facts. Tell the court who the parties are, what happened to them, and how they got into the mess that brought them to court. And interesting stories are more persuasive – and informative – than boring ones. Pay attention to the rules of storytelling. Introduce the main characters and their setting. Introduce the problem that created the conflict. Then describe how the conflict was resolved (or left unresolved). The best storytellers include just enough details to bring the characters and their situations to life. The reader should finish the story knowing who the players were; knowing what they did; and knowing or suspecting why they did it.

6. Organize Your Facts

A mass of facts that lacks any logical order is unlikely to persuade anyone. Organize the facts in a way that will best tell the story you want to tell. Chronological organization is usually the best way to tell a story clearly. But there are other methods. For instance, news article writers often begin by describing a particular striking event, and then laying out the chain of occurrences that led to that event. Avoid setting forth the facts witness-by-witness. Instead, weave the witnesses' testimony together, pointing out significant witness contradictions as the facts arise.

7. Be Clear

Strive to make your statement of facts understandable (and perhaps even interesting) to a reader who knows nothing about your case. Use short, clear, sentences and active sentence structure. Favor strong nouns and verbs. Keep your paragraphs short – there's no page limit, only a word limit. Use subheadings to transition between events and keep the reader oriented (e.g., "The Accident"; "Smith Sells Blackacre"; "Jones Breaches the Contract.") Avoid calling parties "appellant" and "respondent"; use their names. Don't use an alphabet soup of acronyms; unless the acronym is a common one (such as "EPA" or "CIA,") try to use an abbreviation that makes sense ("The City"; "The Department").

8. Every Fact Should Serve a Purpose

Be selective. Include only the facts that support the argument and tell the story. Avoid excessive detail. You don't need to state the date and time each event took place if prepositions such as "then," "after that," or "the same day" will tell the story just as clearly.

9. Be Fair and Honest

Remember, this story is nonfiction. Never misrepresent facts, or leave important facts out. You have a duty to be honest with the court. Further, the court will check each fact you cite, so playing fast and loose will only make you look bad. Addressing bad facts head-on is more effective advocacy than avoiding them (and allowing your opponent to discuss them first).

10. Advocate, but Don't Argue

Just as you shouldn't argue when examining a witness, you shouldn't do so when setting forth your evidence. Arguments in the midst of your facts suggest to the reader that the facts, standing alone, don't support your case. You should tell your story in a manner that persuades the reader that your side should win. But save the argument for the argument section of your brief. Your job in the fact statement is just to tell your story.



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