



## WRITING A STATEMENT OF FACTS IN AN APPELLATE BRIEF<sup>1</sup>

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This handout is designed to complement the Writing Center handout titled, “From Memo to Appellate Brief.”

The Statement of Facts is a critical segment of an appellate brief. In crafting it, a writer should take a somewhat different approach from that taken when he writes a memo. The Statement of Facts should be written persuasively, consistent with the overall persuasive nature of the brief as a whole. While there are numerous approaches to writing a Statement of Facts that can yield compelling results, some general pointers may prove helpful.

**The goal of the Statement of Facts is to be persuasive without being extreme.** Remember that a judge could use your description of the facts in his opinion and will also have read both the lower court’s and opposing counsel’s description of the facts. If your version of events is dramatically different from these sources, your credibility will come into question.

### ***1) PERSUASIVE TECHNIQUES***

**Incorporate your Theory of the Case into the Statement of Facts.** The Theory of the Case is the unifying concept of your case; it is an implicit message in your brief that ties together the factual, legal, and policy issues. While the facts explain what happened, and the law explains the legal implications of what happened, the theory explains *why* it happened and helps your reader empathize with your client.<sup>2</sup>

- For example, if you are representing a party injured in a car accident, your *legal theory* might be that the other driver was negligent, but your *theory of the case* might be that “he was in a rush.” In your Statement of Facts, you highlight facts that support your Theory of the Case—the driver was speeding, late for an appointment, not paying attention, et cetera.
- It is difficult to write an effective Statement of Facts without a clear understanding of your Theory of the Case. It may be helpful to initially write the Statement of Facts objectively, and then to pass through it again after you have a solid grasp on your Theory of the Case.
- Utilize the Statement of Facts to shape the reader’s opinion of what the outcome “should” be. For example, if you can frame your opponent as a “bad person,” a brief reader may subconsciously hope that they lose. Or, if your client committed a crime, emphasize anything that would make such a decision seem more excusable or relatable – Were they

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<sup>1</sup> Prepared by Brooke Rowland (2014)

<sup>2</sup> Writing Center handout, “From Memo to Appellate Brief.” Refer further to this handout for a more detailed explanation of how to craft your Theory of the Case.

provoked? Were they trying to protect themselves or provide for their family? Anything that goes toward making a person more likeable or an action more understandable will help create a persuasive Statement of Facts.

**Include all legally relevant facts, even if they do not favor your client.** Leaving out key facts causes you to lose credibility, may be unethical and a violation of the Rules of Professional Responsibility, and can make the Discussion section of the brief seem unclear, so be sure you have included all legally relevant facts. When you fail to include facts that work against your client, you lose the opportunity to frame that negative fact – which will inevitably surface in the opposing counsel’s brief – in a way that is less damaging. Ignoring a harmful fact does not make it go away; it simply leaves the problem unexplained and undefended.

- Emphasize the strengths and minimize the weaknesses of your case. In most briefs, there will be a negative fact about your client that, in the interest of full disclosure, you must reveal. When you do this, focus on providing the best possible representation for *your client’s specific situation*. If it is critically important for the court to know that your client has done something distasteful, frame it in the best way possible, but do disclose it. You cannot change what happened; you are only working to change how you can accurately present the situation in a persuasive way.

**Do not deceptively characterize the facts.** Such characterization damages your credibility. Accurately state the facts in a way that most favors your client, but do not try to make the Statement of Facts persuasive by being dishonest or deceitful.

**The Statement of Facts should not appear biased; do not utilize overly dramatic language.** Again, such language damages your credibility by causing the reader to suspect you are not accurately characterizing the facts. While it might make for a more interesting read to set the scene as “sinister and turbulent” or to note that the plaintiff “let out a bloodcurdling shriek as she fled in panic,” do not use similarly dramatic terms unless the factual record clearly supports such statements as accurate. When you attempt to color your reader’s perception of a character, do not be obvious about it; gently lead a reader to your desired conclusion.

- **Not:** “John Smith, a wonderfully kind man with a spotless moral record who probably adopts puppies in his free time, first met the shady and obviously morally questionable Mr. Mark when he spotted him lurking in the background at a park, probably trying to spot unwatched children and kidnap them.”

Use a more subtle approach – one that may likely lead your reader to personally come to a similarly extreme conclusion, but that doesn’t outright reach that conclusion on its own. Upon reading that Mr. Smith is a family man with five dogs, and Mr. Mark has a history of drug abuse, the reader may well *think* Mr. Smith is “a wonderfully kind man with a spotless moral record,” and they may well perceive Mr. Mark as being a “shady lurker.” Bring the reader to this point, but do not say it outright.

**Even seemingly neutral sentences may be tweaked to become persuasive.** For example, it is generally a good strategy to insinuate that your client’s position is the “default,” and that a decision

against your position would be going against the grain. So, if your clients entered an area that they were not authorized to enter, instead of saying, “people *were not allowed* to enter the park, unless”—which suggests that entering the area is the exception to the rule, you might consider saying, “people *were allowed* to enter the park, unless” – which suggests that the norm is being allowed to enter, and therefore the client’s choice to enter seems less taboo.

## **2) STORYTELLING TECHNIQUES**

**Make it interesting.** The Statement of Facts is most persuasive when it reads like a story. A bullet-point or very abrupt style of writing is unlikely to sway a reader in one way or another. When the Statement of Facts is crafted as a story, it is easier for the reader to become personally interested in the parties and for the reader to want to “pick a side” – which, if you are using appropriate persuasive techniques, should be your client’s side.

**Use specific, accurately descriptive words when appropriate.** Descriptive words make the story more interesting and allow the reader to more vividly picture the scenario. You can also be deliberate in your choice of descriptive words and choose terms that are more likely to favor your client.

- “Mr. Brown’s enormous black Doberman attacked Sam.”
- “The dog bit Sam on the arm.”

The first sentence is vivid and makes the same scenario seem scarier, which is great if you are Sam’s attorney. On the flip side, it can also be good technique to deliberately use general terms to downplay a negative incident and make a scene feel less vivid—the second sentence would surely be a better choice for Mr. Brown’s brief.

**Where you start the story matters.** It often makes sense to tell a story chronologically. Nonetheless, a chronological recitation is not always the most persuasive. One should consider other factors. Consider telling the facts from your client’s perspective. Frame the facts in the context that places your client in the most favorable light. What do you want to focus the reader on? If the opposing side is especially unlikeable, you might lead with facts that show that quality. If your client is the “good guy,” do not make your reader wait until the end of your Statement of Facts to find out.

- For example: “Mr. Smith, a convicted child molester, stole three televisions from an electronics store on the evening of March 3<sup>rd</sup>.” This kicks off the statement of facts with negative information, leaving the reader thinking, “Well, gee, I don’t like child molesters and I don’t like people who commit crimes, so this guy needs to go jail.”

**Use names to vary the reader’s level of attachment to the characters.** It may be helpful to refer to the opposing party as “Defendant” or “Plaintiff” and to your own client by their name. Using terms like “Plaintiff” and “Defendant” makes the reader feel more emotionally distant from the character, while use of names feels more intimate. Note, however, that many court rules advise against referring to parties by labels such as Plaintiff/Defendant, Appellant/Appellee. Likewise, think of how you refer to the characters. If you represent the Prosecution, you may refer to the

police officer as Officer Monk, but if you represent the Defendant you may simply refer to the police officer as Monk.

### **3) OTHER CONSIDERATIONS**

**Compare the Statement of Facts with the facts you have included in your Discussion section.** If a fact is in the Discussion section, it *must* be in your Statement of Facts. Critically evaluate any information that has been included in your Statement of Facts but not your Discussion – does it serve a purpose?

**Do not waste space.** Be critical in reading each sentence of the Statement of Facts. Every sentence does not have to be inherently persuasive, but each sentence does need a purpose – even if that purpose is to provide necessary background, transition into a new event, or distract from a negative fact. Also, think about proportion – the Statement of Facts generally should not take up too much of your allotted space. Your legal analysis is more important than the Statement of Facts, and the amount of space you dedicate to analysis should reflect that.

**Include citations to the factual record.** Almost every sentence in your Statement of Facts should be followed by a citation to the specific page of the factual record that supports your statement. This also serves as a check to ensure that your representation of the facts is persuasive but not inaccurate.

**Do not prematurely end the Statement of Facts.** Your Statement of Facts should tell a complete story; explicitly lay out the problem so the reader has a clear understanding of the purpose of the following legal analysis.

- Don't just say, "A woman went to the grocery store. She had a conversation with a friend there about a sensitive topic. A man she did not know recorded the conversation. The End." Finish the story – why was that a problem? What happened after that? Even if it feels obvious, explain what exactly happened and why the parties are in court. "After the woman found out about the recording, she was shocked and sued the man for intrusion on seclusion." Now, the story is complete and the reader is clear on what the rest of the brief will address.

**Step back.** Do not "overdo" the Statement of Facts. After evaluating every sentence for persuasive power and manipulating individual words for maximum impact, step back and simply consider whether the story comes across as a clear, reasonable presentation of what occurred in the case.

**Include the procedural posture of the case.** The procedural history, the nature of the case, and the disposition from the lower court(s) are typically included in the Statement of the Case or the Statement of Facts if the court rules do not provide for a Statement of the Case. If court rules do not require a separate Statement of Case, then you would include this section in your Statement of Fact. This part of the Statement of Facts is fairly straightforward and not particularly persuasive. It is sometimes labeled as its own separate section and titled, "Statement of the Case." Follow the rule that the court or professor you are writing for articulates. For example, revised Rule 28 of the

Federal Rules of Appellate Procedure now requires one combined Statement of the Case that includes the procedural history, the nature of the case, the disposition from the lower court(s), and a recitation of facts. Thus, in an appellate brief to be filed in federal court, the writer would label the section Statement of the Case, begin with a discussion of the procedural history, nature of the case, disposition below, and then a recitation of the facts consistent with the points set forth earlier in this handout.