WRITING PERSUASIVE FACTS AND FRAMING THE QUESTIONS PRESENTED

Cases are often won or lost on the framing. This short piece discusses the importance of framing effective questions and crafting a compelling fact section. It highlights techniques that work and those that do not. With these simple tips, you can win over the court before your "argument" even begins.

I. INTRODUCTION

According to some lawyers, the front matter of a brief—featuring the questions presented and the fact statement—are small time. Mere afterthoughts. The irrelevant junk required by the rules but not really important to the outcome. Cases, after all, turn on *arguments*, and briefs are meant for *arguing the law*. No one cares about the silly framing of the issues—the judges will figure it out in the argument section. And surely no one cares about the facts. As one famous judge put it, "facts are for sissies and trial courts." Hon. Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 330 (1992).

This, of course, is exactly wrong. First impressions count. A compelling "question presented" can sway an entire appeal. It shapes how the court approaches the case, what it expects to find in the briefs, and how it thinks about the issues. An effective articulation can immediately reduce a case down to its core—so much that Justice Brennan admitted he typically could determine the certworthiness of a petition based solely on reviewing the questions presented. William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473 (1973). Yet some still refuse "to appreciate that the outcome * * * [may] rest[] on what the court understands to be the issue." Hon. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 83 (2008). In our small way, this article hopes to change that.

The fact statement is every bit as essential—and Judge Kozinski would be the last person to say otherwise. His quip above was describing an effective attitude for *tanking* an appeal. And if you want to lose, ignoring the facts is a magnificent strategy. But for those trying to win, marshalling an impressive fact section is critical. Judges know a lot about lots of things, but lacking omniscience (barely) they often know virtually nothing about why you've showed up at their courthouse door. The facts set the stage for the legal rule. The facts explain what happened, why the law matters, and how the court's jurisprudence will play out in a concrete setting. The Framers designed Article III to care about "cases or controversies," and so should we.

This short piece proceeds in two parts. The first part examines how to frame effective questions presented. The second part examines how to craft a powerful fact section. This part explains why there are two parts. Let's proceed.

II. FRAMING THE QUESTIONS PRESENTED

The questions presented "may well be the most important part of your brief." Scalia & Garner, *supra*, at 83. Yet litigants often fail to take full (or any) advantage of this critical section. This is a first opportunity to frame exactly what you want the court to resolve. This is a chance to orient the panel to view the issues from your perspective—thinking of the case on your terms, not your opponent's. Judges are forced to endure countless, drab appeals. This is a prime place to separate your brief, and your client's position, from all the monotony: a well-crafted question can instantly capture the court's attention, generate excitement about your case, bolster your credibility, and soften the reader to your point of view.

A poor question presented, however, can leave the court annoyed, mystified, asleep, or worse. The errors are unnecessarily common. Why, for example, do some litigants insist on limiting themselves to a single, long, horrible, insufferable sentence, as if periods or punctuation were off-limits? Why not break up these impenetrable run-ons into multiple parts? Why not include a short introductory paragraph that carefully features the key statutory terms or legal principles at issue? Why not highlight the key elements that will be dispositive, offering a subtle, but fair, sense of how the question ought to be resolved? Why not limit a case to the issues that count, rather than list every conceivable point decided adversely below, even those that (heaven forfend) would not change the outcome if all of humanity depended on it?

As with all legal writing, crafting the questions presented is part science and part art. There is no single right way to do it—but there are many wrong ways. Rather than attempt an exhaustive treatment of the subject, this section highlights some primary considerations that apply in most settings. The art of perfecting the question presented takes time and practice. But these simple guidelines offer a good place to start.

A. Considerations Of Form

Contrary to what your local barista may think, there are few mandatory rules dictating the form of a question presented. This is not like ordering a "large" when you really mean "venti." A question can be framed in a single sentence or multiple sentences. It can start with "whether" and end in a period; it can start as a true question (go figure) and end with a question mark. The question(s) can be prefaced with a

short introductory paragraph—or not. The key is deciding what form best frames your particular issue with maximum clarity and effect.

Here are a few factors that help guide that determination.

1. A common misperception is that all questions presented must be limited to a single sentence. There is no such mechanical rule and no reason for any such rule. No one wants to read a 100-word sentence with endless clauses and subclauses appearing in all directions. Unless your issue is conducive to a single sentence, do not subject the poor judges to this kind of abuse.

2. If you elect to use "whether," end the sentence with a period—otherwise it sounds like you're not really sure what you want to ask. So do this: "Whether disparate-impact claims are cognizable under the Fair Housing Act." But not this: "Whether disparate-impact claims are cognizable under the Fair Housing Act?" ("Is this really my question? Should I ask something else?")

If you think "whether" sounds stilted, then feel free to frame the question as a *question*: "Are disparate-impact claims cognizable under the Fair Housing Act?" Litigants have had success with such simplicity in the recent past. See, *e.g.*, *Tex. Dep't of Housing & Cmty. Affairs* v. *The Inclusive Cmtys. Project, Inc.*, No. 13-1371 (U.S.) (pet. granted Oct. 2, 2014). But there is absolutely nothing wrong about using "whether"—and you will see that formulation used regularly by experienced members of the Supreme Court bar (including the federal Solicitor General). See, *e.g.*, Eugene Gressman et al., *Supreme Court Practice* 455 (10th ed. 2013).

3. Consider prefacing the question(s) with a short introductory paragraph. Some fear that this "introduction" is somehow forbidden because it is an *introduction*, not (strictly speaking) a *question*. But despite not being explicitly mentioned in most court rules, this helpful technique is both effective and permitted in every federal court (and state court) of which we are aware. Courts want to understand *substance*, and a leading paragraph often materially supports that task. Gressman, *supra*, at 455-456.

Suppose, for example, that you have a statutory-construction case (or even a case simply involving a statute). A short paragraph can set the stage for the question and provide critical background for any judge who hasn't yet memorized the entire U.S. Code.

So rather than do this:

> Whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

Try this:

> Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."
>
> The question presented is whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

United States v. *Alvarez*, No. 11-210 (U.S.) (pet. granted Oct. 17, 2011). For anyone not intimately familiar with Congress's "stolen valor" prohibition, this concise lead-in is essential for understanding what the case is truly about.

As another example, rather than do this:

> Under CERCLA, whether a party who incurs response costs conducting a cleanup under a consent decree may pursue a cost recovery claim under § 107(a)(4)(B) or is limited to a contribution claim under § 113(f)(3)(B) as its exclusive remedy.

Try this:

> The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) creates two "clearly distinct" (*Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 163 n.3 (2004)) civil remedies to permit private parties to recoup costs of environmental cleanup: a general cost recovery action under § 107(a), and a specific, tailored right of contribution under § 113(f).
>
> The question presented is:
>
> Whether the Eleventh Circuit erred in concluding, consistent with every other court of appeals to have decided the question, that a party whose claims are specifically addressed by CERCLA's § 113 contribution remedy may not bypass its limitations by instead pursuing the unbounded general remedy of § 107.

Br. in Opp., *Solutia, Inc.* v. *McWane, Inc.*, No. 12-89 (U.S.) (pet. denied Oct. 9, 2012). This added context not only helps the reader understand the otherwise-random statutory cites, but it effectively hints at the party's core argument: why craft a specific remedy with "tailored" limitations if any party can elect to ignore those limitations by resorting to a general right of recovery? The opening paragraph, by providing necessary context and stressing appropriate

considerations, informs the Court while lightly suggesting the desired answer. A single-sentence formulation could not cleanly accomplish that same objective.

An initial paragraph can also introduce key concepts that explain an issue's importance. In the Supreme Court, for example, an introductory paragraph can help illustrate why the question presented may be certworthy:

> In *City of South Lake Tahoe* v. *California Tahoe Regional Planning Agency*, 449 U.S. 1039 (1980), two Justices dissented from the denial of certiorari in a case asking whether a political subdivision has standing to sue its parent state for violating a structural provision of the Constitution. In the following three decades, this same issue has produced a widespread, entrenched, and intractable three-way circuit split—predominantly premised on different courts reading this Court's own precedent in very different ways. This confusion has been expressly acknowledged by multiple courts of appeals, a variety of district courts, and the academic community, and prompted calls from individual judges to reconsider circuit precedent—yet without any indication that any circuit is prepared to abandon its own position.
>
> Petitioner, a political subdivision, was denied standing to challenge its parent state's allocation of water as exceeding the state's power under the dormant Commerce Clause.
>
> The question presented is:
>
> Whether, in a suit against its parent state, a political subdivision has standing to press (i) statutory claims, but not constitutional claims, as the divided Tenth Circuit held below; (ii) all "structural" claims (constitutional *or* statutory), as the Fifth and Eleventh Circuits have held; or (iii) no claim at all, as the Ninth Circuit has held.

This formulation (though distinctly on the long side) hints immediately that the issue (which some might find dreadfully boring) otherwise might satisfy the Court's criteria for review.

While there is no definitive rule on the length of the "intro paragraph," some excellent authorities suggest limiting the entire question (including the leading paragraph) to 75 words. Bryan A. Garner, *The Winning Brief* 80-84 (2d ed. 2003). And in the context of a cert. petition, most suggest limiting the "question presented" (all parts inclusive) so everything fits on a single page. Gressman, *supra*, at 454. Yet the ultimate lodestar is substance, not form. And some exceptional advocates exceed these recommended limits when the situation warrants it. See, *e.g.*, *Bond* v. *United States*, No. 12-158 (U.S.) (pet. granted Jan. 18, 2013).

None of this means that a leading paragraph is always necessary or helpful. But where the subject matter is obscure or dense, this technique is often invaluable in breaking down the issue into concrete, accessible parts. Courts enjoy reading a few sentences and understanding the core issue. Courts do not enjoy reading a single sentence that defines nothing and is too abstract to convey anything useful about a case. And courts especially do not enjoy decoding an incomprehensible mess where a party tries to cram too much information in a single sentence. Garner & Scalia, *supra*, at 87-88.

Evaluate your issue and determine the optimal way to highlight the key elements that make the issue significant and interesting. Let form follow substance.

B. Considerations Of Substance

Having finished explaining why form should follow substance, we now let substance follow form. (Only in terms of the article's order, of course.) The optimal substance for a question presented will vary by case, but there are universal considerations to keep in mind. Think first of your audience: the court wants to know what the case is about and why it matters to the litigants and the court's jurisprudence. This is the time to capture the court's interest, orient its perspective, and force the other side to play on your turf—all while objectively presenting a fair picture of the dispositive issues.

As before, there is no magic formula for crafting the perfect question presented, but the following guidelines are useful in most settings.[1]

1. So how many issues should be included in a brief? No set rule dictates the answer. "Two questions presented are *sometimes* too many and five are *sometimes* too few." Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, Appellate.Net (1994), http://www.appellate.net/articles/gdaplbrf799.asp. The key is to think carefully about why an issue is included or omitted. Which issues are dispositive? Which are legitimate? Which truly warrant the court's consideration?

[1] This article aims to provide a general framework for thinking about how to craft the questions presented. It does not attempt to exhaustively examine every issue implicated by how a question is framed, including important considerations such as which subsidiary questions are "fairly included" within a question presented (see, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992)). Such considerations (and other preservation issues) are essential, and they should be considered carefully when framing your question(s) presented.

Do not include too many issues simply for the sake of including too many issues. Contrary to the view of some litigants, judges tend not to presume a direct correspondence between the merits of an appeal and the sheer multitude of issues presented. It is the rare case where the district court committed 17 independent and dispositive errors—*and courts know this*. The presumption instead is that the litigant has little to say and is wishing to find salvation in the kitchen sink. (You will not find salvation. You will find only unused pasta.)

Do not lose credibility with losers. If an issue is weak, do not feel compelled to raise it. It will distract from your better points and (if truly bad) will hurt your credibility. Dropping a baseless issue is much like offering a sound concession; it shows the court that you are measured and reasonable, suggesting that the points you *do* raise might also be measured and reasonable. So ask whether any sentient being would vote for you on issue 5 after voting against you on issues 1-4. If the answer is no, then drop the issue.

(A rare exception: At times, it is worth including a borderline issue for other reasons. You may need an appropriate vehicle to underscore the equities of the case or develop helpful atmospherics. But this is truly the exception, not the rule. It is almost always possible to find a home elsewhere in a brief for those tangential points (whether in an introduction, in the statement, or in supporting other arguments). And where a fact does not fit *anywhere* else in a brief, it is likely not important enough to include in the first place.)

Do not hide winners with losers. Weak issues dilute the power of strong issues. If you wish to *lose* an appeal, a great technique is to "conveniently bury your winning argument among nine or ten losers." Kozinski, *supra*, at 327. And a brief with too many issues can be exhausting. No one wants to wade through endless points, especially when most are clearly ineffective. Judges and clerks are busy; they have enough work without having to grapple with useless points better excised from a brief. Once the court perceives that a brief unnecessarily presses meritless issues, it might lose attention and miss the golden nugget tucked away between issues 1-7 and 9-13. Respect the court's limited bandwidth. A confident litigant will limit the number of issues because she knows that her client can win on the issues raised. Take the advantage by focusing all your efforts on those legitimate, genuine issues.

2. Do not include repetitive issues. Some litigants have trouble choosing the right way to say something, so they repeat the same question three or four different times—enumerating each formulation as a separate issue. This is confusing and ineffective. It is confusing because the reader wonders why there are so many questions that seemingly cover the same ground. They will waste time wondering if there is some nuance they've missed. It is ineffective because a single question, optimally phrased, is more powerful than restating the issue multiple times. It tells the court exactly what it must decide to rule in your favor. State the issue once, then stop.

3. A crucial task is deciding how much detail to include in the question presented. Include too little and the panel will have no idea what you're talking about. Include too much and the question typically becomes too complex, too awkward, or just too *much*. (There is no rule that every granular fact or element must appear in the question presented itself; this is why the rules allocate space for other parts of the brief.) The idea is to convey the core question that the court will decide. Provide relevant details that disclose the key considerations and what makes the question interesting. Isolate those factors that will drive the result. "A well-framed issue statement suggests the outcome you desire." Scalia & Garner, *supra*, at 83.

Let's start with what not to do. What, for example, does this question tell the reader: "Whether the trial court erred in granting summary judgment." Fantastic. Very helpful. Unfortunately, we have no idea what this means. Was the case about securities fraud? Patent infringement? Stealing a cat? The panel will get that the case was decided at summary judgment, but will not otherwise understand anything else. Was the "error" a failure to grasp the existence of a material fact dispute? Did it misconstrue a statute or misapply a controlling precedent? Did it goof on a procedural matter (*e.g.*, did it grant summary judgment without permitting the opposing party a proper opportunity to develop the record)? Even without any question(s) presented, the panel can already guess that the appellant is probably unhappy with the result below. But your judges are not Nostradamus. They cannot see what your case is about unless you tell them. And this kind of useless and abstract question ultimately tells the panel nothing useful about the case. That annoys the panel and misses an important opportunity to frame the discussion. Gressman, *supra*, at 454-455.

Instead, try highlighting the relevant factors that will drive the analysis. Do not ask "whether plaintiffs failed to state a viable antitrust claim." Instead, ask this: "A business serves two different sets of consumers in two different markets. One market benefits from competition and the other does not. The question presented is this: Whether consumers operating in the *non-competitive* environment (and thus *never* benefiting from competition) may invoke the Sherman and Clayton Acts, 15 U.S.C. 1, 15, where the business voluntarily sets prices in that non-competitive environment to mirror allegedly fixed prices in the separate, distinct, competitive market." This gives the court a flavor of the issue. If the business *voluntarily*

links the two markets, can its allegedly illegal behavior in one market (where consumers are protected) carry over into the other (where different consumers are not protected)? The question suggests an answer to the question while still making it perfectly clear to the court what it must decide. It puts a thumb on the scale (and previews the issue) without sacrificing credibility. Gressman, *supra*, at 456-457.

And it is important not to offer unduly tilted questions that *do* sacrifice credibility. Frey & Englert, *supra* ("Advocacy has a role in drafting the questions presented, but it is a mistake—and a common one—to slant the formulation of the issue too obviously in your own favor."). A question presented can fairly suggest the right answer by setting up the relevant considerations and letting the court's logic and reasoning do the rest. Scalia & Garner, *supra*, at 84. But an element of objectivity is helpful and required. Do not ask "whether the scumbag defendant should be let off the hook for its egregious tort." Not helpful. And while using a syllogism can prove incredibly effective (see Garner, *The Winning Brief*, *supra*, at 53-97), it is important not to skew what you're asking. So rather than do this:

> The law clearly says that the statute of limitations runs from the moment of injury, not the moment of discovery. Did the trial court err in holding that the limitations period ran from the moment of discovery, not the moment of injury?

Try this:

> Whether the statute of limitations runs from the moment of injury or the moment of discovery.

The former *might* be passable if the law were truly undisputed (and undisputable), and the entire point is that the trial court flouted binding precedent. But if the issue is open on appeal, then why pretend that it is foreclosed? If you know the court will grapple with your premise, rephrase the question in a manner that says exactly the same thing without dinging your credibility. See Gressman, *supra*, at 456 ("A question presented to the Court should have a high degree of objectivity, candor, and fairness. At the same time, a fairly stated question may be written in a manner that may cause the reader to favor one side of a case more than the other.").

4. As with all writing generally, remember your audience. A question appropriate on appeal at the panel stage may not always be appropriate at the rehearing stage (or later in a cert. petition before the Supreme Court). See, *e.g.*, Timothy S. Bishop & Jeffrey W. Sarles, *Petitioning the United States Supreme Court for Certiorari: A Primer*, Appellate.Net (1994), http://www.appellate.net/articles/petit799.asp. One duty of a circuit court is error correction; the same is untrue for the Supreme Court (or even a circuit at the rehearing stage). So frame the question presented with the audience in mind: If it is possible to highlight factors that are important to those courts, consider including those factors somewhere in the question presented.

5. The questions presented are not reserved exclusively for topside briefs (*i.e.*, the "opening brief" in appellate lingo). Do not feel bound by your opponent's framing. It is perfectly acceptable (and often desirable) to reformulate the questions on your terms. This can redirect the court's attention and shift the focus to what you consider important. Having already won below, a proper framing of the QPs can help preserve your victory on appeal.

III. WRITING PERSUASIVE FACTS

"Let me write the statement of facts, and I care not who writes the law."—Justice Louis Brandeis

"It may sound paradoxical, but most contentions of law are won or lost on the facts."—Justice Robert H. Jackson

The statement of facts—or what the Federal Rules of Appellate Procedure now call the statement of the case—"is the complete guts of your case." Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. Chi. L. Rev. 627, 637 (1962). In short, it tells what the case is about. It explains how the litigants have arrived here: the background and context for the questions presented and the legal rules you urge the court to apply.

The application of law to facts is the nub of the matter. Although some lawyers may view appellate courts as concentrating on the law while trial courts focus on the facts, "[t]he law doesn't matter a bit, *except* as it applies to a particular set of facts." Kozinski, *supra*, at 330. The facts determine which legal principle applies, how much a rule of law might have to be extended, whether a certain precedent is distinguishable, and so forth. Effectively framing the facts augments the force of the legal arguments to come.

The statement of facts thus aids the argument, but it must not itself be argumentative. Objectivity is key, in both substance and presentation. Avoid emotional pleas, purple prose, and one-sided statements. Nothing is so damaging to a litigant's credibility than misstating or distorting a fact—and nothing is so easy for his adversary to point out. If the brief misrepresents a fact, the judge (or her law clerk) will inevitably mistrust the brief's legal discussion as well. Nearly as bad is to

omit adverse facts. Confronting a bad fact bolsters credibility and affords the opportunity to spin that fact favorably—or, if you're the appellant, at least to remove some of the sting before the appellee aims for your head. Relatedly, be sensitive to the procedural posture of your case. For instance, if you're appealing an adverse jury verdict, to discuss only favorable facts is to discuss only those facts that the factfinder has rejected.

Still, the statement of facts can—and must—persuade. That is accomplished by the strategic emphasis of some facts and minimization of others, artful organization, and precise phrasing—or, as Justice Scalia and Professor Garner put it, "by your terminology, by your selection and juxtaposition of facts, and by the degree of prominence you give to each." Scalia & Garner, *supra*, at 94. The result, Professor Llewellyn explains, is two-fold. First, the reader "arrive[s] at the conclusion that the case has to come out one way"; and second, it becomes clear that the case "fits into a legal frame that says, 'How comfortable it will be, to bring it out that way. No trouble at all. No trouble at all.'" Llewellyn, *supra*, at 637.

A chronological approach typically is best. To do that well, Justice Scalia and Professor Garner suggest "produc[ing] a raw-material 'chronology of events' sequencing all the facts in order." Scalia & Garner, *supra*, at 95. One common (and ineffective) alternative is to state the facts using a witness-by-witness or document-by-document account. Why that approach should be disfavored becomes clear from remembering that every case involves a story. Regardless of the subject matter, the pertinent private actors, government bodies, or individual administrators interacted with each other in ways that led to the instant dispute. That is, the actors didn't act independently, and the witnesses didn't view the same event sequentially. Recounting the facts witness-by-witness thus loses the thread of the story.

It is crucial to support your facts with citations of the record. (As an aside, one cites a document; one does not cite "*to*" a document.) Such citations are mandatory to comply with court rules. See, ***e.g.***, Fed R. App. P. 28(a)(6); 5th Cir. R. 28.2.2; Tex. R. App. P. 38.1(g), 55.2(g). They also represent good lawyering. Unsupported statements leave the panel to wonder whether there's any support at all. "Judges are not like pigs, hunting for truffles buried in briefs." *United States* v. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). An enterprising law clerk might mine the record herself, but the court also might point out, as the Fifth Circuit has often done in reviewing summary-judgment rulings, that the court of appeals has no "duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Willis* v. *Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014) (citation and internal quotation marks omitted). The Texas appellate courts have expressed similar sentiments: "We are not required to search a voluminous record, here being four hundred pages of oil and gas engineering documents, with no guidance from appellants, to see if an issue of material fact was raised by the affidavit." *Paull* v. *Capital Res. Mgmt., Inc.* 987 S.W.2d 214, 220 (Tex. App.—Austin 1999, pet. denied). A well-supported statement of facts ensures that the court will credit your assertions.

This is not to say that everything in the statement must come from the record. Indeed, in many cases involving statutory interpretation or complex regulatory schemes, the most important "facts" may be the text of the relevant statutes and administrative regulations or orders, along with how those statutes and administrative actions developed. (Yes, contrary to some counsel's belief, it is absolutely permissible to discuss this type of "law" in the fact section.) That framework may provide critical context for the litigants' actions and can easily be described without argument in the statement of facts. Many effective statements thus begin with the relevant background law.

It should go without saying to include only relevant facts. Too often briefs incorporate facts that have no significance to the questions presented. At best, this extraneous information bogs the reader down and distracts her from the helpful facts you want to emphasize. At worst, the reader is confused, asking herself why the brief is discussing facts that don't appear to bear on the issues. Either way, you're losing an opportunity to score points.

That said, some color is permissible. For instance, the issues in criminal and habeas corpus cases often do not turn on the nature of the crime or the identity of the victim, but references to those technically immaterial particulars can provide sympathetic color. Be careful, though, not to go over the top, lest your statement begins to sound like it's attempting to play on the judge's emotions because you know your legal arguments won't persuade.

Other blunders abound. One of the most frequent is a slavish devotion to relating the precise date of every event, transaction, filing, etc., regardless of whether the exact timing matters one whit. The better practice is to recount those facts in relative terms. Professor Garner supplies a helpful example, organizing seven separate actions while mentioning only one specific date:

> On February 16, 1993, Leib allegedly slipped and fell on kiwifruit at the Shop-Rite Supermarket. More than five months later, her doctor diagnosed a herniated disk in her lower back. Leib sued Shop-Rite, alleging

> negligence and gross negligence in maintaining the premises. A jury returned a verdict in favor of Shop-Rite, and the trial court entered judgment on the verdict. After the court denied Leib's motion for new trial, she timely appealed.

Garner, *The Winning Brief*, *supra*, at 387.

Of course, if dates are material to the issue—perhaps your argument involves a statute of limitations or a missed appellate deadline—then don't omit the dates; repeat them as necessary to prove your point. (Saying the party missed the deadline—"but I won't tell you what it is!"—leaves the court unable to evaluate your claim without accepting it at face value. Courts do not like accepting facts at face value.) But rarely will it matter whether the jury returned its verdict on March 2nd or April 23rd. So as with other facts that do nothing to persuade the court, omit the dates so that the reader can focus on what counts.

Another potential distraction is overuse of acronyms, which can disrupt the flow of the brief. By and large, appellate judges are generalists. They haven't spent their careers in the trenches of environmental regulation, for example, and likely aren't especially comfortable with acronyms common to specific industries or areas of administrative regulation. Judge Kozinski offers a particularly (un)helpful example: "LBE's complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP." Kozinski, *supra*, at 328. The result, he pithily concludes, is that "[e]ven if there was a winning argument buried in the midst of that gobbledygoop, it was DOA." *Ibid.* Instead of using unusual acronyms, make your defined terms more descriptive. (On that note, refrain from using "Appellant" or "Appellee.") For example, define the defendant Hollywood Upstairs Medical College as "the College" instead of "the HUMC."

Block quotations represent a third potential pitfall. These walls of text don't interrupt the reader's attention so much as propel it past the quotation and whatever impact it was supposed to have. If a block quotation simply can't be avoided, the sentence immediately preceding and introducing the quotation must summarize the coming text or at a minimum state why the reader must pause and absorb the quotation. For instance, instead of writing simply, "The witness testified: [quotation]," write, "The witness detailed the defendant's aggressive behavior, including audible threats and physical acts: [quotation]." That way, if the reader does skip the quotation, she still appreciates the point. And if the reader amazingly reviews the block of text, she'll be happy to know you weren't lying—which promotes your credibility.

A final, general mistake is to take the fact statement from a trial-court motion and reproduce it verbatim as the statement of facts in the appellate brief. This is usually a bad idea for any number of reasons. It's unlikely that the issues in your motion and on appeal are the same, and at the very least the flavor and framing of the issues will have changed. Some facts thus become irrelevant, while others must be refocused. Moreover, the procedural posture may be different—for example, using a summary-judgment motion's statement for an appeal of a jury verdict may confuse and possibly mislead the court. More fundamentally, the statement of facts is the foundation for the remainder of the brief. The statement thus should be presented in a manner that maximizes the force of the legal arguments—again, it is doubtful that those arguments will be presented identically to the appellate court as they were to the trial court.

Two last points. First, although most court rules allow the appellee to forgo its own statement of the case, doing so is, in Professor Llewellyn's words, "suicide." Llewellyn, *supra*, at 638. If you've read this far, we hope it's clear why that is so. The statement of facts is a critical part of the brief's overall arguments. The appellant's statement can't possibly reveal her adversary's best view of what the case is about.

Second, as to the length of a statement of facts, two Supreme Court practitioners offer an apt analogy: "Recall what Lincoln said about how long a horse's legs should be: long enough to reach the ground. A statement should be long enough to tell the judges or Justices what they need to know, and no longer." Frey & Englert, *supra*. As long as you include only relevant facts, in an organized, dispassionate fashion, you've probably arrived at an appropriate length.