Good Grief! The Court Needs A Brief
(Part Two)

By F. Georgann Wing©

Statement of Facts

Many lawyers consider the statement of facts the most important part of the brief. It's the lawyer's opportunity to skillfully and persuasively lay the foundation for the argument from the client's viewpoint. Subtle persuasion is the theme in every step of the statement of facts. "Too often, however, attorneys neglect the statement of facts in favor of the legal arguments and thus fail to make use of one of the strongest tools of persuasion . . . ."[15]

To set the stage, start with a one- or two-sentence statement about the action. This short introduction prepares the court; it provides the right frame of reference for the events that follow.

Example:

> Susan Jones is dying of cancer. She has asked the court to enter a declaratory judgment giving her the right to refuse medical treatment, food, and water, so she may die with dignity.

Follow the brief introduction with a compelling story from the client's viewpoint, taking every opportunity to subtly persuade. For example, the plaintiff's attorney might describe the client as:

a competent woman
a young boy of 16
an unemployed widow with five children
an active, healthy older man (before his injury)
an innocent victim

The defendant's attorney might describe the same person as:

the petitioner
John Miller
a college-educated woman
a 76-year-old man (implying that he had already outlived his life expectancy)
the plaintiff

The facts should be stated persuasively, and at the same time be clear and accurate—a fine balance. In appellate briefs, support the facts you have stated by continually referring to the record[16]/appendix.[17]

(Tr pp 42-46)
(Tr V I, p 39)
(4-3-90, Tr 25-28)

(63a-71a)
(23b-35b)

This doesn't mean you can take the easy route and state the client's case by lifting (quoting) substantial portions of testimony from the record. No judge should have to do your work by sifting through yards of testimony to sort out the relevant facts. Besides, as John Dernbach says, "[Judges] are often too busy and too impatient to find the kernel of wheat in a brief full of chaff."[18] So summarize the witnesses' description of the important events, giving the names of the witnesses and referring to the appropriate pages in the record or appendix.

In trial briefs, support the facts by continually referring to the pleadings, depositions, and affidavits, attaching them as appendixes or exhibits, if possible.

(Plaintiff's Motion for Summary Disposition, ¶ 11.)
(Dep, John Smith, p 63.)
(Affidavit, Richard Johnson, attached as Exhibit 2.)
(Presented at Preliminary Examination. A transcript of the examination has been ordered but is not available.)

In all instances, artfully and honestly discuss the emotional facts, directing the court's eye to the equities of your client's case. Vividly describe the testimony of your client's doctor.

Example:

> The cancer was in remission when Susan Jones married two years ago. Just three weeks after Susan learned she was pregnant, her doctor discovered that the cancer had returned and she had only a few weeks to live. Her death is now imminent, With medical treatment her death can only be prolonged six or seven weeks, which will not be long enough for her fetus to become viable. Treatment would be extremely painful, and she would be heavily sedated during the last days of her life. Susan says she does not want to die, but neither does she want treatment that would only prolong the inevitable—her death. Susan is competent to decide her destiny.

Emphasize the pain and uselessness of the medical treatment. Describe the testimony of her family and friends, and her testimony, pointing out facts

© 1990, F. Georgann Wing

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

to show that she is competent and able to make reasoned and knowledgeable decisions about the fetus and her own life and death.

The opposing counsel would state the negative facts blandly, emphasizing the positive facts.

> *No one can say with certainty when the petitioner's life will end. With medical treatment she could live long enough to enable her baby to live on its own. She may be mentally competent, but her decision is not rational.*

Don't jeopardize your credibility by slanting or omitting legally relevant facts because they are unfavorable. On the other hand, you aren't obligated to build your opponent's case, so state the unfavorable facts merely as facts. Don't emphasize them by stating them first or last in the statement of facts; instead, briefly mention them where their sting may go unnoticed.

Be objective in a persuasive way. Don't cite authorities or argue your client's case. And avoid bluster such as:

> *It is clear that Susan Jones's right to refuse medical treatment outweighs the state's interest in preserving life.*

For appellate briefs, include the detail that the court rules require: "the nature of the action"; "the character of pleadings and proceedings"; "the substance of proof"; "the dates of important instruments and events"; "the rulings and orders of the trial court"; "the verdict and judgment"; and anything else necessary for "an understanding of the controversy and the questions involved."[19] Point out and emphasize where error occurred.

Like the legally relevant facts, the procedural facts should be discussed in a chronological manner as they occurred within the setting of the facts of the case. Chronological organization is critical for understanding.

As in stating the questions, try to state the facts so clearly, completely, and accurately that your opponent will accept your statement of what has happened. It's easier to work on your own terra firma. Even so, realizing the persuasive value of the statement of facts, the opposing counsel may still find a reason to prepare a counter-statement of facts.[20]

Argument

Now for another challenge. In the Argument, you will weave together fragmented points and principles of law to develop a legal theory that applies to the facts of your client's case. The Argument includes the point-headings, thesis statement, topic sentences, analyses, and applications.

1. Point-Heading. Start with a point-heading. It's the issue you will discuss, but now stated as your conclusion. As an example, instead of asking whether a competent patient has the right to refuse food, water, and medical treatment, you will say that she either does or does not have that right. The point-heading is indented inward five spaces from each margin, typed in capital letters,[21] and numbered with a Roman numeral.

If your major point-heading requires that you discuss two or more sub-issues to make your point and answer the question, you may want to use sub-point-headings where they are appropriate within your discussion. They serve as organizational devices to separate and highlight the points (elements, sub-issues, principles) that you must discuss to arrive at your conclusion. The sub-point-headings, like the point-headings, are complete sentences that make a positive or negative assertion about your client's case. They are prepared in lower case, boldface type, and are single-spaced. Here's the structure of a possible argument.

Example:

> I. A COMPETENT PATIENT'S LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION ENCOMPASSES THE RIGHT TO REFUSE FOOD, WATER, AND MEDICAL TREATMENT THAT COULD PROLONG HER LIFE, WHERE THE WOMAN HAS CANCER AND IS 15-WEEKS PREGNANT, AND WHERE TREATMENT WOULD ONLY EXTEND HER LIFE SIX OR SEVEN WEEKS. (Point-heading)
>
> (After the major point-heading, discuss relevant authorities to show that patients generally have the right to make their own decisions about medical treatment, and that food and water may be considered medical treatment.)
>
> A. **A competent patient with a pre-viable fetus has the right to make an informed refusal on behalf of herself and her fetus.** (Sub-point-heading)
>
> (Discuss the relevant authorities to show and resolve the conflict between the mother's rights and the rights of the fetus.)
>
> B. **The state's interest in protecting life does not outweigh a mother's right to refuse treatment.** (Sub-point-heading)
>
> (Discuss authorities pertaining to the state's interest in preserving life.)

Now that you have an outline, let's begin.

2. Thesis Paragraph. After stating the major point-heading, you will need a thesis paragraph that gives the court an overview of what you are about to discuss. The thesis paragraph summarizes the legal and factual arguments and tells the court what you want. It's a key organizational tool that tells the court up front what this action and this brief is about.

Example:

> A competent adult has a common law right and a liberty interest under the Due Process Clause of the United States Constitution to refuse unwanted medical treatment, including food and water. This right is paramount to any rights the non-viable fetus may have, and it outweighs the state's interest in preserving life. And in reality, the state of Michigan has no interest to protect, because medical treatment will preserve neither

the life of the petitioner nor her fetus. Even with invasive medical treatment, the petitioner's death could not be prolonged long enough to produce a viable fetus. The petitioner therefore requests that the court grant her request for a declaratory judgment, giving her permission to refuse all treatment and to die with dignity.

Now you have set the stage for your analysis of authority.

3. Codified Law. Codified law should be discussed first, in a separate paragraph, after the thesis paragraph. Discuss the relevant provisions and point out the language that creates the controversy. Include the text of the codified law in the brief or in an addendum.[22]

4. Topic Sentences. After discussing codified law, you will usually discuss case law. Start the analysis of each case with a topic sentence. This first sentence should state a main point (often a principle of law) from the case. It also serves as a transition that links the cases together. The topic sentences should provide a coherent outline of your argument under each point-heading or sub-point-heading. After making your point, you would, of course, go on and briefly analyze the case.

Examples:

A competent person has a right under the Due Process Clause of the United States Constitution to refuse unwanted medical treatment. In *Cruzan v Director, Missouri Dept of Health,* ___ US ___; 110 S Ct 2841; 111 L Ed 2d 224 (1990),.... (Now analyze *Cruzan.*)

In addition to having a constitutionally protected right, a person has a common law right to determine the course of his or her own medical treatment. *Fosmire v Nicoleau,* 75 NY2d 218; 551 NE2d 77; 551 NYS 876 (1990).

A competent adult also has the right to refuse artificially supplied food and water when she suffers from an incurable illness. In *Bouvea v Superior Court,* 179 Cal App 3d 1127; 225 Cal Rptr 297 (1986),....

Some courts have determined that a terminally ill patient is the only true judge of how the rest of his or her life may best be spent. In *Tune v Walter Reed Army Medical Hospital,* 602 F Supp 1452 (D DC, 1985),....

After you have analyzed all the authorities under that point-heading, go back and check the topic sentences. Do they summarize the law from your client's viewpoint, providing the court with an organized outline of your argument?

5. Analysis of Cases. Consider the court in which you stand. In many trial court cases, the same issues are raised over and over again. In those cases, analyze the one or two definitive cases, in more or less detail depending on the need. Analogize the cases that support your client's case and distinguish the others.

When writing briefs for the Court of Appeals and the Supreme Court, you will undoubtedly have to analyze more cases, in more depth. Often appellate cases are cases of first impression with no clearly defined law that applies. You'll find merely threads of law that you must weave together and use to build an argument. Public policy is important and should be included as needed.

Discuss the important cases where they appropriately fit within the framework of your argument. The analysis should be brief but should include the facts, the holding or result, and the court's reasoning. The reasoning includes the law that the court discussed and the court's application of the law to the facts of that case. Without some depth in your discussion of the court's reasoning, you will have little to apply to your case. Your four-step analysis would look like this:

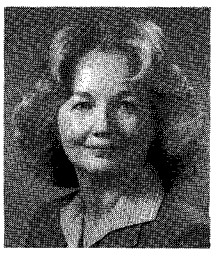
topic sentence
facts
holding or result
reasoning:
the law that the court discussed; the court's application of law to facts

Example:

A person should not be compelled to submit to a significant bodily intrusion for the benefit of another. In *In re AC,* 573 A2d 1235 (DC App, 1990), the terminally ill patient was 26½ weeks pregnant. If taken by cesarean section, the viable fetus had a 50- to 60-percent chance of survival. The mother first agreed to have the surgery, but moments later said she did not want it. During much of the time she was sedated. The trial court ordered the surgery. Both the mother and baby died shortly thereafter.

The court held that "in virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus." *Id.* at 1237. It reasoned that courts do not require a person to undergo significant bodily intrusion for the benefit of another. And a fetus does not have rights superior to the rights of a person already born. The court held also that the trial court must determine and abide by the patient's wishes, unless compelling reasons exist to override them. A person is competent if he or she can evaluate the options and the risks. If the patient is incompetent, the court must use its substituted judgment to determine what the patient would have wanted. The trial court made no findings about her competency, and it committed error in proceeding without those findings.

So analyze the reported case briefly but fully when your purpose is to show that it either applies or does not apply to your case. But at other times, you will merely include a principle or point from a case that is appropriate to your discussion. The case does not require an analysis, because (1) the facts of the case are too different to be relevant,



F. Georgann Wing is an associate professor at Thomas M. Cooley Law School. She teaches Research & Writing and administers the Advocacy program.

(2) you merely want to state a principle of law or a holding, (3) you want to define a term, or (4) the case is well-known. In those instances, make your point and cite the case.

Example:

Viability usually occurs at about 28 weeks. *Roe v Wade,* 410 US 113, 160; 93 S Ct 705; 35 L Ed 2d 147 (1973).

Do not blindly cite cases without stating their supporting principles. Like string citations, they would break the flow of your argument and would probably not be helpful.

6. Application. Now you've analyzed a case, and it's time to consider your application. In a separate paragraph, tell the court why the law from the case either applies or does not apply to your facts. Include the application where it fits. Usually, though, it's best to apply law directly after or soon after the analysis, while the law and the facts of that case are fresh. Don't make the reader turn back several pages to review the analysis in order to understand your application. And general applications don't work; be specific.

Example:

Unlike the mother in *In re AC,* the competency of Susan Jones is not in question. She is competent, and she has very clearly stated that she does not want the medical treatment. She alone has the right to decide, and her decision must be respected. She cannot be required to submit to treatment that could only extend the fetus' life for about six or seven weeks.

7. Quotations. A few concise quotations will add strength to your brief. But don't overdo it. The analysis will miss its mark if you have done little more than string quotations together. And use page numbers for the quotations. It's disconcerting to have to review page after page of an opinion to find that quotation. For Michigan cases, use the page number from the official reports (Michigan Reports or Michigan Appeals Reports). For other cases, give the page number from the unofficial reporter.

Examples:

Jarvis v Providence Hospital, 178 Mich App 586, 590; 444 NW2d 236 (1989).

Id. at 590 (if *Jarvis* is the immediately preceding authority).

Jarvis at 590.

Bouvia v Superior Court, 179 Cal App 3d 1127; 225 Cal Rptr 297, 304 (1986).

Id., 225 Cal Rptr at 304.

Bouvia, 225 Cal Rptr at 304.

Request for Relief

In a concluding section, tell the court what you want it to do.[23]

Example:

The Petitioner respectfully requests that this court issue its declaratory judgment granting her authority to refuse all medical treatment, food, and water, so that she may die with dignity.

Respectfully submitted,

_____
(signature)

Review Your Work

Last, polish what you have written. Check the citations. Remove the lawyerisms. Review sentence structure, punctuation, and spelling. And, of course, keep in mind that briefs, like all other legal documents, should be written in plain language.[24] ■

Footnotes

15. Bentele & Cary, *Appellate Advocacy: Principles and Practice* (Cincinnati: Anderson Publishing Co, 1990), p 170.
16. MCR 7.212(C)(5) and MCR 7.212(D)(2).
17. MCR 7.212(C)(5), MCR 7.306(A), MCR 7.307(A), and MCR 7.308.
18. Dernbach, *The Wrongs of Legal Writing,* 16 Student Lawyer 18, 20 (1987).
19. MCR 7.212(C)(5).
20. MCR 7.212(D)(2).
21. MCR 7.212(C)(6).
22. MCR 7.212(C)(6).
23. MCR 7.212(C)(7).
24. Professor Robert W. Benson and Joan B. Kessler conducted a comparative study with two groups of judges and research attorneys from the same court. They asked one group to access passages from briefs using legalese and the other group to access the same passages rewritten in plain English. "By statistically significant margins, the respondents rated the passages in legalese to be substantively weaker and less persuasive than the plain English versions. Moreover, they inferred that the attorneys who wrote in legalese possessed less professional prestige than those who wrote in plain English." Benson and Kessler, *Legalese v Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing,* 20 Loyola L R 301-302 (1987).

    Review also a similar study conducted in Michigan by Professor Joseph Kimble and Steve Harrington. Kimble & Harrington, *Survey: Plain English Wins Every Which Way,* 66 Mich B J 1024 (1987). This same study has been conducted in Florida and Louisiana. Kimble & Prokop, *Strike Three for Legalese,* 69 Mich B J 418 (1990).

DON'T "DAMAGE" YOUR CASE

Whether you're representing the plaintiff or the defendant — and the case involves the value of a business, a lost-profits or wrongful-discharge claim, or a similar matter calling for financial analysis expertise — then getting a handle on the extent of the damages can be key to your case.

As independent experts who've been called in to testify in hundreds of cases — by lawyers for plaintiffs and defendants as well as by the Court — we'll be glad to give you that handle.

We've been providing litigation support for over 20 years. We've often done it on short notice — and we're ready to do it for you: Complete or abbreviated reports. . . testimony as expert witnesses.

Call us. You'll find our fee for reviewing your file and evaluating it a cost-effective investment.

THE LEFKO GROUP
Orville B. Lefko, Director

707 E. Maple Rd.
Suite 100, Troy, Michigan
Mailing Address:
P.O. Box 778, Troy, MI 48099
Phone: (313) 528-2373
Fax: (313) 528-0465