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Legalizing the Appellate Introduction

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In polite society, it is rude not to introduce yourself, but if you are writing a brief to a Florida appellate court, the issue is complicated. The rule describing the required content of a brief does not describe an introduction.[1] This article suggests that the rules should be amended to replace the "summary of the argument" with an introduction that is a summary of the case that may be persuasive.

The Problem

Over the last 15 years, the number of briefs that contain an introduction has increased substantially. These introductions have grown in length, and the rhetoric of the typical introduction has grown increasingly argumentative. Especially in civil cases, a brief now frequently contains an introduction that is as long or longer than the statement of the case or the statement of the facts. This unregulated section of the brief is often longer than the two pages recommended for a summary of the argument and occasionally is longer than the five pages permitted for a summary. All too often, the introduction attacks the opposing lawyer rather than explaining the merits of the case. At best, the brief simply contains two summaries of the argument rather than one.

Responding to this trend, the Second District Court of Appeal recently posted "Practice Preferences" on its website containing the following preference:

"7. *Keep a Nature of the Case Statement ("Introduction") Very Brief.* If the statement of the case and facts begins with an introduction about the nature of the case, the introduction should be limited to a very brief, non-argumentative statement about the case and the issue or issues presented on appeal. Outlines of substantive arguments are more proper in a brief's summary of argument section...."[2]

Although other courts have not been as openly critical of the unauthorized introduction, it is clear that more appellate judges are beginning to question the use or abuse of the introduction. However, an introduction is actually a good idea. A well-written introduction is an important part of any persuasive essay. It is critical to achieve the "super-clarity" recommended by Stephen Armstrong

and Timothy Terrell.[3] It is the fourth tip of Bryan A. Garner in his "Ten Tips for Writing at Your Law Firm."[4] While certainly not in the same academic league, this author has long encouraged lawyers to "front-load" persuasive writing.[5] Front-loading cannot be achieved without an introduction.

A Little Early History

A brief submitted under the 1962 revision of the Florida Appellate Rules (typed on a typewriter using carbon paper) was a stodgy document. Prior to filing the brief, the appellant's attorney had already filed "assignments of error."[6] At least theoretically, the "points on appeal" were required to have been raised in the assignments.[7] The brief was required to have a "statement of the case and of the facts and points involved."[8] From the author's experience, this requirement was often fulfilled in three separate sections. The brief, however, was not required to have a summary of the argument. Some courts would have stricken a brief that contained one.

When the current rules were first adopted in 1977, "assignments of error" were eliminated in civil cases. The lawyer was given a little more flexibility in the selection of issues. For the first time, a lawyer could include a section in the statement of case and facts that described the "nature of the case."[9]The rules did not provide for a "summary of the argument."

At the time of these changes, very few lawyers took full advantage of the new requirement that they file a "nature of the case" as the initial portion of their statement of the case and of the facts. Although this rule change clearly authorized at least a paragraph or two that briefly summarized the case in a neutral fashion, it was uncommon to see this information included in a brief. It was rare to see a brief that contained a section entitled "Nature of the Case."

The Advent of the "Summary of the Argument"

The current requirement that a brief contain a "summary of the argument" began in 1984 when the Florida courts decided to borrow this requirement from the federal courts.[10] The appellate judges who were on the bench at the time of this change were not unanimous in its value. Initially, lawyers tended to write the summary just before they finished a brief. As a result, it was often poorly written and never edited. When I joined the Second District as a judge in 1989, probably a majority of the judges regarded this section of the brief as the least important section, a section that could be skimmed quickly or even skipped.

In the 1990s, this section of the brief gained in importance.[11] The word processer simplified the writing and editing of this section, and lawyers began to appreciate its importance. But when a brief was written with its contents in the order that is contemplated in Rule 9.210, the summary came after the statement of the case and facts. To most lawyers, it seemed illogical to summarize the statement of the case and facts in a summary that followed this section. The rule itself did not expressly contemplate a summary of the facts, although appellate judges often encouraged lawyers to provide a full summary of the case. A summary that omitted the facts seemed disjointed.

The Appearance of the Unauthorized Introduction

Writing the required summary of the argument taught lawyers the value of a summary. For the reasons explained above, its value as a tool of persuasion was limited. As a result, beginning in about 2000, a few lawyers began providing introductions that were actually a summary of his or her case. At seminars and bar meetings, appellate judges would sometimes comment that these sections were helpful. They were, but as explained earlier, this unregulated add-on to the brief began to create more problems than it solved. By the time the Second District published its "preference," that court was seeing too much of a good thing.

A Proposal

If the summary of the argument were removed as a required section of the brief and replaced with a summary of the case at the beginning of the brief, perhaps a better brief could be written without adding any extra length to the brief. This would be similar to the practice of providing an "executive summary" at the beginning of a business memorandum. Because this summary would include a brief synopsis of the facts, the suggested length might be a little longer. To avoid the concern of judges that the introduction has become an overly aggressive argument, the rule, or if need be the committee comment, could encourage a more restrained persuasive rhetoric.

The amendment to Rule 9.210(b), with additions and deletions, might read:

"(b) Contents of Initial Brief. The initial brief shall contain the following, in order:

(1) A table of contents listing the sections of the brief, including headings and subheadings that identify the issues presented for review, with references to the pages on which each appears.

(2) A table of citations with cases listed alphabetically, statutes and other authorities, and the pages of the brief on which each citation

(3) A summary of the case, suitably paragraphed, condensing succinctly, accurately, and clearly the basic facts of the case and the argument(s) actually made in the body of the brief. The summary may be persuasive, but not argumentative. It should seldom exceed 2 ½ pages and never 5 pages.

(4) A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal. References to the appropriate pages of the record or transcript shall be made.

(5) Argument with regard to each issue, with citation to appropriate authorities, and including the applicable appellate standard of review.

(6) A conclusion, of not more than 1 page, setting forth the precise relief sought.

(7) A certificate of service.

(8) A certificate of compliance for computer-generated briefs."

I hope this article can generate some debate and comment. If the idea is well received, perhaps the Appellate Rules Committee will consider its adoption. **Republished with permission by the The Florida Bar Journal**

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