No Introduction Needed?
The Effectiveness of Introductions in Appellate Briefs

By Lance Curry

At the beginning of this year, a colleague sent me an opinion from the First District Court of Appeal striking an appellate brief because the brief included a rather long and argumentative introduction.

The order striking the brief did not say why the brief was stricken, but the motion to strike the brief argued that the introduction was nothing more than a long, aggressive summary of the argument that was improperly placed before the statement of the case and facts. Florida Rule of Appellate Procedure 9.120 does not expressly authorize the use of introductions, but does specifically state that the summary of the argument must come after the statement of facts.

The First District’s ruling in that case piqued my interest as to whether the stand-alone introductions I had come to include in most of my briefs were actually adding value. I started using introductions a few years ago because my opponent had done so in what appeared to me to be an effective manner. The introduction provided the reader—at the outset—with a concise statement of the issues and arguments that the writer viewed as most important, as well as the desired outcome. Since that time, the introductions I have used have always been well-received by my clients and colleagues. But what about those who matter most? Do judges and law clerks find introductions helpful or persuasive?

Before seeking the input of the judiciary, I contacted a group of appellate practitioners to see whether they were using a separate introduction. I asked those who do use introductions to describe how the introduction is used and how it differs from a summary of the argument. After receiving numerous responses, I contacted several current and former judges and law clerks to obtain their thoughts.

The vast majority of the practitioners who contributed believe that using a separate introduction at the beginning of the brief is helpful, if not necessary, to guide the reader into the statement of the case and facts. Several of the judges who I spoke with, however, felt that introductions are neither helpful nor permitted under the appellate rules. Other judges felt that introductions can be helpful if they assist the reader in better understanding the issues and arguments. The law clerks were generally receptive to the use of separate introductions, provided that their use was warranted under the circumstances.

While it is obviously difficult to please everyone, the discussion below will hopefully aid practitioners in determining for themselves the best way to introduce the case on appeal.

The Practitioners’ Views

Although a few of the appellate practitioners I contacted do not use introductions because they are not expressly authorized by the Florida and Federal appellate rules, most of them do. Indeed, some practitioners believe that a stand-alone introduction is a critical component of a brief. Others will use an introduction only under certain circumstances. Here are some of the comments I received, organized by those who always or often use separate introductions, those who use separate introductions only under certain circumstances, and those who seldom or never use them.

A. Those Who Always Or Often Use A Separate Introduction.

A former chair of The Florida Bar’s Appellate Practice Section who has taught appellate practice and legal writing for several years stated that he has used introductions in briefs for more than 30 years (without ever having had one stricken). He believes that introductions are critical to set out important themes, put the statement of facts in context, and generally let the reader know what they are about to read and why they are reading it.

One practitioner stated: “My goal with an introduction is to explain what the case is about, from my perspective. Before plunging into the facts, I want the court to know what the case is about. The intro is the first they will learn about the case from me. So it has to be good. I probably spend more time—per word—on the intro than on any other part of the brief.”

Another practitioner stated that he uses an introduction to “help focus the court’s attention on the posture of the matter and the key issues presented.” His advice was to not include “argument or characterizations that approximate argument” because the brief will also contain a specific section summarizing the arguments.

Another contributor commented that it is “hard for any reader to start with either jumping right into the facts or jumping right into the procedural history of the case with no way to focus on what the issues are going to be.” She stated that using the introduction makes her nervous “because it is not provided for in the rules,” but she does so anyway because she believes “it is helpful if done right.”
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Another began including an introduction after hearing a program by renowned writing instructor and author Bryan Garner. She states that Mr. Garner “always states the issue right up front and could not conceive that a brief would start without a statement of the issue.” She noted that the Florida appellate rules appear to cover Mr. Garner’s concern by requiring that the issues be set out in the table of contents, but she still includes an “Introductory Statement and Question Presented” section before the statement of the case and facts.

Several other contributors emphasized that a good introduction must be concise and focused. If the introduction is too long, it undermines its purpose and begins to resemble a misplaced summary of the argument. The acceptable length varied dramatically (from one to two sentences to three pages), although most believed that one to three paragraphs are enough.

Contributors had varying thoughts about how an introduction differs from the summary of the argument. One practitioner stated that “[u]nlike the summary of the argument, which I really use to boil down the legal arguments into a concise form, the introduction is more a chance to set the theme using the best facts and law.” Another stated that the summary of argument “assumes a working knowledge of the facts in the case.” She noted that in contrast with an introduction, the summary of the argument flows (a) from the statement of the case and facts, and (b) into the argument. Another stated that unlike the paragraph long introduction that he uses, “[a] summary of the argument is longer, more technical, and will perhaps make sense only after reading the statement of the case.” He further noted that “sometimes judges read the summary of the argument before reading the facts, but with a good introduction they won’t need to do that.”

B. Those Who Use Separate Introductions Under Certain Circumstances

One practitioner stated that he always uses an introduction when representing an appellant, although he finds them “far less useful when representing an appellee.” He wisely noted that you must know your audience: “The particular form of the introduction and its substance will vary with the particular court, based on my own view of the court’s tolerance for what might appear to be some degree of argument at a place where a statement of facts or case is ordinarily expected.”

Another practitioner stated that he would like to not use separate introductions given that they are not expressly authorized, but because his opponent often will have an introduction, sometimes he feels compelled to have his own. He generally tries to use a “one-paragraph introduction (always less than a page) that is not argument but tries to state the issue and a roadmap on how my Statement of the Facts will be organized.” He believes that most introductions are just another summary of the argument. One practitioner stated that he only uses a separate introduction section when he feels like he is “in trouble” and needs “to dramatically re-frame the appeal.” He acknowledged that his introductions “border on the argumentative.”

C. Those Who Seldom Or Never Use Separate Introductions

The most common comment of those who do not use introductions is that they are not expressly authorized under the state or federal rules. Several practitioners noted that introductions are largely superfluous “if everything one would have included in the introduction simply appears in the brief where it is supposed to appear.”

Others believe that the purpose of a separate introduction can be accomplished at the beginning of the statement of the case and facts. As one practitioner put it: “I think a well-done Statement of the Case can introduce the issues in a sentence or two, so that what follows make sense.” Another stated: “I only use intros in my statement of facts to give a general overview of the case so that the court knows where I am going. I make it neutral and cite to the record. I do not include an argumentative intro that precedes my facts . . . but I’m seeing them more and more.”

So What Do the Judges Think?

Several of the current and former judges I spoke to had strong opinions that introductions are not appropriate in appellate briefs. Judge Peter Webster of the First District Court of Appeal said that he does not need an introduction because after see-

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that it provides an exclusive list of Webster’s reading of Rule 9.210 is an introduction, which will often simulate a bench memo of some sort to provide that most judges are going to rely on also wary of introductions. He noted the Fourth District Court of Appeal, is an introduction unnecessarily lengthens the brief. Adding a separate “Introduction” section is important: if they are so helpful to the courts, why are they not included in the appellate rules? Judge Klein does believe that it is important to insert a separate statement of the points on appeal at the beginning of the statement of the case and facts. By so doing, the brief informs the reader of the important issues before the reader delves into the facts.

On the other hand, a few appellate judges I spoke to have found introductions to be quite helpful if done correctly. Judge Ed LaRose of the Second District Court of Appeal said that he appreciates an introduction in the brief if it helps him focus on the key issues of what the case is about, therefore making it easier to understand what he is reading. He believes that an introduction is not helpful if it is long or overly argumentative.

Former Supreme Court Justice Raoul Cantero, who has returned to private practice and is the current chair of The Florida Bar’s Appellate Practice Section, believes that the use of an introduction is “critical” to “provide context to the court for the facts they are about to read.” He states that “the judges can’t understand the facts unless they understand why they are reading them.” His introductions usually include two paragraphs: one to discuss the general nature of the case and some basic background, and another discussing the issues on appeal.

Other judges were more ambivalent about the issue. Judge Chris Altenbernd of the Second District Court of Appeal believes that using a separate introduction is fine as long as it is brief and not overly argumentative, which can immediately turn the reader off. Judge Altenbernd noted that because most appellate judges (including those in the Second District) rely to some extent on a summary prepared by staff attorneys, the writer may want to put the introduction into the first paragraph of the statement of facts. If an introduction is placed in a separate section, it might not make the summary. In the Second District, the required portions of a litigant’s brief are not edited so including a brief introduction in the statement of facts would necessarily be included in the staff summary.

Judge Richard Suarez of the Third District Court of Appeals does not have a problem with the use of an introduction in an appellate brief unless the intro is too argumentative or goes on for several pages. To be effective, Judge Suarez believes that the introduction should give a quick overview of what he is about to read. If done right, it allows him to connect ideas to the facts presented. If the introduction is too argumentative or long, he will usually skip over it. Judge Suarez cautioned those practitioners who incorporate an introduction into the statement of facts to be careful not to undermine the statement of facts by including argument. In his opinion, the statement of the facts should provide an objective, straight-forward assessment of the facts pertinent to the appeal based precisely on what the record reflects.

Judge Alan Lawson of the Fifth District Court of Appeals emphasized that, whether done in a separate introduction or at the start of the statement of the case and facts, it is important to let the reader know what the case is about in order to put the statement of the facts in context. Judge Lawson often reads the parties’ briefs before he receives the memorandum from court staff, but has not noticed many stand alone introductions. He feels that the purpose of a separate introduction can be accomplished through a good statement of the case and facts.

**What About the Law Clerks?**

Prior to starting private practice, I served as a law clerk for two years. Unfortunately, I am far enough removed that I cannot even remember whether I saw introductions in ap-

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pelle breifs much less whether I felt that they were helpful and persuasiv. I did, however, keep copies of a few briefs that I considered to be outstanding examples of legal writing. Half of them contained introductions and the other half did not. The briefs that contained introductions tended to be longer and involved more complex civil issues, whereas the ones that did not were typically shorter and more straightforward.

Other current and former law clerks I spoke to were generally receptive to the use of separate introductions. One former clerk for the Eleventh Circuit Court of Appeals said that he liked introductions because they allowed him to get a quick assessment of what the case was about and what the parties were going to argue. The introductions or lack thereof would sometimes dictate whether he worked on a particular case or set it aside in favor of another.

A current Florida Supreme Court law clerk who has worked for several different justices thinks that introductions are great in that they give the reader a snapshot of the case and the issues. She said that she surprisingly does not see them that often in briefing to the Florida Supreme Court. A similar comment was made by a former Florida Supreme Court law clerk. She stated that introductions were not common and that she even distinctly remembers a couple of cases where she wished introductions had been used. That said, this former law clerk felt that introductions are not appropriate for all appellate briefs. Only those briefs involving difficult, complex issues or nuanced areas of the law actually merit a quick overview of the case. And the case in a separate introduction as opposed to in the opening paragraph of the statement of the case.

She believes that having a separate introduction eliminates the possibility that argument can show up in the statement of the case and facts, which causes her to be less trusting of the author’s statement of the facts. She emphasized that the introduction should not exceed a paragraph. In her opinion, if the introduction goes beyond a paragraph or includes too much argument, it becomes distracting.

So What’s An Appellate Practitioner To Do?

A practitioner’s brief is likely to be read by several different people (including the client), all of whom have their own idea about what the brief should or should not contain. Nearly every reader seems to agree, however, that introducing the case or the issues in some manner before providing the facts is helpful. Whether you do this through a separate introduction or not is, to some extent, a matter of style and personal preference. As long as your ultimate goal is to make the reader’s job easier (as opposed to simply rebuking your opponent with repetitive argument), the reader should appreciate your efforts.

If you decide to use a separate introduction, keep it short and make it more informative than argumentative. The ultimate goal is to help the reader better receive and understand the information and arguments contained in the more detailed portions of your brief. An overly argumentative or lengthy introduction is likely to create more confusion than clarity.

If you have concerns about using a separate introduction, an alternative approach is to provide a paragraph in your statement of the case and facts that succinctly introduces the issues presented and what your client is ultimately requesting of the court. That information is, after all, purely factual. If you go this route, take care not to be too argumentative in framing the issues. The last thing you want to do is have the reader lose trust in your statement of the case and facts because you were overzealous in its opening paragraph. Remember that when dealing with the statement of

the case and facts, understated advocacy works best.

Lastly, know your audience. Develop a sense of what works where. Unless the rules are amended to require a specific type of introduction in appellate briefs, each practitioner will have to make up his or her own mind as to how to approach this issue given the circumstances presented. What may work well in one case or court, may not work well in another.

In closing, I would like to thank everyone who contributed to this article. If you would like to comment on this subject, please email me at curry@hwhlaw.com. If I receive enough comments, I’ll try to provide an update in a later edition of The Record.

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Endnotes:


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

(1) A table of contents listing the issues presented for review, with references to pages.

(2) A table of citations with cases listed alphabetically, statutes and other authorities, and the pages of the brief on which each citation appears. See rule 9.800 for a uniform citation system.

(3) 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 volume and pages of the record or transcript shall be made.

(4) A summary of argument, suitably paragraphed, condensing succinctly, accurately, and clearly the argument actually made in the body of the brief. It should not be a mere repetition of the holdings under which the argument is arranged. It should seldom exceed 2 and never 5 pages.

(5) Argument with regard to each issue including the applicable appellate standard of review.

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

(c) Contents of Answer Brief. The answer brief shall be prepared in the same...
manner as the initial brief; provided that the statement of the case and of the facts may be omitted.

2 The “introduction” discussed in this article is not to be confused with what some practitioners call a “preliminary statement,” a section used to identify the parties and the manner in which the record is cited. An introduction in an appellate brief—in the eyes of most who use them—provides a short statement of the issues and key arguments on appeal at the outset of the brief.

3 Rule 28 of the Federal Rules of Appellate Procedure states in pertinent part:

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

1. a corporate disclosure statement if required by Rule 26.1;
2. a table of contents, with page references;
3. a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;
4. a jurisdictional statement . . . ;
5. a statement of the issues presented for review;
6. a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
7. a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));
8. a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;
9. the argument . . . ;
10. a short conclusion stating the precise relief sought; and
11. the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant’s statement:

1. the jurisdictional statement;
2. the statement of the issues;
3. the statement of the case;
4. the statement of the facts; and
5. the statement of the standard of review.

4 One practitioner noted that her partner, a former judge on the First District, also disliked introductions and considered their use as one of his pet peeves.

5 A former judge from the Eleventh Circuit Court of Appeals had a similar reading of the federal rule. He stated that under the federal rule, “no ‘introduction’ is permitted.”

On July 1, 2010, The Florida Supreme Court adopted five new rules of appellate procedure relating to mediation rules, eligibility for mediation, mediation procedures, appointment and compensation of the mediator, and completion of appellate mediation. 1 Although the rules are new, in Florida, the concept of appellate mediation is not new. The First and Fourth District Courts of Appeal initiated in-house appellate mediation programs in the mid-90s, and the Fifth District started a program in 2001. The benefits of appellate mediation have long been apparent, but in the face of budgetary constraints both the First and Fourth DCA programs were shut down in 2000 and 2001, leaving the Fifth DCA with the only functioning mediation program. 2

The First DCA’s now-defunct program was started in 1996 and patterned after the successful program utilized by the United States Court of Appeals for the Eleventh Circuit in Atlanta. 4 The First DCA program was operated in-house by the court, such that the Court employed first one, then two mediators who reviewed, selected, and mediated cases. 5 The program was successful, settling approximately seventy-five percent of the cases selected for mandatory mediation. 6 Like in the Eleventh Circuit, the process was mandatory for those cases selected as eligible and free to participants. In contrast, while the process is also mandatory for cases selected, the Fifth DCA does not conduct mediation itself, and participants must share the certified mediator’s fee. 7

As of July 1, 2010, there are new rules for appellate mediation applicable throughout the state and in all the district courts of appeal. Rule 9.700 sets out appellate mediation rules, beginning with the application of the rules not just to district courts of appeal and the Florida Supreme Court, but also to circuit courts exercising review jurisdiction under Florida Rule of Appellate Procedure 9.030(c). Different from the DCA in-house mediation programs, pursuant to the new rule, appellate mediation is not mandatory. Instead, the court or a party may refer a case to mediation and either party may object to the referral. 8 The Florida Supreme Court modified the rule to allow for mediation to be delayed, if requested by the parties, until after briefing has been completed. It was observed that:

Unlike an initial proceeding . . . a controversy on appeal has been resolved in favor of one party over the other, [and] [t]he viability of [appellate] mediation . . . may not be apparent to the parties. Instead, that may not occur until after the briefs have been filed, reflecting the issues upon which review is sought as well as the strengths and weaknesses of the parties’ arguments. To accommodate the distinction between trial court and appellate mediation, proposed appellate rule 9.700 including subdivisions (c)(Applicability) and (d)(Referral), is modified to permit the parties to agree to postpone mediation until after the time for filing briefs has expired. 9

There is a significant timing effect on appellate proceedings under the new rules. Specifically, a motion for mediation filed within 30 days of the notice of appeal tolls all deadlines under “these rules” until it is ruled upon. And, “all times under these rules for the processing of cases shall be tolled for the period of time from the referral of a case to mediation until mediation ends pursuant to section 44.404, Florida Statutes.” 10

Appellate Mediation in Florida

by R. Lainie Wilson Harris, Esq.