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## Don't Be Afraid To Characterize the Facts

The perspective you supply will assist and persuade the reader

By Kenneth F. Oettle

**N**ever forget that you write for a reader who is probably not as familiar with the facts as you are. This unfamiliarity puts the reader at a disadvantage, especially if the case is complex. You can help the reader understand the facts and persuade the reader to see them as you see them by sorting and summarizing.

Suppose that events leading to the execution of a lengthy contract include dozens of letters and e-mails, frequent meetings and multiple drafts. You wonder how to describe the negotiations without bogging down in detail.

One way to handle the glut of information is to warn the reader that it is coming. For example, begin a fact section on the meetings at which the contract was negotiated by saying, "The discussions on April 15 began a hectic series of meetings punctuated by a rapid-fire exchange of drafts."

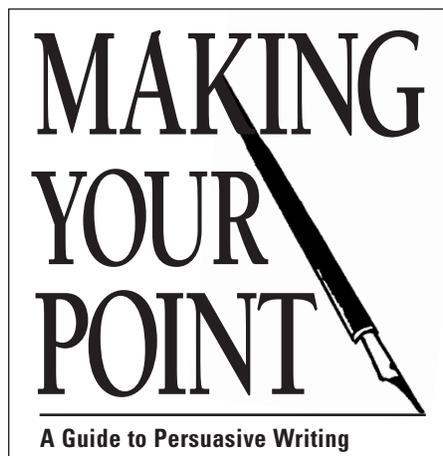
Now the reader will be prepared to sort out a potentially confusing array of meetings and draft contracts and will have a higher tolerance for detail. By making the reader's job easier, you earn a credit you can eventually cash in.

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Not only do you earn the reader's gratitude, but you begin to persuade. By taking control of the facts — sorting and summarizing them — you exude confidence in your material and in turn boost the reader's confidence in you.

Readers know instinctively that writers don't sort and summarize the



facts unless they know them well, or purport to. (If it is only "purport," the reader will catch on soon enough.) The reader will trust the writer's characterizations until they are shown to be wrong.

On the strength of this trust and confidence, your characterizations will help persuade the reader to see the facts as you see them. Rather than merely report the facts, you will shape them as you wish the reader to perceive them.

In this instance, you want the reader to view the negotiation of the contract as frenzied, perhaps to lay the

groundwork for explaining why memories differ or why a concept not treated explicitly in the contract should nevertheless be implied.

Providing an overview of the negotiations also reduces the need for monotonous transitions such as "another conversation" or "the next draft." The overview provides an implicit connector and increases the usefulness of simple temporal transitions like "On April 23."

### Is Advocacy Immoral?

A reluctance to characterize the facts may be rooted, ironically, in too great an adherence to the honorable principle that facts should speak for themselves. Novice writers sense that advocacy is, to a degree, untrustworthy because the writer seeks to direct the reader toward selected facts and away from others. Writers may even deem this aspect of advocacy to be borderline immoral.

Advocacy isn't for the faint of heart or purpose, but it isn't immoral. The brief-writer's job is not to lay out the whole truth and nothing but the truth. It is, among other things, to direct the reader toward good facts and good law — from the writer's perspective — and away from bad facts and bad law.

This goal is attainable because humans are not computers. They have limited attention spans, limited memories and limited powers of deduction, and they are moved by factors other than logic. They can be guided. (As I once heard Yogi Berra say about a hitter, "He could be pitched to.")

Conscious of this seemingly

sneaky element of advocacy, novice writers may eschew characterizing the facts and look to establish credibility by remaining studiously neutral, which is a mistake.

Being neutral is not our job. We are hired guns, and as such, we are expected to shoot.

It is all right to characterize the facts as long as you do it accurately and defensibly. Not only will you not be punished, but if you do it well, you will be rewarded. Readers like to take sides (how long can you watch a sporting event without rooting for one side or the other?), and they appreciate your helping them do so.

Though logic must anchor every brief, it is a tool that serves all masters. Logic is of little help if the reader doesn't accept your premise, which consists, essentially, of the vision of the facts you want the reader to embrace.

#### **Risk and Reward**

Some courage is required in characterizing facts because you have to make editorial judgments. In the example above, the judgments are in the phrases "hectic series of meetings," "rapid-fire exchange of drafts" and even the word "punctuated." You may be reluctant to commit to those judgments. You may fear that the reader won't see the events as "hectic" or the exchange of drafts as "rapid-fire," or that the adversary will deny those characterizations in their responding brief and quote your words back at you.

When you characterize the facts, you take a risk. The risk is that the reader won't agree with your characterizations, and you will lose credibility.

But you also create the possibility of a reward. By characterizing the facts, you make the reader's job easier — for which you will be appreciated — and you guide the reader toward

the view of the case that favors your side. If your characterizations fall within reasonable bounds, the rewards will outweigh the risk.

#### ***Puzzler***

How would you tighten and sharpen the following sentence?

In reaching its decision, the Court concluded that the relevant facts were not in dispute.

You almost never need to say "in reaching its decision," "in its opinion," "in their brief" or similar formulations. The concepts are implicit. You can further shorten the above sentence by substituting "found" for "concluded that" and "undisputed" for "were not in dispute."

The new version:  
The Court found the relevant facts undisputed. ■