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Point Headings Should Persuade

Crisply stated gists help the court follow your argument's direction

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The wind tore through the bivouac area like a great scythe, slashing the palm fronds from the coconut trees, blasting the rain before it.

— Norman Mailer, *The Naked and the Dead*

You may not wish to accent point headings with Mailer-style metaphors, but you should at least give them punch. Point headings should persuade, not merely serve as topical dividers.

Of the following two versions of a point heading, which would you use?

ABC COMPANY'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT SHOULD BE GRANTED.

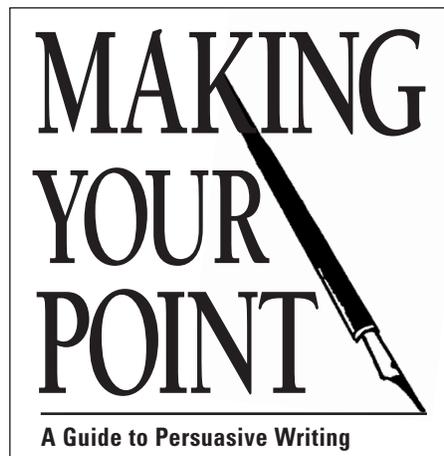
PLAINTIFFS' FIRST AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE ABC COMPANY IS NOT SUBJECT TO THE STATUTE ON WHICH THE COMPLAINT IS PREMISED.

The answer is easy. You would use the second version because it provides a reason. (It also has more force than the first version because it demands the

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harsh remedy of dismissal rather than the bland procedural remedy of a motion being granted.)

Stating reasons in point headings shows you have confidence in your case;



you are not afraid to display your wares. It also suggests your points are strong because they can be stated crisply, within the confines of a point heading. Conversely, omitting reasons from point headings suggests you may have no reasons. Advocacy is subtle that way. If you say nothing, the reader may figure you have nothing to say.

Stating reasons in point headings also helps the court understand the direction of your argument just by reading the table of contents. This is a convenience for which the court will be grateful. With a little skill and a few good facts, you may even begin to move the court toward your side. Brief writers pride themselves on persuading the court in the preliminary statement, but imagine the momentum you could develop by beginning the persuasive process in the table of con-

tents!

Additional examples of effective point headings include:

THE TRIAL COURT PROPERLY ENFORCED THE EXPIRATION DATE OF MR. X'S STOCK OPTIONS BECAUSE TIME IS OF THE ESSENCE FOR THE EXERCISE OF OPTIONS HAVING A SPECIFIED TERM.

THE TRIAL COURT ERRONEOUSLY CERTIFIED A CLASS WITHOUT FINDING THAT THE NAMED PLAINTIFF SATISFIED THE TYPICALITY REQUIREMENT OF RULE 4:32-1(a) OR THE REQUIREMENT THAT COMMON QUESTIONS OF LAW OR FACT PREDOMINATE.

Not only should point headings state reasons, but they should have vibrancy. Use verbs rather than nouns, and in the active rather than passive voice. Trim excess words. Give your client a name rather than a procedural designation such as "putative intervenor."

The point heading below was transformed by these suggestions. The old version:

PLAINTIFF'S WILLFUL FAILURE TO GIVE THE PUTATIVE INTERVENOR NOTICE OF ITS APPLICATION FOR TEMPORARY RESTRAINTS AND ITS KNOWING MISREPRESENTATION THAT IT COULD NOT IDENTIFY ANY OTHER NECESSARY PARTIES TO THE ACTION PRECLUDE PLAINTIFF FROM OBTAINING EQUI-

TABLE RELIEF.

The new version:

PLAINTIFF IS BARRED FROM RECEIVING EQUITABLE RELIEF BECAUSE IT WILLFULLY FAILED TO NOTIFY ABC COMPANY OF THE APPLICATION FOR TEMPORARY RESTRAINTS AND KNOWINGLY MISREPRESENTED THAT IT COULD NOT IDENTIFY ANY OTHER NECESSARY PARTIES.

The old version took forever to get from the dual subject (failure and misrepresentation) to the verb (preclude). The reader had to wait nearly four lines to find out what happened. Readers don't like to wait; they become irritated and move on.

In contrast, the revised version hits home. It begins assertively by saying plaintiff is "barred," which is the bottom line. If plaintiff is "barred," then plaintiff

gets no relief. Instead of preaching "Plaintiff's willful failure blah blah blah" and making the reader wait to learn the proposed consequences of this failure (preclusion of equitable relief), the point heading gets right to it.

The author of this point heading asked me, "Shouldn't I say first what plaintiff did wrong, that is, failed to give notice and misrepresented? Aren't those the persuasive facts?" Yes, but they are more persuasive if delivered with force, which verbs supply. Verbs portray action, which engages the reader and, in this case, emphasizes the intentionality that you hope will persuade the court that plaintiff deserves to lose ("willfully failed," "knowingly misrepresented"). Embodying key facts in verbs rather than nouns can be worth the grammatical delay.

Puzzler

How would you tighten and sharpen

the following sentence?

"The vehicles must be removed from the property as it is against regulations to store them there."

That the vehicles must be removed from the property is exactly the point. Therefore, don't change the beginning of the sentence if it flows well with what came before. You would shorten the beginning to "Remove the vehicles..." only if the context called for a command. Replace "as" with "because" (the principal connotation of "as" being temporal, not causative) and replace the passive "it" construction with the more direct "regulations prohibit." Finally, substitute "Storage" for "store them." The reader will understand from the context that storage refers to the vehicles.

The revised version: "The vehicles must be removed from the property because regulations prohibit storage there." ■