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Put Your Openings to Good Use

Use them to persuade, not to mark time

By Kenneth F. Oettle

> [M]an is by nature credulous. He is victimized by first impressions, from which he can only escape with great difficulty.
> —James Harvey Robinson, *The Mind in the Making* (1921) at 100.

Lawyers often begin preliminary statements by reciting the nature of the case ("This is an action for breach of contract") or the purpose of the brief ("This is a brief in opposition to defendant's motion for summary judgment"). Such openings delay the persuasive process and generally waste time.

If procedure will persuade, then use it. Otherwise, stick to the facts because facts persuade. The sooner you get to the facts, the sooner you begin to persuade.

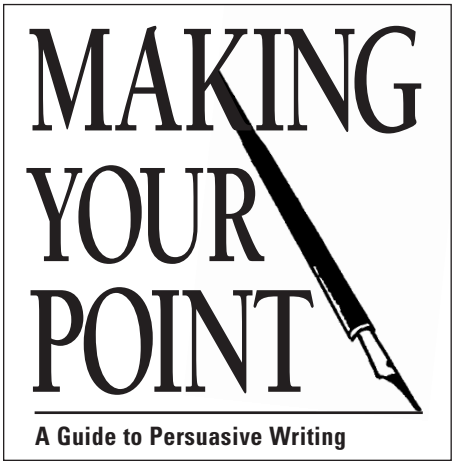
Moreover, once you get readers on your side, they tend to stay there because readers, like jurors, look to reinforce their first impressions. The sooner you create a good impression, the sooner this dynamic begins working for you.

The following opening to a preliminary statement merely marks time and is therefore ineffectual:

> Plaintiff ABC Co. submits this brief in support of its motion for summary judgment.

The cover of the brief already says, "ABC CO.'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT." Why say it again? The reiteration takes up prime space that should be devoted to persuasion.

You may think you give no ground with a bland opening, but it is like leaving your money under the mattress. Not only do you earn no interest, but you lose to inflation. You miss an opportunity to make your point, and, by failing to persuade, you may create the impression that you have no point worth making.



Here is another way not to begin a preliminary statement:

> This action began with the filing of a complaint seeking damages for breach of an express covenant and breach of the implied covenant of good faith and fair dealing.

Reciting how the case began does not persuade. You may feel that reiterating the causes of action is assertive, but it is not persuasive because you provide no supporting facts.

Belief Is Not Proof

One of the classic self-deceptions in the writing process is to believe so intensely in your case that you think, wrongly, that you have made a point just by stating your conclusion, as in the following opening:

> Summary judgment should be granted against Plaintiff's wrongful dismissal claim because the undisputed facts indicate that Plaintiff failed to supply adequate prior notice to Defendant regarding his leave from work.

What are the "undisputed facts"? You may know them, but the reader doesn't. Even if the facts follow immediately (and they usually don't), you'll spend precious time trying to fill the gap left by the conclusory opening.

Optimally, the opening sentence will tell the court why your client should win, as in the following example:

> This is an action to enjoin the award of the contract to repave a section of Route One in Sprawlville because the low bidder omitted a bid bond from its bid package.

Any judge assigned a public bidding case will know that the omission of a bid bond, which guarantees a penalty amount if the low bidder withdraws, is fatal to a bid. Thus, the bid bond opening not only claims victory — it justifies it.

But suppose you cannot encapsulate your key point in one sen-

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tence. Then you have to prepare the reader.

Rather than recite procedure (e.g.,"This brief is submitted in support of defendant's motion to dismiss Counts III, IV and V of plaintiff's complaint") or even say what the case is about (e.g., "This case involves a contract to distribute perfume products in Argentina, Brazil and Peru"), look for something that begins to color the case against the other side, e.g., "This litigation arose from the decision by defendant John Doe to abandon his contractual and fiduciary obligations to his business partner Richard Roe and sell his services to a competing firm."

Maybe you don't have one controlling fact, like the omission of a bid bond, but you can begin to cast the departure of John Doe in a bad light. You say that Doe "abandoned" contractual and fiduciary obligations (shows fickleness and disloyalty) to his "partner" (thus abandoning family) to "sell his services" to a competing firm (shows he's an opportunistic hired gun).

Naturally, you need more than just spin. You need good facts. But in most litigations, both sides have some good facts. Your job is to highlight yours so the reader will see the case through the prism of your good facts, not the other side's.

One of my partners says he begins the preliminary statement as if he had 30 seconds on the evening news to pitch his case. He shapes his opening like the lead sentence in a news article — focused and factual. Because he needs to know the case well enough to reduce the opening to a sound bite, he writes the preliminary statement last.

In sum, look to begin a preliminary statement with your best facts, not with a statement of what the brief is for, when the action was filed, or even what the case is about. Begin at the center and radiate out. If you choose your facts well, you will radiate power.

Puzzler

How would you tighten and sharpen the following sentence?

> It is the duty of the reviewing court to adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided.

"It is the duty" can be reduced to "must." "Adjudicate the controversy in the light of the applicable law" can be reduced to "apply the law." "In order" can generally be replaced by "to," and "denial of justice" can be replaced here by "injustice." Make "avoid" active rather than passive.

> The revised version:
> The reviewing court must apply the law to avoid manifest injustice. ■