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Lead With Good Facts if the Law Is Unsettled

You aren't required to begin an argument with a rule

By Kenneth F. Oettle

An associate asked whether the argument section of a brief should begin with law or facts. The answer is that it depends.

If the law is favorable, you can follow the traditional though not exclusive format for argument: state the law; state the facts; and apply the law to the facts. If the law is thin or unsettled, you may wish to open with good facts. Your goal is to begin to persuade the reader as soon as possible.

Suppose you represent a person who is looking to hold an employer liable for the negligence of an employee who caused an auto accident while returning to work from a coffee break at a nearby restaurant. The employer can be held vicariously liable for the employee's negligence only if the employee is deemed to have been on the job while returning from the coffee break.

Generally, commuting to and from work is not within the scope of employment. This is the "coming and going rule." To establish the employer's liability for the tort of its employee, you have to show that the employee's travel to and from the coffee break does not fall within the coming and going rule.

You have two good facts: (1) the employer did not make coffee available on-site, and (2) the employer encouraged employees to go off-site for coffee so they would stay alert on the job.

You also have two helpful though not dispositive cases. An appellate opinion in your jurisdiction in a third-party liability case (not a workers' compensation case, where the standard is more liberal) deems a coffee break to be work-related because it benefits the employer as well as the employee. The case says nothing about coffee breaks off-site.

MAKING YOUR POINT

A Guide to Persuasive Writing

An appellate opinion in another jurisdiction, also in a third-party liability case, is more on point. It holds that travel to and from a coffee break does not fall within the coming and going rule because the coffee break benefits the employer, just as a business trip benefits the employer. You found no such holding in your own jurisdiction.

You decide to move for summary judgment. The draft brief opens the argument by stating the coming and going rule:

> An employee's commute to and from work is generally not within the scope of his or her employment. See *Smith v. Jones* [citation]. In *Smith*, the Appellate Division noted that traveling to and from work does not render a service to the employer.

This correctly states the law but seems to have been written by your adversary. Not only does it exclude commutes from the scope of employment, but it states the rationale for the rule. After two sentences, you've given the reader no basis on which to favor your cause. To the contrary, you've begun to make the case for the other side.

Perhaps you felt you couldn't begin the argument with an exception to the coming and going rule because the exception has not been recognized in your jurisdiction. The solution is to open with facts instead of law. Let's consider the possibilities.

Your first instinct may be to say that the employee was acting within the scope of his employment when he caused the accident "because he was on a coffee break and on his way back to work." This mentions "work," which is good, but being on the way back to work smacks of coming and going, which is bad. If the employee was "coming" or "going," he was not acting within the scope of his employment.

You could say the employee was acting within the scope of his employment on break "because no coffee was available on-site." This helps, but the employee could have brought coffee in a ther-

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mos, and we have no evidence that the employer denied any requests for a coffee machine on-site. Going off-site is still an independent decision by the employee. The absence of coffee on-site helps, but it is not your best fact.

You could add that the employer encouraged the employee to go off-site for coffee so he would perk up on the job. Now the employer is cast in an active role, having encouraged the employee to do something for the company. It's your best fact. If the employer encouraged the employee to travel for the benefit of the company, then the employer should bear some responsibility for what happened during that travel.

If you combine your good facts, you can say the employee was acting within the scope of his employment on the coffee break "because no coffee was available on-site, and the employer encouraged him to go off-site to obtain it." Even better, say the employer "provided no coffee on-site," further portraying the employer in an active role.

These facts are persuasive, but they can be offset by facts that cut the other way. The employer could argue that the employee chose to go off-site for coffee rather than bring coffee to work and that the employee took the same route to the same restaurant as he did for lunch, which does not fall within the scope of his employment. The employer would argue that the employee was commuting on break just as he commuted in the morning and evening and at lunch.

To overcome the standoff between opposing facts, you invoke higher authority — judicial opinion. First, you cite the local case holding that coffee breaks are work-related because they benefit the employer. Then you look to the out-of-state holding that travel to and from off-site coffee breaks doesn't fall within the coming and going rule The local court isn't bound by out-of-state law, but it may take comfort from the holding and may be guided by the court's reasoning, if any.

Knowing that you have helpful though not dispositive case law to back you up, you begin the argument with your good facts, pointing out that the employee had to go off-site for coffee and was encouraged to do so by the employer:

> Smith was acting within the scope of employment when he had his accident even though he was driving back from a coffee break because the employer provided no coffee on-site and encouraged the employees to travel off-site for coffee so they would be more alert on the job. Because Smith was acting not only for his own benefit but for the benefit of his employer, his off-site trip for coffee falls within the scope of his employment.

Now you are ready to discuss the law, having used good facts to incline the reader against an application of the coming and going rule even before you mention it.

Puzzler

How would you tighten and sharpen the following sentence?

> Defendant filed a motion to dismiss the claims against it and filed a separate motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

Shorten "filed a motion" to "moved" and drop "the claims against it" as implicit. Would a party move to dismiss anything other than the claims against it?

If Rule 11 is mentioned, a motion for sanctions is implicit, as are the federal rules. All you have to say is "sought sanctions under Rule 11."

> The revised version:
> Defendant moved to dismiss and sought sanctions under Rule 11. ■