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## Favor Facts Over Law for Initial Reader Contact

If you can, use metaphors to interest the reader and intensify the image

By Kenneth F. Oettle

**F**acts engage because they tell a story — everyone likes stories — and they persuade because they suggest, if not conclusively show, how the dispute should be resolved. A mere statement that unspecified facts satisfy an element of a cause of action, e.g., “Seller made false representations,” creates no images and provides no context for a moral judgment.

Suppose your client bought all the stock of a company that needs a license in each state where it sells gaming equipment. The seller represented in the purchase agreement that it was unaware of any pending or contemplated regulatory proceedings challenging the company’s licenses. The seller failed to reveal that one state regulator had informally advised the company that it would likely be asked to explain a longstanding association with a reputed mobster.

Now it is a year later. Several states have investigated the company’s association with the reputed mobster, and one state has scheduled a hearing in which the company must show cause why its license should not be revoked. If that license is forfeited, the others may fall like dominoes.

Your client sues the seller for fraud and breach of contract. The seller makes a motion (whether to change venue, to

dismiss the complaint, to compel discovery or to obtain summary judgment), and your associate drafts a responding brief. An introductory paragraph, whether in the preliminary statement or the first point of the argument, begins as follows:

Seller made specific representations in the Purchase Agreement to induce the purchase of Seller’s business. These representations concerning the condition of the



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business, however, were false. Plaintiff, though, reasonably relied on the representations, which the Seller knew were false, in entering into the Purchase Agreement. Buyer’s reliance has caused it considerable damage.

Putting aside the relentless pauses, the unnecessary “however,” the gratuitous shift from “plaintiff” to “buyer,” and the useless references to reliance and damages, the paragraph has no bite because it creates no images. Try to envision someone making a “specific

representation.”

It is true that if the defendant seeks dismissal or summary judgment, you have to proffer allegations or material issues of fact going to each element of your causes of action, but you don’t persuade by citing the elements. You persuade by showing the lie.

To improve the above paragraph, delete the references to reliance and damages, which take the focus off the wrongdoer; eliminate words to improve the pace; and present facts rather than concepts. Instead of running a litany of the elements of a cause of action for fraud (e.g., seller knowingly made false representations on which buyer relied to its detriment), concretize the seller’s deception. Make the court want to compensate your client for the seller’s bad acts:

Knowing that the association with Bad Guy Mobster could seriously impact the value of the company, and well aware that the Gaming Commission’s expressed concern suggested that the impact might be imminent, Seller concealed both the association and the regulatory concern.

The new version is better. It includes facts: the name of the mobster, the warning from Commission staff, and the seller’s motive. It begins to tell a story, which a recitation of elements cannot. If you get this far in your editing, you have done a nice piece of work.

Some writers will take the presentation to another level with a metaphor — a rhetorical device that can tell a story in a phrase. A common sight in a courtroom on motion day is the well-heeled practitioner with handkerchief in breast pocket, raising forefinger in the air and brandish-

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ing a metaphor, perhaps something as simple as, "Plaintiff is looking to have his cake and eat it, too," or something more creative, like, "Plaintiff's attempt to fulfill this requirements contract was like the little engine that could: 'I think I can. I think I can. I think I can. I think I can.' The trouble was, this little engine couldn't."

Metaphors condense and encapsulate. In the context of the gaming company sale, a metaphor might develop as follows:

Seller knew that a regulatory storm was coming even as it warranted that the seas were smooth as glass. The company's association with Bad Guy Mobster and the warning from Commission staff were the "red sky in the morning" of which Seller should have given clear notice. Seller knew the gathering storm would be severe and license-threatening, but Seller kept silent. Worse, Seller swore that nothing was amiss.

The maritime metaphor creates an image of angry regulators hurling hurricane-force rulings that leave the company's licensing status in shambles. The metaphor engages the reader because it is colorful, and it imprints the image of serious harm without your having to say, "Buyer was damaged."

The "red sky in the morning" is not only metaphor but allusion. It alludes to the anonymous saying, "Red sky at night, sailor's delight. Red sky in the

morning, sailors take warning."

The allusion delivers a pointed message. Just as a sailor would be foolish to ignore a red sky in the morning, so would a purchaser of a licensed business be foolish to ignore a license-threatening circumstance of which the purchaser was aware. The metaphor conveys the materiality of the deception.

A further allusion may appeal to a smaller audience: The likely source of the red sky metaphor is a passage from the Gospel According to St. Matthew:

The Pharisees also with the Saducees came, and tempting desired him that he would shew them a sign from heaven.

He answered and said unto them, When it is evening, ye say, It will be fair weather: for the sky is red.

And in the morning, It will be foul weather today: for the sky is red and lowring. O ye hypocrites, ye can discern the face of the sky; but can ye not discern the signs of the times? [Matthew 16:1-3; King James version].

The biblical allusion may be lost on the court, but if the court knows the Bible, you may gain points for your erudition even as you invoke connotations of Heavenly wrath descending upon those who would conceal the truth.

One final note: Your revised para-

graph concludes with the statement that the seller swore nothing was amiss. Did the seller actually swear? No, but the word is close enough for our purposes. The seller made an explicit promise by warranting that it was unaware of any pending or contemplated regulatory proceedings. The seller won't dare respond that it didn't "swear," that it merely promised.

## *Puzzler*

What is the problem with the following sentence?

When you review the documents provided by our client, I would appreciate your looking for evidence of insurance coverage.

Read literally, the sentence suggests that the writer's appreciation will occur during the document review ("When you review...I would appreciate..."). This is not what the writer means. Improve the sentence in either of the following ways:

Version A: When you review the documents provided by our client, please look for evidence of insurance coverage.

Version B: I would appreciate your looking for evidence of insurance coverage when you review the documents provided by our client. ■