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Reasons Persuade: Conclusions Do Not

Give reasons to back up your positional statements

By Kenneth F. Oettle

Statements of one's conclusions are like violets — expressive if well-tended but congestive, like weeds, if permitted to spread.

Consider the following paragraph from a draft of an appellate brief challenging a trial court's ruling on the value of property. The issue addressed in this paragraph is whether the trial court's valuation findings based on expert reports rather than live testimony are protected on appeal by the abuse of discretion standard notwithstanding the court's failure to hold a hearing.

> Nothing can hide the fact that the trial court judged the various approaches taken by the experts without a hearing. Plaintiff attempts to protect the trial judge's departures from the law by limiting this Court's review to the "abuse of discretion" standard. He claims incorrectly that the judge's decision not to hold a hearing was within the court's discretion. In truth, the trial court's "findings" in setting a value on the property without holding a hearing are entitled to no deference by this Court, but rather a plenary review.

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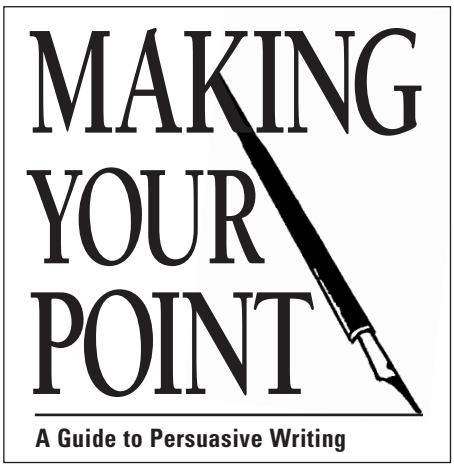
The abuse of discretion standard provides that an appellate court should not substitute its judgment for that of the trial court in the absence of a clear abuse of discretion. The rule is based on the trial court's having an opportunity to gauge the credibility of the witnesses and develop a feel for the case. Without a hearing, a trial court has no better perspective than a reviewing court.

The above paragraph from the draft brief does have spirit: It accuses, negates, and draws conclusions. It purports to be making a point.



But the paragraph doesn't actually make a point. It merely stretches out the writer's conclusion — that the abuse of discretion standard cannot protect the trial court's findings — without stating a rationale.

Let's examine the first sentence:

> Nothing can hide the fact that the trial court judged the various approaches taken by the experts without a hearing.

Who is hiding anything?

The other side isn't. They will argue that the trial court's review of expert reports took the place of a hearing. They won't try to hide what the trial court did; they will seek to justify it. So the concept of "hiding" is a straw man.

The second sentence states what the plaintiff is arguing:

> Plaintiff attempts to protect the trial judge's departures from the law by limiting this Court's review to the "abuse of discretion" standard.

This is true, but you don't need to devote a full sentence to it. You aren't educating the court, and you aren't exposing a secret strategy. The winner below always invokes a restrictive standard of review. Though you have to mention the abuse of discretion standard, you can refer to it in passing, as shown below.

The reference to the trial court's "departures from the law" is gratuitous and conclusory. The appellate court knows that unless the trial court departed from the law, the judgment will be affirmed. Because you haven't explained any departures as yet, the reference is just conclusory.

Now let's look at the third sentence:

> He claims incorrectly that the judge's decision not to hold a hearing was within the court's discretion.

This sentence doesn't even belong in the paragraph. Though it speaks of the trial court's discretion, as did the second sentence, it makes a different point regarding discretion, namely, that

the abuse of discretion standard doesn't protect the trial court's decision to forego a hearing. That may be true, but the subject of this particular paragraph is whether the findings the court made without a hearing are protected on appeal.

Deceptively, the sentence flows smoothly from the one before it because of transitional hooks. The pronoun "he" in the third sentence echoes "Plaintiff" in the second, and the trial court's "discretion" is referenced in both. You can read the paragraph several times before realizing the third sentence doesn't fit.

Now consider the last sentence:

> In truth, the trial court's "findings" in setting a value on the property without holding a hearing are entitled to no deference by this Court, but rather a plenary review.

This sentence says that plaintiff can't invoke the abuse of discretion standard, but it doesn't say why. It also takes an ungracious swipe at the trial court with ironic quotation marks around "findings." No matter how strongly you feel that the trial court deserves to be criticized, you must hold your tongue, as it were, because name-calling (the ironic quotation marks) makes you look bad.

Now consider what the paragraph accomplished. It took four sentences to say that because the trial court failed to hold a hearing, the plaintiff cannot invoke the abuse of discretion standard to protect the trial court's findings. It doesn't say why the court's failure to hold a hearing negates the abuse of discretion standard.

Explaining why the standard doesn't apply takes little space:

> The abuse of discretion standard does not protect the trial court's findings because the court held no hearing, thus forfeiting the opportunity to evaluate the credibility of the witnesses and develop a feel for the case.

Writers seem to know instinctively when they haven't presented a reason. Sometimes they have a reason but don't state it, and sometimes they have no reason at all. Their makeshift solution in either case — with which they almost always deceive themselves but not the reader — is to reiterate their conclusion or draw it out.

Writers are particularly prone to doing this where they have a partial "because." The writer can say, for example, "The abuse of discretion standard does not apply because the trial court held no hearing." That's true, but it's only the beginning of the explanation. The writer still needs to say why the failure to hold a hearing makes a difference.

Puzzler

How would you tighten and sharpen the following sentence?

> It is important to keep in mind that typically it is the responding party that pays for the production of documents requested in discovery.

Drop the warm-up phrase "It is important to keep in mind." Ideally, everything you write is important. Don't suggest that some things you write are not. The construction "It is … that" can be eliminated in the same way that the construction "there are … that" can be eliminated. Just delete the words.

Reduce "production of documents" to "document production" and drop "requested in discovery" as implicit.

The revised version:

> Typically, the responding party pays for document production. ■