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Preliminary Statements Should Focus on the Facts

Be selective rather than comprehensive

By Kenneth F. Oettle

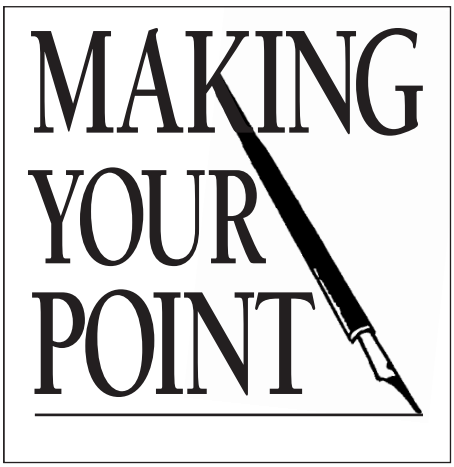
An associate asked about writing preliminary statements when moving for summary judgment against a multicount complaint. He asked how to do better than "Plaintiff's Count one fails because … Plaintiff's Count two fails because ... " and so forth.

The associate correctly deduced that recitation by the numbers is not an effective opening for a brief. It bores the reader and wastes prime space, and it is unlikely to have any positive effect because a preliminary statement is too short to provide back-up for a litany of conclusions. True, one can declare opposition to each count, but one can't make a strong impression while covering too much ground.

This tactical issue arose in a whistleblower suit where a terminated employee alleged a violation of the state whistleblower statute and several common law causes of action: breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with existing and future economic advantage, intentional infliction of emotional distress, and defamation.

Representing the defendant employer, the associate initially considered beginning the preliminary statement to our summary judgment brief with, "Plaintiff's cause of action for X must fail because ... " and continuing in that mode for each count, including not only the whistleblower count but all the common law claims. Because he knew the approach would be tedious, he rejected it.

But instead of drafting an opening based on facts, he defaulted to:



"Defendant, through its undersigned counsel, respectfully submits this brief in support of its motion for summary judgment." Toward the end of the first paragraph, he dutifully assured the court, "There are no genuine issues of material fact."

The associate acknowledged that this approach was duller than a tent peg, and he was frustrated — a good sign — not to have done better. We talked about it and decided that the facts in support of our proximate cause defense, that is, that the employee was fired not in retaliation for whistleblowing but because of bad behavior, could open the preliminary statement. The facts were relevant to the defense and, more importantly, they were the reason the plaintiff deserved to lose. The plaintiff was fired because he did a bad job.

The revised preliminary statement began by saying that the plaintiff was terminated after botching one assignment, refusing to perform another and causing such acrimony among the employees that management had to intervene. Only then did we acknowledge that plaintiff claimed his termination was a consequence of having blown the whistle on illegal behavior by a co-employee. First we made our point; then we addressed plaintiff's.

Look First To Persuade

The preliminary statement isn't a procedural history by another name. Nor is it a condensation of your entire brief into two or three pages. It doesn't have to cover the field; it has to persuade. It should show the court why your client deserves to win, why the other side deserves to lose, or both. Having accomplished that, you can turn, as we did in this preliminary statement, to individual causes of action. Chances are, they can be grouped.

Because a person bringing a statutory whistleblower claim in New Jersey waives common law claims, we could say that all causes of action except the whistleblower claim were waived. We didn't have to discuss them individually.

We believed the common law claims would fail anyway because their elements could not be satisfied on the facts of our case, regardless of waiver, but we gave that only passing reference. After presenting our key facts, we said

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that the common law claims failed not only because of waiver but also because their elements could not be satisfied, "as discussed in Point III."

We made a tactical decision to focus the preliminary statement on the reasons for plaintiff's discharge because those reasons countered the whistleblower claim — plaintiff's only viable cause of action, the others having been waived — and because a good set of facts will defeat most any cause of action, whatever name you give it. Discussion of the individual common law claims would produce only diminishing returns and would dilute the main message.

Lawyers may be concerned that if they fail to address an issue in the preliminary statement, the other side will argue, and the court may conclude, that their position on that issue must be weak. They fear that anything unaddressed will be deemed evaded.

Though confronting or deflecting all the other side's points is important, that task does not have to be accomplished in the preliminary statement. By addressing everything up front, you weaken your primary message.

In this case, the primary message is that the employee was fired not for whistleblowing but for doing a bad job. Your aim is to persuade the court to reach this conclusion before the court heads into the rest of the brief.

If you accomplish this, you develop "momentum," which in the lingo of persuasive writing is shorthand for, among other things, the tendency for a reader to interpret new information to support the reader's initial hypothesis. In other words, if the court is with you after the first paragraph, the court will look to stay with you for the rest of the brief, partly because readers (people) find changing their opinions unpleasant and partly because they have a tendency to root for one side in a contest. If your facts are good, the reader's initial hypothesis will be that the plaintiff was fired not for whistleblowing but for bad behavior.

Good facts will persuade the reader to view the case favorably to your side. The default approach of "Defendants respectfully submit this brief in support of their motion for summary judgment" will not. Besides, you already said that on the cover and in the notice of motion.

Begin the preliminary statement by encapsulating your most persuasive point in a sentence or two. If you can't do that, then take a slower-developing tack (not "tact," though you need that, too), and get to the point as quickly as possible, always focusing on the facts.

Puzzler

How would you tighten and sharpen the following sentence?

> The defendant certainly had constructive notice by reason of the recording of the documents.

Drop "certainly." If you don't persuade with your facts, you won't persuade with your intensifiers. Substitute "because" for "by reason of." It is shorter and more direct. Finally, end the sentence with the important fact — the recording. Alternate versions may work better in context.

The revised version:

> The defendant had constructive notice because the documents were recorded.

First Alternate:

> Recording the documents gave the defendant constructive notice.

Second Alternate:

> The recorded documents gave the defendant constructive notice. ■