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Don't Give Your Adversaries Free Airtime

By Kenneth F. Oettle

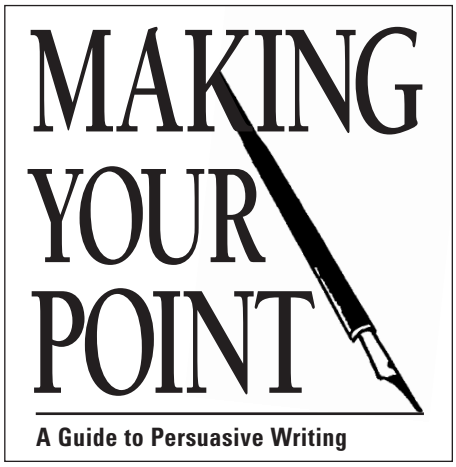
Advocacy is like advertising — if you keep putting the thought out there, sooner or later the consumer may try it on for size. Don't do your opponents' advertising for them. Don't give them "free airtime."

An associate representing a defendant began a preliminary statement by repeating six of the plaintiffs' allegations. I deleted the paragraph. She acknowledged that she was giving plaintiffs "free airtime" by restating their case, but she thought she was obliged to begin by listing the points she would need to refute. She also thought the allegations would be neutralized if she preceded each one with "Plaintiffs allege."

Saying "plaintiffs allege" won't neutralize the allegations unless they are incredible on their face. To the contrary, restating the allegations may fix them in the reader's mind, especially if the reader, whether judge or law clerk, has just finished plaintiffs' brief, which probably cast the allegations in their best light.

Naked reiterations of the other side's position are frequently (actually, just short of invariably) followed by what I call the "no-no statement." You write, "Plaintiff says X," and then you follow with, "Plaintiff is wrong," "misses the point," "falls short of the mark" or "fails to understand the issue." Initially, you give no "because," just a negation, a "no-no statement."

The no-no statement seems necessary to you, as indeed it might. You've just finished stating plaintiff's position, so every fiber of your advocate's body demands that you say the opposite, fast. So you do. You make a no-no statement.



Sometimes no-no statements are immediately followed by a supporting rationale, which repairs some of the damage, but sometimes they are not. Even if you supply a rationale, you lose a tempo because you spend two "beats," as it were, accomplishing nothing — one beat to restate plaintiff's argument and another to deliver the bare negation, the "no-no statement," which has little value other than to assure the reader you haven't given up yet.

The following no-no-statement is accompanied by, but delays, a rationale:

> Insurer X alleges that ABC Co.'s retention of environmental consultants shows that ABC Co. knew or suspected that its groundwater was contaminated. *This is untrue, and Insurer X is unable to muster any evidence to support this contention*. Quarterly groundwater testing was mandated by RCRA.

All the information the writer wishes to convey is in this paragraph, but in the wrong order. First the writer gives the other side free airtime, restating the insurer's contention that the hiring of consultants to test groundwater shows knowledge of contamination. Then the writer makes a no-no statement ("This is untrue and Insurer X is unable to muster . . . blah blah blah"). So far, the score is one to nothing for Insurer X, and ABC Co. is thirty-eight words into the paragraph.

Changing the order of presentation avoids giving the insurer free airtime and eliminates the no-no statement:

> ABC Co. retained environmental consultants because RCRA mandated quarterly groundwater testing, not because ABC Co. knew of or even suspected groundwater contamination as Insurer X contends.

As in the first version, the writer presents the insurer's position and the company's position, but the order is different. In the revised version, the writer provides the explanation first, so when the reader sees the insurer's position, it is with the explanation in mind. Not all no-no statements are this easily

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eliminated, but many are.

A second example appeared as the opening paragraph of an appellate reply brief:

> Respondent argues that, for this Court to reverse the trial court, it must repudiate the holding in *Smith v. Jones*. Respondent is mistaken. Contrary to Respondent's argument, this Court need not challenge the holding in *Smith* in order to find in Appellant's favor. *Smith* is silent on federal law. It does not mention ERISA or cite even a single federal case.

This opening grants free airtime and uses not one but two no-no sentences, beginning with "Respondent is mistaken." We do not learn until the last sentence of the paragraph, forty-three words in, why the Court would not have to repudiate *Smith* to find for Appellant.

Minor adjustments shape up the opening:

> Respondent incorrectly contends that this Court will have to repudiate *Smith v. Jones* to reverse. *Smith* is not an ERISA case and doesn't even mention federal law. Thus, it is inapposite.

The word "incorrectly" interrupts the free airtime and provides the negation for which the writer previously used a no-no sentence, allowing the writer to get more quickly to the point. Replacing the phrase "to find for Appellant" with the punchier phrase "to reverse" further shortens and sharpens the passage, propelling the reader toward the conclusion.

Puzzler

How would you tighten and sharpen the following sentence?

> The parties conducted the depositions of the experts for discovery purposes prior to the submission of the trial briefs.

If you use a non-specific verb like "conducted," you get stuck having to add "the depositions of." See if your principal noun can be converted to a verb. Here, the principal noun is "deposition," which makes the verb "deposed." You can drop the phrase "for discovery purposes" because it is assumed. "Prior to" becomes the more compact "before," and "the submission of" becomes the more compact "submitting." Often, you don't need "the." Here, it can be removed from in front of "trial briefs."

The revised version: "The parties deposed the experts before submitting trial briefs." ■