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Even Procedural Histories Can Be Persuasive

Take any opportunity to highlight good facts

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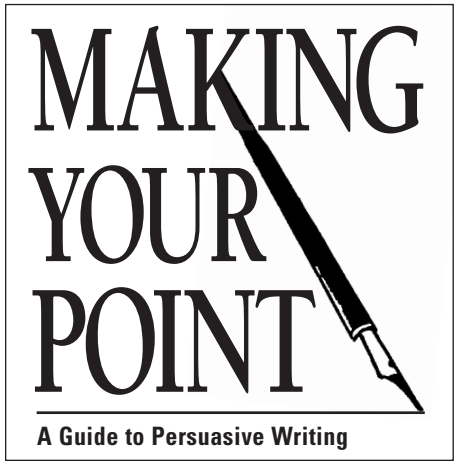
The principal persuasive sections of a brief are the preliminary statement, the statement of facts, the argument, and sometimes a statement of issues, which must be carefully drawn to suggest, or at least permit, a good result. In contrast, the procedural history — a staple of appellate briefs — is typically colorless even though that relatively clinical section of the brief can be used to support your point.

Suppose you represent an electroplating company seeking insurance coverage for the cost of cleaning up a landfill where residue from the company's plating operations, thought to be harmless at the time, was deposited years ago in compliance with state law. The cleanup took place pursuant to a consent order between the Environmental Protection Agency and several generators of waste, including your client.

The first sentence of the procedural history in your appellate brief reads as follows:

> On April 28, 1989, ABC Corp. ("ABC") filed an action against defendant XYZ Insurance Company ("XYZ"), seeking indemnification for cleanup costs and related expenses incurred in response to a directive of the Environmental Protection Agency ("EPA") to clean up a landfill where residue from ABC's electroplating operations was deposited.



Even though this is "just" a procedural history, you can add some facts that may begin to shape the reader's view of the merits of the case. For example, instead of saying that cleanup costs were incurred "in response to" an EPA directive, say "in complying" with an EPA directive, casting your client in a cooperative role — less the bad-guy polluter, less the wearer of the black hat.

You can further suggest that your client was cooperative, not a troublemaker, by saying that the expenses were incurred in compliance with an EPA "consent order," which is a subset of "directive." The word "consent" suggests your client cooperated with the government and was a good corporate citizen.

You can also say the deposits of plating residue were made "in compliance with state law" and that the residue was "deemed nonhazardous at the time," showing that your client was law abiding and not an intentional polluter. If your client were an intentional polluter, not only would it have a hard time establishing insurance coverage under standard policy terms, but it would gain little sympathy with the court.

One chooses facts to season the procedural history much as one chooses facts for the statement of facts — to support an element of your claim or defense and to make your side look good or the other side look bad. Procedural histories should not be argumentative or even overtly persuasive, but you do not cross these boundaries merely by choosing words with favorable denotations and connotations. You can advocate without arguing.

The revised opening sentence for the procedural history in your appellate brief would read as follows, with the changes underlined:

> On April 28, 1989, ABC Corp. ("ABC") filed an action seeking indemnification for cleanup costs and related expenses incurred in complying with a consent order issued by the Environmental Protection Agency ("EPA"), directing the cleanup of a landfill where residue from ABC'S electroplating operations, deemed nonhazardous at the time, was deposited in compliance with

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state law.

You don't expect to win the case with the procedural history, but you can echo the theme of the preliminary statement and keep the reader focused on your good facts until you begin the story in the statement of facts.

A Second Example

Suppose you represent a company whose former executive sought to exercise stock options two days after the last permissible date and then sued the company when it declined to honor the options. Would you begin the procedural history with the filing of the complaint or with the missed deadline?

Technically, the first legal procedure in the case was the filing of the complaint, but the case really began when the plaintiff missed the deadline for exercising the options:

> The expiration date for plaintiff's corporate stock options was April 6, 2003. Plaintiff attempted to exercise the options on April 8, 2003. When ABC Corp. declined to honor the expired options, plaintiff began this action, filing a complaint in the Superior Court on May 4, 2003.

Note that the first sentence refers to the "expiration date" of the options rather than the "last date for exercising the options." The denotation is the same — time ran out — but the connotations are different. If something has expired, it no longer functions. It is dead.

In contrast, "last dates" can be extended. People often miss deadlines and are granted more time. Because deadlines can be extended, "expiration date" has a stronger connotation of termination than "last date for exercising."

The preliminary statement undoubtedly told the story of the expired options, but the procedural history can repeat key facts to keep the reader focused and to drive the point home.

I would place the missed deadline at the very beginning of the procedural history rather than a sentence later or even several words later as part of a description of the complaint. This way, you direct attention to the missed deadline, and you begin with something the plaintiff failed to do (missed the deadline) rather than with something the plaintiff did (filed the complaint).

Puzzler

How would you tighten and sharpen the following sentence?

> Appellant contends that evidence of prior breaches admitted at trial was irrelevant, unduly prejudicial and served to taint the jury verdict.

This sentence has structural and logical flaws. The structural flaw is the absence of parallel construction. The series begins with two adjectives (irrelevant and prejudicial), leading the reader to expect a third adjective to conclude the series. Instead, the last item is a verb phrase (served to taint), disappointing the reader's expectations.

If the final item in the series can't be converted to the same part of speech as the first two items, then the series should be broken up, reducing the number of parallel items to two, as follows:

> Appellant contends that evidence of prior breaches admitted at trial was irrelevant and unduly prejudicial and that it served to taint the jury verdict.

Now the two elements of the sentence — the two "that" clauses — are parallel.

But the sentence is not yet right. It contains a logical flaw. Because the third item in the series (taint) is a consequence of, not coordinate with, the first two items (irrelevance and prejudice), the three items do not form a set and should not be connected by "and."

Finally, you can trim "jury" and "admitted at trial" as implicit.

> Amended version:
> Appellant contends that evidence of prior breaches was irrelevant and unduly prejudicial, tainting the verdict. ■