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Don't Tell the Reader What To Think

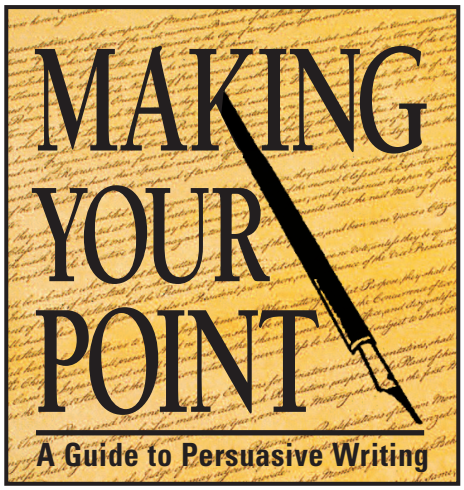
If your facts are strong but not dispositive, you may wish to suggest, not declare, your conclusion

By Kenneth F. Oettle

Instinctively, readers resist being told what to think. They want to reach conclusions on their own. Also, they know you are an advocate, so they hesitate to accept any conclusion that hasn't been preceded by a heavy dose of supportive facts.

This instinct has ramifications for advocacy. Wherever possible, brief writers should allow readers to reach conclusions on their own. I don't mean you should eschew summational sentences that follow a solid set of facts, e.g., "In light of defendant's having secretly entered into contracts with seven other suppliers, defendant evidently did not intend to fulfill its requirements with plaintiff's goods." I mean only that conclusions should be preceded by facts. If your facts don't compel the conclusion, you may not wish to state the conclusion explicitly.

Suppose you represent a landlord who is allegedly responsible for the brain damage of a child who may have been exposed to lead paint in the landlord's apartment. The child was exposed to lead in a previous apartment, and while he was living there, a series of tests showed high levels of lead in his blood. After he moved to your client's apartment, tests showed that the level of lead in his blood precipitously declined, falling well below



what is officially considered the danger level.

You move for summary judgment on the ground that the jury should not be permitted to speculate on plaintiff's exposure to lead in your client's apartment in view of the rapid and steep decline in the level of lead in the plaintiff's blood while living there. You write the following:

> In view of the rapid and steep decline in the level of lead in plaintiff's blood while living in Landlord's apartment, and in view of the evidence that the level of lead in plaintiff's blood was highly elevated in his prior apartment, which was heavily lead-contaminated, *probably causing any later-assessed brain damage*, a jury should not be permitted to speculate on plaintiff's possible injury from lead exposure in Landlord's apartment. [Emphasis added].

You add the phrase "probably causing any later assessed brain damage" for several reasons: One, you want to make sure the reader doesn't miss your point — that someone other than your client probably caused plaintiff's injury. Two, you figure that one of your tasks is to make the reader's job easier, so you spell out this conclusion to save the reader the trouble of deducing it. Three, the added language is aggressive, and you feel that the aggressive approach makes you look good. Litigators are supposed to be aggressive.

These are good purposes, but they are outweighed by a more important consideration. Though the evidence of plaintiff's exposure to lead in a prior apartment is overwhelming, you don't know for sure that all plaintiff's brain damage was caused by the contamination in the prior apartment, and you don't know for sure that the presence of lead in your client's apartment didn't contribute to the plaintiff's injury notwithstanding the rapid and steep decline in the level of lead in plaintiff's blood while he was living there.

Consequently, you can't say with-

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out qualification that lead exposure in the first apartment "caused" plaintiff's brain damage. It probably caused all or nearly all of it, but for summary judgment purposes, "probably" isn't good enough, and it doesn't sound good enough. To win the motion, you have to show that no reasonable jury could find that your client caused the harm.

On these facts, arguably no reasonable jury should find that your client caused the harm. But you have to be careful about contending that the entire injury occurred in the first apartment. Write it as follows, deleting the phrase "probably causing any later-assessed brain damage":

> In view of the rapid and steep decline in the level of lead in plaintiff's blood while living in Landlord's apartment, and in view of the evidence that the level of lead in plaintiff's blood was highly elevated in his prior apartment, which was heavily lead-contaminated, a jury should not be permitted to speculate on plaintiff's possible injury from lead exposure in Landlord's apartment.

This is an instance where you shouldn't force a thought on the reader. The reader will be sympathetic to a plaintiff injured by exposure to lead paint and will resist being overtly guided to the conclusion that plaintiff has no claim, but the reader may be moved by the inexorable logic that a person whose blood shows high levels of lead in a heavily lead-contaminated apartment and shows a precipitous decline in lead thereafter almost certainly absorbed the lead in the first apartment, not in a subsequent apartment, even if the subsequent apartment also had lead-based paint.

With the help of my Informal Polling Group, I tried to parse the psychology behind readers' desire to reach conclusions on their own. The consensus is that it is primarily a matter of trust. The reader implicitly trusts what he or she can deduce. The reader does not trust you, at least not at first. Therefore, the reader will tend not to trust any conclusion you proffer that isn't manifestly supported by the facts.

Votes were also cast for other reader motivations: (i) the desire to feel self-sufficient, that is, to feel capable of deducing the conclusion without assistance; (ii) irritation at the insult to intelligence in the suggestion that the reader is foolish enough to accept an unsupported conclusion; (iii) irritation at being offered conclusions rather than facts even though the brief writer purports to be supplying facts; and (iv) sheer ornery resistance to being told what to think.

It's an amalgam, probably worth figuring out and certainly worth trying to figure out. If the process of analyzing of readers' motivations helps embed the point that excessive advocacy is ill-advised, then I am all for it. It's like Zen. The master doesn't expect you to answer the question, "What is the sound of one hand clapping?" But he wants you to try.

Puzzler

Which is better, Version A or Version B?

Version A: *Due to* the absence of a clause addressing attorneys' fees, each side must bear its own.

Version B: *Because of* the absence of a clause addressing attorneys' fees, each side must bear its own.

Some writers will not begin a sentence with "Because." Maybe that was once a rule, but it is not a rule now. A few curmudgeons may care, but I think the coast is essentially clear.

In contrast, the coast is not clear on "due to." Curmudgeons do care if you use "due to" rather than "because of" because "due to" is considered substandard.

Be wary of curmudgeons (rigorously trained, obsessive compulsive readers over 40). They offend easily — some would say unfairly — and once offended, they may think that your argument, your writing, and maybe even you are substandard.

You can avoid the curmudgeons altogether with this version:

Version C: In the absence of a clause addressing attorneys' fees, each side must bear its own. ■