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Focus on the Essential Flaw in Your Opponent's Argument

Begin a response or a reply with a point, not merely a declaration of disagreement

By Kenneth F. Oettle

Briefs written in response to an opponent's brief, whether as a "responding brief" (e.g., opposing a motion) or a "reply brief" (in further support of a motion) often begin with a statement that the other side missed the boat, as in the following opening to a reply brief in support of a motion to dismiss:

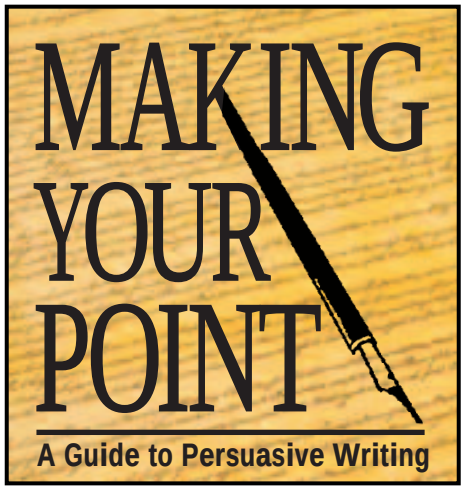
> Plaintiff's brief in opposition to defendant's motion to dismiss the complaint distorts the arguments in defendant's brief and misinterprets the case law relevant to plaintiff's claims.

This opening has no grip because it is abstract and conclusory. Except for the accusations of distortion and misinterpretation, the words have no visceral appeal: "Plaintiff's brief in opposition," "defendant's motion to dismiss," "complaint," "arguments," "defendant's brief," "case law" and "plaintiff's claims." They are conceptual and sterile.

The accusations of distortion and misinterpretation, though serious and presumably heartfelt, are only name-calling when presented without factual support, as here. To break bones (persuade), you need sticks and stones (facts).

Some briefs compound the sluggishness of a conclusory opening by restating the conclusion from another perspective. For example, the following was the second sentence in the same reply brief:

> An accurate reading of defendant's arguments and defendant's incorrect interpretation of the case law demonstrates that plaintiff's claims should be dismissed.



After accusing the adversary of distortion and misinterpretation, the writer says that a careful reader will see through the deception. That's not a point; it's a prediction.

Language like this merely marks time; it does not persuade. It tells the court what you think of the other side's arguments, but the court already knows what you think. The court rarely reads a brief that says, "We agree with the adversary and concede."

The opening sentences in a brief receive special attention because they come first, when the reader is alert, interested, and ready to tip one way or the other, depending on the strength of your message. If you begin well, you build momentum. Conversely, if you open flat, as with unsupported negation ("Plaintiff misses the point") or neutral procedure ("This is a brief in opposition to…"), you waste an excellent opportunity to win the reader over.

I am not surprised that writers default to naked negation. It is a natural though misguided outlet for the anger and indignation stimulated by the adversary system. Puffing up and declaring that the other side is "simply wrong" seems as if it should move the reader — but it doesn't. A conclusory accusation is like a blank cartridge — full of powder and good for a bang, but nothing comes out.

On the other hand, I am surprised that so many experienced lawyers embrace the conclusory approach. When their associates dare to use the opening to jump into the facts or encapsulate the key flaw in the other side's position, the supervising attorney pushes the facts deeper into the opening and inserts a conclusory statement up front. They seem to be under the misimpression that postures persuade.

Some reply openings unnecessarily restate the procedural posture of the case, as in the following from a reply brief in support of a minor's appeal from an adjudication of delinquency:

> AZ appeals from an Order of the Superior court, Family Part, adju-

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dicating him delinquent on various sexual offenses.

The opening continued with a naked negation of the other side's position:

> As demonstrated herein in this reply brief, the arguments of the State in its brief lack merit. Several errors of constitutional dimension occurred in AZ's case and his adjudication as a delinquent should be reversed.

At that point, the appellate judges probably shrugged, figured "Whatever," and turned to the first page of the reply argument.

A common tactic in responding briefs is to attack the other side's apparent motive:

> Defendant's response to plaintiff's motion for summary judgment is merely an attempt to stall a simple collection case.

Maybe defendant was attempting to stall, but motives aren't merits. The kernel of persuasion in this brief actually appeared about 20 lines down the page:

> Although defendant opposes this motion on the basis that discovery is incomplete, it has made no discovery request for nearly a year.

That fact has weight and speaks for itself. The writer should have given it prominence at the beginning of the reply brief.

In contrast to the foregoing, the following opening from a reply brief in support of an application for a preliminary injunction gets right down to brass tacks:

> Defendants acknowledge that they failed to make good on their promise to operate a men's clothing store at the Plaza Shopping Center. Without notice, they emptied their store of goods, transferred employees, and closed up shop. Two weeks later, just as suddenly, their demolition crews returned to tear out the walls and lighting, leaving a scarred and pockmarked space.

This opening tells a story. It presents the facts and lets the reader draw the conclusion, which, given the facts, will be unfavorable to the defendant. It doesn't tell the reader what to think.

The following opening from an appellate reply brief uses the same technique:

> Plaintiff's responding brief fails to explain how the jury could determine without expert support that light from a hooded doorway fixture with a 60-watt bulb – had the bulb been functioning — could have prevented a trip-and-fall in a parking lot more than 70 feet away.

A judge knows from experience that hooded light fixtures above doorways aren't intended to, and don't, illuminate parking lots 70 feet away. The fact speaks for itself. That is your goal — to have your facts speak directly to the reader. Once the message is delivered, you can sum up.

Puzzler

How would you improve the following sentence?

> Some states either impose no franchise tax at all or it is very minimal.

This is a run-on sentence because independent clauses are connected without a comma (the second independent clause is "or it is very minimal"). But that isn't the sentence's only problem.

The word "either" in front of the verb "impose" prepares the reader for another verb after "or," but the sentence supplies a pronoun instead ("it"), disappointing the reader's expectations.

Also, the natural progression in this sentence about the absence of franchise tax is from minimal tax to none at all, not from no tax to minimal tax. Once the reader sees "no franchise tax at all," the reader senses closure, only to have the sense of closure disturbed by the reference to minimal tax. Again, the reader's expectations are disappointed.

In a close call, I would retain "either" as a signal that the unit of thought will continue past "minimal franchise tax."

The new version:

> Some states impose either minimal franchise tax or none at all. ■