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# Unsupported Conclusions Are Not a Good Way To Begin

## Step down off your soapbox and mingle with the facts

**By Kenneth F. Oettle**

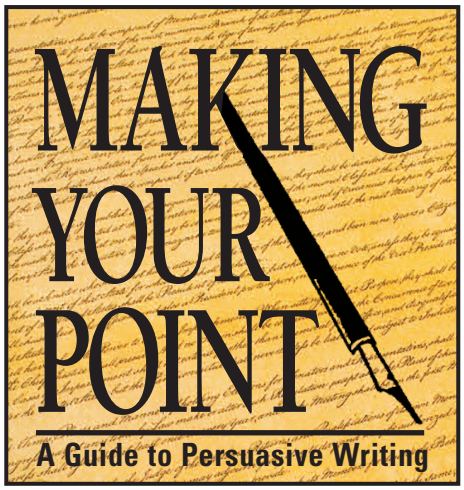
I remember a cartoon of a man sitting by an open window and confronting two little birds on the sill. One bird was wearing a tie, carrying a brief case and looking very displeased, and the other bird, in no better mood, was gesturing toward the first bird and saying, "… and this is my lawyer."

The bird in legal battle garb was posturing. It's part of a lawyer's bag of tricks. A little bluster and self-generated anger can work wonders in a face-to-face. Adversaries respect it; clients love it; and gentler souls cringe, as intended.

But lawyers don't posture so well on the printed page. The words don't capture the huff-and-puff, and the writer can't command the room with his presence. The only presence is the one created on the page. The reader is insulated from tones and attitudes and can, at leisure, see through the fluff.

### The Conclusory Bleat

A classic way to mediocritize a Preliminary Statement is to begin by declaring that you meet the legal test, whatever it is, and to leave the matter of support for later. This is a form of posturing. The conclusion puffs you up, and then you deflate.




Suppose you are seeking to persuade the highest court of your state to take a case for review. You begin: "XYZ Corp.'s petition for review should be granted because this appeal presents questions of general public importance that have not been settled by the Supreme Court."

Questions of general public importance that have not been settled by the Supreme Court constitute one of the grounds on which the Court may take a case, but the mere restatement of that test, even coupled with "we meet the test," has no persuasive value. The Court knows it may take a case of general public importance. Why use one of the premier sentences in your brief to remind the Court of what it already knows?

Writers looking for a way to open a brief often default to a declaration that they meet the legal test (or to procedural recitations such as "This is a brief in support of … "). I asked the author of the above sentence why he began by stating that his case met the legal test rather than by presenting something about the case that might persuade the Court to review it. He was forthcoming in his response.

"It was easier," he said.

I appreciated the candor. Progress is aided, after all, by a clear view of one's motives.

The writer knew the importance of the sound bite, the compact statement of a theme, but he hadn't figured out why his side deserved to win. Consequently, he couldn't formulate an opening with visceral appeal.

At such times, writers may rationalize that the Court needs to know which of several tests the writer is invoking. This is true, but only in good time. It is better to soften up the Court with the facts. Then your invocation of the test is more likely to result in "We agree" rather than "Show me."

Writers also rationalize that reciting a legal test "observes the forms," showing respect for the legal process and the Court. By showing respect, it is said, you strengthen your relationship with the Court. This is true, but why use the opening, which is a focal point in the

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brief, to nurture a relationship rather than persuade?

You have a whole brief in which to develop the Court's trust with well-supported points and clear prose. Given the importance of starting strong (to persuade the Court early so the Court will thereafter interpret what it reads to be consistent with its initial hypothesis), you should look to persuade as soon as possible. You don't have a whole brief in which to do that.

By beginning with an unsupported declaration that you meet the legal test, not only do you take longer to get to the point, but you create the suspicion that you don't have a point. Readers sense that if you had a point, you would lead with it. They don't stop to think that the reason you aren't beginning with good facts might be that you overvalue procedure. Your flat opening is indistinguishable from that of a writer who lacks good facts.

Ideally, begin with a fact that tends to persuade, for example:

> The Trial Court eschewed a live hearing and evaluated the expert reports cold, without the benefit of cross-examination, declaring that the court had "no intention of giving the case more time than it was worth."

The point speaks for itself. If you have a fact like that, leap on it.

You can begin with a legal test if your good fact follows immediately:

> When a seller refuses to close on the sale of real property, the law requires that the disappointed buyer sue for specific performance "promptly." Plaintiff ABC Corp. did not act promptly. It waited three years. This motion seeks to dismiss ABC Corp.'s claim for specific performance and to vacate its *lis pendens* because of ABC Corp.'s failure to sue promptly.

If you don't have an equitably compelling fact, perhaps something unique about your case will interest the Court:

> This is the first case to decide whether documents exempt from disclosure under the Open Public Records Act are nevertheless subject to disclosure under the common law.

If explaining your point will take a few sentences, you might open with something catchy, like this:

> This purported class action to challenge an allegedly deceptive practice was brought by a plaintiff who was neither deceived nor injured.

If you aren't ready to set the hook, then troll the lure.

Writers who begin briefs with conclusory statements of law or procedural declarations seem not to understand that only facts persuade and that the persuasive process should begin immediately. To their credit, most of these writers have a rationale, which is better than not having a rationale, but they don't ask themselves, "How can I begin to persuade the reader with my first sentence?" To find that first sentence — or the lead-in to a second or third sentence that rings true — consider what will cause the reader to think the other side deserves to lose.

## ***Puzzler***

How would you tighten and sharpen the following sentence, which began a post-trial brief?

> The briefing in this case has been successful in that figurative "battle lines" have been drawn.

"The briefing has been successful" is imprecise. Neither side wrote a post-trial brief to draw battle lines. Each side wrote to win. Therefore, the manifestation of battle lines wasn't a success for either side; it was a collateral benefit.

The phrase "in this case" is implicit and therefore unnecessary. It disappears anyway with the rest of the "successful" clause. For clarity, add "post-trial" before "brief."

If you call the battle lines figurative, you don't need the quotation marks. The word and the marks accomplish the same purpose. Substitute "established" for "have been drawn" to be more active and to sidestep the clichéd (but not so bad) expression of battle lines being "drawn."

> The new version: The post-trial briefing has established "battle lines."

> Alternate version: The post-trial briefing has drawn figurative battle lines. ■