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Write the Preliminary Statement First If It Helps You Focus

Drafting an introduction can crystallize your theme

By Kenneth F. Oettle

I have been asked whether the introduction to a brief — the "preliminary statement" — should be written first or last. The answer is that it depends.

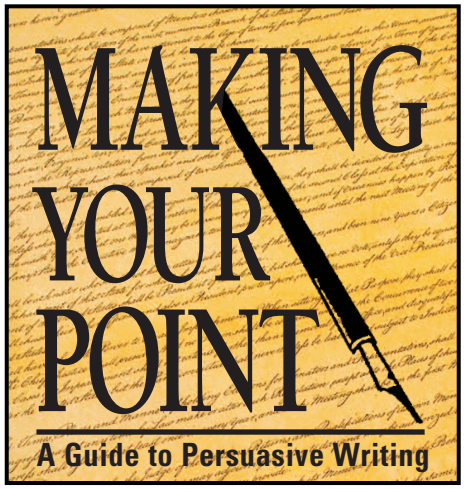
To increase the chances of encapsulating your argument in the preliminary statement on your first try, write it last, after you have gathered, analyzed and articulated all the facts and law. At that point, you are in the best position, almost by definition, to formulate an overview. As one member of my informal polling group says, "I can't summarize what I've said until I know what I've said."

Why, then, do some lawyers write preliminary statements first? Are they misguided?

Two-thirds of the members of my informal polling group write their preliminary statements first. Several insist this is the "right" approach. (We all stand at the center of our own universe.)

The principal reason they give for drafting the preliminary statement first is that the exercise of summing up their argument helps them shape it. Writing aids their thinking, and the clarified argument guides the rest of the brief.

I don't write entire briefs much, but when I do, I don't have the patience to put off the preliminary statement. Once I know the facts and have a sense of the law, I feel a need to articulate a theme — why my side deserves to win or why the other side deserves to lose. Usually, I just extend the articulation and finish the preliminary statement. If the theme doesn't ring true after the facts and the law are fully developed, I re-examine it. At the outset, I want to know if I have a point.



One doesn't have to write an entire preliminary statement to shape on a theme. Articulating the core argument in a sentence or two can serve as a guidepost for the rest of the brief. If nothing else, it will be a working hypothesis.

The author is a partner and co-chair of the writing and mentor programs at Sills Cummis Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.

Crystallizing an Argument

Formulating a theme requires a dialectic, a back-and-forth of ideas. Because ideas push boundaries and are distorted by wishful thinking, not all ideas are good. In fact, in difficult cases, most ideas are bad.

Ironically, new ideas always seem good to the persons who have them, at least at first. This phenomenon is probably a component of the expression "bright idea." Not only are ideas "bright" if they are good (because they sparkle with creativity), but they are bright because they *seem* good to the persons who have them. They wear a halo when first conceived.

If you try to create an argument on your own, with nobody to force you to discard a bright idea or take it to the next level, you are at a disadvantage. Serving as your own critic is difficult because you have invested both time and ego in the product and because you are bound by your own thought patterns.

If you let your work sit overnight and come to it fresh in the morning, you can, to some degree, review the work from a neutral point of view, achieving distance and thus perspective. If you have the time and the courage to show your work to someone else, this is even better. Third-party feedback is more powerful than self-feedback, even if limited to generics such as, "I'm not sure I get your point."

In lieu of sharing your draft, you can talk out the issues with another lawyer, creating a dialectic in real time. Discussion is less intimidating than cold criticism. In such a dialogue, you can, among other things, supplement your point if the listener seems dubious or

confused. Exchanging ideas toward a common goal tends to be more exploratory than critical.

As a communication vehicle (as opposed to a creative device), the preliminary statement must be strong because it constitutes first contact. From the first word of the preliminary statement, you begin to build — or lose — credibility and to shape the court's impression of your case. From that point forward, inertia will be either your friend or your enemy.

As it is said, "You get only one chance to make a first impression." (Actually, most people say, "You *only get* one chance..," which is considered colloquial and possibly substandard but which, arguably, makes a better point, assuming you aren't at risk of irritating a grammar freak.)

The Perfect World

Here is my perfect world for creating a preliminary statement: First, learn the facts because facts control. If you are tempted to formulate a theme prematurely, do your best not to commit to it until you know all the facts. Often, the worst facts emerge last because nobody wants to focus on them.

Once you know the facts, formulate a theme (a reason why your side deserves to win or why the other side deserves to lose). If your theme has visceral appeal, you are on your way. If it doesn't, you need more facts, or you need to keep thinking.

Armed with your facts and a theme, begin the legal research. Sometimes, the research alerts you to facts you haven't gathered or focused on, or it may cause you to rethink your theme. The facts, the theme, and the law are synergistic.

In the perfect world, you formulate a theme based on your facts, you find law to confirm and support the theme and you encapsulate the theme in a powerful preliminary statement. If you write the preliminary statement first and use it as a working hypothesis, be flexible enough to abandon your initial idea and redraft the opening to fit the facts and the law. Don't contort the facts or the law to fit the preliminary statement, notwithstanding how much effort you put into it or how enamored you are with the prose.

Puzzler

How would you tighten and sharpen the following sentence?

> The court granted a motion by the defense for summary judgment, finding that the injuries suffered by the plaintiff did not meet the permanency standard of the Tort Claims Act.

Drop "a motion" as implicit — a court won't grant summary judgment without a motion. If the context permits, drop "by the defense" because the reader is quickly reminded of the identity of the moving party by the reference to plaintiff's inadequate proofs.

Possessives like "plaintiff's" are often crisper than prepositional phrases like "by the plaintiff." Here, the possessive lets you drop the verb ("suffered") as well. But not every prepositional phrase should be converted to a possessive. For example, converting the prepositional phrase "of the Tort Claims Act" to "Tort Claims Act's" would make the reader wait until the end of the sentence to find out what standard the plaintiff failed to meet (the permanency standard), and it would create the excessively sibilant phrase, "Claims Act's."

The revised version:

> The court granted summary judgment, finding that plaintiff's injuries did not meet the permanency standard of the Tort Claims Act.

Alternate version (more assertive):

> The court granted summary judgment on the ground that plaintiff's injuries did not meet the permanency standard of the Tort Claims Act. ■