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To Establish Common Ground With the Court, Begin Points with Local Law

Strategize the order of citations as you would strategize the order of witnesses

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In a NITA trial practice course many years ago, I learned that one strategizes the order of witnesses in a trial just as one strategizes the order of arguments in a brief. As a young associate in a large firm, I had never formulated trial strategy or, for that matter, any strategy outside the library. I had written briefs.

In the trial practice course, I learned that the touchstone for sequencing witnesses is the likely impact on the jury, considering their prejudices and preconceptions, their attention spans and their powers of retention. I learned that a trial attorney wrestles with questions such as, "Should I begin with a strong witness to create a good impression early, or should I save my best for last? Will the jury forget my first witness by the time I get to the last? Should I present Witness A first to validate Witness B, even though Witness B is more important?"

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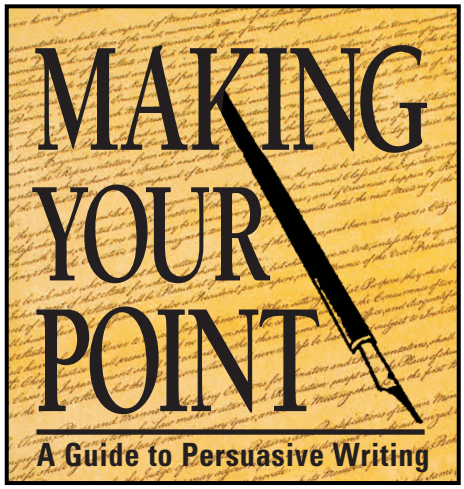
Similar questions attend the sequencing of argument in a brief, all with a view to maximizing the impact on the reader, just as the sequence of trial witnesses aims to maximize the impact on the jury.

A frequent tactical issue in brief writing is what to cite first when the law



of another state is more on point than the law of your state. Suppose, for example, that you represent a machinist who sued to enforce an agreement with an auto parts manufacturer to machine auto parts. Though the parties left the price-per-piece unresolved, their intent to agree was clear — they signed a letter to that effect — and the parts manufacturer touted the solid reputation of the machinist in a successful effort to persuade an auto manufacturer to give the parts manufacturer a contract to produce parts.

The parts manufacturer now moves for summary judgment, citing the rule that contract formation requires agreement on "all essential terms" — a subset of the broader principle that contract formation, like contract interpretation, is a function of the parties' intent. Agreement on essential terms confirms that the parties intended to be bound.

Unfortunately, you can't find local authority to the effect that clear intent to form a contract can overcome the absence of an essential term. The best dictum you can find locally is that the intent to be bound is "a significant consideration" in determining whether the parties have an enforceable contract.

Fortunately, you have other resources. A treatise and several out-of-state cases say that notwithstanding the absence of an essential term, such as price or quantity, the parties' clear intent to be bound, especially where the reputation of a subcontractor helps win a contract, can oblige the parties to negotiate the omitted term in good faith.

Your adversary will characterize this as an unwarranted "extension of the law" of your state, knowing that without local precedent, a judge may "see no reason to extend the law." The resources available to address this concern include the following:

• Broad principle (local law): A "significant consideration" in contract formation is whether the parties intended to be bound.

• Broad principle (*Restatement of Contracts*): Contract formation is a function of the parties' intent.

• Precise principle (out-of-state courts): A court will impose a duty to negotiate an unresolved essential term in good faith if the parties clearly intended to be bound.

• Precise principle (treatise): Same.

What should you present first — the broad, nonspecific dictum in your

state, the broad principle in the *Restatement* (effectively, an amalgam of the law of all states), the precise principle as articulated in out-of-state cases or the precise principle as articulated in a well-known treatise?

In most instances — enough that it is a convention — one should begin with local law because it binds and comforts the court. Here, you would begin with the principle that a "significant consideration" in contract formation is the parties' intent to be bound. In contrast, were you to begin with an out-of-state case, a treatise or the *Restatement*, thus breaching the convention, the court might suspect that you are "weak on the law."

In its moving brief, the adversary will unquestionably argue, and the law clerk writing the judge's bench memo will confirm, that a contract is formed by agreement on "all essential terms." The court may therefore form the preconception that a contract lacking agreement on price is unenforceable.

You need to overcome this preconception. The first step is to develop a connection between the principle for which you have local support — that contract formation depends on the parties' intent to be bound — and the specific principle, articulated in out-of-state cases and a secondary source, that clear intent to be bound can support a contract notwithstanding the absence of agreement on an essential term.

Don't tell the court right away that what appears to be the general rule is merely a "subset." It may be a subset, but it's such a frequently stated subset that it threatens to envelop the set. Work your way toward this conclusion slowly.

After stating the general rule that the parties' intent is a significant consideration in contract formation, say that your state's law is consistent with "black letter law" to this effect, namely, the *Restatement of Contracts*. This establishes a link between the law of your state and the law elsewhere, of which the *Restatement* is an amalgam.

Then acknowledge the rule of thumb — agreement on all essential terms — and state matter-of-factly that it is a subset of the general rule and can be overcome by the parties' clear intent to be bound. Cite the treatise for that proposition; use the out-of-state cases as examples; and quote their dicta.

If your equities are strong, the court will realize that the only reason a court in your state hasn't adopted the rule you advocate is that the appropriate fact circumstance hasn't arisen. You don't advocate a reshuffling of moral premises, merely the application of an old rule to new facts.

Note the rhetorical strategy — one anticipates the other side's arguments and the court's concerns, confronting and dissolving preconceptions. Once these barriers are removed, you can make your point.

Puzzler

What is the flaw in the following sentence?

> An employer is liable under IRCA for continuing to employ an alien after learning that they are unauthorized to work in the United States.

If the sentence said "aliens" (plural) instead of "an alien," the pronoun "they" would be correct. Unless you know that the alien is male or female, which would allow you to use "he is" or "she is" without being politically incorrect, rewrite as follows:

> The revised version:
> An employer is liable under IRCA for continuing to employ an alien after learning that the alien is unauthorized to work in the United States. ■