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Never Relax Your Persuasive Posture

Even the conclusion can, where appropriate, make a point

By Kenneth F. Oettle

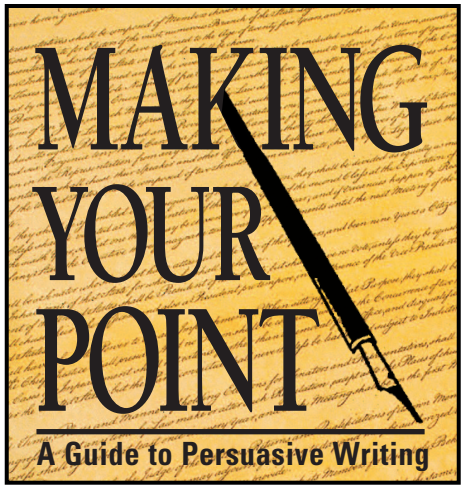
Writing a brief is hard work. When we finish our last argument point, we relax, deflate and deem the process over. We don't want to think about it anymore, which may be one reason why conclusions almost always default to a statement of the relief sought, as in, "For the foregoing reasons, plaintiff ABC Corp. respectfully requests that defendant's motion to dismiss be denied."

I reviewed dozens of conclusions in our firm's archives and found the pattern repeated in nine out of ten briefs. Typical are the following:

> For the foregoing reasons, and those stated in the briefs filed in the Appellate Division, the petition for certification should be denied.

> For the foregoing reasons, ABC Corp.'s Motion for Reconsideration should be granted, and Paragraphs 3, 4 and 5 of the Court's December 5 Order amended accordingly.

> For the foregoing reasons, plaintiff ABC Corp. respectfully requests that the Court issue an Order enjoining defendant Smith from (a) working for any competitor, including defendant XYZ Co., for 18 months beginning the first of the year; (b) for the same period, soliciting or accepting business from any of plaintiff's customers who purchased goods or services during his employment by ABC Corp.; (c) for the same period, soliciting plaintiff's employees; (d) disclosing ABC Corp.'s confidential information, including trade secrets; and (e) requiring Smith to return any such information and to destroy his copies of it.



Nearly all conclusions begin, "For the foregoing reasons…" and then state the relief sought, which makes sense because the court needs to know what you want. Some conclusions, especially those seeking injunctive relief, have subdivisions, as in the third example above. Whether the conclusions seek complex relief or not, the vast majority are limited to a statement of the relief sought. Evidently, when the argument section is finished, writers figure that enough is enough.

Actually, it may not be enough. By defaulting to "For the foregoing reason…," you may be missing an opportunity not only to reiterate your point but to test it. If forced to encapsulate your argument one more time after all your points are written, you may discover that your argument is not as strongly premised as you thought.

Ultimately, the purpose of a brief is to embed your point in the reader's mind. To this end, you begin vigorously, looking to persuade quickly and gain momentum. You highlight your argument in point headings, where it will be viewed not only in the body of the brief but also in the table of contents. You develop your theme in the preliminary statement, in the statement of facts, and again in the argument, sometimes ad nauseum.

You are understandably concerned that if you make your point yet again in the conclusion, it will truly be ad nauseum. You may also be concerned that you are "selling past the closing," in other words, trying to persuade someone who is already persuaded, creating the risk of reopening an issue that was properly closed.

I can see the concerns, but I don't think a good substantive conclusion is boring, nor do I think it sells past the closing. Though judges hate exaggeration and loathe mischaracterization, they have a relatively high level of tolerance for reiteration. Making a point,

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after all, is what lawyers are paid to do. If it's a good point, and assuming you haven't been blathering on, the worst a judge will think is, "OK. OK. I get your point." They probably won't become suspicious and think, "Hmm ...counsel protests too much."

I offer the following substantive conclusions as guidelines. As the Bar Examiners say, "These sample answers achieved high grades, but they are not to be taken as models":

> Plaintiff's rudimentary cash analysis isn't worth the paper it's printed on. At best, plaintiff's figures establish a claim that falls well short of defendant's offset. Accordingly, defendant respectfully requests…

> As a matter of law, the Bank can be held liable only for injuries resulting from defects in the project caused by the Bank's assertion of control. The Bank cannot, even in theory, be held liable for injuries caused by someone else's negligence before the Bank took control. Accordingly, the Court should grant partial summary judgment against plaintiff's claims based on injuries suffered before the Bank took control of the project.

> This is a case where the Court's equitable powers are desperately needed. Human errors were made, and a house was constructed with a modest setback error. The consequences should not be the dislocation of a family and the destruction of a valuable property. It would be grossly inequitable to order that the rear 10 feet be sheared from the otherwise lawful structure.

A substantive conclusion is best used when you have a strong equity — a compelling matrix of fact that can be reduced to a sound bite. It allows you to give prominence to something you might not have said in the preliminary statement, as in the first example above ("Plaintiff's rudimentary analysis isn't worth the paper it's printed on"). You probably wouldn't say something so abrasive until you had thoroughly made your point and thus earned the right to "speak plainly."

A substantive conclusion should, normally, be shorter than a preliminary statement. By the end of the brief, the court has had about enough, even if it agrees with your position. You might just restate your theme, reminding the court of a key fact or favorable policy.

The absence of argument in most conclusions is probably not a case of mass dysfunction. Some customs do reflect collective wisdom (in contrast to the custom of beginning preliminary statements blandly with, "This is a brief in opposition to…").

The judges I have asked don't seem to care if a conclusion makes a point other than to state the relief sought. "If the writer hasn't made his point by then," said one, "then he probably isn't going to make it in the conclusion."

Pretty much everyone — judges and advocates — says that the conclusion is too late to be making new points. Some add that the conclusion can, without sacrificing much, be limited to a reiteration of the relief you seek. Nevertheless, reiteration increases the chances that your point will be remembered, and, as mentioned above, it forces you to re-examine whether you have a good one.

If you can re-encapsulate your theme and drive the point home, why not do it? Make a judgment call. If you have a good point, reiteration won't hurt your case, and it might make the judge think, "Yes! That's right!" Before you take the conservative approach of restricting your final words to the relief you seek, ask yourself if you aren't sidestepping a more substantive conclusion because you are tired and just want to move on.

Puzzler

Fill in the blanks with dependent or dependant.

> Whether you can deduct for a _____ is _____ in part upon the person's residence.

Recently, I saw dependent and dependant misused by several writers in one week. A person who is dependent (a "dependant") takes an "a," and the quality of being dependent (the adjective) takes an "e." ■