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Reasons Consist of Facts Rather Than Conclusions

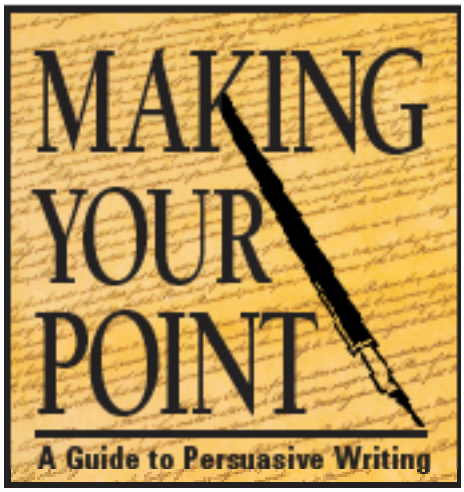
Clearly erroneous and good cause are standards, not reasons

By Kenneth F. Oettle

Lawyers identify with their clients. As the saying goes, "When their clients bleed, they bleed." They empathize with their clients and show anger and indignation toward the other side. This is good bedside manner — clients love to be validated — and thus it is good business. But lawyers should be careful that their empathetic enthusiasm doesn't carry over to and dominate their persuasive writing, where indignation is no substitute for analysis.

Assume your firm is defending a manufacturer in a products liability action in federal court. You move for the pro hac vice admission of two out-of-state lawyers who have handled many such cases for the client and have developed extensive knowledge of the subject matter and significant expertise in this kind of litigation. The client trusts and relies on these lawyers.

Normally, pro hac vice admission is granted as a courtesy and is pro forma, meaning that nobody objects; you don't have to submit a long song and dance; and the court says yes. Parties tend not to abuse the privilege because clients don't want to pay for more lawyers than are necessary.



Unexpectedly, the magistrate judge denies the pro hac vice application, stating that your firm is fully capable of handling the representation and that your client "has enough lawyers." Your assigning attorney is outraged and wants to appeal this ruling to the U.S. District Court. He asks you to write a memo setting forth the best argument in support of the motion that will constitute the appeal.

The magistrate judge didn't say much in support of his denial, so you don't have much to shoot at. In fact, after the ruling, your supervising partner angrily exclaimed, "The magistrate had no basis on which to do that" (subtly demeaning the magistrate judge by dropping "judge" from the back end of his title). Deferring to the heartfelt sentiments of your superior, and having learned in college that one tends to do well parroting what the professor says, you include that thought in the opening to your memo (i.e., "The court had no basis on which to deny pro hac vice status"):

The best argument for challenging the order denying the admission of Smith and Jones pro hac vice is that it was clearly erroneous to deny the motion. The decision to deny the motion is clearly erroneous because there is good cause to admit them pro hac vice, and the magistrate judge had *no* basis on which to deny pro hac vice status.

Because you hadn't really thought through the impact of the pro hac vice denial on your client, you chose to attack the magistrate judge's lack of justification instead of articulating why pro hac vice status should be granted.

In support of your attack on the ruling, "no basis" seemed like a decent argument. "No" means you reject what the magistrate judge says, and "basis" is something that every argument needs. So you figured that "no basis" makes the point that the magistrate judge's argument lacks what it needs. To drive the point home, you italicized "no." In your mind's eye, you were pounding your fist.

"No basis" is a point, I suppose, under one interpretation of the word "point," but it doesn't "make a point" because it merely declares the conclusion. It offers no reasons. Therefore, it can persuade only persons who are willing to take your word solely on faith. Similarly, describing the magistrate judge's ruling as "clearly erroneous" doesn't make a point. "Clearly erroneous" is a standard, not an argument, as is "good cause" to admit the lawyers pro hac vice.

When lawyers become indignant on behalf of their clients — and to some degree they should — they may fall into the trap of thinking that the indignation by itself justifies their position. In the worst manifestation of this tendency, a writer's argument consists only of conclusory (unsupported) statements.

More commonly, a writer begins an argument with a conclusory statement, as if the mere declaration that "there is no basis" makes the point. Some reasoning follows,

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The author is senior counsel and co-chair of the writing and mentor programs at Sills Cummis & Gross. Making Your Point, a Practical Guide to Persuasive Legal Writing*, a compilation of these columns published in 2007 by ALM Publishing, is available at LawCatalog.com. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.*

but — and here's the rub — the writer is too worked up with indignation to subject the reasons to rigorous evaluation. Often, a half-baked reason is followed by another unsupported declaration.

Conclusory statements at the beginning of a paragraph (maybe they should be called "beginnory" statements) are a low-percentage play. Until you provide support for them, they don't persuade, and they barely guide. Save them for the end, after you have earned the right to make them by having presented credible and well-supported reasons. Then the statements won't be "conclusory." They will be summational.

The following re-write of the paragraph setting forth the "best argument" for reversing the magistrate judge focuses on the implications of denying pro hac vice status. Any lawyer with a little experience would be aware of these implications or with a little thought could be:

> The best argument for reversing the magistrate judge's denial of pro hac vice status for Smith and Jones is that local counsel cannot be expected to bring to bear the extensive knowledge and expertise that Smith and Jones have acquired in representing ABC Corp. in other actions like this or the knowledge and expertise that the attorneys and paralegals in Smith and Jones's home office will develop as they work this case. ABC Corp. should not be forced to undertake the duplicative, costly, and tactically dubious task of building a local defense team from scratch. The Smith/Jones lawyers will develop the case, and they, not local counsel, will, at least initially, master the facts and the law. If they can't address the court themselves, they will have to prepare local counsel for court appearances as if counsel were a 30(b)(6) witness — an empty vessel to be filled in the office and drained at the event. By admitting Smith and Jones *pro hac vice,* that awkward ritual can be avoided, and the client's choice of counsel can be honored. Surely these benefits outweigh the magistrate judge's unexpressed concerns.

Your point is that the client will be much better served — and the client's right to choose counsel will be respected — if knowledgeable and experienced counsel whom the client trusts do the work. After making that point, you take your shot, briefly, at the flimsiness of the magistrate judge's ruling.

Memos should get right to the point. Someone has asked you a question and is waiting for an answer. A brief may begin with a reference to the "clearly erroneous" standard of review (assuming that is the standard), but only to cite the standard. You would still get quickly to the point —to the "because clause":

> The standard for reviewing a Magistrate Judge's denial of a pro hac vice application is whether the ruling was clearly erroneous. [Citation]. "Clearly erroneous" has been interpreted to mean . . . [Citation]. The Magistrate Judge's refusal to admit Messrs. Smith and Jones *pro hac vice* was clearly erroneous because . . .

Puzzler

Which is better, Version A or Version B?

> Version A: That gave him an opportunity to perpetuate a fraud.

> Version B: That gave him an opportunity to perpetrate a fraud.

I don't think the writer means that the wrongdoer was able to make a fraud last forever (perpetually). The expression is "perpetrate a fraud." The word is related to perpetrator (colloquially, the "perp") — one who commits a wrong. ■