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Subheadings in the Statement of Facts Guide and Persuade

Internal markers help readers sort and retain data

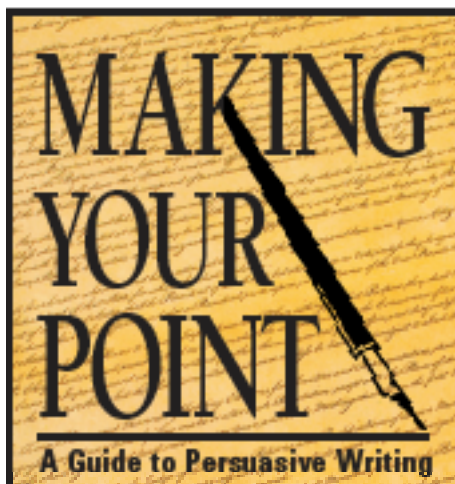
By Kenneth F. Oettle

Inexperienced brief writers tend to use subheadings sparingly in the Statement of Facts if they use them at all, and the ones they use tend to be bland. By “subheadings,” I mean short summaries of the subject matter to follow. The summaries are usually centered, numbered or lettered, and they are often in boldface and/or underlined. Physically, subheadings divide; rhetorically, if used well, they guide and persuade.

A series of subheadings segmenting a Statement of Facts might read like this: “Defendants Offer Widgets at Only \$2.00 Above Cost”; “Defendants Repeatedly Represent that Widgets Are Made with Code-Compliant Materials”; and “Widgets Break Down When Substandard Materials Buckle Under Stress.”

By summarizing your facts, subheadings can create a narrative in the table of contents. Because judges and law clerks often read the TOC first to see what the case is about and where the arguments

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are going, you can begin to persuade even before your readers begin the text of the brief. The first paragraph of the Preliminary Statement — on which you work so hard — then becomes the second blow of a potentially powerful one-two punch.

Inexperienced writers don’t realize how much subheadings can help the reader. They overestimate the capacity of judges and law clerks to absorb and process data and arguments with which the writers are already so familiar.

Subheadings group information. This helps the reader understand and retain it. By segmenting the story and highlighting the most important facts, they make the story easier to grasp. By breaking the data into manageable chunks, subheadings help the reader store the data and recall it.

Not only do subheadings facilitate reading, but they enhance it. They create anticipation as they announce the beginning of a new idea. They instill confidence because the reader knows what is coming and then, upon completing a segment, realizes that what was read can be remembered and integrated into the larger scheme. And

they provide interim closure — a sense of accomplishment for having completed and understood a segment of the text.

Skimming on subheadings may be a function in part of not having needed them in law school. Several members of my Informal Polling Group say that the materials for mock appellate briefs in writing classes are so compact and inherently organized that factual subheadings aren’t needed. Thus, students aren’t challenged to use them.

Finally, one member of my Informal Polling Group adds a dollop of chaos to the overall gestalt: He says that he initially didn’t use subheadings because his writing was so disorganized that subheadings didn’t occur to him. He eventually learned their value by reading adversaries’ briefs.

The disinclination of novice writers to use subheadings is perpetuated in practice because of the old standbys — inertia and lack of instruction — and because new lawyers are less likely to go to court, where one can literally feel the court struggling to grasp the facts (you were so *sure* you made it clear). Enduring this frustration drives home the importance of fostering comprehension by feeding the court information “in little bites.”

Not only do newer writers hesitate to use factual subheadings, but when they use them, they tend to mute them; having been told that overt advocacy should be reserved for the Argument section of the brief. Writers weaken their subheadings by using passive verbs or no verbs at all, and they compound this reduction by mixing up their grammatical structures, forfeiting the flow that comes with parallel construction.

For example, their versions of the subheadings in the second paragraph of this column might read as follows: “Widgets Offered at \$2.00 Above Cost,” “Defendants’ Representations,” and “Failure of Widgets.” Such markers are probably better than none at all because the benefit of providing guid-

ance, albeit minimal, would outweigh the bad impression likely to be created by weak, grammatically scattershot dividers. But it is a close call. The truncated subheadings aren't forceful, and they wouldn't read well in the TOC because they are short, fact-deficient, and essentially verbless. As such, they can't tell a story.

Some novices think that substantive, aggressive subheadings in the Statement of Facts are too obvious, that they make the writer appear to be trying too hard to make a point. Writers are afraid that a reader who senses the hand of an advocate shaping the material will reject the presentation as biased. Because they cannot tell how much advocacy is too much, they opt for a bland approach.

One violates no rules of court or ethical rules of which I am aware by using forceful assertions in the Statement of Facts (e.g., "Substandard widgets buckle under stress."). Judges and law clerks won't be offended. But I would stop short of declaring the legal conclusion you wish the court to reach, as in, "Defendant's negligence results in widgets' failure under stress." That's pushing the boundaries too far, and it's unnecessary. Good facts say all you need.

I sometimes wonder which comes first, the chicken (organization of ideas) or the

egg (creation of subheadings). The easy answer is that organization comes first so that you know what to say in the subheadings. But subheadings also drive the bus. Like the chicken and the egg in the reproductive cycle, the writing of subheadings and the formulation of ideas support each other.

Subheadings are not only aids to communication but also self-monitoring devices (as are other writing techniques, e.g., argumentative point headings, parallel construction, introductions to quotations). Creating them forces the writer to think through and confirm the sequence of events for the Statement of Facts, just as creating argumentative point headings forces a writer to think through the logic of the argument (to "drill down" to its core, to use a current cliché). If you can't create pithy subheadings, your grip on the facts may not be as tight as you think.

Just about everyone uses subheadings eventually, either by being forced to do so or from watching senior attorneys and adversaries use them to good effect. Time and again, I have heard experienced litigators tell associates to use more subheadings, but I have never heard an experienced litigator tell an associate to use fewer subheadings.

In baseball, it is said that "you can never have too much pitching," and in football that "you can never have too many pass-rushing defensive ends." In brief writing, one exaggerates only slightly to say that in a Statement of Facts, "You can never have too many subheadings." Good sense imposes limits, but you can probably use more subheadings than you think. You need these guideposts because the reader is not as familiar with the material as you are.

Puzzler

How would you tighten and sharpen the following sentence?

Physically, subheadings serve as dividers, and rhetorically, they serve as guides and as persuasive devices.

Turn nouns into verbs because verbs convey action, and action stimulates interest. Verbs are crisper and quicker to the point.

The semicolon in the new version reinforces the staccato rhythm.

The new version: Physically, subheadings divide; rhetorically, they guide and persuade. ■