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Remove Subordinate Thoughts That Occlude Your Point

Crispness tends to be better than embellishment

By Kenneth F. Oettle

Having a point worth making is primary. Making it clearly and succinctly runs a close second. To get to the point quickly so that readers can absorb it, buy into it and move on, strip away all words that litter the path to the point.

Suppose you represent a plaintiff who is seeking summary judgment as to liability but not damages in a contract case. In summary judgment motions, the court decides whether the case, or an element of the case, should go to the jury. The party opposing the motion seeks to establish "fact issues," an imprecise term of art for fact disputes so material that taking the case away from the jury or from the court if the court is the trier of fact, would be inappropriate.

As expected, the defendant raises a smokescreen of fact, but the facts go to damages, not liability. In reply, your associate drafts a point heading stating that fact issues regarding damages do not preclude summary judgment as to liability:

> Questions Regarding The Amount of Damages Owed To Plaintiff By The Defendant Do Not Preclude The Grant Of Summary Judgment As To Contractual Liability

So great is the perceived ability of "fact issues" to defeat a motion for summary judgment that brief writers shy from even articulating the phrase. Here, for example, the author spoke of "questions" regarding damages out of fear that a reference to "fact issues" would acknowledge their existence and doom the motion.

Don't run from the phrase "fact issues." Your avoidance may suggest fear. You can and should acknowledge it, but be careful that the effort to minimize supposed fact issues doesn't itself create an aura of fact.

For example, the point heading qualifies damages with "the amount of." An amount is a quantity, and a quantity is a fact. Thus, the point heading adds factual weight to the concept of damages, increasing the possibility that the irrelevant issue may bleed into and undermine your argument for summary judgment as to liability.

Not only does the phrase "the amount of" add factual connotations, but it delays the point. It makes the reader wait three words longer to find out that fact issues regarding damages don't preclude summary judgment as to liability. The delay is brief, but delays can add up.

I know why the writer added "the amount of" (damages). The phrase appears in the summary judgment rule, which states that "a summary judgment or order interlocutory in character may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages)" (emphasis added).

The Rules of Court deserve respect, but they don't need to be slavishly tracked. The summary judgment rule refers to the "amount" of damages only to differentiate the quantification of damages from the right to receive them. The point heading doesn't need that clarification.

Evidently out of respect for the rule, or possibly looking to invoke its aura, the writer allowed a subordinate premise (that the rule should be tracked, or can be tracked to advantage) to override two dominant premises — that one should avoid connotations of fact and that one should get to the point. Similar reasoning applies to the phrase "owed to plaintiff by the defendant." Like "the amount of," it embellishes the concept of damages, giving it more weight than it deserves. It also delays, by six words, the point that fact issues regarding damages don't preclude summary judgment as to liability.

No strategy other than stripping out the descriptors makes sense. The cleansing permits you to dismiss the blemish ("fact issues") immediately after acknowledging it. You don't linger over damages,

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either by raising the concept of amount or by explaining who owes damages to whom. You reduce the attention given to a concept that is bad for your motion ("fact issues"), and you get to the action ("do not preclude") as quickly as possible.

To his partial credit, the writer did have a plan. He included the phrase "owed to plaintiff by the defendant" with the intent of delivering a gratuitous "zetz" to the defendant — the accusation that the defendant owes the plaintiff money. ("Zetz" is a Yiddish term meaning strong blow or punch.) In the writer's eyes, that portrayed the defendant as a deadbeat, ostensibly providing moral support for the court's granting summary judgment.

A little street fighting isn't bad if used appropriately, but it is risky. By "street fighting" I mean calling attention to technically irrelevant but viscerally offensive facts about the adverse party. Side trips to take a whack at the enemy are off-message and therefore diverting, and the relentlessness of the advocacy may annoy the reader.

In accordance with the foregoing suggestions, the point heading can be rewritten as follows:

> Fact Issues Regarding Damages Do Not Preclude Summary Judgment As To Liability

Note that I deleted "the grant of," a phrase that is unnecessary because it is implicit and that is harmful because it weakens the core thought "do not preclude summary judgment" in two ways: by splitting it in half, making the reader wait three more words to find out what is precluded, and by absorbing and thus diverting some of the power of the strong verb "preclude" because the reader sees "preclude the grant of" rather than "preclude summary judgment."

Grant is a useful word. It has a lawyerly tone and a touch of gravitas. In fact, one of my mentors made a point of telling me that courts don't "give" relief; they grant it. Nevertheless, as used here, the word is unnecessary and interruptive.

Finally, I deleted "contractual" as a modifier of "liability" because it is unnecessary and harmful. It is unnecessary because the court knows this is a contract case, and it is harmful because it weakens the thesis by suggesting that fact issues as to damages can preclude summary judgment, at least as to forms of liability that aren't contractual.

Brief writers tend to be comforted by bulk because bulk connotes substance. Unfortunately, bulk also obscures and undermines. Each word in a brief, particularly in point headings, should be analyzed to determine whether it helps or hurts. If it both helps and hurts, weigh the relative impacts and make a judgment that favors getting to the point.

Puzzler

Which is better, Version A or Version B?

> Version A: Plaintiff's lawyer objected to the court's having discussed the case with defendant's lawyer outside the courtroom.

> Version B: Plaintiff's lawyer objected to the court having discussed the case with defendant's lawyer outside the courtroom.

Plaintiff's lawyer did not object "to the court" — a message that a reader could momentarily embrace because of the sequence "objected to the court." Counsel objected to what the court did — it discussed the case with counsel outside the courtroom.

Because readers are programmed to expect that a possessive will be followed by what is possessed, the "apostrophe-s" on court in Version A alerts the reader to suspend closure, in other words, to look past "court" to find the target of the lawyer's objection, that is, the court's having discussed the case with counsel outside the courtroom. In grammatical terms, the possessive signals that the object of the preposition "to" isn't the court — it is something belonging to the court.

Version A sends a clearer message and is therefore better. ■