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Open A Brief With Substance, Not Bluster

Mere posturing is ineffective

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From time to time, I like to revisit one of my favorite subjects — the opening paragraph of a brief. Arguably, it is the most important paragraph because one can practically win outright if the paragraph persuades. Once persuaded, a judge, like a juror, tends to stay persuaded.

But openings aren't easy. You have to have a point and be able to articulate it concisely and forcefully. You have to know what to say first, which is one of the challenges that separate the wordsmiths from the apprentices.

To some writers, openings are no challenge. Their briefs begin, "This brief is in response to a motion for . . . ," an approach that postpones persuasion until the second paragraph. I don't have a big problem with such introductions, bland though they may be, because they do little harm. But if I were a judge, I would stop reading them as soon as I realized what they were.

In today's example, counsel for defendant was responding to a motion seeking sanctions for destruction of documents after litigation began ("spoliation"). Counsel made three arguments in the first paragraph — that the documents were irrelevant, that their destruction was inadvertent and that the destruction was voluntarily disclosed:

> Plaintiff's motion for sanctions should be denied because the documents that ABC Corp. routinely destroyed in accordance with its document retention program have no bearing on any issue in this case. Plaintiff is simply trying to turn ABC Corp.'s good-faith disclosure of routine destruction of irrelevant documents into a litigation advantage. Plaintiff is mistaken on the law and the facts. No advantage accrues where a party did not intend to destroy relevant evidence and in fact did not destroy any relevant evidence.

Sound familiar? It should because it's typical. But it's also conclusory (states conclusions without supporting facts), *ad hominem* (attacks the advocate rather than the advocate's position), and redundant (repeats itself to no advantage).

The first sentence says that the destroyed documents "have no bearing on any issue in this case." That may be so, but the writer does not say why. Consequently, the statement can't persuade. It is merely a conclusion.

The reference to the documents having been routinely destroyed is ill-advised because it invites the reply that once litigation begins, routine destruction of documents is no excuse. If the documents are relevant — and defendant hasn't shown they are not — their destruction pursuant to routine rather than bad intent does not get the defendant off the hook.

Inadvertence may be a mitigating factor, depending on the jurisdiction, but it is not an excuse. It may *seem* like an excuse because it tends to reduce the level of culpability, but it doesn't reduce it enough to avoid a finding of spoliation. A similar analysis would apply to self-reporting.

Lawyers often mistake mitigating factors for dispositive elements because lawyers' success is premised on their ability to spot equities and trumpet them on the client's behalf. Sometimes they overdo it. *Lesson:* Before you rely on an apparently good fact (an "equity"), make sure it goes to the issue for which you use it. If it doesn't, find an issue for which it is relevant.

In the second sentence of the sample paragraph, "Plaintiff is simply trying to turn ABC Corp.'s good-faith disclosure of routine destruction of irrelevant documents into a litigation advantage," defendant looks to shift the court's attention from what defendant did wrong to what

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plaintiff's counsel allegedly intended. I call this "motive spotting." Lawyers do it all the time, and the bell curve on its effectiveness bulges at "does more harm than good." The tactic can't work at all if its premise is faulty, i.e., that no offense was committed.

The third sentence, "Plaintiff is mistaken on the law and the facts," is overbroad and unsupported. Used early — as opposed to later, after the law and the facts have been set forth — it may be the worst stock phrase in the brief-writing lexicon. The reader has no idea on what facts and what law plaintiff is wrong. Writers who wish to express opposition but haven't developed and distilled a point often default to versions of, "Plaintiff is mistaken on the law and the facts." At least it sounds assertive.

The final sentence of the paragraph, "No advantage accrues where a party did not intend to destroy relevant evidence and in fact did not destroy any relevant evidence," is not only hampered by double negatives and a useless "any," but it states the obvious — that if the destroyed documents are irrelevant, no harm is done — and it re-invokes the flawed argument that lack of intent to destroy can excuse the destruction. If the flawed argument were removed, and if the paragraph had already explained why the documents were irrelevant, the concluding sentence would be acceptable.

Let's break down what the defendant said in the sample paragraph:

• Plaintiff didn't get hurt because nothing relevant got destroyed (but we're not saying why the documents are irrelevant).

• Defendant didn't do it on purpose (and therefore should not be punished).

• Defendant self-reported (and therefore should not be punished).

• Plaintiff is mistaken on the law and the facts (whatever that means).

• (Again), defendant didn't mean it, and plaintiff didn't get hurt.

The second, third, and fifth bullets offer excuses that don't work; the first and fifth bullets make the same unsupported statement (that the documents were irrelevant); and the fourth bullet is overbroad and unsupported. Thus, the paragraph has no positive value. To the contrary, it is a net negative because it is conclusory, and thus a credibility drain, and because it invites retaliation by making eminently refutable arguments.

Instinctively, lawyers want to oppose. If all they can muster as opposition at the outset is conclusory negations, off-point excuses, *ad hominems*, and unhelpful repetition, then they are "digging a hole for themselves," like a football team that gives up two early touchdowns. Had the writer encapsulated in his opening why the destroyed documents were irrelevant, not only would he have begun the persuasive process, but he might have felt less need for the dross that he used to fill out the paragraph.

Puzzler

How would you improve the following sentence?

Upon notice of default by Smith, Jones had the right to immediately terminate deliveries.

Moving "immediately" to the end of the sentence eliminates the split infinitive and places this important temporal concept in a position of emphasis. To save words, change "default by Smith" to Smith's default. In a close call, I would not shorten "had the right" to "could" because I wish to emphasize Smith's entitlement (his "right").

The revised version: Upon notice of Smith's default, Jones had the right to terminate deliveries immediately.

Alternate version: Jones had the right to terminate deliveries immediately upon notice of Smith's default. ■