

Why Is It So Hard to Front-Load?

By Stephen V. Armstrong and Timothy P. Terrell

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We will bet whatever is left of our 401(k) plans that every law school graduate in the country—at least, all of them who have been taught by readers of this journal—believes that he or she “gets” the concept that goes under such labels as “point-first writing,” “front-loading,” or “beefing up introductions.”

Most legal writing books and instructors spend a lot of time on the concept, as has the *Writing Tips* column over the years.¹ Yet, in our work with associates around the country, no problem shows up more often, or with more damaging effects, than the failure to apply this concept effectively, especially after the writer gets beyond the opening introduction.

This sad fact has led us to investigate why so many smart lawyers—lawyers who are, by most other criteria, very good writers—have such difficulties front-loading their writing. Here is our diagnosis. We offer it because we are convinced that we will never cure this problem simply by raising the idea again and again, in an increasingly frustrated tone of voice. We have to understand the problem's causes so we can address them head-on. A quick

warning, however, before we get to our diagnosis.

Unlike most *Writing Tips* columns, this one will not include a lot of examples. We suspect you have all you need, and we plan to focus instead on why writers fail to front-load enough, not what it would look like if they succeeded all the time.

Judging by our experience as writing teachers and coaches, the problem has three primary causes.

1. Failing to Understand the Concept

Most legal writers don't “get” the concept as well as they think. This is the case for two reasons.

First, it is a complex concept—or, at least, a multipart one. To front-load effectively, a writer has to keep in mind the several kinds of information a reader may need at the start:

- The conclusion or “bottom line.” To complicate matters, in letters or memos to clients, or in documents that will result in advice for a client, the bottom line should often include a practical, action-oriented component, not only a legal conclusion.²
- A focus for the reader's attention. That can be a conclusion, but it can also be a question or a thread to follow through the maze. (For example, “At the core of this dispute are the actions Mr. Smith took after learning of the discrepancy in the accounts.”)
- A map of the structure that lies ahead.
- A “label” or “frame” that allows readers to locate the topic within their mental universe, and to bring immediately to bear what they already know about it. (“The hearsay exclusion simply does not apply in this case.”)

These ingredients overlap, of course. And not every introduction—especially not every smaller-scale introduction within the document—requires all of them, or even most of them. But a skillful “front-

¹ Stephen V. Armstrong & Timothy P. Terrell, *Just One Damned Thing After Another: The Challenge of Making Legal Writing “Spatial,”* 7 Perspectives: Teaching Legal Res. & Writing 119 (1999); Stephen V. Armstrong & Timothy P. Terrell, *To Get to the “Point,” You Must First Understand It*, 13 Perspectives: Teaching Legal Res. & Writing 158 (2005) (hereinafter *To Get to the Point*); Gregory G. Colomb & Joseph M. Williams, *Well Begun Is Half Done: The First Principle of Coherent Prose*, 8 Perspectives: Teaching Legal Res. & Writing 129 (2000).

² *To Get to the Point*, *supra* note 1.

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loader” has to be familiar with them all, not only with the amorphous concept of “introduction.”

Second, properly understood, “front-loading” is not a task to be performed here and there, in a few places in a document. It is a cast of mind that applies everywhere, because it has to do with how we insert new chunks of information—whatever the size of the chunk—into the flow of information streaming through a reader’s mind. Thus, the concept applies all the way down to paragraphs and sentences. They too should begin, for example, by focusing readers on their topic—even if, in a sentence, that means no more than naming the topic in the grammatical subject and placing the subject relatively close to the sentence’s start. Most writers are initially baffled if they are told they should be doing similar work when they “introduce” a sentence as when they introduce a document, even though the “introductions” will look very different. But, once they grasp this expansion of the front-loading concept, there is often an “ah ha” that turns them into much better editors.

2. Failing to Understand the Resistance

To identify the problem’s second cause, we need to look at ourselves rather than our students. Those of us who teach legal writing often give too short shrift to the qualms writers have about front-loading, and especially about front-loading conclusions. Not all of these qualms are rational, but some are, and even those that are not need to be taken seriously.

- Even if lawyers had not been trained in the IRAC form of analysis, they would feel, as would most analytically inclined problem solvers, that the appropriate place for a conclusion is—well, at the conclusion. That’s the natural order of things, unless you are an ideologue or a genius who can dispense with all the usual steps between question and answer. Placing the conclusion at the beginning is a perversion of the normal thinking process, an unnatural act forced on us by the need to communicate with impatient readers. It feels especially unnatural to many lawyers, an introverted group often more interested in their own thinking than in their audience.

- Whether to state a full, firm conclusion at the start is a judgment call, and sometimes one that novices find difficult. The call will often depend on the audience: We would give different advice to a lawyer writing for a judge than to an associate writing about a complex tax issue for a partner. In that situation, some partners will prefer to test every link in the analytical chain before they are presented with a conclusion. The call may also depend on how unpleasant or unexpected the conclusion will be. If it will seem to come out of left field, or is such bad news that readers will want to reject it out of hand, then the “conclusion-first” approach may not work. But the “conclusion-last” approach should always be considered an exception rather than the rule. The “default” position should be “conclusion first.”

- When we encounter a section or subsection that lacks an adequate “map” at its start, we often hear from its author something like this: “I know I added a couple of points later in the section. But they’re not nearly as important as the main point, and I didn’t want to give them too much emphasis. So I didn’t mention them in the introduction.” This argument is usually wrong, but it is not wholly wrongheaded. The most common solution, of course, is to create a map that signals, as most maps should, the relative importance of its pieces. Sometimes, the solution is to drop the other points altogether, if they are in fact so unimportant.

- Although we don’t recall ever having seen the first draft of a complex legal document that overdid the front-loading, novices sometimes go too far in the second draft, because their judgment is still inexperienced. Here again, audience and circumstance matter a great deal. Most judges appreciate a lot of front-loading throughout a brief. Some partners, once they get past the initial introduction to an internal memo, prefer only enough “mapping” and “focusing” to keep them on track as they read, because they want to digest the analysis for themselves.

3. Failing to Understand Why the Work Is So Hard

Front-loading effectively is hard work, for several reasons.

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First, some of the work is intellectually demanding. For example, if you are writing the introduction to a knotty, complex analysis, it is usually difficult enough to sum up your conclusion; it may be even more difficult to map the analysis by which you reached it. Similarly, if you are tackling a messy issue, it is often difficult to focus on the precise, end-of-the-road question, after the initial broad and vague issue has been peeled down to its core. But these are reasons, not justifications, for failing to respond to these challenges in an edit.

Second, even when the work of front-loading is not intellectually strenuous, doing that work throughout a document requires persistence and stamina. At some point in a draft, even the best writers tend to flag. The following example comes from a section of a memorandum of law in support of a preliminary injunction motion. The section begins many pages into the brief, and the writer—who usually front-loads rigorously—has begun to tire. Here is the section’s original introduction, along with the opening sentences of two paragraphs toward its end:

Plaintiffs are likely to succeed on the merits because Defendants have not paid Plaintiffs their lawful wages. As a plain reading of the relevant statutes makes apparent, Defendants are liable for Plaintiffs’ overtime, spread of hours, and minimum-wage pay.

[Six paragraphs omitted]

Plaintiffs also offer strong evidence of Defendants’ history of impulsive retaliation. . . .

Plaintiffs have also raised claims of age and ethnicity discrimination. Here, as well, Plaintiffs have a probability of success on the merits. . . .

Here is the revised introduction, with a complete map:

Plaintiffs are likely to succeed on the merits of their wage claims because Defendants have not paid Plaintiffs their lawful wages. In addition, Plaintiffs offer strong evidence that creates a probability of success on two other claims: Defendants’ unlawful retaliation against them,

and Defendants’ discrimination against them on the basis of age and ethnicity.

And here is a paragraph from within the section, first in its original form:

Both federal and state statutes impose strict recordkeeping requirements on employers to ensure compliance with the minimum wage and overtime laws. *See* []. Failure to comply with these requirements results in an evidentiary presumption in favor of employees. *See* []. Therefore, if the employer fails to keep accurate records and the employee seeking damages can provide credible testimony—even of a general nature—of the number of hours worked and the wages paid, the burden will shift to the employer to provide the exact number of hours worked. *See* []. As there is reason to believe that Defendants failed to maintain accurate records, *see* [], and will be subject to an evidentiary presumption against them, Plaintiffs are even more likely to succeed on the merits of their wage claims.

Here is the revised, front-loaded version:

Plaintiffs are even more likely to succeed on the merits of their claim because, if an employer fails to keep accurate time records, the burden of proving the number of hours an employee worked shifts to the employer. Both federal and state statutes impose strict recordkeeping requirements on employers to ensure compliance with the minimum wage and overtime laws. *See* []. If an employer fails to comply with these requirements, the failure results in an evidentiary presumption in favor of employees. *See* []. In that circumstance, if the employee seeking damages can provide credible testimony—even of a general nature—of the number of hours worked and the wages paid, the burden will shift to the employer to provide the exact number of hours worked. *See* []. As there is reason to believe that Defendants failed to maintain accurate records, *see* [], they are likely to be subject to an evidentiary presumption against them when the Plaintiffs’ wage claims are considered.

Third, front-loading is actually an act of intellectual courage, not only of intellectual labor, and many inexperienced writers are simply nervous about their professional status and circumstances. One of the hallmark features of a new legal writer, for example, is the frequency with which paragraphs begin with citations of authority. As natural as this opening seems—we are lawyers, after all, working through legal material to a conclusion—the initial reference to a case or a statute fails to tell readers why the authority matters or how it fits into the analysis. Instead, the citation requires them to take the authority “on faith” until the writer, having now worked through the authority, finally feels it is safe to venture an opinion about its point and relevance. Here is a passage that illustrates this problem:

Before:

To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an “indispensable instrument” to the pledgee. *Id.* at 562; see *Peoples Nat’l Bank of Washington v. United States*, 777 F.2d 459, 461 (9th Cir. 1985).

Restatement of the Law, Security § 1 comment (e) defines an indispensable instrument as “formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument.” See also ... [continuing analysis and citations omitted] Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. [citation omitted]. In *Miller v. Wells Fargo*, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ...

In *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ...

In the revision, there are two changes: a minor but useful one at the beginning of the second paragraph, and, more significantly, entirely new

sentences to introduce each of the *Miller* and *Duncan Box* cases.

After:

To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an “indispensable instrument” to the pledgee. *Id.* at 562; see *Peoples Nat’l Bank of Washington v. United States*, 777 F.2d 459, 461 (9th Cir. 1985).

An indispensable instrument is a “formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument.” Restatement of the Law, Security § 1 comment (e). See also ... [continuing analysis and citations omitted] Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. [citation omitted] On the other hand, they have been held not to include a telex key code. In *Miller v. Wells Fargo*, ...

The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor’s obligations. In *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140 (W. Va. 1980), ...

Most legal writers will work hard on a document’s initial introduction. Many will also work almost as hard on the introductions to major sections. But far fewer have the stamina to front-load effectively all the way through the document. That is why we teach lawyers that, to front-load consistently, they should develop the habit of taking at least one editorial pass through a draft to focus on nothing but front-loading, especially in the document’s interior. The revisions above resulted from a good writer adopting that editing technique, with no need for anyone else to guide her.

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