

“Introductions like these help readers know what to expect as they read; more than that, they help readers understand why they should read at all.”

FRAMING PLEADINGS TO ADVANCE YOUR CASE

BY GREGORY G. COLOMB

Gregory G. Colomb is a Professor of English at the University of Virginia in Charlottesville. He is also a visiting professor at the National Judicial College and a regular contributor to the Writing Tips column in Perspectives.

In two previous columns¹, Joe Williams and I explained how writers make the readers' task easier by framing and structuring documents to meet their needs. We meet their needs *as readers* by beginning with a framework that helps them know what to expect and then structuring the body to help them find it. Specifically, the framework should announce

- the main characters that form the connecting threads for the story,
- the key concepts that form the connecting threads for the argument, and
- what's at stake, the issue(s) that the body will address.

The body should then explicitly and evidently focus on those characters, concepts, and issues. These principles apply not just to documents but to all the units within them, from sections down to paragraphs.

Readers expect us to do more, however. Since few people read legal documents for the fun of it, readers also expect us to show how our document serves the needs that led them to read it in the first place. In most documents, we typically do that by stating in the introduction a problem that readers have and our document will solve. These problem statements have a standard form:

Common Ground	The situation as the reader already knows it.
Problem Condition	The new or newly relevant state of affairs that disrupts the common ground.
Consequence	The costs that the reader will face if the disruptive condition is not resolved.
Resolution	The solution or a promise of a solution to come later in the document.

Here is an example:

As you recall, in a conference call from 2:12 to 2:51 p.m. on June 26, 2000, we discussed the exclusivity and first-refusal proposals with representatives of Clearlines.com. **[common ground]**

I will be negotiating the final wording of the contract next week, and I may have to rely on certain representations you made in that conversation. **[condition]** In order to ensure that my notes correctly reflect what you said, **[consequence]** please review the following summary of that conversation.

Let me know by Monday the 12th if I have misunderstood any of your positions.

[resolution / recommended action]

Introductions like these help readers know what to expect as they read; more than that, they help readers understand why they should read at all.

These principles of organization apply to documents of all kinds. In most documents, including some legal ones, effective writers implement the principles by using standard organizational tools such as prototypical problem statements. But many legal documents are used in ritualized situations with special rules and practices—and with distinctive genres. This column and the next will address the specialized tools that effective legal writers use to organize the kind of documents collectively known as *pleadings*—documents written by an advocate to convince a court or other decision maker to decide a certain way, documents such as briefs, motions, memoranda supporting motions, filings for

¹ Gregory G. Colomb and Joseph M. Williams, *Well Begun Is Half Done: The First Principle of Coherent Prose*, 8 Perspectives: Teaching Legal Res. & Writing 129 (2000) and Gregory G. Colomb and Joseph M. Williams, *So What? Why Should I Care? And Other Questions Writers Must Answer*, 9 Perspectives: Teaching Legal Res. & Writing 136 (2001).

commissions, and so on. The next column will explain the tools for **structuring** the body of such documents; this one will explain the tools for **framing** them.

The Special Importance of Framing a Pleading

In business and the professions, most readers are overworked and distracted, so most writers have to design documents that are easy to read and remember. For that, a good beginning is essential. But few professionals write in an environment as challenging as a legal contest. Not only do you compete for the time and attention of busy readers, but also you have to compete for their understanding—against your opponents' arguments, against their responses to yours, and, if they are cunning, against irrelevancies that muddy your case without affecting theirs. For that, beginning well is doubly important.

You start out ahead of the game if, in the first page or two, your pleadings give readers a strong framework that helps them know how to read and understand the arguments that follow.

- **A strong framework protects your document against “noise” in the environment.**

Give a decision maker a clear, focused, and appropriate framework for understanding your argument, and he or she will be more likely to block out competing information as you make your case.

- **It can undermine your opponents' arguments.**

If your framework is more focused and more compelling than your opponents', it is likely to influence how the decision maker reads their documents as well as yours. (That's why all your pleadings in a case should present if not the same then at least mutually supporting frameworks.)

- **Finally, it helps the decision maker to get your argument right.**

Decision makers want to be able to scan your document once quickly, understand it easily, and remember it accurately. Offer them that kind of document and you benefit twice over. Not only do you gain a foothold in their memory and understanding, but also you help them do their job well—a valuable element of persuasion.

Your goal in establishing a framework should be to start readers out with a disposition to agree—or at least to take your arguments seriously. You want readers to see enough of your argument at the beginning that not only do they know what to expect, but also they think to themselves, *If you can prove what you say here, then yes, I will decide as you ask.*

The Parts of Pleadings

Many courts and commissions have rules stipulating that pleadings must have specific parts in a specific order. In all but the rarest cases, those stipulated forms do not prevent writers from designing effective documents, with a clear frame at the beginning and a body structured to match what that frame promises. So whatever the names of the parts you must work with, you can still use them to offer readers a framework for understanding your arguments, even if you may have to compromise between your persuasive goals and the substantive demands of stipulated units.

To help you focus as much on your readers' need for a framework as on those substantive demands, what follows is organized not around specific units (which vary) but around the questions that your readers need you to answer (which do not). These questions also map out a default structure that you can follow when you are free to create your own.

What kind of decision do I need to make? **Caption + Introduction**

What specific issue do I have to decide? **Issue**

What decision do you want and why should I give it to you? **Summary of the Argument**

Don't get caught up on these specific names. You use any headings you want for these sections, and for a short pleading, you can put them together under the single heading “Introduction.” When a court or commission has stipulated a specific form, your goal is to accomplish these tasks within the structure of the stipulated form. To help you do that, after explaining what information readers need, I'll also indicate which units can best accommodate it.

“Your goal in establishing a framework should be to start readers out with a disposition to agree — or at least to take your arguments seriously.”

“Issues help lay readers distinguish what is relevant in a complex body of facts and reasoning.”

.....

The Overarching Question: *Why should I read this?*

For most documents, readers' most important question is whether they have to read it at all. Normally, writers answer that question by showing readers that they have a problem the document will solve. But readers of your pleadings already know why they have to read them: their job is to make the decision your document advocates or opposes, often a decision you forced on them. So readers don't need an explicit problem statement to motivate them to read; it's their job, like it or not.

But even if a pleading doesn't need a problem statement, you still have to design it around your reader's problem: to make and defend a good decision. Too many advocates focus only on their problem as writers, to muster all the arguments they can in support of the decision they want. Effective advocates know that their efforts at persuasion are more successful when they not only push the buttons that motivate a decision maker to make a specific decision, but also provide a good argument for the decision maker to explain and defend that decision. When they are different, as they often are, the argument makes the motives more persuasive.

What kind of decision do you want me to make?

Your readers will know why they have to read your documents as soon as they know what kind of decision you seek and what party you represent. These you should make clear in the caption or, if the decision maker is not a court, in the title, subject line, or opening sentence. Sometimes, the caption has all the information your reader needs to understand what task you bring him or her. But your reader may also need an introduction with a bit of procedural history to know why your document is before him or her—for example, that you are responding to a response to a response to your opponent's third motion on the same question. Space at the beginning of a document is precious, so don't waste much of it on procedural history. Stick to the minimum information a reader needs to understand how your document bears on the decision he or she has to make.

Add more only if you intend to argue about the procedures themselves or if you think a fuller account makes your opponent look bad in a way that supports your own arguments.

What specific issue do I have to decide?

The statement of the issue can be your most important persuasive tool. A decision maker with legal training is long accustomed to focusing decisions around them. If he or she accepts your version of the issue (and the facts are on your side), you are halfway to gaining his or her agreement. But a clear statement of the issue is even more important to a decision maker who does not have legal training. Issues help lay readers distinguish what is relevant in a complex body of facts and reasoning. If you state the issue so that the decision maker begins with a clear understanding of the elements of the decision you ask him or her to make, you help the decision maker remain focused on what is most relevant to the outcome you want. And if you have chosen the issue well, the facts and the reasoning will seem to fall into place as he or she reads.

Many stipulated forms include a distinct section for "Issues" or "Questions Presented." Otherwise, you can easily include a statement of the issue in a section titled "Introduction" or "Statement of the Case." You can even use it to begin a "Summary of the Argument." When you include a statement of the issue in a larger section, explicitly signal readers what you are doing:

The issue is ...

The decision turns on the question ...

This commission has to decide three questions ...

Wherever you put it, an effective statement of an issue has four characteristics:

1. Forecast not just the outcome but the elements of the argument supporting it.

You want to lead the decision maker to the specific outcome you seek: "Did Jones commit fraud?" But every responsible decision maker will only get there by working through the argument you offer to support it. So you help him or her see things your way when you state the issue in two parts: a **judgment** part that frames the outcome

you want and a **reasons** part that frames your supporting argument. Be sure to use substantive terms that anticipate the key elements of your argument:

Did Jones **fraudulently misrepresent** the property [**judgment**] when he **encouraged** Kim to **rely** on his advice to lease it and **falsely claimed** that he could not answer Kim's question whether there was a deeded right-of-way to the property, even though Jones **knew** there was none? [**reasons**]

It is better to put the judgment before the reasons: the judgment clause frames the reasons, and is almost always shorter and simpler. For example, the issue statement above has greater impact than this one:

When Jones encouraged Kim to rely on his advice to lease it and falsely claimed that he could not answer Kim's question whether there was a deeded right-of-way to the property, even though Jones knew there was none, [**reasons**] did he fraudulently misrepresent the property? [**judgment**]

Most of all, don't cram all the reasons into a long, complex subject:

Did Jones' encouragement of Kim to rely on his advice to lease it and his false claim that he could not answer Kim's question whether there was a deeded right-of-way to the property, even though Jones knew there was none, fraudulently misrepresent the property?

Although some think that the issue must be a single sentence, you can always revise a too-long issue into one or more sentences. You'll have to put the reasons before the judgment, so begin with a brief heading that forecasts the issue your concluding question will raise:

Fraudulent misrepresentation: [forecast of judgment] Jones encouraged Kim to rely on his advice to lease the property and falsely claimed that he could not answer Kim's question whether it carried a deeded right-of-way, even though Jones knew there was none. [**reasons**] Did Jones fraudulently misrepresent the property? [**judgment**]

2. State the issue in the specific terms that support your case.

Some will say that you should state the issue in neutral terms, without names or details, because the issue should be a matter of law, not advocacy:

Non-compete: Does a covenant not to compete prevent an ex-employee from working only for a direct competitor or for all generally related businesses owned by the parent of a direct competitor?

Such a neutral stance may make sense for a judge who wants to seem fair in reporting his or her decision, or when you want to contrast your measured argument against an opponent whose advocacy goes too far. But in most circumstances, you do better to state the issue using the specific details that support your position. Compare these two versions of the non-compete issue:

Protection of proprietary information:

Can DataCorp enforce against Jones a covenant not to compete when Jones left a sensitive position designing telephone switching equipment for DataCorp to work for the Memory Chip Division of Datamation, whose separate but related Switching Division is DataCorp's chief competitor?

Scope of non-compete covenant: Does Jones have the right to leave DataCorp to work in a new industry when his new employer does not compete with DataCorp and has no use for DataCorp's proprietary information, but its parent owns a separate division that does?

When you decide how strongly to word the issue, be sure to match your overall rhetorical posture—fierce advocate, just-the-facts expositor, patient reasoner, etc. You have to show some restraint (see below), but you've generally made a mistake if a reader cannot tell which side you represent from your statement of the issue alone.

3. Avoid excessively judgmental language.

What will carry the day with a decision maker is the substance of your argument, not the heat of your language. In fact, heated language almost always hurts your case, unless the decision maker

“It is better to put the judgment before the reasons: the judgment clause frames the reasons.”

“Experienced writers state their main point early, typically at the end of the introduction.”

already shares your strong feelings *and is willing to indulge them*. Even an exasperated judge will often strain not to let those feelings enter his or her deliberations. And if you guess wrong and go too far, you will only make him or her suspicious. Avoid this:

Did Officer Friendly **brazenly** violate the plaintiff’s constitutional protection from unreasonable search and seizure when without permission **or even a single word of explanation** he **brutally ripped** plaintiff’s backpack off of his back and **dumped** its contents **all over** the ground?

A more balanced account will almost always be more persuasive:

Did Officer Friendly violate the plaintiff’s constitutional protection from unreasonable search and seizure when he did not ask plaintiff to remove and open his backpack but forcibly removed it and spilled its contents on the ground?

You advance your cause more with specific details in plain language than with language overcharged with your judgments. When you let the details speak for you, your case seems to be grounded more in the facts than in your assertions.

4. State the question as a complete sentence rather than a fragment beginning with *whether*.

Issues are traditionally stated in a sentence fragment beginning with *whether*:

Whether Jones fraudulently misrepresented the property when ...

Whether DataCorp can enforce against Jones a covenant not to compete when ...

Whether Officer Friendly *violated* the plaintiff’s constitutional protection from unreasonable search and seizure when ...

But most readers react better to issues stated in complete sentences, as in the examples above. (Begin with *do/did/does/is/are/can/will*, etc.) It’s a small change, but complete sentences are marginally easier to process. Besides, to help create in your reader a disposition to agree, you want your issue to invite a decisive “yes” or “no”; a noncommittal *whether* does not.

What decision do you want me to make?

In ordinary documents, readers want to know most of all what you want them to do (or think) and how you propose to help them solve their problem: that’s the *main point* of almost all professional documents. And they want to know it sooner rather than later. Experienced writers state their main point early, typically at the end of the introduction. In that way, readers are in more control of their reading: not only do they get the most important information quickly, but if they accept the point, they don’t have to read on. When, however, writers save their main point for the end, they seem to put their readers at their mercy:

Reader, now that I have shown you a problem that you need to solve, settle in and get comfortable. I’ll share my solution, but not until you have read every word I wrote.

Of course, most busy readers reject that offer and turn to the end to find the point they wanted to see at the beginning.

In a pleading, however, readers usually know what you want them to decide as soon as they read the caption or other front matter, sometimes before. That leads some writers to assume that they don’t have to say it:

Plaintiff Harlan Jones (hereinafter “Jones”) filed his Complaint against defendants Tarik and Tanya Smith (hereinafter collectively “the Smiths”) and Abco, Inc., on February 28, 1993. Jones’ Complaint seeks compensation for merchandise sold and delivered to defendants on consignment and account. (Complaint ¶¶ 1–3, 9–11, 22.) The Smiths and Abco filed their Answer to Jones’ Complaint on April 1, 1993. On that same date, they also asserted a six-count verified counterclaim against Jones. Since the filing of this action, the parties have engaged in extensive discovery. No final pretrial or trial dates have been set.

Even if readers already know what you want, they react better when you state it up front: we are all too accustomed to thinking of documents that

withhold the point until the end as rude and unhelpful. Besides, it cannot hurt your effort to create a disposition to agree if you can remind your readers, in a way that feels helpful, exactly what you want them to decide. It is always a mistake if a reader cannot tell which party you represent just from the way you state the case.

Why should I decide as you ask?

It is not enough, however, just to state the decision you seek. Responsible decision makers will not make a decision simply because it seems right at first blush, or because they already thought it best, or worst of all, just because you asked. What matters most is *why* they should decide as you ask. So when you state the decision you want without any indication of why you should get it, you seem as rude and unhelpful as those who withhold their point to the end:

Reader, I know that you need good reason to make the decision I seek, and so I also know that what you most want to know are the reasons I can offer to support what I ask, but you'll have to read every word I wrote before you find out what they are.

It doesn't help simply to refer your reader to the body of the document:

For the reasons stated below, the court should ...

That adds insult to injury.

Of course, you cannot state *all* your reasons up front. But you help readers grasp the main contours of your argument if you forecast the most important and dispositive ones. Your goal is to present enough of the outlines of your argument that your reader will think:

If you can prove all that you say, I'll decide as you ask.

Not only does this make it easier for readers to understand and recall your argument, but also it starts them out in a favorable frame of mind. Rather than read to find out what case you will make, they read to see whether you can support a position they already understand and accept.

The most obvious place to include your reasons is a "Summary of the Argument." But you can just as easily include them in an "Introduction" or "Statement of the Case." Be sure to end your summary with the specific decision you seek, not only as the culmination of the argument you summarize but as a launching point for the detailed reading that follows.

Your pleadings will be most persuasive when they start decision makers off with a clear framework that both helps them know what to expect and disposes them to accept your argument. If you then structure the body of your document to deliver on the promises you make at the beginning, your documents will win more than they lose. In our next column, we will show you how to structure the body so that it delivers.

© 2002 Gregory G. Colomb

“Your pleadings will be most persuasive when they start decision makers off with a clear framework that both helps them know what to expect and disposes them to accept your argument.”