

“Pleadings come in many forms, so you can’t frame every one in exactly the same way.”

DELIVERING A PERSUASIVE CASE: ORGANIZING THE BODY OF A PLEADING

BY GREGORY G. COLOMB AND JOSEPH M. WILLIAMS

Gregory G. Colomb is a Professor of English at the University of Virginia in Charlottesville. Joseph M. Williams is a Professor of English at the University of Chicago. Both are visiting professors at the National Judicial College. They are regular contributors to the Writing Tips column in Perspectives.

In a previous column, *Framing Pleadings to Advance Your Case*, 10 Perspectives: Teaching Legal Res. & Writing 92 (2002), we explained how effective advocates use the opening sections of a pleading to construct a conceptual framework that prepares decision makers for what is to come. That frame should help readers know what to expect, so that they can read and understand the main body of the document as easily as its substance allows and, more importantly, in a way that supports the decision the document seeks. The most persuasive pleadings dispose readers to agree right from the start: when a decision maker reaches the end of the opening sections, he or she pauses for a mental breath and thinks: *Now I see what you want me to decide and why. If you can deliver what you promise here, you’ll get what you want.*

Pleadings come in many forms, so you can’t frame every one in exactly the same way. Often, a court or commission will require specific parts in a specific order. But no matter their requirements, effective advocates design their opening sections to address three questions that every decision maker needs answered:

What kind of decision do I need to make?

What specific issue do I have to decide?

What decision do you want and why should I give it to you?

In the most common structure, writers answer these questions using the following parts:

<i>What kind of decision?</i>	Caption + Introduction
<i>What specific issue?</i>	Issue
<i>What decision and why?</i>	Summary of the Argument

When you create a frame including these elements, however, you also create a contract with your reader: you promise to deliver details of fact, law, and reasoning that support the argument your framework forecasts. If readers judge that you have not delivered as promised, they may feel deceived. In fact, the more persuasive the framework, the riskier it is not to deliver the supporting details, endangering not only the success of that document but also your reputation as an advocate.

So a good opening is not enough. Even though the frame is the most important part of any document, you must also design the main body so that readers readily see how it has delivered on what you promised at the start. Unfortunately, we cannot give you a default template for organizing the body: that decision depends on the nature of the argument, the complexity of the law, the number and complexity of relevant facts, the level of the decision maker’s knowledge, and so on. What we can give you, though, are some general principles that you can use to design a body that shows readers how you have delivered on the promises you made at the start.

Organizing the Statement of Facts

Every advocate has heard the cliché that it is better to have the facts on your side than the law. Facts matter: your arguments will be most persuasive when they rest not on your assertions, no matter how well reasoned, but on facts that seem to speak for themselves. So it’s smart to begin planning the body of your pleading by organizing and drafting your statement of facts. But then when you’ve drafted your argument, go back and *revise* your facts to fit your argument. In your draft of the facts, you discover what facts you have (and what ones you may still need to find). In your second draft, you pare down your facts to the relevant ones and arrange them into a coherent story that anticipates and supports your argument.

Facts never really speak for themselves, of course. So in your first pass you have to cycle back and forth between facts and the law. Start by creating a bare-bones sketch of the argument you think you can make as soon as you can (at this point, don’t worry about their order). Your arguments may change as your document develops,

but without a preliminary sense of what they are, you cannot know what facts you may need.

Next, collect in one place all the facts you have. By the time you get to drafting, you will probably have recorded facts in many forms: summaries of depositions, notes from interviews, documents provided by clients, facts statements from legal memoranda, and so on. For this first pass, you can just cut and paste what you have into a simple chronology. Your goal now is more completeness than coherence. But be sure that your account follows some pattern so that you can locate specific facts (or their absence) as you draft your arguments. Highlight those facts that you know are crucial to your case, facts without which your argument would fail, facts that you will emphasize in your argument.

Now go back to your arguments and draft them as carefully as you can. When you finish, return to the facts to reshape them into a coherent story that both supports and prepares readers for those arguments. You can't mix fact and argument: most decision makers respond badly to facts stated in ways that seem overtly argumentative, or worse, mingled with argumentative claims and language. But effective advocates always write the facts so that *readers* begin to anticipate the most important arguments to come. That's another reason why it is so important to begin with a framework that prepares readers to look for the key elements of the applicable law or regulations: when readers know what arguments to expect, they will look in your statement of facts for those they expect to see reappear in your fuller arguments.

To design a statement of facts that tells a coherent story and anticipates your arguments, follow these four steps:

1. Eliminate irrelevant facts; find missing, but relevant ones

Though decision makers want the whole story, they don't want to know every fact you have. They especially don't want a story so complex that they cannot hold it in mind at once. In general, the simpler the story supporting your arguments, the more persuasive you will be.

So start by testing your facts for relevance. For this step, don't rely entirely on your own memory and understanding: you know so much that you will see connections invisible to readers and will

mentally fill gaps that stop readers in their tracks. Instead use these simple tests:

- A fact is relevant if it is mentioned (or implied) anywhere in your argument, whether or not the decision maker may already know it.

This test is obvious and easily applied: read through each argument looking for every fact or assertion that depends on a fact; highlight each one in your statement of facts. If you cannot find it, add it or note its absence. (This sounds so basic that you might wonder we mention it all. But we can tell you from experience that time and time again, writers rest their arguments on facts that never appeared in their statement of facts.)

- A fact is relevant if it is a (non-obvious) part of the chain of causes leading to a relevant fact or linking two relevant facts.

Your story will not seem coherent if its parts do not seem to follow an intelligible pattern of action. For example, suppose you represent Tiny Entrepreneur suing Giant Corporation, alleging that Giant used bogus threats of trademark suits to convince Tiny's customers to stop buying Tiny's products. It may not be directly relevant to your legal arguments that Tiny had twice recently sued Giant and won, but it *is* relevant to help a decision maker understand why Giant might do what you allege.

- A fact is relevant if it adds background that the decision maker does not know but needs to understand your story.

Here, the key question is the decision maker's need to know: avoid unnecessary background at all costs, but do put unfamiliar or puzzling facts in a context that makes sense of them. For example, if your case involves a familiar sales environment, you should not include background facts on the role of advertising in retail sales. If, however, your case involves an arcane, technical aspect of a niche business, you should explain enough background for the decision maker to understand why people acted as you say they did.

You'll face the toughest decision about the relevance of background when you have facts about your opponent's bad acts that are irrelevant to your legal arguments but might be relevant to your story. Most decision makers will tolerate some casting of a bad light on your opponent, but only if they agree with your assessment and only if you do not seem to replace objective facts with ad

“[E]ffective advocates always write the facts so that readers begin to anticipate the most important arguments to come.”

“Ignoring bad facts risks your credibility; seeming to hide them can be fatal.”

hominem attack. But all responsible decision makers recoil when advocates start slinging mud. You have to have a good feel for your reader to know how far you can go. So be cautious about facts whose only contribution is to put a “spin” on the story.

2. Evaluate the relevance of “bad” facts

Even when the facts are on your side, you are likely to have some that at least challenge, if not undermine, your arguments. If you address them in your argument, you must include them in the statement of facts. But even if you don’t, consider weaving them into your story. Ignoring bad facts risks your credibility; seeming to hide them can be fatal.

3. Group facts into episodes with headings

Readers struggle to understand and remember a story that comes to them as an undifferentiated string of events. So if your facts take longer than a page or two, group them into discrete episodes that you “name” in headings. If you can think of nothing better, create chronological groupings. If possible, use key events, not dates to indicate episodes in your story:

Events Leading Up to the Merger

The Merger

Discoveries After the Merger

You’ll help readers remember key facts and connect them to your arguments if the episodes and their names anticipate major themes in the argument to come:

Kinahan’s First Discrimination Complaint

Abco’s Corrective Actions

Kinahan’s Second Complaint

The Parties’ Resolution of the Second

Complaint

Kinahan’s Third Complaint

Abco’s Finding That There Was No New
Discrimination

4. Revise the story to match your arguments

Your facts will be more persuasive if your readers learn them not as a list of discrete items but as a coherent story. Rewrite each episode so that it tells a story. Use language that anticipates the key terms in your argument, and focus your sentences on the character that puts your client on the right side of the standard and your opponent on the wrong side.

In particular, if a fact is crucial to your argument, be sure that your reader will see that fact as an important one. At the very least, introduce it in a new paragraph. And if you can, introduce it with language that emphasizes what is important about it. For example, if the date of an event is important relative to some other date, don’t just date it:

On March 5, 1999, plaintiff informed defendant that the filters did not meet the specifications stipulated in the contract.

Make it clear why that date is significant:

On March 5, 1999, 18 months after plaintiff had accepted delivery of filters and six months after expiration of the guarantee, plaintiff informed defendant that they did not meet the specifications stipulated in the contract.

Be careful, however, that you do not let this kind of highlighting become thinly veiled argument:

It was not until March 5, 1999, more than 18 full months after plaintiff had accepted delivery of filters and six months after the clearly stated expiration date of the guarantee, that plaintiff finally got around to alleging that the filters did not meet the specifications stipulated in the contract.

As you construct these stories, remember that decision makers not only want to do what is legal, they also want to do what is, in some intuitive sense, the right thing to do. If the facts of the case give you any opportunity to show that, now is the time to bring it in—with subtlety.

Organizing Your Arguments

Your arguments should give the decision maker reasons to decide as you ask, usually one major reason per section. Those reasons can correspond to the elements of a cause of action, criteria in a regulation, or any other basis you might have for a legal argument. We can’t tell you what reasons you’ll need: that varies with each case. What we can tell you is how to deal with them once you have them.

1. Create a separate section for each contestable major reason and its support

You help readers follow your argument if you design your document so that it helps them see its outline. Each major reason should have its own

section, with a heading that states both that reason and a precis of its support. For example, this is not helpful:

Abco can make fair use of the Elston's publications.

This is more helpful:

Abco can make fair use of the Elston's publications because they are the product of mere mechanical compilation and do not reflect creative or original thought.

Your readers can then deal with your argument one reason at a time, but also have an outline of the whole in the sequence of your headings.

Don't assume that you should have a separate section for every element in a legal standard or criteria in a regulation. You can often dispose of an element of a decision in a sentence or two—because it is uncontested, because the decision maker has ruled, because you can predict how the decision maker will rule, and so on. Don't waste your reader's mental energy by focusing on those elements already yours.

Organize your arguments to focus your reader's attention on those matters where you need an argument to gain a crucial element of the decision. The only reason to devote an entire section to a point already won is to gain the rhetorical advantage of having won it. For example, if you have just won a bitterly contested ruling that your opponent has improperly thwarted discovery, you *might* briefly rehash that argument in subsequent documents, but only if you are sure your reader is willing to be reminded. Otherwise, don't distract decision makers with what is not at issue.

Also try to avoid sections that appear to be arguments but are in fact only recitations of the applicable legal standard. Set aside a separate section for the applicable standard only if you cannot either weave it through individual sections or cover it in the introductory paragraph of a section, *in no more than a sentence or two*. If you do have a separate section, clearly label it so that readers do not expect to find arguments. (Of course, most readers will simply skip it.)

If to establish a major reason you have to make substantial arguments for several subreasons, group them so that you can present each important subreason in its own subsection. Suppose, for example, that in order to show that Abco should be held responsible for an action, you have to prove

three distinct, contested elements. You'll help readers see that logic if you lay it out visibly on the page, with a main heading and three subheadings:

Abco is responsible for action X because it meets elements A, B, and C.

Abco meets element A because of evidence i, ii, and iii.

Abco meet element B because of evidence

Abco meets element C because of evidence

Of course, in a case like this you do most of your arguing in the subsections. Usually, the only text for the main section is a framing paragraph that establishes the three elements and summarizes the arguments in the subsections.

2. Select an order for your reasons/sections

Once you have identified the main reasons that will define the sections in your document, you must arrange them in the most persuasive order. Sometimes you have little choice: some reasons fall into a logically *necessary sequence*, so that you can deal with one reason logically only after you have already dealt with others.

But often your reasons will be logically *parallel*: they "add up" to support a claim but they do not depend on one another. For example, we all know that if something looks like a duck, walks like a duck, and quacks like a duck, it is probably a duck. But the object in question would be just as much a duck if we demonstrated its quack before its look and walk. This distinction is important because you must deal with sequential and parallel reasons differently.

Logically sequential reasons. If reasons fit into a logical chain of reasoning, arrange their sections in that sequence. For example, if a legal standard requires that an act be performed with a specific intent to harm, it makes little sense to argue intention before you have established that the act was in fact performed. So if you must argue both, argue performance first and intention second, unless the same evidence establishes both, in which case you can argue them together.

Another kind of logical sequence concerns not steps in a logical chain but steps in a decision process. For example, suppose that in addition to the arguments about performance and intention, you also have arguments about a statute of limitations. The logical order would then start with the statute of limitations, because if you can prove

“Don't assume that you should have a separate section for every element in a legal standard or criteria in a regulation.”

“Get the good stuff out early.”

a statute of limitations has expired, the other points simply don't arise as issues. Points that pre-empt others are logically prior to them.

On the other hand, do not argue an uncontested point just because it fits into a logical sequence. For example, suppose that to hold Abco responsible for an act you have to show (i) that the person performing the action was Abco's agent, (ii) that Abco explicitly authorized the agent to perform that kind of action, and (iii) that Abco had actual knowledge of the action. If it is obvious and uncontested that any agent would be explicitly authorized to perform the action in question, don't waste a whole section on that point: you'll only distract readers from what you do need to prove. Simply fold the uncontested point into the introduction to the next contested reason in the sequence:

Since it is uncontested that Abco had authorized its agents to enter into agreements like the Kinahan Pact (cites), the next issue is whether Abco had actual knowledge of Kim's actions

Legal arguments also have one other form of logical sequence that is uncommon elsewhere, arguing in the alternative: Abco didn't do it; but if it did, it didn't mean to; and if it did mean to, it didn't cause any damage. These arguments usually have a necessary logical order, which you should follow.

Logically parallel reasons. Reasons are in parallel when they don't depend on one another. You can put these reasons in any order, so you should arrange them to best rhetorical effect. To judge the rhetorical effect, you have to consider not only their value in supporting your claim but also their effect on your readers. That means balancing several factors, some having to do with the nature of the reason itself and others having to do with the disposition of your readers.

Here are some principles of order based on the nature of the reasons. They assume (as every writer should) that a decision maker doesn't want an argument that reads like a mystery story, building and building until, on page 36, it unveils its crowning point. Get the good stuff out early. Add lesser arguments not quite as afterthoughts, but as clearly ancillary. Consider these orders:

- i) dispositive first
- ii) strong before weak
- iii) simple/short before complex/long

iv) substantive before technical

Other principles of order depend on what your readers know and believe:

- v) welcome before unwelcome
- vi) easy before difficult
- vii) familiar before unfamiliar
- viii) common sense before merely legal

If all of these principles apply to a group of reasons in the same way, you have only to follow that order. But they often conflict. For example, dispositive reasons are often technical ones—a party has failed to follow a necessary procedure, and the law says the decision maker must rule against them no matter the substance of their argument. No one likes to make decisions like that, so you help a decision maker rule on a technical issue if you first show that your substantive argument has merit. You can weigh these questions well only on a case-by-case basis, and only if you have good tactical instincts and a lot of knowledge about your readers.

A complication: in a complex argument, you may have some reasons that are logically sequential and others that are parallel. Distinguish these two possibilities.

- The sequential reasons make a larger point that is parallel to your other reasons. (For example, you could label them: Pa, Pb, [S1, S2, S3] Pc, Pd.)

In that case, make the sequential reasons subreasons that you group around the larger point. Then decide where that larger point fits in relation to the other parallel reasons. Just remember that any logical sequence that establishes a single major reason is likely to be both more complex and more difficult to process.

- The parallel reasons all support a larger point that is one step in a logical sequence of reasons. (For example, you could label them: S1, [Pa, Pb, Pc] S2, S3, S4.)

In that case, make the parallel reasons subreasons that you group around a larger point that you locate in the logical chain of reasons.

A final note on order: If your document responds to your opponent's argument, do not be influenced by the order of reasons in his or her document. Make your argument your own, not a me-too reflection of your opponent's. The order of reasons that best supports the decision he or she

.....

wants will seldom be the order that best supports the decision you want.

3. Frame each section in the same way you framed the whole

Decision makers want you to help them read each section and decide its issue as much as you helped them with the whole. Advocates sometimes think that, having framed the overall argument, they should approach each of its sections step-by-step, starting at the beginning and slowly building up to a conclusion. That strategy imposes less cost on readers for a section than for the whole, but it is no more welcome. Start each section by framing its issue, stating its point, and forecasting key elements of its argument.¹ Also be sure that in stating these, you use key terms that you repeat in the supporting argument.

The best test for a sound organization is to ask a colleague to skim your pleading as quickly as he or she can. Tell that person to read only the statement of the case, to skim the statement of facts, and then to read only the first paragraph after each heading in the body of the argument. If that person cannot give you back a coherent summary of your argument, you have a problem.

The most persuasive legal pleadings can seem almost magical, marvelous creations that coordinate stories, legal reasoning, common sense, factual investigation, shared principles, emotional appeals, rhetorical gambits, and anything else the advocate can draw in to make a decision seem logically inevitable, emotionally satisfying, and just plain right. But you don't need magic to put together an effective pleading. Even when you don't have all the facts or law or common sense on your side, you can make the best case for your client by following one by one the steps for framing a pleading so that readers begin having accepted your promises, and then by following the steps for designing the main body to deliver on those promises.

© 2003 Gregory G. Colomb and Joseph M. Williams

¹ See *Framing Pleadings to Advance Your Case*, 10 Perspectives: Teaching Legal Res. & Writing 92 (2002).

“The best test for a sound organization is to ask a colleague to skim your pleading as quickly as he or she can.”