



# Show Me the Way

Using Headers More Effectively

BY MICHAEL A. BLASIE

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Headers are helpful. Use them.<sup>1</sup>

## Use Headers in a Statement of Facts

Think of all the good reasons you use headers in your argument section. Those same reasons apply to a Statement of Facts. So use headers there too.<sup>2</sup>

When you do come across the rare Statement of Facts that uses headers, it often contains ones like these:

- A. The December 22, 2010 Common Interest Agreement
- B. Defendant's Negligence

These are useless. The date and title of the document are probably irrelevant.<sup>3</sup> The first header does not engage the reader because none of us wants to read about common interest agreements. Neither header provides a fact essential to a court's ruling. In fact, the second

header is a legal conclusion (not a factual one). They are neither memorable nor relevant. In short, they say nothing about your case.

But it doesn't have to be this way. Ross Guberman plucked a good example from the Martha Stewart case.<sup>4</sup> See how the government used headers in a Statement of Facts section to defend the convictions:

- A. The Government's Case
  - 1. "Get Martha on the Phone"
  - 2. "Peter Bacanovic Thinks ImClone is Going to Start Trading Downward"
  - 3. Stewart Sells Her ImClone Stock
  - 4. "Something is Going On With ImClone and Martha Stewart Wants to Know What"
  - 5. Stewart's Conversation With Mariana Pasternak
  - 6. The Investigations Begin

- 7. The Tax Loss Selling Cover Story
- 8. January 3, 2002: Faneuil Lies to Investigators
- 9. Bacanovic Changes the Cover Story
- 10. January 7, 2002: Bacanovic Lies to Investigators
- 11. Stewart Alters Bacanovic's Telephone Message
- 12. February 4, 2002: Stewart Lies to Investigators
- 13. February 13, 2002: Bacanovic Lies in Sworn Testimony
- 14. March 7, 2002: Faneuil Lies to Investigators Again
- 15. April 10, 2002: Stewart Lies to Investigators Again
- 16. Stewart's False Public Statements
- 17. Faneuil Reveals the Truth<sup>5</sup>

When you read these headers, a story emerges—and not just any story, a story helpful to the prosecution.<sup>6</sup> Indeed, while the dates are likely irrelevant to the legal standard, they aid the prosecution's narrative by showing a series of lies in only three months.

Here's an even simpler example from a Table of Contents:

- A. Farm Inc. Agreed to Deliver One Hundred Eggs to Pie Corp. Every Sunday
- B. One Sunday, Without Notice, Farm Inc. Delivered No Eggs
- C. Without Eggs Pie Corp. Could Not Bake or Sell Any Pies That Week

D. That Week Pie Corp. Lost \$1,000

From these headers you can predict this lawsuit probably contains a breach of contract claim. The headers track the elements without using legal terms like “breach” or “causation.” More important, these four headers match the four factual findings needed to succeed on the claim. If the court remembers nothing else except these four factual conclusions, the plaintiff’s fact section has done its job.

### Phrase Argument Section Headers Persuasively

Frequently, headers state a legal conclusion without any reasoning. For example:

- A. The Complaint Fails to State a Claim upon Which Relief Can be Granted
- B. The Existence of a Disputed Material Fact Precludes Summary Judgment
- C. Defendant’s Negligence Caused Damages

These headers could appear in any brief for any case involving these types of motions or claims. They are weak and add little. Remember, when your reader gets to these headers, the reader already knows what you want. The caption page and opening said what you want and why. So the reader knows you think the complaint does not state a claim when the reader gets to the header saying the complaint does not state a claim. Add something new and helpful.

Strengthen headers by including why you win:<sup>7</sup>

- A. Because the Complaint Does Not Allege the Third and Fourth Elements of Negligence, It Fails to State a Claim for Negligence
- B. Conflicting Expert Testimony about Whether the Landfill Continues to Cause or Threaten Environmental Damage Creates a Disputed Material Fact
- C. When the Driver Became Distracted While Texting on Her Phone, She Crashed into the Car

### The Integrated Header: Visual Cues for the Reader

Usually we think of a header as an indented sentence prefaced with an outline-symbol such as a roman numeral. So headers are abrupt and obvious. Not quite.

Some briefs integrate headers into the main text, using abbreviated headers to start paragraphs. These integrated headers are not in the Table of Contents. Weaker but also less disruptive than traditional headers, they function as helpful visual cues and transitions.<sup>8</sup> These headers are neither better nor worse than traditional headers. They are an option. Use them when they help.

Former U.S. Solicitor General Seth Waxman has a knack for these. Take a look.

### Example 1

#### 3. Appellants’ rule is singularly inappropriate in this case where the landowner is the City and the property at issue is a street

Finally, Appellants’ bid to jettison owner intent in favor of public use as the north star of the implied-dedication analysis is singularly inappropriate here, where the

landowner in question is the City of New York and the parcels at issue are legally designated as streets. In particular, two blackletter principles of law foreclose application against the City of any rule driven by “public use.” And there is no authority for the proposition that city streets—which, like parks, are held in trust for the public—can be converted into parkland through implied dedication.

a. By elevating long continued public use to the “main determinant” of dedication, Appellants’ rule would eviscerate the distinction between prescriptive rights—those acquired through . . .

...

b. Appellants acknowledge that their vision of implied dedication rests not on the City’s actual intent regarding the status of the DOT Strips, but instead on . . .<sup>9</sup>

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Rather than including a full subheader, Waxman uses each letter to start a new point and a new series of paragraphs. The letters are not part of traditional headers, but introduce full main text paragraphs. In doing so, they visually break up points for the reader and function as transitions without a transition word or phrase.

### Example 2

#### B. Social Science Does Not Support Any of the Putative Rationales for Proposition 8.

Proponents of laws like Proposition 8 have advanced certain social-science arguments that they contend support the exclusion of same-sex couples from civil marriage. The proponents' main arguments are (1) *deinstitutionalization*: that allowing same-sex couples to marry will harm the institution of marriage by severing it from child-rearing; (2) *biology*: that marriage is necessary only for opposite-sex couples because they can procreate accidentally; and (3) *child welfare*: that children are better off when raised by two parents of the opposite sex. Each of these arguments reflects a speculative assumption rather than a fact, is unsupported in the trial record in this case, and has in fact been refuted by evidence.

*Deinstitutionalization.* No credible evidence supports the deinstitutionalization theory on which petitioners heavily rely. . . .

*Biology.* There is also no biological justification for denying civil marriage to same-sex couples. . . .

*Child Welfare.* If there were persuasive evidence that same sex marriage was detrimental to children, amici would give that evidence great weight. But there is none. . . .<sup>10</sup>

The introduction establishes three counterarguments in a numbered list. The brief assigns each counterargument an italicized title. Those italicized titles later preface rebuttals to those counterarguments. They are an intuitive and helpful structure.

But these integrated headers are more than visual transitions. They are more effective versions of the classic “first, second, third” sign posts. If this brief used the classic organization, the introduction would have been one sentence: “Each of proponents’ three arguments reflects a speculative assumption rather than a fact, is unsupported in the trial record in this case, and has in fact been refuted by evidence.” Then the section would read something like “First, Proponents claim that [x] is unpersuasive because . . . Second, Proponents claim that [y] is unpersuasive because . . . Third, Proponents claim that [z] is unpersuasive because . . .” This classic structure works, but Waxman’s offers added benefits. It states all three claims upfront, so the reader knows what is coming rather than having to wonder what point two will cover. When the reader gets to each italicized word, the reader knows the brief has moved to a different point and how many points remain. The visual cues also make it easy to go back and find each argument; rather than having to remember whether child welfare comes first, second, or third, just look for the italicized term.

### Conclusion

Everyone loves headers. I have never heard a critique that a brief contained too many, so use them. But remember that while adding headers is a good start, effective phrasing is where the power comes from. 

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### NOTES

1. For more information on using headers effectively, see Armstrong and Terrell, *Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing* 121–25 (Practicing Law Institute 3d ed. 2008); Garner, *Legal Writing in Plain English* 20–22 (University of Chicago Press 2d ed. 2013); Guberman, *Point Made: How to Write Like the Nation’s Top Advocates* 73–80 (Oxford University Press 2d ed. 2014); Guberman, *Point Taken: How to Write Like the World’s Best Judges* 108–11 (Oxford University Press 2015) (discussing use of headers and subheaders in opinions).
2. See Guberman, *Point Made*, *supra* note 1 at 73–76 (discussing use of headers in Statement of Facts section).
3. “Lawyers love narrative—and they adore dates and places. . . . And when, pages later, [the date] turns out to be wholly irrelevant, the judge will feel duped—a feeling that often leads to irritability and impatience. I would consider that a less-than-desirable start for one’s case.” Eich, “Writing The Persuasive Brief,” *Wisconsin Lawyer* (Feb. 2003), [www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=76&Issue=2&ArticleID=614](http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=76&Issue=2&ArticleID=614); Guberman, *Point Made*, *supra* note 1 at 69–71 (discussing alternatives to dates in a Statement of Facts); Guberman, *Point Taken*, *supra* note 1 at 44–56 (2015) (discussing cutting irrelevant facts from court opinions).
4. Guberman, “Free Martha? Not with these Headings!” *Legal Writing Pro*, [www.legalwritingpro.com/articles/free-martha-not-headings](http://www.legalwritingpro.com/articles/free-martha-not-headings).
5. Brief For the United States of America at 6–17, *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006).
6. Query whether the dates in these headers are needed. They might suggest several significant events in a short period.
7. “The old test is still the best. Could a judge skim your headings and subheadings and know why you win?” Guberman, *Point Made*, *supra* note 1 at 93. For more advice on using headers in your argument section, see *id.* at 93–106. See also Scalia and Garner, *Making Your Case: The Art of Persuading Judges* 89 (Thomson West 2008) (describing Table of Contents as “primarily a finding tool” but also noting “many judges look at it first to get a quick overview of the argument. That’s one reason you should make your section headings and subheadings full, informative sentences.”)
8. Guberman, *Point Made*, *supra* note 1 at 73 (giving examples of integrated headers in Statement of Facts).
9. Brief for Necessary Third-Party Appellant-Respondent New York University at 59–60, *Glick v. Harvey*, 25 N.Y.3d 1175 (N.Y. 2015).
10. Brief of Amici Curiae Kenneth B. Mehlman et al. Supporting Respondents at 10–12, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).