

Coming Attractions:

An Essay on Movie Trailers & Preliminary Statements

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I. Preliminary Statement

I ease into the soft, comfy chair that gently rocks and place the soda in the cup holder on the armrest. The lights go down as I eat the first of many handfuls of popcorn. Accompanied by a roomful of strangers, I am ready to leave behind the troubles of the day—student papers waiting for my review, a committee report to write, tending to that letter of recommendation I promised to write—and settle into the world of the movies. But first, a few previews of coming attractions. Inspiration can come at the strangest moments . . .

For the past few years, I have been interested in furthering my understanding of persuasion. In particular, I've explored the concept of applied legal storytelling with an eye toward learning how storytelling techniques can be used in the context of legal persuasion. It was during that day at the movies that I was struck by the persuasive power of movie trailers. In just a matter of seconds, I can usually tell if I want to see whatever movie a trailer is promoting. That got me wondering—how do trailers work? What persuasion techniques do they use to promote films? Are there lessons to be learned from those strategies that could apply to legal persuasion? By the time the feature presentation was cued up, I was ready to dive into the world of movie trailers and first impressions. That dive has led to this essay.

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What I have discovered is that filmmakers indeed use specific persuasive strategies to make effective movie trailers. The first decision to make is which storyline of the film should be featured in the trailer. As trailers have only 2½ minutes to make their pitch, they cannot, obviously, tell the entire story of the movie. Usually, the trailer will focus on one storyline that best captures the feel of the movie. The second decision is to determine the lens through which the story is told. Most trailers fall into one of three categories:

the *genre trailer*, which uses a wide angle lens to feature the kind of movie it is promoting rather than the specific details of the film's central storyline;

the *story trailer*, which looks beyond the genre of the film to reveal some of the specific characters and storylines of the film; and

the *star trailer*, which zooms in with a telephoto lens to feature a well-known actor, director, or perhaps producer of the film with little exposition of the story or genre¹ of the film.²

Within each of these categories of trailers, the filmmaker will use specific techniques to develop the desired theme of the trailer.

Well, that's what they do with trailers; but what does any of this have to do with persuasive legal writing? Of course, lawyers are not yet to the point where we write separate "previews" of persuasive legal documents that we send out in advance of our briefs. I suspect most judges would be surprised to receive a short "trailer" promoting an upcoming Memorandum in Support of Summary Judgment. Nonetheless, a lawyer can establish a good first impression of her Argument in the Introduction or Preliminary Statement of a brief at either the trial or appellate level. This paper discusses how one might use the techniques of successful movie trailers to create a Preliminary Statement that sets the stage for the featured presentation of a brief's Argument Section. Doing so can create a persuasive advantage by priming the audience to be more receptive to the Argument. Just like a good movie trailer, a well-written Preliminary Statement can establish a theme that takes the critical first step of creating a positive frame of the legal dispute. Establishing that frame is essential to convincing the audience of the soundness of what will follow.

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¹ These categories are not mutually exclusive, and many trailers develop aspects of all three categories. In addition, some "stars" are so well known that their films have become genres of their own. Hitchcock films, for example, are probably best described as a genre unto themselves.

² See Lisa Kernan, *Coming Attractions: Reading American Movie Trailers* (2004) at 41–44 (discussing the three principal rhetorical appeals made by trailers).

Before going further, I should clarify one point about Preliminary Statements. Most court rules, including the Federal Rules of Appellate Practice and the Federal Rules of Civil Procedure, do not require Preliminary Statements. A few states do have rules. For example, New Jersey requires that Preliminary Statements not exceed three pages.³ However, I am aware of no court that expressly prohibits Preliminary Statements. In light of this general silence, many lawyers have recognized the value of Preliminary Statements and routinely include them their briefs to both trial and appellate courts. In briefs submitted to the U.S. Supreme Court, for example, Preliminary Statements are quite common.

Section II of this article examines the neuroscience explaining why it is that first impressions are so powerful. Several scholars have shown how this science can be applied to make legal writing more persuasive generally. Section III will briefly review a few fundamental principles about movie trailers and the art behind making them. Section IV then examines how the persuasive techniques used in three trailers—each representing a different kind of trailer—parallel the persuasive strategies used in recent briefs written to the U.S. Supreme Court. Finally, Section V offers specific strategies for writing Preliminary Statements that will appropriately prime a legal audience and, in doing so, make a writer’s legal documents more effective.

II. The Power of First Impressions

Substantial evidence supports the nearly intuitive idea that first impressions matter. For example, website users form an initial impression about the quality and reliability of a web site in less than two-tenths of a second.⁴ This is true even though it takes the eye about 2.6 seconds to land on the area of the website that influences the first impression.⁵ In other words it takes a viewer longer to find the section of a website that will influence the viewers’ impression of a website than it does for the viewer to form that impression. First impressions are also significant when we make judgment about people’s character. One study asked subjects to look at photos of people for as little as 100 milliseconds and evaluate the people in the photos on attractiveness, likeability, competence, trustworthiness, and aggressiveness.⁶ The subjects of this study were also asked to rate their

³ New Jersey Rule App. Practice 2:6-2(a)(6).

⁵ *Id.* at 32.

⁴ See Sirjana Dahal, *Eyes Don’t Lie: Understanding Users’ First Impressions on Website Design Using Eye Tracking* 32-33 (2011) (unpublished Master of Science thesis, Missouri University) (available at http://scholarsmine.mst.edu/thesis/pdf/Dahal_09007dcc80956af5.pdf).

⁶ Janine Willis & Alexander Todorov, *First Impressions: Making Up Your Mind After a 100-Ms Exposure to a Face*, 17 Psychol. Sci. 592, 593 (2006).

degree of confidence in their judgments about the photos. The subjects were then given more time to look at the photos. Although the additional time increased the subjects' confidence in their assessment, it did not change the subjects' evaluations as to the characteristics of the people in the photos. More time apparently served to reinforce opinions about people even when those opinions were based on seeing photos of those people for only a fraction of a second. More time did not, however, change the subjects' opinions about the people they were measuring.

The lasting power of first impressions can be partially explained by what Daniel Kahneman calls the "halo effect."⁷ Once a person has a first impression, all other information about the subject will be filtered through that impression. For example, if a person is described as "intelligent, industrious, impulsive, critical, stubborn, and envious," then the listener will tend to interpret his stubbornness as part of his intelligence and industry. On the other hand, if a person is described as "envious, stubborn, critical, impulsive, industrious, and intelligent," that person will be seen as envious first, and the other descriptors are filtered through that lens. Obviously, the person in the first example will be viewed more positively.⁸ Of course, a careful reader will have already noticed that these two lists of descriptors are identical, but merely in reverse order. The halo effect—that whatever we first learn about a subject will color whatever we learn later about that same subject—explains the power of first impressions.

The halo effect can overcome even contradictory information learned after one has formed an opinion about a matter. For example, one study suggests that if a person has a negative experience with a colleague in the workplace, that experience will be a dominant impression that persists. If the person later meets that same colleague in a social setting and enjoys his company, that favorable feeling will influence the person's perception of her colleague, but only in similar social settings. Her perceptions of the colleague in the workplace will not change.⁹

These types of studies reveal the power of "priming." Priming is the psychology concept of providing an audience with a stimulus for the purpose of influencing that audience's perception of later events or information.¹⁰ Recently, legal scholars have begun to explore the power of priming in legal writing, particularly in persuasive writing. For example,

7 Daniel Kahneman, *Thinking, Fast and Slow* 82–83 (2006).

8 Solomon E. Asch, *Forming Impressions of Personality*, 41 J. Abnormal and Soc. Psychol. 258, 270–72 (1946).

9 See Bertram Gawronski, Bram Vervliet, Robert J. Rydell & Jan De Houwer, *Generalization Versus Contextualization in Automatic Evaluation*, 139 J. of Experimental Psychol. Gen. 683, 697–98 (Nov 2010).

10 Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. Rich. L. Rev. 1213, 1228 (2010).

Michael Higdon, after extensively reviewing the science behind priming, shows how judges use priming in the introduction to their opinions to foreshadow their more-detailed explanations and rulings that follow.¹¹ Higdon argues that how judges foreshadow their decisions in the framing of the issue or explanation of prior case law can make the ultimate decision appear inevitable to their intended readers.¹²

Kathryn Stanchi has also explored the role of priming concepts legal persuasion. For example, “inoculating” against adverse material can effectively counter the force of that adverse information.¹³ Inoculation theory suggests that an effective way to address a counterargument is to raise a weakened version of the counterargument, then provide a reasoned rebuttal to it. This, Stanchi posits, is akin to the principle of inoculating against a disease. By injecting a weak version of a disease into the human body, the body is able to build up a resistance to that disease that will protect it against future attacks. Similarly, facing the most troubling material of a lawsuit at the outset of a brief allows the writer to steal the thunder of the counterargument as the reader is inoculated against its force.¹⁴

Though the power of first impressions is well understood, we have only begun to explore how priming can be applied in legal storytelling. Stanchi provides useful examples of how priming works in the context of presenting an Argument in a trial memo or an appellate brief. However, there is no need to delay these persuasive strategies until one’s Argument or even the Statement of Facts. A Preliminary Statement can make that critical first impression, which, if done effectively, can prime one’s reader so that the reader is more receptive to the details that will follow.

To show how we can take advantage of such a Preliminary Statement, we turn to a different medium entirely—the movie trailer.

III. Movie Trailers—A Few Basics

The producers of movie trailers have been working for over 100 years to figure out how to persuade movie audiences to come back the theater for the next movie. One of the first things they learned was that audiences don’t stick around after the show is over. The short promotional films we call trailers got their name because originally they were shown after the

11 *Id.* at 1245–57.

12 *Id.* at 1257.

13 Kathryn Stanchi, *Playing With Fire: The Science of Confronting Adverse Material In Legal Advocacy*, 60 Rutgers L. Rev. 381, 399 (2008).

14 See *id.* at 414–17 (discussing inoculation as applied to a legal context).

feature film—that is, they *trailed* the movie. However, once the studios figured out that most of the audience left before the advertising came on, they moved the trailers to before the movie. Apparently, by that point, it was too late to start calling them “leaders” and the name trailer has stuck.¹⁵

This story illustrates the most important rule about making a persuasive trailer: *audience matters*; the rest is just details. Filmmakers know that most films will appeal to only a slice of the movie-going public. Thus, they design trailers to appeal to the target audience. This explains why most of us can determine whether we want to see the advertised movie within a matter of a few seconds. The trailer either speaks to us or it does not. *How* it does so is at the core of its persuasive nature.

The key to a successful trailer is to find the theme of the movie. That is, to find the core of the movie that will resonate with the intended audience on an emotional level. Very few of us base our movie-attending decisions on rational analysis. For example, when was the last time you watched a movie trailer and consciously went through a thought process something like this?

This trailer is a promoting a romantic comedy set in England;

I like every romantic comedy set in England I have seen before;

Ergo, I will like this movie and plan to see it.

Now, if asked why a trailer appealed to us, we might have provided this kind of explanation. But in the darkness of the movie theater, we are more likely to be thinking, “Oh, this looks like fun.” That reaction is all the movie maker needs to prime us—to get us to be receptive to the movie.

Undoubtedly, you have had the experience of seeing a trailer and thinking, “Well, I don’t have to see that movie; the trailer showed the whole story.” In reality, it is impossible to show an entire two and half movie in a two-and-half-minute trailer. What has really happened is that the trailer has revealed enough of the key plot points that we *think* there can’t be anything of significance left to tell.

On the other hand, a successful trailer reveals enough of the movie to pique our interest to want to see the rest of it. Note that this is not the same thing as knowing how the movie will end. We *know* how virtually every romantic comedy or action movie will end. What we want to see is *how* the story will unfold to get us to that end.

15 See Kernan, *supra*, n. 2 at 27.

Finally, Hollywood trailers are indeed sophisticated persuasive endeavors. It might seem that promoting movies should be pretty easy. After all, the audience is already at the movies—so it is clearly receptive to the idea of attending more movies. And most movies that get made have an appeal to at least some audience. This should be easy. But there are a lot of movies competing for limited entertainment dollars.

Consider, for example, designing a trailer to promote a documentary film about dolphin harvesting in Japan. This is not a movie that we can expect a natural audience of millions lining up hours ahead of time to see. And yet, the trailer for *The Cove*¹⁶ does a masterful job of creating interest in a subject that is far from what most movie goers are seeking. The trailer creates a gripping, action-filled story that portrays the documentary filmmakers risking their safety to get this story told. It builds an emotional reaction that allows an audience to set aside its reasoned-based skepticism of such documentaries.¹⁷

Surely, if a trailer can reveal the heroically compelling and emotionally gripping side of dolphin harvesting in Japan, we can also find compelling themes at the heart of legal disputes that are so challenging they defy resolution without resort to the dangerous and expensive world of litigation.

IV. The Point: Movie Trailers and Preliminary Statements

The persuasive techniques of movie trailers parallel those of Preliminary Statements. Both present opportunities to make that first impression that will prime the targeted audience.

The first challenge to creating either a trailer or a Preliminary Statement is to choose the storyline on which to focus. Every complicated story, be it a movie or a lawsuit, will have multiple characters and multiple subplots within it. The most compelling first impression requires determining the storyline that best captures the theme of the broader story. By “theme,” I don’t mean the plot, the setting, or even necessarily the characters. Rather, I mean the essence of the story that will resonate with the audience. Thus, once we have decided on the best storyline, the second challenge is determining how to reveal the essence of that storyline in a way that will best resonate with the audience and build empathy for the central character of the story.

16 *The Cove*—trailer, (available at <http://www.youtube.com/watch?v=iV9Fv8h08Vc>).

17 This is an excellent example of how an effective emotional appeal, or *pathos*, may persuade even a skeptical audience’s resistance to an idea. For a general review of role of *pathos* in persuasion see Ruth Anne Robbins, Steve Johansen & Ken Chestek, *Your Client’s Story: Persuasive Legal Writing* (2013) at 24.

This section examines three trailers that choose different ways to establish the themes of the movies they promote. These movies are then paired with examples of Preliminary Statements that use similar techniques to establish the central story of their respective legal disputes. The first pair examines a “genre” trailer, for the film *Inception*. This trailer has been painted with a broad, familiar brush. Though revealing very little about the characters or details of the plot, the trailer promises the audience both what it expects in an action movie and an interesting twist that sets it aside from other movies of its ilk. The Preliminary Statement from the Respondents brief in *Mohamed v. Palestinian Authority*¹⁸ similarly presents the legal dispute in a familiar frame—statutory interpretation. Like the typical genre trailer, it presents the reader with familiar, stock legal structures without revealing many details of this particular legal story.

The second pair compares a “story” trailer and a Preliminary Statement that bring a more focused view of their stories. The trailer, for the film *Being Flynn*, quickly develops the central characters of the specific story told in the movie. We learn who they are and how the world looks from their point of view. Likewise, the Preliminary Statement from the Petitioner’s brief in *Turner v. Rogers*¹⁹ reduces the legal dispute to the essential elements of the Petitioner’s challenge to meet the demands of the legal system.

The final pair of trailers takes an even narrower focus on the story. The “star” trailer for *The Descendants* is essentially a trailer for George Clooney. Though the trailer gives glimpses into the plot and other characters of the movie, its message is “this movie stars George Clooney.” It is compared with the Preliminary Statement from the Respondent’s brief in the Affordable Healthcare Act litigation, *U.S. Dept. of Health and Human Services v. Florida*.²⁰ This Preliminary Statement also features its legal star—the venerable United States Constitution. The reader knows that whatever other details may follow, this story is about fundamental Constitutional principles, and everything else takes a back seat to the star.

A. Focus on genre

1. Genre trailers

The movie trailer with the broadest, most general perspective is the genre trailer. These trailers focus on the type of movie—action, romantic comedy, mystery, horror. All of these genres are familiar to the audience,

18 132 S. Ct. 1702 (2012).

20 132 S. Ct. 2566 (2012).

19 131 S. Ct. 2507 (2011).

and the trailer is designed to persuade the viewer that the targeted movie will include those elements of the genre that the audience recognizes. Thus, action-movie trailers will show *action*—car chases, gunfights, explosions—all the things one expects in an action movie. However, the genre trailer cannot just play the old familiar elements that show up in every action movie. There must be something new, something suggesting that this movie, while falling clearly within the familiar genre, also offers a twist to the usual fare that makes the movie stand out from other films within the genre.

A good example²¹ of the genre trailer is *Inception*.²² The trailer very quickly makes clear that this is an action movie. Within the first ten seconds, we see a gun and a suitcase that has something that looks like a bomb in it. Having identified the genre, the next 50 seconds of the trailer is a series of scenes that reveal the twist—it appears the characters are able to move between the real world and the world of dreams. Having set the stage, the rest of the trailer intersperses the familiar tropes of action movies—car chases, exploding buildings, and general mayhem. A few more scenes very briefly show us what appear to be the main characters: the movie’s hero; a young woman who appears a likely love interest; an older, apparently wise, mentor; and a host of bad guys. As explosions devolve into ever increasing chaos, the hero calmly says, “I have it under control,” when he clearly does not.

In two-and-half minutes, we learn a lot about the target movie. It will have all the explosions, car chases, and exaggerated violence that we expect in an action movie. It has what appears to be something of a mind-bending twist involving dreams. There appears to be a bit of ironic humor mixed in with the mayhem.

It is also notable what we do not know after watching this trailer. For example, we don’t know any of the characters’ names. In fact, we don’t know much about the characters at all. In the trailer, they appear to be little more than stock structures—a young hero, a smart, potential love interest, lots of thuggish bad guys—but there is virtually no character development. We don’t need to know more about the characters—we will fill in the gaps in our knowledge with our own stock structures of the characters that normally inhabit action movies.²³ What is important about this

21 Indeed, the *Inception* trailer won the Golden Trailer Award for action movies in 2010. <http://www.goldentrailer.com/awards.gta12.php>.

22 *Inception* Trailer 2 (available at <http://www.youtube.com/watch?v=66TuSJo4dZM>).

23 For a general discussion of stock structures, see Gerald Lopez, *Lay Lawyering*, UCLA L. Rev. 1 (1984) at 6; Michael R. Smith, *Linguistic Hooks: Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation*, 8 Leg. Comm. & Rhetoric: JALWD 1 (2011) at 3.

movie, what will sell it to the audience, is the action and the interesting twist. Put simply, this movie is about explosions and mind games.

2. The genre preliminary statement

Like movies, many legal disputes also fall into genres. Contract disputes, personal injury claims, administrative law appeals and dozens of other legal problems often fall into familiar categories with legal issues with which a judge is well acquainted. Sometimes, particularly for defendants on appeal, this familiarity is what one wants the judge to focus on. In essence, one wants to encourage the reader to draw on her stock structures of the legal genre—"This is a contract dispute; it's just like many other contract disputes you've seen before." If one can set this theme early, the reader will, naturally, review the facts with an eye toward the familiar contract issues that all lawyers have known since their first year of law school—breach, excuse, impossibility. Once a reader starts looking at the legal dispute through this familiar lens, she is more likely to analyze the law and its application through that same lens.

Of course, one party to the contract dispute may not see this as such a simple, familiar case. It may want to emphasize the unfamiliar twist that requires more than a straightforward analysis of long-understood principles. If so, a genre approach to the problem may still be appropriate, though the lawyer will want to put the legal twist in a position of emphasis.

The Appellee's brief in *Mohamed v. Palestinian Authority* provides a good example of a genre Preliminary Statement:

The Torture Victim Protection Act of 1991 ("TVPA" or the "Act") provides that "[a]n individual who * * * subjects an individual" to torture or extrajudicial killing under color of foreign law shall be liable "to that individual" or "to that individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350 note § 2(a). The question in this case is whether the term "individual" in that statute means what it almost invariably means in ordinary and legal usage—a natural person or human being. That question all but answers itself. While "person" often encompasses corporations and similar entities, "individual" does not. Indeed, Congress replaced the word "person" in an earlier draft of the statute with "individual" precisely to exclude organizations from liability.²⁴

This opening paragraph simply identifies the relevant statute and states the question before the court. But in doing so, the author primes the

24 Brief for Respt. Palestinian Authority, et al., *Mohamad v. Palestinian Authority*, 2012 WL 293720 at 1–2.

reader to assume the answer to that question. The issue is posed as one of whether “individual” means what “it almost invariably means in ordinary and legal usage. . . .” A legal reader will likely intuitively extract the author’s implicit argument: this is a simple case of statutory interpretation. The tone is almost apologetic. It is as if the author, in writing “the question all but answers itself” is telling the Court, “I’m sorry you even have to deal with this issue, but the Appellants are insistent in their misguided assertion.” The reader is primed to read the rest of the brief with an expectation that resolving this dispute will require nothing more than applying familiar statutory interpretive tools—indeed, the plain meaning of “individual” is so obvious that the Court will not need to look much further than the dictionary to decide the case.

We also know from this first paragraph that this a story about the law and not the parties. The first paragraph identifies the applicable statute, but the parties to this dispute are completely absent. This does not mean the author is not telling a story. Rather, the author has chosen to develop the storyline of the law. That storyline is of course consistent with the thesis that this is a simple statutory interpretation problem. In this genre, the protagonist is the legislature (in this case, the Congress). As in the *Inception* trailer, the protagonist is introduced, though not fully developed. In the second paragraph, the author introduces the main character of this story:

The TVPA brings certain international human rights violations within the civil jurisdiction of U.S. courts. Mindful that it was creating a private cause of action with extraordinary extraterritorial reach, Congress proceeded carefully, tailoring the statute to achieve a limited but important purpose. By imposing liability on the responsible “individual,” the Act prevents human rights violators from seeking safe haven in the United States. But by precluding suit against organizations alleged to be responsible for the individual’s conduct (often the state itself), Congress limited the risk of international discord and potential interference with the Executive’s conduct of foreign policy. Giving “individual” its ordinary meaning respects the careful balance Congress struck. The judgment of the court of appeals should accordingly be affirmed.²⁵

This second, and final, paragraph, introduces us to a Congress that is both thoughtful and deliberate. It is “[m]indful” and “proceeded carefully” in enacting the statute and “limited the risk of international discord” and “struck a careful balance” between competing concerns. Deconstructing

²⁵ *Id.* at 2.

the Preliminary Statement in this way may raise some skepticism—this does not sound like the Congress that has an approval rating hovering under ten percent. But the reader is not likely to deconstruct the Preliminary Statement. The Preliminary Statement is only introducing what will be explained in full detail in the Argument. The reader is looking only to be oriented to the author's argument. Now the stage is set and the reader is primed to look at the ensuing Argument in light of the theme established in the Preliminary Statement: this is a familiar statutory-interpretation issue that really isn't even very interesting.

What remains missing in the Preliminary Statement is any mention of the *parties* to this dispute. This is clearly by design—this is a story about statutory interpretation. The author wants the reader to be primed for a simple and familiar statutory analysis. All this case requires is an understanding of the law. Once that understanding is clear, the application of the law to the facts becomes quite simple. It is *so* simple, in fact, that we don't even need to bother with explaining the factual context in which this lawsuit is set.

A more cynical reader may conclude that the parties are left out of Preliminary Statement because the underlying facts are unfavorable. This is certainly true. The plaintiffs in this case are the family members of a U.S. citizen who was taken off the streets of Palestine and then tortured and killed by agents of the Defendant, the Palestinian Authority. Rather than try to deal with these facts, the author sets out a storyline that makes them simply irrelevant. In the author's story of statutory interpretation, all that matters is that the protagonist, *Congress*, did not intend for organizations such as the Defendant to be answerable for the offenses of their agents. Simply put, we don't care what the Defendant's agents did. Without expressly making this point, the Preliminary Statement implicitly marginalizes the underlying facts because, after all, in a simple story of statutory interpretation, the underlying facts should not guide our interpretation.

Early in my legal career, I developed a practice of starting every persuasive document with the sentence "This is a simple case." I did this in an effort to show the reader that whatever legal entanglements the other side tried to create, the pending legal dispute could really be reduced to one or two fundamental points. Almost always, those fundamental points were also based upon concepts that were familiar to my reader. In effect, I was trying to establish a genre-style perspective along the lines of "this is just a statute of frauds case," or "the parties had a meeting of the minds, and hence a valid contract." I stopped this practice when, after reviewing a 40-page brief in an arbitration case, my boss, perhaps growing weary of my oft-repeated opening line, said, "Steve, this is *not* a simple case!" He was right. Not every case can be reduced to a simple and familiar legal or

factual concept. But for those cases that can, a genre-style Preliminary Statement will prime the reader to expect a straightforward and convincing Argument.

B. Focus on the story

1. Story trailers

The story trailer presents a more narrowly focused look at a movie than the genre trailer. It identifies the central characters and often provides insight into the protagonist's goals and the obstacles he faces in overcoming them. The theme of a genre trailer is, "Here's a kind of story that you are familiar with, but with something different from other stories of this type." A story trailer, on the other hand, has a theme of, "Here are characters struggling to overcome challenges. Through this movie, you will get to understand and empathize with these characters."

A good example of a story trailer was made for the film *Being Flynn*.²⁶ The trailer opens with a voice-over: "Don't worry, you're in the hands of a masterful storyteller. America has produced only three classic writers: Mark Twain, J.D. Salinger . . . and me." We immediately see that this character's perception of his writing ability is not yet shared with a large reading audience. He is an aging, struggling writer—and apparently struggling not just with writing, but with life generally. The trailer then switches the point of view from the writer to his twenty-something son: "This is not my father's story. Well, it is, but he's not telling it . . . I am." In the opening 30 seconds we learn that this is a movie about father-son relationship.

Once the two leading characters are identified, the trailer then reveals a bit more of the movie's plot. The son gets a job in a homeless shelter. The estranged father shows up there. We learn that the son, Nicholas, has demons of his own and is struggling to come to terms with being his father's son. The trailer suggests that the son, through telling his father's story, is really engaged in a classic Man Against Self conflict.²⁷ His mother has died. His father has been a failure as a writer, a husband, and a father. Yet we also get a glimpse of the father that suggests he has a deeper understanding of his place in life (and his son's place as well). The trailer ends ambiguously optimistic, with the father telling Nicholas, "We were put on this world to help other people, Nicholas. It's a wonderful life; it's a masterpiece."

26 *Being Flynn* Official Trailer #1 (available at <http://www.youtube.com/watch?v=NHZfQDgkqIM>).

27 See Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Statements*, 32 Rutgers L.J. 459, 469 (2001).

In two-and-a-half minutes, the trailer has revealed the essence of the film's story. We know the protagonist, Nicholas, and the conflicts he apparently faces—his father's failures, his own anger, and his own fear of becoming his father. We also know that his apparent goal is to come to understand his relationship with his father so that he can move on with his life in a healthy way.²⁸ By revealing the framework of the story, the trailer allows the audience to build empathy with Nicholas. We care about him and will now want to see the movie to understand the details of this story and how Nicholas ultimately fares.²⁹

The trailer uses some specific techniques to allow the audience to empathize with the central characters. For example, the trailer tells the story from the point of view of the characters. The voice-overs that begin the trailer are first the father, then the son, Nicholas. We learn that the father sees himself as a great writer whose greatness will be discovered "soon, very soon." While the image of him driving a cab or handing out flyers shows us that he may likely be delusional, we can immediately understand how he sees the world. The trailer also reveals the story from the point of view of Nicholas—the protagonist of the story—that of his missing father, of his mother who died, of his own emotional struggles. Rather than be informed by an omniscient narrator, we are exposed only to the perceptions of the characters themselves.

This is different than the point of view of the *Inception* trailer, in which there is no voice-over. We see characters talking to each other. We, the audience, are the omniscient observers, watching the action unfold. The characters exist to reveal what that action is. In contrast, in the *Being Flynn* trailer, we hear the characters' thoughts; we see the world through their eyes. This is more than point of view: in seeing the world through another's eyes we identify with him. When Nicholas first sees his father in the homeless shelter, the audience also sees his father from Nicholas's point of view—looking through wire mesh screen at the face that abandoned him (*now us*) so long ago. Each scene that follows brings us a deeper understanding of Nicholas and his challenges—his anger towards his father, his own dark writing, his fear of being like his father. We know that this is not a film that will allow us to remain detached observers. In this movie, we will feel what Nicholas feels.

28 There's also a woman involved, though we don't learn much about her in the trailer.

29 Though building audience empathy was the apparent target of the trailer, it seems to have missed the mark. Despite its excellent story trailer, the movie did not find economic success. As of the time of this article, the film's domestic gross sales were about \$550,000. In contrast, Marvel's *The Avengers* had grossed over \$617 million. The lesson here, which should be obvious, is that effectively setting the stage is no guarantee of success.

The *Inception* trailer purposely keeps us removed from the characters' point of view. This is consistent with creating the theme of familiarity—the essence of this story is that we have seen it before. On the other hand, the *Being Flynn* trailer purposely brings us closer to the characters. It allows us to see the world as Nicholas sees it. The trailer's theme is not that this is a “coming of age” genre film. Rather, its theme is “this is Nicholas's story.” The narration, the camera angles, the building of the scenes all work to establish this emphasis on the story over the genre.

2. The parties' story preliminary statement

It may seem that there is no place for such overt emotional telling of our client's story in legal persuasion. Our audiences are trained to value logic and to be skeptical of obvious emotional appeals. Even if our client has been outrageously wronged, we will not prevail unless we can connect that wrong to a logical legal basis for recovery. However, the point of telling the story of the parties is encourage our reader to empathize with our client, to see the world as our client sees the world. When we do that successfully, our reader is primed to see the legal dispute form our client's perspective. That in turn, will make our reader more receptive to our client's argument.

Of course, to persuade a legal audience we must show how our client's story fits within the legal framework of our particular dispute. However, in the Preliminary Statement, we do not need to reveal our entire Argument. Instead, we establish the theme—priming our audience for what will follow. When our client's story is compelling (and clients' stories are almost always compelling, at least to themselves), we should emphasize that story and do so first in the Preliminary Statement.

The Petitioner's brief in *Turner v. Rogers* provides a good example of the client-story Preliminary Statement:

Petitioner Michael Turner was incarcerated for twelve months after a South Carolina family court held him in civil contempt of a court order to pay child support for respondent Rebecca Price's (now Rogers') minor child. The contempt order provided that Turner could purge his contempt and gain release from jail if he paid his arrearage in full (nearly \$6,000), but Turner, who is indigent, was unable to pay, and he served the full sentence.

Turner was not represented by counsel at the contempt hearing, nor did the court advise him of his right to counsel. Had counsel been appointed, Turner could have made the evidentiary demonstration and legal arguments necessary to establish that he could not pay the thousands of dollars he owed, which, under South Carolina law and this Court's decisions addressing civil contempt, would have been a complete

defense precluding his incarceration. Instead, Turner was left to defend himself (to no avail) and was jailed, in effect, for being too poor to pay.³⁰

In the first paragraph, we are immediately introduced to the story's protagonist, Michael Turner. We learn the essence of the story that is at the heart of this case—Turner could not pay his child support and so he was incarcerated for twelve months. The second paragraph adds that he was also too poor to afford counsel and had he had that counsel, he could have made the apparently uncontested argument that one cannot be incarcerated for “being too poor to pay.”

Note that these paragraphs are not laden with emotional appeals. They do not include over-the-top adjectives. They do not contain pleas to abstract notions of “justice.” Nonetheless, they do attempt to strike an emotional chord with the audience. Mr. Turner served a year in jail because he was poor. Showing the reader these facts is much more effective in creating an emotional response than merely telling the reader that Mr. Turner was treated unfairly.

Though not as overtly emotional as the *Being Flynn* trailer, these paragraphs do subtly present Turner's dilemma from his point of view. We know from the first paragraph that Turner is so poor that he spent a year in jail instead of paying \$6000. This creates a stock structure in the reader's mind. Most readers would, at least implicitly, make some assumptions about Turner. He probably has little education (surely an educated person would have some way of scraping together a few thousand dollars to avoid a year in jail). Turner's educational deficit itself suggests that he is not well-versed in the law or capable of adequately defending himself. From his point of view, the court is demanding that he pay money that he does not have and cannot get. His only choice, as far as he can see, is to go to jail.

The structure of the second paragraph reinforces this stock image of Turner. Note that the first sentence is fairly short and straightforward—he was not represented and the court did not advise him of his right to counsel. The third sentence is similarly direct: Turner is too poor to pay. However, the *middle* sentence—the one that explains why he needed legal counsel—is considerably more complex. First, it is 49 words long. It includes terms like “evidentiary demonstration” and “complete defense precluding incarceration.” It has two dependent clauses. It nearly takes a lawyer to understand it. Writing *this* sentence in this way, juxtaposed against sentences that short and easily readable, reinforces the point that a poor, simple man like Turner cannot be expected to represent himself. The author creates empathy for Turner's dilemma—lets the reader

30 Brief for Petr., *Turner v. Rogers*, 2011 WL 49898, at 2–3.

appreciate the challenge he faced—without ever expressly telling the reader, “My client was too ignorant to defend himself.”

The Preliminary Statement continues:

This twelve-month sentence was neither the first time nor the last that Turner has been incarcerated for failure to pay child support without the aid of counsel. Because Price had received public assistance benefits, she assigned her right to child support to the South Carolina Department of Social Services (DSS), and the child-support enforcement proceedings against Turner became subject to automatic procedures carried out by DSS and the family court. Each time Turner’s account fell into arrears, the court was required by law automatically to issue a rule to show cause why Turner should not be held in contempt. Turner has been incarcerated in this manner several times, and so long as he continues to owe unpaid child support, he will continue to face automatic contempt proceedings and the threat of incarceration. Indeed, Turner is presently in jail again for failure to pay child support.

This third paragraph continues to explain Turner’s story. He is repeatedly incarcerated because he cannot pay his child support. In fact, we learn the rather startling fact that at the time of the writing of the brief, he is in jail yet again for failure to pay child support.³¹ As with the opening two paragraphs, this paragraph tells this simple story in a straightforward manner. It is free of hyperbole. The theme of the brief is clear: Turner is in jail because he is too poor to afford a lawyer.

Only in the final paragraph does the author reference specific authority that supports Turner’s position. By that point, the reader is primed—Turner has been wronged by a system that effectively criminalizes poverty:

In the decision below, the Supreme Court of South Carolina rejected Turner’s argument that he was constitutionally entitled to appointment of counsel at the contempt hearing.

Notwithstanding this Court’s decisions that have found a right to counsel in both criminal *and* civil proceedings that carry with them the “awesome prospect of incarceration,” *In re Gault*, 387 U.S. 1, 36–37 (1967), the court held that the right to counsel applies only in *criminal* contempt proceedings. In reaching that conclusion, the court relied on the assumption that a civil contempt sanction is “conditional” and may be avoided through compliance with the underlying court order. But

³¹ This fact does raise a rather obvious question: Turner clearly has legal counsel at this point. Why are his current lawyers unable to keep him from returning to jail if the reason he was sent to jail originally was because he did not have legal counsel? Alas, neither the Preliminary Statement nor the rest of the brief answer this question.

whether Turner *in fact* had the ability to avoid incarceration by complying with the child support order—and thus whether he could be sentenced to jail for coercive purposes in a civil proceeding at all—was the precise question before the family court. As a matter of fundamental fairness, Turner should have been afforded the assistance of counsel to show that he could not. The state court’s contrary decision cannot be reconciled with this Court’s teachings on the right to counsel, the special character and purpose of civil contempt, or the requirements of due process. This Court should reverse the judgment below.³²

But of course, a legal reader will not be persuaded by this alone—she needs the law. The author provides a brief glimpse into the theory of the case—the holding of *In re Gault* should be clarified to require legal counsel in civil contempt proceedings. This connects the story of the parties, i.e. Turner’s story, to the legal storyline that supports the author’s argument. The first three paragraphs told Turner’s story and gave the reader reason to *want* to rule in his favor. The final paragraph gives the reader the legal hook that explains *why* the reader should rule in his favor. Having primed the reader by establishing the Argument’s theme, the author is now ready to move to the “feature presentation” that will more fully blend that theme with the theory of the case in the Argument section of the brief.

C. Focus on the star

1. The star trailer

The final type of trailer uses an even closer focus than the story trailer. The Star Trailer promotes a film through emphasis on a particular person associated with the film—an actor, director, or possibly a producer or screen writer—whose previous work has established her reputation with the audience. These trailers count on the audience to assume that if it liked the star’s previous work, it will like the star’s most recent work as well; the trailer theme is, “If you liked me before, you will like me again.” Obviously, this works most effectively when the star is well-known and has a significant body of work that has appealed to the target audience. Indeed, some actors and directors have achieved such notoriety as almost to have become a genre themselves—Meryl Streep, Jack Nicholson, Alfred Hitchcock—these types of stars have dedicated followers who will be drawn to any of their movies, whatever the genre and whatever the story might be. That, of course, is the point of a star trailer—to attract an

32 *Id* at 3–4.

audience by the mere association of the star to the movie. A good example of the star trailer is a trailer³³ made for *The Descendants*,³⁴ a film starring George Clooney.

The trailer starts with a close up of the immediately recognizable George Clooney running down the street with an intense look on his face. A quick cut to a longer shot reveals that he is running in flip flops—and looks pretty silly doing it. We learn that this story takes place in Hawaii, but that there is trouble in paradise. Clooney’s character is facing a struggle with his two daughters. There’s a surfer dude of a boyfriend that Clooney (and another, much older, man) apparently don’t care for. We don’t learn much more about the story. Clooney’s character is not referenced by name, and neither are any of the other characters. This appears to be a family drama that “will “drive you to tears” and “have you laughing seconds later.”³⁵ But the details of what is at the center of the drama remain unclear.

What is not unclear is that this is a film starring George Clooney. Every scene in the trailer has either Clooney in it or his voice speaking over it. In less than a minute we see him looking worried, perhaps panicked, as he runs; experiencing heartache as he looks at a picture of his wife; appearing intensely distrustful of his daughter’s boyfriend and downright goofy as he peers over a hedge. Thus, the theme is established—in this movie George Clooney will display his remarkable acting ability as he plays a character who experiences the gamut of movie emotions. The viewer knows that if he liked previous films starring George Clooney, he can expect more of the same mix of heartfelt emotion and subtle humor in this latest effort.

The star trailer is all about trust. The trailer is counting on the audience to trust its connection with the featured star. It also may be the most risky, for it is putting all its proverbial eggs in one basket—counting on the drawing power of the star to attract the audience without selling the movie’s genre or story. If that star has lost the audience’s trust, the trailer will fail. Of course, for Hollywood’s biggest stars, that risk may be minimal. George Clooney can draw a significant audience no matter what kind of movie he makes. Since 1987, he has made 29 movies, averaging \$53 million in gross sales. It is understandable why the trailers of his movies are often more about him than about the story.

³³ As with many films, there were multiple versions of the trailer for *The Descendants*. All of them are fairly classified as star trailers. The shorter Trailer 2 is the clearest example of a star trailer.

³⁴ *The Descendants* (2011) Trailer #2 (available at <http://www.youtube.com/watch?v=d-3FWLv4-wA>).

³⁵ Peter Sciretta, SlashFilm.com (quoted in trailer, *supra* note 35)

2. The star preliminary statement

The star trailer probably has the least common analog in legal writing. Whereas Hollywood may have its brightest stars, most legal disputes do not. In a legal dispute, there are two obvious potential stars—the client and the lawyer. Neither, however, is particularly well-suited to the star treatment.

Even in high-profile celebrity cases, the participants’ fame will usually not, by itself, establish a strong sense of trust in the brief’s reader. Legal disputes are not about the parties independent of the narrative context in which they find themselves. A moviegoer may be persuaded to attend a movie just because his favorite actor has a starring role. A judge, on the other hand, is not likely to be persuaded to rule in favor of the plaintiff just because his name is George Clooney. Or Bill Clinton. Or Lance Armstrong. In the courtroom, we need more than the star’s reputation to persuade our audience.

Of course, the law has its own stars—high profile lawyers who have established their reputations as trusted members of the bar. But even these legal stars cannot write a brief with the explicit theme of, “Trust me—you liked my argument in earlier cases, so you will like this one too.” Though a lawyer’s reputation will certainly play an implicit role in her effectiveness as an advocate, it is not something that the lawyer can explicitly exploit.

If neither the client nor the lawyer can be an effective star of a Preliminary Statement, it might seem that there is no place at all for the Star Preliminary Statement. However, ours is a government of laws, not men.³⁶ Thus, if there is a place for the star treatment, it may be in recognizing the true star of the courtroom—the law itself. The appropriate place for a star preliminary statement may be when the case concerns a well established—indeed venerated—legal principle. A good example of this is found in the State Respondents’ brief in the Affordable Care Act case, *United States Department of Health and Human Services v. Florida*.

Respondents in this case were challenging the constitutionality of the Affordable Care Act, asserting that Congress went beyond its powers under the Commerce Clause. The “star” of their Preliminary Statement was the Constitution itself:

The individual mandate rests on a claim of federal power that is both unprecedented and unbounded: the power to compel individuals to engage in commerce in order to more effectively regulate commerce. This asserted power does not exist. If Congress really had this

36 John Adams, *Novanglus Letter No. 7* (1775) (reprinted in *The Political Writings of John Adams: Representative Selections* 38, 44 (George A. Peek, Jr. ed. 2003)).

remarkable authority, it would not have waited 220 years to exercise it. If this power really existed, both our Constitution and our constitutional history would look fundamentally different. We would not have a federal government with limited and enumerated powers, or States that continue to enjoy dignity and residual sovereignty. The extraordinary power that the federal government claims here is simply incompatible with our founding document.

The Constitution protects and promotes individual liberty, while the mandate’s threat to liberty is obvious. The power to compel a person to enter into an unwanted commercial relationship is not some modest step necessary and proper to perfect Congress’ authority to regulate existing commercial intercourse. It is a revolution in the relationship between the central government and the governed.³⁷

The opening line of the Preliminary Statement established the essence of the Commerce Clause argument: Congress cannot compel individuals to engage in commerce. The rest of the first paragraph then shifts to highlight that Congress has not claimed such power in the 220 years of its existence. The legal theory established, the second paragraph introduces the star of the brief—the Constitution and its guarantee of liberty. This theme continues through the remaining two paragraphs of the Preliminary Statement:

The Constitution grants the federal government only limited and enumerated powers and reserves the plenary police power to the States. There is nothing limited about the federal power asserted here. Given the breadth of the modern conception of commerce, there is almost no decision that Congress could not label “economic” and thereby compel under the federal government’s theory. There is nothing left of the residual authority reserved to the States if Congress really has the power claimed.

Finally, the Constitution divides and limits power to ensure accountability. Legislation, especially legislation raising taxes, is supposed to be difficult to pass. Those subjected to costly new regulations are expected to object. But if taxes can be disguised as mandates to enter into unwanted transactions and the regulated enticed by the promise of expanded business via those compelled transactions, the normal democratic process cannot perform its vital and intended limiting function.

By checking this first assertion of this unbounded power, this Court will endanger no other legislation. Nor will it imperil health care policy,

³⁷ Brief for State Respondents on the Minimum Coverage Provision, *U.S. Dept. of Health & Human Servs. v. Fla.*, 2012 WL 392550, at 1.

as all agree that there are ample constitutional—though perhaps not politically feasible—alternatives to the mandate. However, by making clear that this uncabined authority is not among the limited an enumerated powers granted the federal government, this Court will preserve our basic constitutional structure and the individual liberty, state sovereignty, and government accountability it guarantees.³⁸

The focus here is on the threat to Constitutional principles of the divided and limited power of the federal government. The final paragraph makes the point clear: the specifics of this particular story are not what is at stake here. This is not a challenge to the health care policy that underlies the Affordable Care Act. No, this case is about protecting the Constitution, the greatest star in our legal constellation. Recognizing the constitutional limits of Congress is necessary to preserve individual liberty, state sovereignty, and government accountability.

V. So: Lessons To Be Learned from Movie Trailers

A. Find your theme.

Though good movie trailers are as varied as the movies they promote, they all have one thing in common: they capture the essence of the movie. Trailers create first *impressions*. That is, they show the audience how the movie *feels*—appealing to the audience on an emotional level so that the audience will *want* to see the movie.

A good Preliminary Statement will do the same thing—connect to the audience in a way that makes the audience want to keep reading. Of course, this is sometimes easier said than done. For many cases, finding a compelling theme can be challenging. Some legal disputes just don't naturally evoke emotional responses. However, the harder it is to see a legal dispute's underlying emotional appeal, the more important it is to find it. Fortunately, there are a places one can look for the theme of the case.

1. Review the argument.

The easiest place to find a theme is where you last left it. Go back through the Argument, looking for the recurring, essential principle that connects the disparate ideas of the Argument. Many writers have, at best, only a vague sense of their theme before they start writing the Argument. However, as they work through the drafts of the Argument section, the theme becomes clearer. Sometimes, that theme turns out to be something

38 *Id* at 1–2.

completely different from the writer's initial assumption as to the appropriate theme. Consequently, we should always wait to write the Preliminary Statement until after the Argument and Statement of the Case have been completed.

2. Look for the leading storyline.

Every lawsuit has three storylines: the story of the parties; the story of the law; and the story of the lawsuit's procedure. Usually one of these storylines will be the most compelling for your client. For example, the *Mohamed* Preliminary Statement brought the focus to the story of the law—this was a simple and familiar case of statutory interpretation. On the other hand, the *Turner* Preliminary Statement was almost all about the story of the parties—and in particular Turner himself. Both briefs necessarily developed the law as well as explained how the law applied to their client's situation. But both kept the focus of the Preliminary Statement on the most persuasive of these storyline.

3. Find the hero's story.

Every story needs a protagonist—the hero that can evince empathy in the reader. Most of the time, the hero of our legal story is our client. Certainly, when we focus on the storyline of the parties, we will want to make sure our reader sees the case from our client's point of view. But developing an affective theme requires more than just explaining who our client is. We also need to develop the other aspects of her story—her goal and the obstacle keeping her from that goal. Turner, our impoverished Everyman, just wanted to get his life back to normal and stay out of jail. However, the system that demanded money from him that he did not have kept working against him. The Preliminary Statement, at least implicitly, set out all the elements of Turner's story to develop the theme of an Everyman struggling against the power of the state.

B. Keep it short.

A movie trailer has just 150 seconds to get its message across. If a Preliminary Statement is to have a similar ratio to the brief it is "selling," it should not be more than two percent of the total brief. For a 50-page brief, that's one page. The most effective Preliminary Statements come close to matching this ratio.

Many of us have difficulty saying anything in less than a page. But remember, the purpose of a Preliminary Statement is to establish the theme. This does not require surveying one's entire argument. It may not even require introducing the central characters of legal dispute. Instead, a writer should strive to establish the theme, or feel, of the brief. Just as the

Inception trailer established the action-genre theme of the movie without exploring the main characters, or introducing the key plotlines in any detail, so too can a good Preliminary Statement establish the soundness of an argument without revealing all its subparts.

The Preliminary Statement from *Mohamed* illustrates how much can be told in just a few paragraphs. The key sentences come right at the beginning, early in the first paragraph: “The question in this case is whether the term ‘individual’ in that statute means what it almost invariably means in ordinary and legal usage—a natural person or human being. That question all but answers itself.”³⁹ These two sentences establish the theme of brief—this is a simple statutory-interpretation issue. The tone evokes a bit of annoyance at even having to address the question. The reader is primed for what will follow. That is the goal of a Preliminary Statement. There is nothing more that need be done.

C. Underpromise and overperform

Most of us have had the experience of being excited about a coming attraction after seeing the trailer, only to be disappointed by the film that couldn’t live up to the promise of the trailer. For example, the *Descendants* trailer suggested that movie would have the audience crying one minute and laughing the next. It includes several humorous visual clips, including George Clooney doing his silly run and slowly peering over a hedge. From that, one might expect the film to be a roughly even mix of drama and comedy. If so, one would be wrong. The film is sad at the beginning, sad in the middle, and sad at the end. Though there are small bits of comic relief, this is not a comedy. Or even a “dramedy.” It’s pretty much sad throughout. Now, to be fair, the trailer was primarily designed to appeal to George Clooney fans, and in that sense it delivered as promised. Clooney is in nearly every scene. It was, however, misleading in suggesting that one could expect a lot of laughs. This is not to say it is a bad movie. It just isn’t what the trailer suggested.

For the movie producer, this type of misleading trailer may be of only slight concern. After all, we’ve paid our money to see the film, so at least the short-term goal has been reached. Although the movie producer may risk some long-term reputational damage, not many of us will connect the misleading trailer with a future movie from the same producer. At least, not until this becomes a repeated experience. Lawyers are not so lucky.

If a Preliminary Statement promises more than the brief can deliver, there is likely to be a more significant negative consequence. Our reader,

³⁹ See Brief for Respt. Palestinian Authority, et al., *Mohamad v. Palestinian Authority*, *supra* n. 24.

once primed for a good read, is likely to react badly if that good read never appears. In fact, our reader is likely to see that failure as undermining the merits of the entire brief. And, of course, a Preliminary Statement makes an impression not just about the brief, but about the brief's author. At the very least, that impression should be that the author can be trusted to deliver on the story promised in the Preliminary Statement.

