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Look Behind the Quotation for the Rationale

Supply reasons even if your quoted source did not

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Brief writers love to quote treatises and judicial opinions because they carry weight. In fact, brief writers who find a credible source stating a conclusion they like may quote a statement even if it isn't backed by a rationale. If you are tempted to do this, think about it. Try to deduce the rationale that the source did not supply.

Suppose a contract requires the parties to make "reasonable efforts" to perform but does not define reasonable efforts. Because you contend the other party made no serious effort to perform, you want "reasonable efforts" to be a tough test and the other party's nonperformance to constitute a breach.

A treatise on contract law characterizes the reasonable efforts test as "more onerous than that of good faith." With this statement, you figure you have struck gold. The language is directly on point. You plan to drop the quotation from the treatise right into your draft brief for the bench trial, adding emphasis to make sure the court doesn't overlook the felicitous phrase "more onerous." This is the excerpt

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from the treatise as you plan to quote it:

The "reasonable efforts" test requires a party to make such efforts as are reasonable in light of that party's ability and the means at its disposal and of the other party's justifiable expecta-



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tion. Such a duty is "more onerous than that of good faith."
[Citation; emphasis added].

A "more onerous" duty sounds like a tough standard, but the treatise doesn't say why the reasonable efforts test is more onerous than the test for good faith. Initially, you aren't concerned because you have faith in quotations. You have been quoting since the sixth grade. Your sources knew more than you did then, and you suppose they know more than you do now.

This may be true, but sources do

not always explain what they know. If the source you wish to quote doesn't give a reason for its conclusion, try to fill the gap. Readers are persuaded more by reasons than by conclusions.

The first place you will probably look for support — because of how you were trained — will be the citations in the footnote to the "more onerous" statement in the treatise. Sometimes the cited cases provide a rationale; sometimes they don't. Assume that in this example, the cases merely repeat the "more onerous" statement, providing no rationale. One or two cases even quote the treatise, but none provides a rationale. Thus, you are left to your own devices.

Let's look at the reasonable efforts test. The treatise says that the test requires a party to make such efforts as are reasonable in light of (a) that party's ability and the means at its disposal and (b) the other party's justifiable expectation. These elements do not seem onerous. They are premised on the relatively benign, very flexible terms "reasonable" and "justifiable." Why, then, would the reasonable efforts test be more onerous than the test for good faith?

Think about it (and cover the next sentence if you wish to test yourself).

The reasonable efforts test is more onerous than the test for good faith because the reasonable efforts test is "objective." It is tied to a minimum level of acceptable behavior (e.g., what is "reasonable") regardless of the actor's intent, whereas good faith is tied

to the actor's intent. One can fall short of reasonable efforts even though one acts in good faith.

In the brief, you could follow the statement from the treatise with the following rationale:

The reasonable efforts test is more onerous than the good faith test because it is objective, not subjective. One can fall short of reasonable efforts even though one acts in good faith.

You would then tie that generalization to the facts of your own case, showing how, despite the other party's claimed good intentions, it failed to meet a reasonable standard of performance.

A Second Rationale

Something else is worth noticing about the test — it has two parts. The definition examines not only whether the actor's efforts were reasonable but also whether the nonactor's expectations were justifiable. This gives a person invoking the test “two bites at the apple” — two ways in which the test may not have been met.

You can characterize the test as having dual elements by adding the following sentence after your discussion of objective and subjective:

Not only is the reasonable

efforts test objective rather than subjective, but it is a function of two variables: what the performing party is reasonably able to do and what the nonperforming party justifiably expects.

The “not only...but also” construction suggests that “reasonable efforts” is a difficult test because the party looking to establish that it made reasonable efforts must not only meet an objective rather than a subjective test, but it may also have to fight on two fronts. The party may have to contend not only that its behavior was reasonable but also that the other party's expectations were unjustified. With this supplementary sentence, you reinforce the reader's view, which you molded a few sentences earlier, that the test is tough.

All you did to get to this point was think. You examined your material — the quotation from the treatise — and you made connections and deductions, just as you would for a set of facts. Your observations added value, just as you would add value by characterizing a time interval and events (e.g., Instead of the bland, “On June 15, such and such happened, and on July 15, such and such happened,” you would say, “On June 15, such and such happened. Only one month later [thus characterizing the time interval], a similar event took place” [thus characterizing the event, which you then date and describe.]).

Look to add value beyond mere

hunting and gathering. After you collect material, examine it, understand it, and explain it. Don't ask readers to take anything on faith. Show them the reason.

Puzzler

How would you tighten and sharpen the following sentence?

Differences over valuation will go to arbitration because it is a less expensive way of resolving disputes than litigation.

Shorten “differences over valuation” to “valuation disputes” and reduce “less expensive way of resolving disputes” to “cheaper than.” “Resolving disputes” is understood because that is what happens in litigation and arbitration.

The new version: Valuation disputes will go to arbitration because it is cheaper than litigation.

If you have any concern that the negative connotations of “cheaper” could reflect poorly on the arbitration or on you, then use “less expensive.”

Alternate version: Valuation disputes will go to arbitration because it is less expensive than litigation. ■