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Be Candid But Selective in Describing Case Holdings

As with all other aspects of persuasive legal writing, take control of the material

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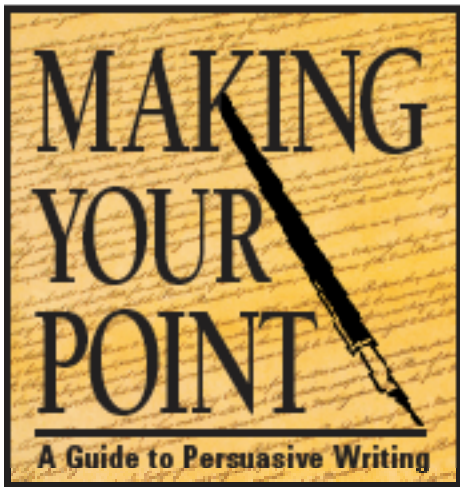

Novice legal writers tend to quote liberally, linearly and sometimes indiscriminately from judicial opinions. They are impressed by the stature of the courts; they lack the confidence to put thoughts into their own words; and they are afraid of leaving anything out. Consequently, we see a lot of long block quotations in their work.

For essentially the same reasons, novices tend to over-report what courts hold.

Assume, for example, that a writer is looking to persuade a court that parties had a sufficient meeting of the minds to form a contract. The writer intends to rely on a reported case where the court found a contract validly formed for three reasons, only one of which — agreement on price — is present in the writer's case.

An inexperienced writer would likely report all three reasons even though price was the only factor relevant to the writer's case, whereas an experienced writer, more confident and more attuned to the benefit of streamlining, might say, "The court in *Smith v. Jones* found the contract to be valid for, among other reasons, the parties' having agreed on a firm price."

The wisdom of the selective approach depends, of course, on the facts. For the writer to dismiss factors in the cited case with the phrase "among other reasons," agreement on price has to be sufficient by itself to establish a meeting of the minds, or the writer's case has to include enough other factors to satisfy the test. It's a judgment call, but one to be embraced, not avoided.

Sometimes You need To Be Inclusive

Sometimes you do have to include the full basis for a court's opinion. Suppose, for example, that an appellant challenging a trial court's interpretation of an administrative agency's regulation seeks to supplement the record on appeal with a position paper written by the agency after the trial court ruled. The appellant contends that the position paper contradicts the trial court's interpretation of the regulation. As counsel for the respondent, you oppose the motion.

A Rule of Court establishes a two-part test for determining whether a document will be accepted in supplementation of an appellate record: (1) whether the party seeking to supplement the record was aware of the information at the time of trial, and (2) whether the evidence if included would likely affect the outcome of the appeal.

Because the agency paper became available only after trial, you cannot argue that it should have been introduced below. You intend to argue that the paper is irrelevant because it didn't actually interpret the regulation; therefore, it cannot affect the outcome of the appeal.

You found only two cases in which a motion to supplement the appellate record was denied — *Smith v. Jones* and *ABC Corp. v. XYZ Co.* In both cases, one of the reasons for denial was that the proffered information was available to the litigants. The other reason was that the evidence, though relevant, carried little weight.

The facts in the two cases are nothing like the facts in yours, so you limit your case summaries to parentheticals:

> *See Smith v. Jones* [Citation] (denying motion to supplement record where defendant was aware of evidence at time summary judgment was granted, and evidence was not likely to affect outcome of appeal in view

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> of other, undisputed evidence); and see *ABC Corp. v. XYZ Co*. [Citation] (denying motion to supplement record because information was available to appellant at time of trial, and evidence would not alter final decision).

Something about the parentheticals bothers you. Both holdings depend on the party having had access to the information and thus having dropped the ball. In your case, the adversary didn't drop the ball. The proffered writing wasn't created until after trial. This distinction is obvious, and the court won't miss it.

You are uncomfortable including the dropped-the-ball factor in the parenthetical, but you can't omit it. The omission would create an easy target and thus give the other side a way to distinguish a case that is actually helpful to you.

The problem can be solved with "not only…but also":

> See *Smith v. Jones* [Citation] (denying motion to supplement record not only because defendant had evidence at time summary judgment was granted but also because evidence was not likely to affect outcome of appeal in light of other, undisputed evidence); see also *ABC Corp. v. XYZ Co*. [Citation] (denying motion to supplement record not only because information was available to appellant at time of the trial but also because evidence would not alter final decision).

With this adjustment, you accomplish two things. You acknowledge that in the cited cases, the party seeking to supplement the record had access to the evidence during the proceedings below, which is not so in your case. This preserves your integrity.

You also focus the reader's attention on the other ground for denying supplementation of the record, namely, that the proffered evidence would not affect the outcome of the appeal. In this way, you report all the reasons given by the courts for denying supplementation of the record, yet you shape the case description to derive maximum value from the holding.

You are still concerned, however, that the cited cases did not deal with irrelevant evidence. The rejected evidence was deemed de minimus in value, not irrelevant.

Solving this problem is easy but requires two steps: a small addition to the parenthetical and a short supplemental paragraph. The addition to the parenthetical is that the proffered documents were de minimus as against the rest of the evidence. That is why the documents were not expected to affect the outcome of the appeal:

> See *Smith v. Jones* [Citation] (denying motion to supplement record not only because defendant had evidence at time summary judgment was granted but also because evidence of de minimus weight was not likely to affect outcome of appeal in light of other, undisputed evidence); see also ... [same addition to *ABC Corp. v. XYZ Co.*].

Now you can turn this distinction to your advantage by adding a paragraph to the effect that irrelevant evidence is even less meaningful than evidence of de minimus weight.

> The evidence proffered in *Smith v. Jones* and *ABC Corp. v. XYZ Co.* was excluded in part because it was de minimus as against the rest of the evidence. Here, the evidence has even less than de minimus weight. It is irrelevant, and thus it cannot affect the outcome of the appeal.

When you don't find a perfect match between a cited case and your case, look to see if the distinction is favorable. If it is, make something out of it.

Puzzler

How would you improve the following sentence?

> "Low income" households are those making 50 percent or less of the median gross income within the housing region; "moderate income" households are those making 80 percent or less of the housing region's median gross income.

Perhaps in the mistaken belief that we should vary our grammatical forms to maintain reader interest, we sometimes reverse elements in what should be a smoothly repeating sequence. This results in choppy prose.

> The revised version: "Low income" households are those making 50% or less *of the* median gross income within the housing region; "moderate income" households are those making between 50 percent and 80 percent of the median gross income within the housing region.■