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How to Improve Your Brief Writing

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How to Improve Your Brief Writing

Judges are busy. Their staff attorneys and clerks are busy. If you want to persuade judges to rule in your favor, you need to make it as easy as possible for them to do so. To improve your brief writing, make sure that you (1) provide the tools of decision-making, (2) aim for the Goldilocks moment in describing authority, (3) represent that authority accurately, (4) guide the reader carefully, and (5) edit with distance.

Provide the tools of decision-making.

A good brief will tell the reader everything the reader needs to know. All the tools of decision-making will be contained within the brief. The law will be stated accurately. Any relevant aspect of the law will be addressed. The law will be up to date. Any necessary fact will be included and cited to the record. Adverse arguments will be rebutted. After reading the brief, the reader will not need to look anything up. The judge will be ready to decide the case.

That should all be obvious. If you want to persuade someone to decide the case in your favor, you should give them all the tools they need to do so. And yet, many briefs fall short.

Consider this example. In October, the Fourteenth Court of Appeals decided a case in which a defendant argued that evidence should have been suppressed because it was obtained illegally. *Thomas v. State*, No. 14-16-00665, __ S.W.3d __, 2017 WL 4400116 (Tex. App.—Houston [14th Dist.] Oct. 3, 2017, pet filed). The defendant argued that his girlfriend knowingly accessed his iPhone, knowing that she did not have his effective consent to do so. *Id.* at *1. This, the defendant claim, violated Texas Penal Code section 33.02, mandating exclusion of the incriminating pictures his girlfriend found. *Id.* Texas Penal Code section 33.02 states: "A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner." Tex. Pen. Code § 33.02(a) (West 2016).

What tools of decision-making might the judge need to decide whether the girlfriend accessed the defendant's iPhone illegally? Well, for one, the statute says the access must be without the owner's "effective consent." The girlfriend said she had used the defendant's other phone in the past without objection and that she did not think she was "doing anything wrong by looking at his phone." *Thomas*, 2017 WL 4400116, at *1-2. So the decision maker will need to know what constitutes "effective consent" under the statute, to determine whether the standard was satisfied.

Where would you look for a tool to help the decision-maker determine whether "effective consent" existed? Would you look for a statutory definition of "effective consent"? Penal Code section 33.01(12) provides just such a definition, applicable to the chapter containing

section 33.02. It defines "effective consent" as including "consent by a person legally authorized to act for the owner," and says consent is not effective if, among other things, the consent is "used for a purpose other than that for which the consent was given." Tex. Pen. Code Ann. § 33.01(12). And yet, the Fourteenth Court of Appeals stated in its decision, "The statute does not define the term "effective consent . . . ." *Thomas*, 2017 WL 4400116, at *5.

Why in the world would the court say that? Because the brief writers failed to provide the tools for decision-making. Neither side's brief cited the relevant definition. The defendant's brief pointed the court to the definitions section of the chapter, citing the definitions of "computer" and "access." But neither side's brief cited the key definition, leading the court to presume—incorrectly—that statute did not define the term.

Sure, it's easy to blame the judges, or the judges' staff, for failing to find the definitions themselves. But that neglects the brief-writers' role. You must be the expert on the case. You must find all of the applicable law. You must update it. You must know the record. Then, you must supply all the decision-making tools for the courts. They are counting on you. And if you don't supply those tools, they might get it wrong.

Aim for the Goldilocks moment.

Lawyers presenting legal authority can be a bit like Goldilocks trying out porridge. Some lawyers say too little; some say too much. Many do both in the same document. Judge A. Benjamin Goldgar asks lawyers to get it "just right":

> Give me a complete legal discussion, too, supporting your points with authority. If there's an analytical framework, lay it out. Too many motions and briefs are long on rhetoric and short on law.
>
> . . . .
>
> "Complete" legal discussion doesn't mean a law review article, of course. I don't have time to read law review articles from each side. Supply just enough authority to support your point, no more.

Judge A. Benjamin Goldgar, *Writing to Convince a Judge: Some Tips from Your Audience*, CBA Record 51, 52-53 (May 2006).

Say enough.

Your presentation of legal authority should give the reader enough information to evaluate the applicability of the authority to your facts. If you are citing the authority for a basic rule—the summary judgment standard, for example—a lone citation may be enough. But if your analysis requires more, such as a determination of whether a statutory or common-law standard is met, more explanation will be necessary.

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