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Too Much, Too Little, or Just Right

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Too Much, Too Little, Just Right

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.
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> . . . . .
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> "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. [1]

When you strive to say enough about the authority, without saying too much, using techniques to make your writing concise can help you get it "just right." And, of course, your effective presentation of legal authority must actually be supported by that authority.

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.

Statutes

Consider this assertion in a motion for summary judgment. If you were the judge, would you learn enough to determine whether the presumption applies?

> A rebuttable presumption exists that an in-home service company was not negligent if it conducted a criminal background check showing that the employee in question had not been convicted of certain offenses. Tex. Civ. Prac. & Rem. Code Ann. § 145.003(b) (West 2011). Because AA Appliance conducted a background check on Frank Hildebrand and it did not reveal any of the listed offenses, AA is entitled to the presumption of non-negligence.

What else do you want to know? Obviously, you need evidence of Hildebrand's background check and what it revealed. But you also need to know more about the statute. What are the "certain offenses" that cannot appear on the background check?

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

Without that language quoted or paraphrased, you would have to look it up to determine whether Hildebrand's offenses are covered. When did the company have to conduct the background check? And what exactly is an "in-home service company"? If the term is defined in the statute, you need to see that definition to determine whether AA Appliance qualifies. You also need to know if there are any other conditions to the presumption arising. And is it really a presumption that the company was not negligent in any respect? Or is the presumption limited to certain situations? Without more information about the statute, it's impossible to tell if it applies in this situation. If you, as judge, are too busy to go figure out the law yourself, you might just deny the motion. At a minimum, if you think the motion has merit, you'll need to look up the statute to figure out whether and how it applies, because lawyer didn't say enough.

In explaining the statutory authority, you also need to make clear when you are citing the statute and when you are citing commentary about the statute. Take this example involving a rule of civil procedure:

> Over twenty years ago the Texas Supreme Court held that a trial court judge must, under threat of mandamus, allow an attorney's full-time secretary, if a notary public, to administer the oath for a deposition to be tape recorded by the attorney and then transcribed by the secretary. *Burr v. Shannon*, 593 S.W.2d 677, 678 (Tex. 1980). Since then, the Rules have been made increasingly more liberal, even doing away with the requirement of a stenographic transcript unless required by the court after a showing of good cause. *See* O'Connor's Texas Rules * Civil Trials, p.380 (2001), Tex. R. Civ. P. 203.6(a).

Is the brief citing Texas Rule of Civil Procedure 203.6(a), which just happens to appear on page 380 of O'Connor's Texas Rules * Civil Trials? Or is the brief citing a commentary in O'Connor's about Rule 203.6(a)? Without a copy of the 2001 edition at hand, the reader has no way of knowing.

Because statutory language is often critical in applying a statute, saying enough about a statute will usually include providing that language for the reader. Including the language in a footnote or appendix may suffice, but particularly key language should be part of your text.

Cases

Cases cited in support of a rule might not require explanation. Often, however, a case is cited in support of an assertion about how a rule applies to a particular set of facts. In that instance, explanation is necessary.

In this example, can you tell whether the mandate language, or a party's attempt to go beyond it, is similar to either of the cited authorities?

> Where an appellate court remands a case with specific instructions restricting retrial to particular issues, "the parties must keep within those issues." *Ballard v. Cantrell*, 597 S.W.2d 41, 42 (Tex. App.—Fort Worth 1980, writ ref d n.r.e.). "In

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