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Let the Implicit Stay Implicit

You need not say what need not be said

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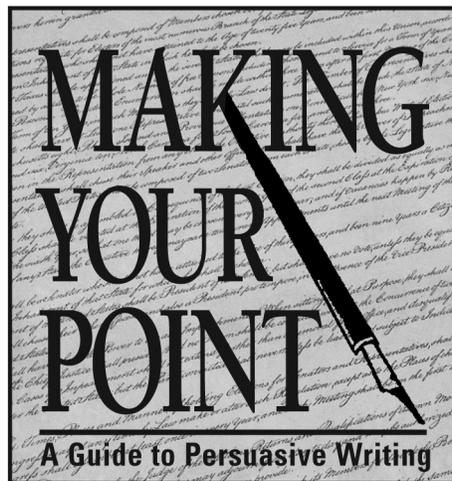
Brief writers bulk up their work by including marginally relevant facts and law (usually when they haven't distilled the essence of their case); by repeating facts and law in successive points (when they organize poorly); by over-quoting (when they can't ascertain, or fear committing to, the point of what they are quoting); and by reporting excessively from judicial opinions (because they are unable or reluctant to encapsulate the holding).

Even when writers get to the point and stay organized, they tend to use too many words. Among other things, they articulate the implicit. Consider the following:

Unlike *the circumstances of* a transaction involving unlicensed entities, a deal between a casino and an independent vendor triggers reporting obligations.

Implicitly, a "transaction" is a circumstance, but the broad category "circumstances of" adds no value. I call it an "amorphous category phrase." Additional such examples include:

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• *The matter of* eligibility for a license is addressed in Section 6 of the Act. (Drop "The matter of.")

• This is not the ordinary *situation where a party has failed* to respond to an interrogatory. (Try: "This is not the ordinary failure to respond ...")

"Matter" and "situation" are huge sets, too broad to convey useful information. The subsets "eligibility" and "failure" are sufficient.

If a word can convey a thought by itself, without qualification or embellishment, then we should let the word do its job. Articulating a set ("situation") where a subset ("failure") is sufficient shows lack of confidence in the subset to convey the message and lack of confidence in the reader to receive it.

Another construction that can be deleted as implicit is what I call the "unnecessary process phrase," for example:

• During *the course of* his employment with ABC Corp, many of his innovations

were awarded patents.

• The settlement is *in the process of* being reduced to a formal agreement.

The reader understands that employment and settlement occur over time. Thus, neither "course" nor "process" adds value. "During his employment with ABC Corp." and "The settlement is being reduced" are not only sufficient but better because they are leaner.

Yet another construction that is best deleted is the unnecessary locator adjective, for example:

• The improvements are *located* in the vicinity of the Common Areas.

• That provision was *contained* in the charter.

• It was one of the most significant clauses *articulated* in the contract.

What do "located," "contained" and "articulated" add? I can only guess. Maybe they are intended to eliminate ambiguity in the word "in" (not much, in context) or to sound formal and therefore important. Mostly, they slow the story down.

Another locator to omit is the "In its opinion" phrase, often used in lieu of a more effective transition:

• *In its opinion*, the court held ... (Where else would a court hold?)

• *In their brief*, plaintiffs argue ... (Where else would they argue?)

The phrases add rhythm, but they add no substance. Worse, they lull the writer into thinking that a meaningful transition has been supplied.

Writers also neglect to edit out the unnecessary "which is" or "that is":

• The President shall have all the powers *which are* incident to the office.

• The Tenant may lease additional space *which is* contiguous to space *which is* already leased.

• The Developer challenged the site plan *that was* approved in June.

Grammatically, the "which's" should be "that's," but in any case, the italicized

phrases should be excised as implicit and therefore unnecessary.

I am not sure why writers articulate the implicit and why they don't edit it out. My Informal Polling Group hypothesizes as follows:

- We add words to produce volume, which deludes us into believing that we have something weighty to say. Thus, we embrace verbosity and undervalue brevity.

- We think that bulk creates emphasis, and we are not as skilled as we should be with the real tools of emphasis, including order of presentation, word placement, repetition, transition (so that the story builds), precision and well-chosen detail.

- As we formulate thoughts, we reason from the general (*e.g.*, "matter" or "situation") to the specific (*e.g.*, "eligibility" or "failure"); we record our thoughts seriatim; and then we neglect to delete the general.

- We use unnecessarily broad categories like "the matter of" as fall-backs in case the subset that follows, like "eligibility," turns out

to be imprecise.

- To avoid having to formulate an effective transition, we default to a locator phrase like "*In its opinion*, the court held ..."

- We write almost anything to overcome writer's block or to meet a deadline and then find ourselves unable to sort through the mishmash. The best medicine for this syndrome is to draft an outline first.

- Finally, writing is difficult and takes time. Many writers aren't willing to commit the time or even to acknowledge that writing is hard. Good writers relentlessly delete everything that is unnecessary, whereas less effective writers — the hurried, the inexperienced and the overly self-assured — edit less and leave more.

Puzzler

How would you tighten and sharpen the following sentence from a responding brief?

The Argument section of plaintiff's brief in support of its motion con-

tains a short, superficial discussion of statistical sampling.

You don't need to say the brief supports the motion. It's implicit.

That the discussion appears in the "Argument" section of the brief is collateral and therefore unnecessary unless you have a reason to call attention to that section. A page citation could direct the court.

I would drop "superficial" to avoid editorializing, that is, telling the court how to think. "Briefly" or "short" can lay the groundwork, and you can win points for letting the facts do the talking.

Reduce the phrase "contains a . . . discussion of" to "discusses." In the alternate version, retaining "contains" allows you to describe the discussion as "short" in the same sentence as the word "brief."

Revised version: Plaintiff briefly discusses statistical sampling.

Alternate version: Plaintiff's brief contains a short discussion of statistical sampling. ■