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Trust Your Reader To Fill In Some Blanks

Implicit steps of a procedural history can usually be omitted

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Briefs often recite procedural histories from soup to nuts, setting forth precise dates when the complaint and answer were filed, when motions and cross-motions were made and argued, and so forth. Procedural histories can go into excruciatingly boring detail.

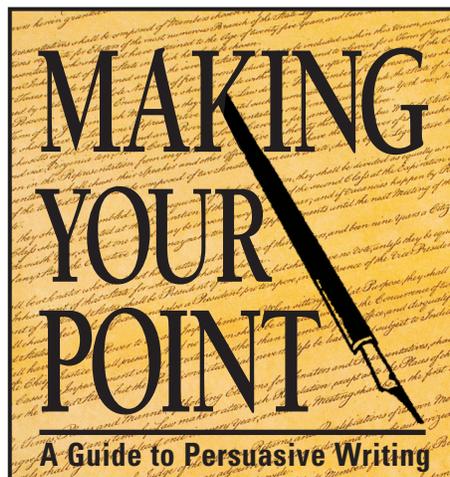
Much of what is typically included in a Procedural History can be referenced in passing or omitted altogether because it is implicit. Either the reader can deduce the information without your articulating it, or the reader doesn't need the information.

Consider, for example, this entirely accurate but very long recitation from the Procedural History of an appellate brief:

— ABC Corp. filed a motion for summary judgment on December 5, 2005. XYZ Co. opposed ABC Corp.'s motion for summary judgment and filed a cross-motion for summary judgment on December 19, 2005. ABC Corp. opposed XYZ Co.'s cross-motion, and after the motions were fully briefed, the trial court heard oral argument on January 20, 2006. The trial court issued its written decision immediately after oral argument, grant-ing ABC Corp.'s motion for summary judgment and denying XYZ Co.'s cross-motion for summary judgment.

Let's lay out the elements of this recitation:

- ABC Corp. moves for summary judgment on December 5.



- XYZ Co. opposes and cross-moves on December 19.

- ABC Corp. opposes the cross-motion.

- The matter is fully briefed.

- Oral argument is held on January 20.

- The court grants ABC Corp.'s motion in a written opinion on the same day.

- The court denies XYZ Co.'s cross-motion.

How many of these elements should the Procedural History articulate?

In the adversary system, opposition of the cross-motion is assumed, as is full briefing. Both elements can be omitted. Also, the court won't care that the motion was filed on December 5 and that the cross-motion was filed two weeks later unless a party is making an issue of the filing dates, which does not appear to be the case here. Omit the filing dates as well.

At all times, think in terms of compacting.

But mind the forms, which in this case may call for an exception to the rule-of-thumb that a writer should trim what is implicit. When both sides move for summary judgment, one side will win and the other will lose, or, more often, both will lose (putting aside the possibility that either party could seek partial summary judgment).

If one side wins summary judgment on the entire case, then by definition the other side loses. Why, then, should the Procedural History say that the court granted one motion and denied the other? Isn't it enough to say that the court granted one side's motion for summary judgment? Theoretically, it should be, but courts and brief writers invariably report that "the trial court granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment."

One member of my informal polling group says that writers don't trust readers to see the implication. Another says that stating the obvious shows respect for the formality of a motion — the mere fact that a motion is made merits comment on its disposition. Another says that clarity and neatness require that the writer specify what happened to all motions, elimi-

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nating the possibility, among others, that one party or both moved for partial summary judgment.

I also received a good suggestion for revision: “The court granted ABC Corp.’s motion and entered final judgment against XYZ Co.” This conveys the sense of XYZ Co. losing without stating the obvious — that XYZ Co.’s motion was denied.

A shortened version of the procedural history might read as follows:

ABC Corp and XYZ Co. cross-moved for summary judgment. On January 20, 2006, the trial court granted ABC Corp.’s motion and entered final judgment against XYZ Co. in a written opinion handed down immediately after oral argument.

Be Careful How You Criticize the Trial Court

As an appellant, you like the suggestion that the trial court denied the loser its “day in court” by apparently having made up its mind before oral argument (the court issued a written opinion immediately after oral argument).

I would not deliver this criticism overtly, if at all. Appellate courts do not like criticism of trial courts’ motives or methods. Such lack of respect for the trial judge demeans the whole judiciary. It also reflects poorly on your case because your election to criticize the trial judge suggests you don’t have confidence in the merits of

your case, and it suggests that the law so clearly disfavored your client that the court granted oral argument only as a courtesy, albeit an empty one.

If I were the appellant, I would not mention the timing of the trial court’s decision because I can’t control how the appellate court will read it. The court might view the trial court as cavalier, but the court might also think my case is so weak that the trial court didn’t need oral argument to help resolve it.

Taking that concern into consideration, a streamlined procedural recitation might read as follows:

ABC Corp. and XYZ Co. cross-moved for summary judgment. On January 20, 2006, the trial court issued a written opinion granting ABC Corp.’s motion and entering final judgment against XYZ Co.

Events move fast these days. Courts aren’t interested in savoring procedural details that don’t bear on the result. If you cut through the details, you will give the court the impression that you know how to get to the point. The court may then continue reading with a feeling of optimism (“Let’s see what we have here”) rather than a feeling of resignation (“Here we go again.”).

Puzzler

Which version of the following sen-

tence is better?

Version A: On February 4, at an informal meeting, members of the Commission staff presented their views.

Version B: At an informal meeting on February 4, members of the Commission staff presented their views.

Version A homes in from the widest view to the narrowest — from the date, which covers the entire day, to the meeting on the day, to the persons who attended the meeting, and finally to what was said at the meeting. It is like a camera zooming in.

The progression has a rationale, but the prose is choppy. The step-wise focus requires two commas. At each comma, the reader pauses. Because of the pauses, the information takes too long to come out.

Version B begins with geography rather than date. The reader envisions a room, a conference table, and people around it. If the reader sees “On February 4” first, the reader doesn’t envision anything except a calendar.

If the sequence of dates is important, Version A can be useful if revised (e.g., “On February 4, members of the Commission staff presented their views at an informal meeting.”).

Version B is better. ■