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Misusing Sets and Subsets

Don't try to make two facts seem like three

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Persuasion requires factual support. You need facts to establish why a contract is ambiguous; why conduct falls short of reasonable care; why an insurance company acted in bad faith; why documents are relevant or may lead to the discovery of relevant evidence; or why a litigant has sufficient contacts with a state to be subject to personal jurisdiction in its courts.

One or two good facts never seem quite enough, particularly when the other side has a strong argument. You may be tempted to lengthen your list of supporting facts by giving equal billing to a lesser included fact taken from a set already stated. Or you may do the reverse: give equal billing to a set of facts that encompasses a single fact already stated — again, to pad your list.

The motivation to create the appearance of more support than you have is compelling. You are afraid that your factual presentation, if short, will look weak, and you will lose. So you try to conjure additional facts from the ones you have — a kind of rhetorical magic act.

But readers know when you've got the goods and when you haven't.

In the following example, counsel for a plaintiff injured in a highway accident allegedly caused by a defective

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highway repair is trying to persuade the court that the highway authority's motion to dismiss on the basis of plan or design immunity should be denied because discovery is incomplete. The authority acknowledged that its motion to dismiss should be treated as a motion for summary judgment because the authority relies on facts outside the pleadings.

Plaintiff's counsel writes as follows:



The Authority concedes in its brief that this motion to dismiss for failure to state a claim, should more properly be considered by the Court as a motion for summary judgment, as facts outside the pleadings in this case must be considered. The Authority's motion, therefore, is premature in that discovery of numerous facts concerning the Authority's decision-making process, the level of involvement of the decision-making personnel who have submitted certifications, and numerous facts

regarding this highway repair project are far from completion.

The paragraph seeks to create the impression that many fact issues have to be explored before the case will be ready for a dispositive motion. Plaintiff proffers three sets of facts allegedly requiring discovery: (i) numerous facts concerning the Authority's decision-making process; (ii) the level of involvement of the decision-making personnel who have submitted certifications; and (iii) numerous facts regarding this highway repair project.

The first set overlaps the second. Facts concerning the authority's decision-making process include the level of involvement of decision-making personnel. Because the second set is merely a subset of the first, exemplifying rather than adding to the first set, the writer appears to be trying to make one set look like two. A better formulation would be to subordinate the second set to the first:

The Authority's motion is premature because numerous facts concerning the Authority's decision-making process have yet to be discovered, *including* the level of involvement of the decision-making personnel who have submitted certifications.

I don't suggest that "numerous facts" is persuasive, but at least the sentence no longer presents one set of facts as two. With more thought, the writer might have realized that "numerous facts concerning the Authority's decision-making process" includes other subsets, such as the need to balance cost and durability in designing a highway repair. When you sense a need for more facts, either analyze further what you know about the case or find more facts outside your existing record.

The third category, “numerous facts regarding this highway repair project,” encompasses and thus duplicates the first two categories. It is broader than facts regarding decision-making (category [i]), which in turn is broader than facts regarding the involvement of decision-making personnel (category [ii]). Though “numerous facts” covers much ground, it is shapeless and therefore powerless. You can’t persuade a court with “numerous facts.”

The artifice of conjuring facts from other facts is alluring not only because of the support that facts provide but also because of the power of three (facts, not witches). Three is a strong sequence. It has good rhythm and is neither too long nor too short.

Because it has a beginning, a middle and an end, you can shape a series of three to hit hard early and then ease off, to start slowly and build, or to hit hard first and last. The three-element series is such a formidable tool that you may fake your sets just so you can have three of them rather than two.

Faking anything insults the reader’s intelligence by suggesting the reader isn’t alert enough to notice that one plus one doesn’t make three. It injures your

credibility, your “ethos,” because you are advertising “three-for-a-dollar” but delivering only two. The dollar is the reader’s time and energy. For the effort expended in reading your product, the reader expects fair return.

Puzzler

How would you tighten and sharpen the following sentence?

The Authority concedes in its brief that this motion to dismiss for failure to state a claim, should more properly be considered by the Court as a motion for summary judgment, as facts outside the pleadings in this case must be considered.

Delete “in its brief,” “by the Court” and “in this case” as implicit, and delete “more properly” as useless. Delete “for failure to state a claim” because the court knows the basis for the motion.

Remove the comma after claim because it separates subject (motion) from verb (should be considered), and remove the comma after judgment

because it precedes a dependent clause. Change “as” to “because.” Use “treated as” because it is more precise than “considered as.”

The concluding dependent clause (“as [because] facts outside the pleadings must be considered”) offers options. You could leave it as is — accurate but bland — or you could ask yourself (a) “What are my purposes in writing this sentence?” and then (b) “What can I draw from the facts of my case that will serve these purposes?” After you choose an approach and write the sentence, ask yourself the same questions again.

Here is one possible solution, in which “relies on,” “affidavits,” “detail” and “decision-making process” all suggest factual substance, and thus possible grounds for factual dispute, with a view to precluding summary judgment:

The revised version:

The Authority concedes that this motion to dismiss should be treated as a motion for summary judgment because the Authority relies on affidavits that detail the Authority’s decision-making process. ■