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When Tracking Statutes and Rules, Use Only What You Need

Verbatim recitation is comforting but often unnecessary

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Tracking statutes or rules — repeating them verbatim rather than paraphrasing them or taking excerpts — ensures accuracy. But tracking can be overdone. If you use it as false comfort, you waste time and space.

Suppose you are objecting to counsel's submission of an unreported opinion to the Appellate Division after briefs are filed. The unreported opinion is two years old and should have been submitted with counsel's brief. A Rule of Court permits a late submission only if the case was decided after the brief was filed:

> No briefs other than those herein specified shall be filed or served without leave of court. A party may, however, without leave, serve and file a letter calling to the court's attention, with a brief indication of their significance, relevant cases decided or legislation enacted subsequent to the filing of the brief. Any other party to the appeal may, without leave, file and serve a short letter in response thereto within 5 days after receipt thereof. [Rule 2:6-11(d); emphasis added].

You consider tracking the rule in your responding letter, figuring that (a) by tracking the rule, you will invoke its power, and (b) in tracking it, you cannot be accused of misquoting or mischaracterizing it. So you draft the argument as follows:

> The submission of this unreported opinion was untimely because it was sent to the Court pursuant to Rule 2:6-11(d), which permits parties without leave of court to serve and file a letter calling to the Court's attention and briefly describing any relevant case decided after the filing of the briefs. [Emphasis in original].

The rule says all that, but you don't have to. You could say less to better effect:

> The submission of this opinion was untimely because Rule 2:6-11(d) permits reference without leave of court only to cases decided after the briefs are filed.

Several elements of your first version were unnecessary: (a) that a letter can be used to call a case to the court's attention; (b) that the letter can be "served and filed"; (c) that the letter can briefly describe the case; and (d) that the case must be "relevant."

All those concepts are in the rule, but they don't support your point, which is timeliness. Your response should make the point on timeliness as efficiently as possible.

Note the underlined word "after" in the longer version. This is a signal that you have obscured your main point, timeliness, and feel a need to highlight a temporal word — "after" — as a countermeasure to the clutter. Underlining is often a makeshift means of trying to bring out what verbosity conceals.

A Second Example

Suppose your opponent is petitioning the Supreme Court to review a ruling of the Appellate Division and contends that the case involves a question of general public importance that has not been, but should be, settled by the Supreme Court. This is one of several possible grounds for discretionary review ("certification") set forth in the following Rule of Court:

> Certification will be granted

MAKING YOUR POINT

A Guide to Persuasive Writing

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> only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. [Rule 2:12-4; emphasis added].

Your opponent's petition claims only that the case presents a question of general public importance. It says nothing about the other grounds for discretionary review: similarity to a question presented in another appeal before the Supreme Court; conflict of the decision with a decision of the same or higher court; need for Supreme Court supervision; or "the interest of justice." Therefore, you need not begin your opposing brief by tracking all five factors in the rule. Just say the petitioner invokes only one ground for discretionary review and fails to provide support.

You will not be viewed as evasive if you eschew the irrelevant. The Supreme Court is well aware of its rules. You may find it comforting to list all the reasons why certification may be granted because no one will be able to disagree with you for several lines in your brief. But the measure of a brief isn't how far you can go before someone disagrees with you. It is whether you can persuade the reader to agree with your point, preferably as soon as possible. Therefore, if you have a point, get to it. Don't temporize with unnecessary tracking.

Puzzler

How would you tighten and sharpen the following sentence?

> The court based its decision to deny defendant's motion to disqualify plaintiff's counsel on the fact that the defendant had acted in bad faith in waiting to file its motion for tactical reasons until a trial was pending in order to force the plaintiff to incur great expense and prejudice in finding new counsel.

This one might have several good solutions. The phrase "based its decision to deny defendant's motion" can be replaced by "refused," and "on the fact that" becomes "because."

"Had acted in bad faith in waiting to file its motion for tactical reasons" can become "delayed" because "bad faith" and "for tactical reasons" are implicit. "Until a trial was pending" is acceptable but not as pointed as "on the eve of trial" or "just before trial."

"Great expense" and "prejudice" overlap. Prejudice is the set, and expense and inconvenience are the subsets. "In order to force the plaintiff to incur" becomes the shorter, punchier "to maximize." That the plaintiff will incur expense and inconvenience is understood.

I would not oppose a flourish like "purposely delayed the motion" or delayed the motion "for tactical purposes" though both are redundant. They add flavor at low cost.

> The revised version:
> The court refused to disqualify plaintiff's counsel on the eve of trial because defendant had delayed the motion to maximize the expense and inconvenience of finding new counsel. ■