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Summarize Statutes and Rules Before Quoting Them

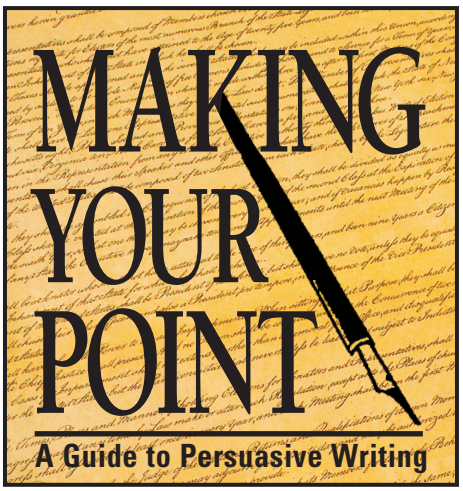
Control your material and thus the reader's perspective

By Kenneth F. Oettle

We revere statutes and rules. They have the authority of government and the illusion of permanence. The common law may shift, but statutes and rules appear solid. For these reasons and, frankly, because of our timidity, we often introduce statutes and rules with the bland "As the statute says" or "As the rule says," as if fearful of purporting to speak for the statute or rule rather than allowing it to speak for itself.

The following introduction to a Federal Rule appeared in a draft reply brief in support of a motion for consolidation. It consists of the bland statement that the Rule "provides," followed by the text of the Rule:

> Fed. R. Civ. P. 42(a) provides:
> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.



The writer was so fearful of intruding on the Rule that she did not even use underlining to highlight the portions of the rule of greatest interest.

After quoting the Rule, the writer made an argument — that the opponent (ABC Corp.) effectively conceded that the threshold test for consolidation is met merely because two cases involve common questions of law or fact. The argument read as follows:

> ABC Corp. does not dispute that the threshold test for consolidating two cases is simply that they involve "a common question of law or fact." All that is required is that common questions exist and that consolidation will prove beneficial.

This is a good thought, but it wasn't used to greatest effect because it was presented after the Rule rather than before. The writer could have taken better control of the material by using the thought to introduce the text of the Rule, as follows:

> ABC Corp. does not dispute that the threshold test for consolidating two cases under Rule 42(a) is that they involve "a common question of law or fact":
>
> *When actions involving a common question of law or fact are pending before the Court*, it may order a joint hearing or trial… [Emphasis added].

The substantive introduction to the Rule induces the reader to read the Rule rather than skip it. It provides a preview that helps the reader understand the Rule, and it challenges the reader to confirm whether the writer has fairly characterized the rule. If the writer's précis of the Rule is correct, the following is accomplished:

- The reader's understanding of the Rule is enhanced.
- The point is reinforced.
- The reader senses that when the writer characterizes a quotation, the writer does so accurately. This builds

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trust.

• The reader senses that the writer is confident enough to take control of the material, which suggests the writer has confidence in her case. If the writer has confidence in her case, so may the reader.

In the corrected version of the excerpt from the brief, we underlined the first clause of the Rule. The underlining provides emphasis, focusing the reader on the portion of the Rule that the writer considers most important. Together, the substantive introduction and the underlining lock in the idea.

A Second Example

Assume you represent a state agency whose power to reject all bids in a procurement has been challenged. The agency's draft brief argues as follows:

> Government bodies are vested with the inherent power to reject all bids. [Case citations]. As the Authority's regulations provide:
>
> The Authority retains the right to reject any or all bids, to waive informalities and minor irregularities and to rebid the entire contract. [Citation to regulation].

If an agency has "inherent power," it can enact regulations articulating that power, as the Authority did. But the segue from the invocation of "inherent power" to the text of the regulation is weak. The clause "[a]s the Authority's regulations provide" doesn't show the connection between the power and the regulation, and it doesn't preview the substance of the regulation.

The flow and emphasis can be improved by introducing the text of the regulation as follows:

> Governmental bodies are vested with the inherent power to reject all bids. [Case citation]. The Authority has explicitly articulated its right to reject all bids and readvertise any of its contracts in the following regulation:
>
> The Authority retains the right to reject any or all bids, to waive informalities and minor irregularities and to rebid the entire contract. [Citation to regulation].

This is a simple example — short, with a regulation that needs little explanation. Even so, you can see how the introductory language adds value. It translates the "inherent power" to reject all bids into the "right" to do so — like converting from one form of electric current to another — and it previews the substance of the regulation. This induces the reader to read the text of the regulation, and it emphasizes the point through repetition. It provides the iteration to which the quoted text of the regulation becomes the reiteration.

Ideally, a writer controls the reader's consciousness at every moment, never letting go. One way to control the reader's consciousness is to provide substantive introductions to quotations, whether the quotations come from statutes, rules or judicial opinions. Once you understand this technique, you will rarely pass up an opportunity to use it.

Puzzler

How would you improve the following sentence?

> Even assuming that there was improper insulation of the boiler causing it to overheat, there are no competent proofs of causation between the alleged improper insulation and the fire.

Rather than conceding the possibility of defeat on one point and falling back to another, make the argument additive. Say that not only did plaintiff fail to prove that the boiler was improperly insulated, but plaintiff failed to prove causation.

To trim and sharpen, eliminate the always-unnecessary "there was" and "there are" and use verbs rather than nouns. "Failed to prove" is more vigorous than "there are no competent proofs," and "caused" in place of "causation" gets rid of several additional words.

Drop the phrase "causing it to overheat" because, being implicit, it is unnecessary and because the phrase is good for plaintiff, not you. It helps color the picture that plaintiff wishes to paint.

I thought about eliminating "that" after the first "prove," but I decided to keep it for parallel construction because I need "that" after the next "prove" to eliminate the potentially confusing combination "prove improper insulation." A reader wouldn't think "prove the boiler" but might think "prove improper insulation."

> The new version:
> Not only did plaintiff fail to prove that the boiler was improperly insulated, but he failed to prove that improper insulation caused the fire. ■