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Don't Bury the Lede Case Law in Your Briefs, Motions

Whereas inexperienced legal writers often give the facts short shrift, more experienced ones often shortchange the law. We miss opportunities to show (rather than simply tell) our audience why our case meaningfully resembles or differs from a binding case, why our case should have the same or different result, and, most important, why we win.

Some of us miss valuable advocacy opportunities by simply citing key cases with nothing more, or by submerging significant facts or reasoning in parentheticals. And even where we do discuss the facts and reasoning of that key case, often we err by “burying the lede.”

What does it mean to bury the lede? “Lede” is a journalism term that refers to the introduction of a news story—that pithy piece intended to entice the audience to read the whole story. A writer buries the lede when she begins her story with secondary details less likely to interest or matter to her audience.

The same principle applies in legal writing. If a case bears enough significance to your facts that you need to discuss it in greater depth, you should begin that discussion with a sentence that unambiguously communicates to the judge why she should care about that case. An attorney buries the lede by starting her discussion of a case by reciting facts or reasoning from that case without clearly tying those facts to a finding, holding, or outcome relevant to the legal rule she’s trying to explain.

A detour: Where and when do you want to discuss a case in more depth? You do this in the “explanation” section of your CREAC,¹ right after you set forth the rule that you intend to explain. You almost always should discuss a case in more detail when both (1) the court rules in your favor, and (2) the facts of the case are significantly similar to yours. You also may want to explore a case in more detail to:

- Clarify a confusing aspect of the rule or interpret an undefined term in the rule;
 - Set up key differences between your case and a case that you’ll want to distinguish; or
 - Illustrate the consequences of violating a rule.

So how do you avoid burying the lede? The first sentence of your case explanation must tell your reader why she needs to know more about that case to decide your issue. This is essentially a two-step process:

1. That sentence should tell your reader something relevant about what the court did. Often, this means the outcome—did the court reverse, affirm, remand? Sometimes, when you are illuminating a narrower aspect of a rule, this means telling your reader what the court held or found regarding that aspect of the rule.
2. Then, in that same sentence, briefly tell your reader *why* the court did what it did. Of course, that “why” should bear directly on the aspect of the rule you are trying to explain.

For example, imagine that you represent the plaintiff in a false imprisonment case, and the defendant asserts the “shopkeeper’s


privilege,” which allows a merchant to detain a suspected shoplifter for a reasonable length of time and in a reasonable manner to investigate. You want to argue that the manner in which the defendant detained your client was unreasonable because store employees terrorized your client, although they used no force. You frame the legal rule like this:

The manner of detention can be unreasonable, even absent the use of force, where a store employee engages in behavior that the detained person could reasonably perceive as a threat to her safety. (cite).

You then illustrate this rule by discussing a case in more detail:

In *Koepnick*, for example, the court concluded that a jury could find the manner of detention unreasonable where two plain-clothed male security guards accosted the suspected shoplifter in a dark corner of the parking lot, blocked him from leaving, seized his package from him, and waved a wrench at him.²

In one fell swoop you’ve told your reader why she should care about the case, and you’ve teed up a helpful comparison with the facts of your own case. In some cases, you may need to discuss the facts and reasoning of the case in more detail, which you would do right after your “lede.”

Part of the fun and challenge of common-law lawyering lies in illuminating the facts and reasoning of binding cases to our greatest advantage. Don’t let your reader’s eyes gloss over a muddle of unsorted facts and rationale—grab her attention with a magnetic lede that sells your “story” of why the case compels the outcome you seek. 

endnotes

1. See my January 2014 column for a refresher on that paradigm.
2. *Koepnick v. Sears Roebuck & Co.*, 762 P.2d 609, 619 (Ariz. 1998).



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