

# New Jersey Law Journal

VOL. CLXXVII – NO. 6 – INDEX 468

AUGUST 9, 2004

ESTABLISHED 1878

## Show Every Step of Your Reasoning on Key Points

Elaborating the obvious isn't necessarily beating a dead horse

By Kenneth F. Oettle

**B**rief writers are sometimes reluctant to elaborate obvious points because they are fearful of being viewed as simplistic if not transparent. Ironically, the more evident a point is, the more inclined a writer may be to deem it too clear for extended comment.

Suppose you represent a bidder on a public contract to drain and fill a small municipal lake and build athletic fields over it. The contractor won't be paid directly by the town. It will receive its revenue from the "tipping fees" charged to haulers who dump fill into the dry lake bed. The request for proposals (RFP) asked the contractors to state what percentage of the tipping fees they would share with the town. The bidder proposing to share the greatest percentage would win the contract.

Your client offered to share the second highest percentage of tipping fees with the town. The contractor that offered to share the highest percentage won the contract, but the winner's proposal deviated from the contract specifications.

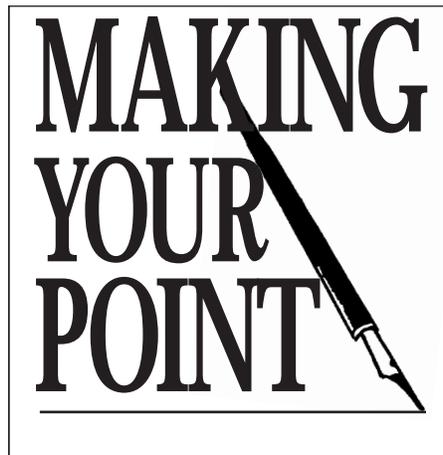
The RFP called for fill suitable for residential use. The winning proposal said the project was not viable using residential-grade fill because not enough fill would be available within the desired time frame, and the tipping

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fees would be too low for the contractor to turn a profit. Because residential-grade fill can be dumped almost anywhere, competition among disposal sites keeps the tipping fees for that grade of fill very low.

The winning contractor proposed to accept not only residential-grade fill but also non-hazardous industrial-grade fill, which is more plentiful and would serve the project as well. If both grades of fill



were used, the project could be completed sooner, and the contractor could charge higher tipping fees, generating more money to share with the town. The town accepted the contractor's proposal.

As counsel for the bidder who came in second, you seek an order enjoining the town and the contractor from proceeding with the project on these terms. You argue that the change in fill should invalidate the winning proposal because the change gives the winning contractor an advantage over the other bidders and thus constitutes a material deviation from the specifications. If you are correct about the deviation, you should win

the case because bids that contain material deviations are void.

Instinct tells you that the proposed change in the type of fill is a material deviation, but you are unsure how extensively to develop that thought. It seems self-evident. Any reader can see the importance of fill to the contract. The lake bed could not be covered without the fill, and the athletic fields could not be built.

You fear the court may think you have nothing better to say if you tediously explain why fill is an important element of the contract and why a proposed change in fill is a material deviation from the specifications.

In this case, the fear is misguided. The closer you come to the core of your argument, the more you should elaborate.

### Lay It on Thick

Because your argument depends on fill being a material element of the contract, explain the importance of fill from several perspectives. For example, after noting the physical role of fill in the project (backfilling the lake; supporting the athletic fields), call attention to its financial role with something like, "Fill is the sole source of funding for the project. Without tipping fees, nothing gets built."

Then reinforce the idea by referencing the outflow of cash as well as the inflow: "Every other aspect of the project requires an outflow of cash, but the tipping fees bring in revenue." Do you need to juxtapose the inflow and outflow of revenue? No, but repetition regarding the crucial function of the tipping fees solidifies the point.

Good arguments are built on obvious facts, such as fill being the primary physical element of the contract and the only source of funding, and industrial-grade fill being more plentiful and bringing in more money through higher tipping fees.

The first set of facts shows the importance of fill to the contract, which goes to materiality, and the second set of facts differentiates one kind of fill from another, which goes to the advantage obtained by the winning bidder.

Don't be shy about spelling out that advantage. In addition to stating that industrial-grade fill will bring in more money because haulers will pay higher fees to dispose of it, explain why haulers will pay more to dump lower grade fill. The exposition may seem so basic that you are embarrassed to discuss it, but don't be. The court will welcome your discussion because it may help the court write its opinion.

After you establish that the tipping fees are determined by the nature of the fill, you are ready to argue that the amount of the fees bears on what percentage the contractor is willing to share with the town. The more cash the contractor receives, the more it can

afford to share with the town.

In this way, the nature of the fill affects the contractor's competitive status vis-a-vis other bidders. If the contractor can accept a more lucrative kind of fill than what the RFP requires, the contractor can offer the town more money and still make a profit. This gives the contractor a competitive edge.

Again, the point is so obvious that you fear the court may think you are patronizing it or beating a dead horse. You aren't.

If you have an important point, explore it. Every story has two sides, and you don't really know the strength of your case until you fully work it out. Assuming your analysis is correct and your exposition clear, then as each element of the analysis locks into place, you further persuade the court that your reasoning is sound. The more time you spend on a winning point, the more the court sees you as a winner.

Although you discuss at length what could be set forth in a few sentences, the rigorous treatment is worth the effort if the subject matter goes to the core of your argument. In reasoning out the obvious, you drive your point home.

## ***Puzzler***

How would you tighten and sharpen the following sentence?

A "germane" claim is one which is related to the validity of the mortgage, the right to foreclose, or to the amount of the debt.

Drop the phrase "one which is" as unnecessary. The quotation marks around "germane" alert the reader that a definition is coming. To achieve parallel construction, change "right to foreclose" to "right of foreclosure" and eliminate the last "to." Use the active "relate" rather than the passive "is related."

Keep the prepositional phrases—even though they add words—so the elements that make the claim germane (e.g., validity, amount) quickly answer the question, "Relates to what?"

The new version:

A "germane" claim relates to the validity of the mortgage, the right of foreclosure, or the amount of the debt. ■