

# New Jersey Law Journal

VOL. CLXX – NO. 7 – INDEX 588

NOVEMBER 18, 2002

ESTABLISHED 1878

## Don't Take Refuge in 'Common Sense'

Like the phrase 'it is important to note,' it may indicate fuzzy thinking

By Kenneth F. Oettle

One of the themes of this column is that flaws in our writing can serve as "red flags" to help us spot when our thinking is unclear or unfinished.

Typical red flags are the words "clearly" and "obviously," which may signal that our thinking is anything but clear and obvious [see "Making Your Point," Oct. 7, 2002, 170 N.J.L.J. 20]. A red flag we often overlook is the expression, "It's a matter of common sense," which we think encapsulates the wisdom of our position but, more often than not, is just a dodge.

"It's common sense!" we exclaim in frustration. We wonder how anyone cannot see the point, and we resent having to explain it. So we don't.

Ironically, the frustration and resentment may reflect our inability to explain why our position is a matter of common sense. We are as frustrated with our own lack of analysis as we are with the adversary's. Therefore, when you feel a desire to say that something "is a matter of common sense," think twice. You may be avoiding the hard job of making a point.

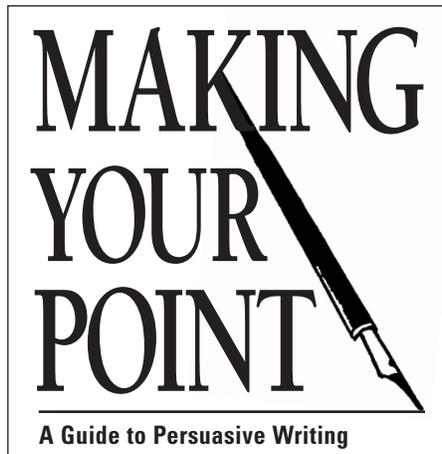
That the phrase "common sense" may not be up to the task we assign it isn't surprising. If you are asked to

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*The author is a partner and co-chair of the Appellate Group and writing and mentor programs at Sills Cummins Radin Tischman Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.*

write a memo, chances are the answer to the question is not crystal clear. That is why someone needs a memo.

Similarly, if you have to write a brief, you are probably in a dogfight on a contested issue. Therefore, common



sense is not likely, by itself, to supply an answer. The phrase "common sense" means "sound and prudent but often unsophisticated judgment." *Webster's Ninth New Collegiate Dictionary* (1983). It implies a resolution "from the gut," which is the antithesis of the thorough analysis you need to perform.

Someone not convinced of your thesis could even view the expression "It's a matter of common sense" as fighting words. If you contend that anyone with common sense must agree with you, where does that leave the unpersuaded reader? Are you implying the reader has no sense? Be careful, or you may unwittingly insult your audience as you voice a frustration that derives from your own inability to make a point.

### It Is Important To Note

Another expression that may conceal more than it promotes is, "It is important to note," which, at best, is unnecessary:

It is important to note that the information in these records is unavailable from other sources.

The unavailability of the information speaks for itself. If the fact were not important, you would not use it. Declaring it important adds nothing.

Consider what you mean when you write, "It is important to note." Are you asking the reader to pay attention? If your writing is effective, the reader is already paying attention.

Are you suggesting the point you are about to make is more important than the point you just made? Don't rank order your points like that — the reader may discard what you demote. Perhaps you are really saying, "I sense that what I am about to say helps my case (thus its importance), but I am not sure how."

Your urge to write "It is important to note" may signal that you don't know how the thought you are about to impart relates to the thought you just imparted or that you don't know how the "important" thought fits into your argument. For example, you may say "it is important to note" a fact that appears to weaken the other side's position, but you don't identify the element of the cause of action to which it relates.

Facts aren't just important, they are important to something. If you leave it for the reader to deduce, you lose control over the persuasive process. Moreover, if

you say that something is important but don't say why, you break an implied promise to the reader to back up your assertions. Failing at this or any rhetorical task costs you credibility as an advocate.

***Puzzler***

How would you tighten and sharpen the following sentence?

Insurer X takes the position that it has "fully responded" to ABC Co.'s request that Insurer X identify the specific facts which support its continued reliance on each policy provision that Insurer X has identified as providing a basis for its coverage decisions to deny insurance coverage and/or to "reserve its rights" to deny coverage for ABC Co.

The sentence is thick with words.

"Takes the position that" can be shortened to "contends." "ABC Co.'s request that Insurer X identify the specific facts" can be shortened to "the demand for facts." (Who besides ABC Co. would make the demand?) "Which support its continued reliance on each policy provision Insurer X has identified" can become "supporting its invocation of specific policy provisions" or "supporting each of its policy defenses." (You may have to use new words to cut out old ones.)

"As providing a basis for its coverage decisions to deny insurance coverage and/or to 'reserve its rights' to deny coverage for ABC Co." either falls away altogether, as in the alternate rewrite below, or it becomes "to deny coverage or reserve rights." In the insurance business, the expression "reserve rights" implicitly means "reserve the right to deny coverage."

- The revised version:  
Insurer X contends it "fully responded" to the demand for

facts supporting its invocation of specific policy provisions to deny coverage or reserve rights.

- Alternate:  
Insurer X contends it "fully responded" to the demand for facts supporting each of its policy defenses.

- Bonus: The sentence also smacks of "free airtime" — a naked restatement of the other side's position (see "Making Your Point," Oct. 21, 2002, 170 N.J.L.J. 192). To avoid giving free airtime, I would look to encapsulate the insurer's discovery shortcomings in introductory language:

Having supplied only skeletal facts or nothing at all in response to Interrogatories regarding its second, fourth, fifth and seventh policy defenses, Insurer X contends it "fully responded" to the demand for facts supporting each of those defenses ■