

New Jersey Law Journal

VOL. CLXXVI – NO. 1 – INDEX 20

APRIL 5, 2004

ESTABLISHED 1878

Look Within for the Premise of Your Argument

You can determine what the court is likely to deem fair

By Kenneth F. Oettle

Describe the facts of a lawsuit to an experienced attorney, and the attorney will quickly tell you, with surprising accuracy, which side will win and why. The scary thing is that in many instances, if you describe the facts of a lawsuit to an intelligent lay person, the lay person will quickly tell you, with surprising accuracy, which side will win and why.

Nonlawyers can do this because the law isn't just a set of rules to be memorized by candidates for the Bar, nor is litigation a game of paper covers rock, rock breaks scissors, and scissors cuts paper, as if winning were a matter of finding a precedent better than the precedent invoked by the other side.

The law is, in essence, what most people agree is fair. Judges know this implicitly. It's their port in the storm. It's the well they dip into in close cases, and it never runs dry.

Judges look to do what is fair, as you would if you were in their shoes. When you judge a dispute between family members or friends, don't you try to do what is fair?

Given that judges look to do what is fair — to do “the right thing” — your

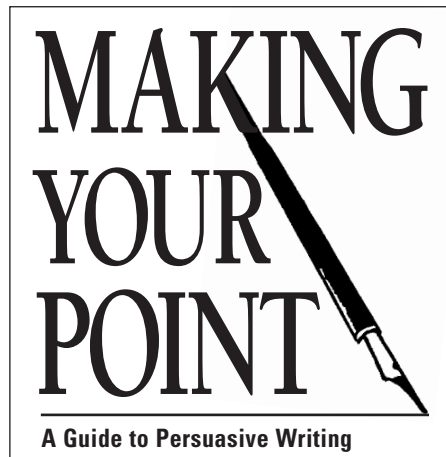
The author is a partner and co-chair of the Appellate Group and writing and mentor programs at Sills Cummis Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. “Making Your Point” appears every other week.

diligent presentation of the law will go for naught if the other side can portray your client as seeking relief that would be unfair.

Fair Is in the Facts

For a court to feel it is acting fairly, the court must know the facts, because fairness requires a balancing of interests. To effect a balance, the court must understand the interests, and to understand the interests, the court must know the facts.

Your job is to persuade the court



why the facts entitle your client to relief — why, in balance, the scales of justice should tip your client's way. You have to make the relief you seek appear fair or the relief the other side seeks appear unfair.

Good facts can persuade by themselves, without your invoking the law. For example, if you represent X in an action for assault against Y, the court will immediately be on your side if it reads the following at the beginning of your preliminary statement or statement of facts in any brief, for any purpose: “On such and such a date, Y walked up to X on Maple Street and, for no apparent rea-

son, struck him in the face and broke his jaw.”

Like any reader, the court would react viscerally to the apparent unfairness in what Y did. The court would identify with X (“What if that happened to me?”) and would think about punishing the wrongdoer and deterring such behavior.

How Do You Know What Is Fair?

Undoubtedly, you have heard the expression “Look within.” You can look within, for example, for the strength to overcome adversity. You can look within for your true feelings, for the solution to a knotty problem or for inner peace.

One secret to good legal writing, and for that matter, to being a good lawyer, is that dominant arguments are found by looking within for your sense of fairness. Run the facts past your conscience to determine what offends you and what does not.

Do this not as an advocate — that is, don't merely ask how your client was hurt — but as an observer. Ask yourself what offends you about what both sides did.

When you have determined what offends you, you can attack the other side's weakness and deflect attention from yours. Looking inward works because your sense of fairness is like that of most people. What you feel, they feel.

Just as you hate thieves, liars and bullies, they hate thieves, liars and bullies. Nobody likes laziness, and almost everyone believes that promises should be kept.

Because we are living beings, we reject behavior that threatens our survival. Instinctively, we deem it immoral,

and we outlaw it. Our reactions are rooted in genetics and reinforced by our environment, which is relatively homogenous.

Americans watch more or less the same shows on TV and read many of the same books, magazines and newspapers. We go to schools having similar curricula, and we support religions that espouse similar guidelines for good behavior. Under such influences, we develop comparable moral codes. What seems right and just to us generally seems that way to others.

Exceptions exist where moral premises conflict, as on the issues of abortion (preserving life vs. preserving the quality of life) or the death penalty (preserving life and rejecting unequal punishment vs. deterrence, revenge and closure). But for the most part, our moral codes are congruent.

Once you realize you can anticipate the likely response of your audience by consulting your own sense of right and

wrong, you will have confidence that when you look within to ask yourself what offends you, you will find the basis for your best argument.

One caveat: You can carry this too far. Because relationships with clients depend in part on lawyers feeling their client's pain, lawyers often perceive only their client's pain, not the pain their client has inflicted on others. Lawyers look within, yes, but in only one direction. As a consequence, they jump too quickly for one-sided arguments and stay with them too long.

Looking within requires a dangerous trip to the netherworld of neutrality. Sometimes, it's best not even to say you've been there. Just bring home the prize — the winning argument — and let others think what they will.

Puzzler

How would you tighten and sharpen the following sentence?

There are a number of variables which will determine the relative accessibility of the data contained in backup files.

Dump "there are," losing "which" in the bargain — three words gone in a flash. Drop "will" as unnecessary and reduce "a number of" to "several." Drop "relative" as implicit, and drop "contained" for the same reason unless you need the connotation of confining data so it can't get away.

Finally, unless you need to mention "files," consider converting the place of storage (backup files) to an adjective.

The new version:
Several variables determine the accessibility of backup data.

Alternate version: The accessibility of backup data depends on several variables. ■