New Jersey Law Journal

VOL. CLXXXIII – NO. 8 – INDEX 512 FEBRUARY 20, 2006 ESTABLISHED 1878

Misinterpreting Cases Is an Occupational Hazard

Beware of both wishful thinking and defeatism

By Kenneth F. Oettle

Doing legal research can be like watching a professional basketball game. When you are finding cases that seem helpful, your team is scoring at will and holds a comfortable lead.

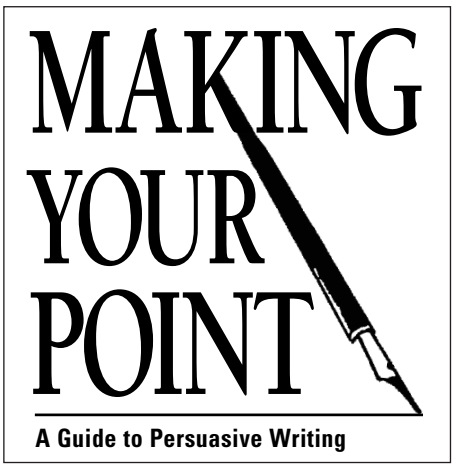
Then you find law that appears to hurt your case, and the momentum shifts. The other team goes on a run, catches up and forges ahead, index fingers jabbing the air as if to say, "We're Number One! We're Number One!"

Be wary of the hope and despair generated by legal research. Your emotions cause you to read too much into judicial opinions, whether the opinions appear helpful or harmful. Precedents are often not as good or bad as they initially seem. Because their facts are almost always different from the facts in your case, the cases are rarely "on all fours."

Falling in Love with Dicta

We tend to interpret cases to support the results we desire. As the saying goes, "Be careful what you seek, for what you seek, you shall find." If you lack support for a proposition, you will be tempted to see a case that is only vaguely relevant as being directly on point, and you will be tempted to suppress your awareness of how the case is materially different from yours. I doubt you do this consciously; few are that cynical. You believe what you think you see.

You overvalue cases where the fight is heaviest, where you are straining to support a position that is only a little better, or a little worse, than the other side's. Driven by the hot blood of the fight and pressed for time, you overlook facts, or you focus on language that appears to support your position but is, by any fair analysis, inconsistent with a governing rule.



For example, counsel looking to defend the rejection of all bids by public entities in New Jersey have latched onto the phrase "good faith" in the following dictum to support the argument that under the bidding statute, a public body can reject all bids for any reason — including nothing more than the desire to force the bidders lower — as long as the public entity's intent is not to direct the contract to a favorite son:

> When a municipal governing body concludes in good faith that the purposes of the public bidding statute are being violated, it may reject all bids submitted and in its discretion order a re-advertising of the contract.

Because the "purposes of the public bidding statute" include saving public money, advocates figure that anything done to save public money is acceptable, short of favoritism.

"Good faith" was not a good choice in the above dictum because the actions of public bodies in New Jersey are governed by the "arbitrary and capricious" test, which is objective, not by the good faith test, which is subjective. Rejecting all bids merely because the public body thinks the bids may be lower the next time is considered arbitrary (though rejecting all bids because they exceed the public body's cost estimate or its appropriation for the job is acceptable).

The objective test doesn't stop advocates desperate for support from taking a shot at the subjective test with the "good faith" dictum above even though, earlier in its opinion, the court said that "our courts do not subscribe" to the view that arbitrariness and capriciousness is immaterial provided that bids are rejected in good faith.

Expanding the Rule

Not only do advocates misread dicta, but they may try to create a rule broader than the facts of a case allow. Suppose, for example, that you represent a public entity that gave notice to a bidder that it would be awarded a contract, but now the public entity wants to

The author is a partner and co-chair of the 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.

award the contract to another bidder. As counsel to the public entity, you seek to establish that mere notice of award does not create a binding contract between the bidder and the public entity.

You find a case that appears to state that rule, but the facts are different. Notice of award fell short of creating a contract because the request for bids said negotiation was required before the awarded contract would be deemed final. Though the dictum appears helpful, the facts are materially distinguishable.

You convince yourself that notice of award never creates a contract between bidder and public entity even though the only rule derivable from the holding in the case you cite is that notice of award fails to create a contract if negotiation is required between bidder and public entity before the contract is considered final.

Exalting the Factual Coincidence

In another typical instance of wishful thinking, writers may fix on a factual similarity between a putative precedent and their case even though the fact is collateral to the holding and thus immaterial. Because they are trying to hit a home run with an apparent match, they stretch their analysis of the holding past the breaking point. This could apply, for example, where the same product is at issue in both cases (e.g., PVC pipe) or where the defendant is the same in both cases (e.g., the same insurance company).

Being Intimidated by Bad Dicta

All researchers are discouraged by bad dicta. Some are intimidated and give up. They concede where they should stand firm and give ground that should be defended.

Do not be easily discouraged. Chances are, something in the facts of the case you need to distinguish is materially different from the facts of your case. If you find a case on all fours where the highest court of your state held against the position you espouse, then you lose. But that rarely happens. When it does, your job is to settle the case short of a judicial resolution or, if you are the plaintiff, not to bring an action in the first place.

Read every important case at least twice, better yet three times. Get the gist of the case and then re-read it to examine why it is like, or not like, your case. Then read it again. Some cases may warrant Talmudic study if the amount at risk justifies the cost. I can almost guarantee that your insight will deepen with each reading and that the law of diminishing returns will take far longer than you think to take hold.

Associates complain, reasonably, that they don't have time to examine cases. They are given only a few days, maybe a week or two, to research and write a brief, even as other assignments nag at them for attention. They can feel the assigning attorney hovering, waiting to opine that their brief lacks punch or misses the point. These are legitimate concerns for which I have no easy answer. Personally, I try not to hover or nag.

If you are forced to rush through cases or if reviewing attorneys are finding mistakes in your analysis, then perhaps you should defend your reading and thinking time with greater vigor. Say "no" to new work and don't overbook. Leave more time for thought.

Puzzler

How would you tighten and sharpen the following sentence?

> The charts which appear in the report show the trend.

Proper usage calls for "that" instead of "which" because you are differentiating these charts from other charts, but the demands of brevity obviate that choice. Drop "which appear" altogether.

> The new version: The charts in the report show the trend. ■