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Unpack Your Broad Statements To Find More Factual Support

Facts persuade; to develop more of them, expand the ones you have

By Kenneth F. Oettle

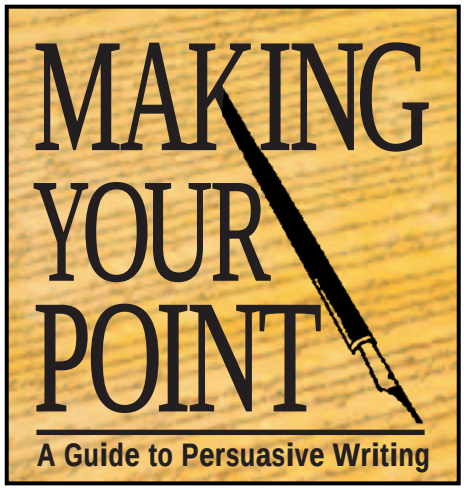
Facts persuade. You know this even if you think that conclusory statements like "Plaintiff totally mischaracterizes the facts" also persuade. Because facts persuade, it stands to reason that a brief, or a memo supporting a brief, should include as many good facts as you can find.

You know this, too. That's why you sense weakness when you feel strapped for facts. If you are light on facts — and, frankly, even if you seem to have enough facts — ask yourself whether any of your facts can be expanded to reveal additional detail.

Suppose you represent a lender who got burned when the borrower on a multi-million dollar loan for the purchase of an apartment building absconded with the loan proceeds. The borrower was assisted by an independent loan solicitor for the mortgage broker — the entity that brought borrower and lender together. Looking for a share of the broker's commission, the loan solicitor handled communications between the crooked borrower and the broker and found an appraiser to overvalue the property and thus increase the size of the loan. The loan solicitor knew the borrower was up to no good.

Unfortunately, the loan solicitor squandered his personal resources and is now penniless, to say nothing of incarcerated. The lender's only hope of recovery is against the mortgage broker, which knew nothing of the loan solicitor's perfidy but did receive a commission on the loan.

The mortgage broker's relationship with the lender was governed by a contract in which the broker guaranteed that if it "knowingly" presented a bogus loan to the lender, the broker would indemnify the lender for any losses. This was a reasonable covenant. Chicanery is toxic to contractual relationships.



The broker will undoubtedly contend that it should not be responsible for the borrower's thievery because it knew nothing of the plot. Consequently, you need a doctrine that imparts the loan solicitor's guilty knowledge to the broker.

But let's not put the cart before the horse. Before seeking a doctrine, you would ask yourself if the loan solicitor's guilty knowledge should, in fairness, be imputed to the innocent mortgage broker. In other words, does the mortgage broker deserve to bear the loss? If it does, you may find a helpful doctrine. If it doesn't, you probably won't find anything. The law follows the facts.

Arguably, the broker should bear the loss. It provided a platform for the loan solicitor. If one of two innocents has to lose, it should be the one that facilitated the crime, even if inadvertently. The broker is in a better position than the lender to verify the borrower's bona fides, and here the broker received a benefit — a commission on the loan. Having used the deal to make a profit, it should step up and bear the loss.

Those are the facts. As in any case, the facts should point to the result. If they don't, you need more facts, or at least a different view of the facts. You won't find a magical doctrine.

Let's assume you determine that the mortgage broker deserves to lose. Legal research under the rubric of "Principal and Agent" uncovers the doctrine that an agent's guilty knowledge will be imputed to an otherwise innocent principal if the principal benefited from the agent's acts. Here, because the broker earned a commission from the loan, the solicitor's guilty knowledge can be imputed to the broker. This means the broker "knowingly" presented a bogus loan, and you can invoke the mortgage broker's guaranty.

Your first instinct in trying to establish the agency of the loan solicitor is to invoke his title: "loan solicitor," which by itself seems almost enough to establish both agency and benefit. Because he developed a loan for the mortgage broker, the loan solicitor seems to be the broker's agent.

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Some writers would say that he was a loan solicitor "and therefore was the mortgage broker's agent," or, because he was a loan solicitor, he solicited loans for the mortgage broker, "which makes him an agent."

You frequently run into situations like this. You sense a connection, even an obvious one, between your fact (loan solicitor) and the conclusion you wish to draw (agency), but you can't seem to cement the connection. In this case, if you analyze the role of a loan solicitor, you can add meat to the bones of the agency argument, something like the following:

> Jones was the agent of ABC Mortgage Broker because he produced the bogus loan for ABC. He found the borrowers, obtained their false personal data, and handled all communications between them and ABC. He even obtained the appraisal that over-valued the property. His efforts resulted in ABC receiving a commission for having done nothing more than providing a platform from which Jones could perform his deception.

In articulating what Jones did as a loan solicitor, you are "discussing" the facts. Among other things, the loan solicitor obtained false personal data from the borrower, handled communications between the borrower and the mortgage broker, and obtained a false appraisal. Because of his efforts, ABC Mortgage Broker received a commission.

It seems obvious that these actions and these consequences are part of being a loan solicitor. Reciting the actions doesn't make Jones any more of an agent or show any more of a benefit to the mortgage broker, but the recited facts create the equitable gestalt — the palpable relationship between the solicitor and the broker that helps the court feel comfortable imputing the solicitor's guilty knowledge to the broker. If Jones did all this for the mortgage broker, and if the broker benefited from it, then not only was he the broker's agent, but in fairness, what he knew should be imputed to the broker.

Having presented these facts, you are entitled to a wrap-up sentence like the following:

> Jones did everything a loan officer does for a mortgage broker and was paid for his services with a substantial percentage of the mortgage broker's commission.

This work-up of Jones's role as a loan solicitor is better than saying merely, "Jones was ABC's agent because he solicited loans for ABC," which is entirely true but unnecessarily bland.

Puzzler

Which is better, Version A or Version B? The only difference is the beginning of the second sentence.

> Version A: In a coverage determination involving multiple events, the "occurrence" issue is generally resolved by answering two questions. The court must first determine when the occurrence or occurrences took place; then the court must determine the number of occurrences.
>
> Version B: In a coverage determination involving multiple events, the "occurrence" issue is generally resolved by answering two questions. First, the court must determine when the occurrence or occurrences took place; then the court must determine the number of occurrences.

Version A is typical. The need for answers causes the writer to think of who must provide the answers — the court — which causes the writer to begin the second sentence with "The court." But the reader wants to know what the questions are, not who will answer them. That the court will answer them is obvious.

The better transition is the word "First" as used in Version B because the word "two" in the previous sentence caused the reader to expect an enumeration. By quickly assuring the reader that the writer will provide an enumeration, that is, identify the two questions, the transition "First" meets the reader's expectation, maintaining the flow. It builds the reader's confidence in the narrative and, ultimately, in the writer. ■