New Jersey Law Journal

VOL. CXCIX - NO.8 - INDEX 503 FEBRUARY 22, 2010 ESTABLISHED 1878

Don't Ask the Court To Take a Leap of Faith To Get Where Wishful Thinking Has Taken You

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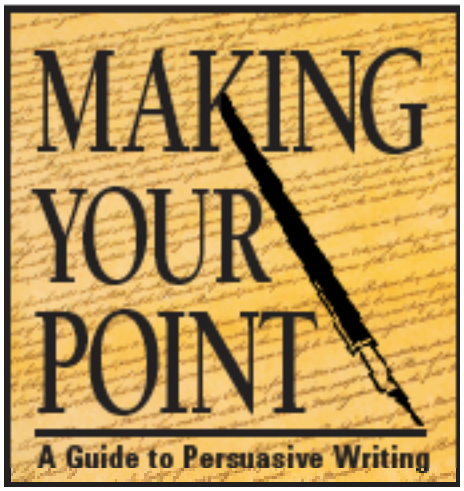
Wishful thinking is a major pitfall in the writing process. We want to win so badly that sometimes we see the law and the facts as we wish to see them, not as they really are. If we edit carefully and listen to the little voice that says, "I don't feel so good about this argument," maybe we'll catch and address the problem before the brief goes out. Or maybe we won't. And when we lose, we are likely to blame bad facts, bad law or the judge.

Wishful thinking threatens every aspect of the analytical process, legal and factual. We sometimes try, for example, to stretch a friendly-seeming statement of law to fit our facts even though the case in which the law appears is factually distinguishable. It's like trying to stretch a small plastic bag around the rim of a large waste basket.

Or we may find a case where the winning party was in a position like that of our client (e.g., employee, franchisee, mortgagee, guarantor), and we contend that the favorable result for that sort of person in that sort of case compels a favorable result for us. We ignore facts that distinguish the putative precedent, and we wish away procedural differences, e.g., that the case involved a motion to dismiss whereas our case involves a motion for summary judgment.

We also misconstrue facts. For



example, we study documents only until they seem to favor us and no farther, ignoring clauses that support contrary interpretations. Sometimes, we just flat out forget bad facts.

Not only do we wish away discrepancies in the law and the facts, but we refuse to acknowledge gaps in our arguments. We supply imaginary links in the logical chain with no basis other than our wish that the link exists. (A legal argument's elemental logical chain is as follows: "The law says that if X is true, I win. X is true. Therefore, I win." Both "the law" and "X" typically have many subsets).

Suppose that in document discovery, the defendant produces an internal memo that discusses, among other things, an ambiguous contract term at the heart of the dispute. Neither the author of the memo nor any of the copyees is identified as a lawyer. In fact, defendant attached the memo to an affidavit in support of an earlier motion, albeit not involving the ambiguous contract term.

Six months later, counsel asks for the memo back as privileged, contending that the copyees were all internal, and one was a lawyer giving advice. You refuse the request, and counsel moves to compel return of the memo. The court rules that defendant's use of the memo in court and production of the memo in discovery waived any privilege that would otherwise have attached, so you get to keep the memo.

Subsequently, at the deposition of defendant's chief financial officer (CFO), you ask about communications between the CFO and defendant's in-house counsel regarding the ambiguous contract term, contending that privileges that might have attached to the communications were waived when the memo on that subject was disclosed in discovery and used in court. Counsel directs the CFO not to answer.

You move to compel, claiming "subject matter waiver," i.e., that the lawyer-client privilege was waived as to the subject of the ambiguous clause when privilege as to the memo was waived. In the Procedural History of your sup-

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porting brief, you describe defendant's position as follows:

> Counsel refused to allow the CFO to respond to questions about discussions with defendant's in-house counsel regarding the ambiguous clause on the ground that such discussions were protected by the attorney-client privilege, *notwithstanding that the Court had determined that any privilege attaching to the memo on that subject had been waived.*

The italicized clause suggests that the court is required to find subject matter waiver because it found waiver as to the memo. At first blush, this seems logical: waiver should beget waiver.

But in your state, subject matter waiver doesn't result automatically from disclosure of a document. The court will consider factors that include, among other things, the waiving party's affirmative use of the document, the party's negligence in disclosing it and general fairness. Thus, the "notwithstanding" clause contains your wishful thinking that one waiver automatically mandates the other.

Consider scaling back your concluding clause to an earlier link in the logical chain — the fact that the memo and your questions at the deposition cover the same ground:

> Counsel refused to allow the CFO to respond to questions about discussions with defendant's in-house counsel regarding the ambiguous clause on the ground that such discussions were protected by the attorney-client privilege, *notwithstanding that the subject matter probed by the questions was the same as the subject matter of the memo for which the privilege was waived.*

You still imply that the court should find waiver as to discussions between in-house counsel and the CFO, just as it found waiver as to the memo, but the suggestion is less aggressive. You leave room for the court to reach that conclusion on its own. You merely state a fact — that the subject of the memo and the subject of your deposition questions are the same.

The suggestion, of course, is that you should be granted access to privileged communications between client and counsel just as you were granted access to privileged communications in the memo. Maybe you should, and maybe you shouldn't be granted access, but at least you aren't trying to pressure the court into a conclusion ("You ruled for me there, so you have to rule for me here.").

At this point, you are only laying the groundwork anyway. The persuasion will occur when you establish that defendant affirmatively used and negligently disclosed the document.

That the subject matter of your deposition questions is the same as the subject matter of the memo isn't dispositive — far from it — but it is a necessary link in the logical chain (it is one subset of "X is true"), and it doesn't intrude on the court's prerogative. You still have to show that your facts meet the test for subject matter waiver, but you have a start, and you haven't offended the court by suggesting it has no choice but to rule for you.

Puzzler

Which is better, Version A or Version B?

> **Version A:** Counsel refused to allow the CFO to respond to questions about the memo.

> **Version B:** Counsel directed the CFO not to respond to questions about the memo.

The bottom line is the same — the witness won't answer the question — but one version more accurately describes how counsel and the witness interact.

When a lawyer defending a deposition hears a question about a privileged communication, the lawyer objects and directs the witness not to answer. The lawyer isn't asked by the interrogator to permit the witness to answer. Version B is therefore more accurate.

Version B also produces a sharper image. A reader can more easily envision someone "directing" a witness than "refusing to allow" a witness.

The source sentence used the phrasing "refused to allow the CFO to respond." In a full edit, I would say "directed the CFO not to answer" rather than "respond." ■