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To Find the Focal Point for Your Attack, Find the Forest

Look for the most serious affront to the moral matrix

By Kenneth F. Oettle

Missing the forest for the trees — overlooking the set by fixating on the subset — is an apt metaphor in legal writing as in other legal endeavors because nearly every function that lawyers perform involves sets and subsets — categories large and small. The larger categories are the forests, and the smaller categories are the trees. When we miss the forest for the trees, we overlook a principal point because we give too much attention to lesser ones.

Suppose that negotiations leading to a contract may shed light on the meaning of an ambiguous clause at the heart of a law suit brought by your client. In your document demand, which is extensive, you ask defendants for drafts of the contract, hoping to find clues to the parties' intentions. Your client did not retain drafts.

The defendants produce drafts that include marginalia (notes in the margins) apparently made by their attorneys. The marginalia reveal counsel's thinking regarding the ambiguous clause. For example, next to the crucial clause on one draft is the question "Is this reasonable?"

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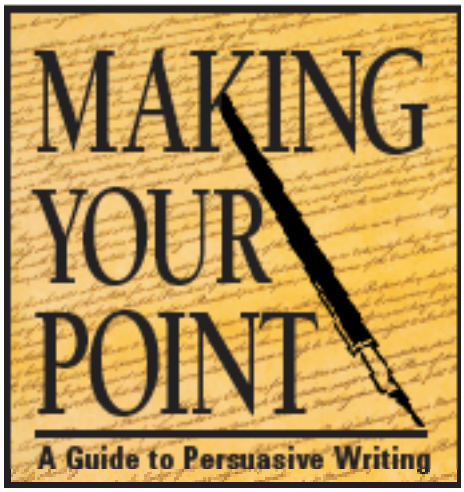
A month later, defendants realize their mistake and ask to have the drafts returned



so defendants can delete the marginalia and add them to their privilege log. You refuse, and defendants move for a protective order, claiming lawyer-client privilege. They argue that their request for temporary return of the drafts is eminently reasonable because the document production was massive, the defendants acted as soon as they realized that the marginalia had slipped through, and they ask only that they be given an opportunity to redact the drafts and claim privilege for marginal comments made by their attorneys.

Defendants' supporting affidavits are carefully drawn, but you can read between the lines that defendants performed no privilege review on the contract drafts. They just turned them over.

In your opposition to defendants' motion, you identify two ways in which defendants' privilege review fell short:

> Defendants produced these documents without first ascertaining whether the marginalia were created by their own lawyers or whether the marginalia were disclosed to plaintiff in the negotiations.

This is the right idea — to show that defendants dropped the ball — but you are focusing on the trees rather than the forest. And the trees aren't even of the same species.

One tree is the question whether the marginalia constituted a lawyer-client communication (the marginalia can't be privileged as lawyer's "work product" because they weren't prepared in connection with litigation). If the marginalia weren't privileged, then the issue is moot.

The other tree is the question whether the privilege, if it ever applied, was waived by disclosure of the marginalia during contract negotiations. Waiver would also moot the issue, but for a different reason. Whether or not the marginalia were potentially privileged, previous disclosure would negate the privilege. Thus, waiver is a different species of tree (apple, perhaps, rather than orange).

You are correct that before turning over the documents, defendants should have determined who wrote the marginalia (and why) and who saw the marginalia. Those omissions do suggest negligence. If defendants wanted to protect themselves, the time to do so was before turning over the documents.

But you can give your argument more punch by presenting these apple and orange omissions as subsets of defendants' failure to perform any privilege review at all. If defendants made no effort to protect themselves, then they deserve no protection. Greater failure deserves greater moral censure.

Try this re-write (added language is in italics):

> Defendants produced these documents *without performing a privilege review. Consequently, they*

> *never even gave themselves an opportunity to* ascertain whether the marginalia were created by their own lawyers *as lawyer-client communications* or whether they were disclosed to plaintiff in the negotiations.

Now the failure to ascertain who wrote the marginalia, and why, and whether the marginalia were previously disclosed are presented as subsets (trees) of a larger category — the failure to perform any privilege review at all (the forest). By bundling the lesser included omissions within the larger category, you deliver a more telling blow. You also legitimize your inclusion of the two species of tree in the same paragraph (failure to determine if privilege applies; failure to ascertain whether privilege was waived).

You had reasons for writing the sentence as you did. You felt that by identifying two elements that should have been part of the privilege review, you were doubling the bulk of your point. Thus, you featured the trees, to wit: "Defendants failed to do this with respect to the marginalia. Defendants failed to do that with respect to the marginalia."

Possibly — and to some this idea may seem incredible, but to others (you know who you are), it will not — you also narrowed your focus because of an excess of chivalry and/or a reluctance to appear to be a screamer (which you wouldn't be here). You limited your attack to the elements of what should have been defendants' privilege review because you were willing to embarrass the other side and/or project an argumentative persona only to the degree necessary, in your view, to win the point. You retracted your claws by saying only that the defendants failed to review the marginalia, not that the defendants totally dropped the ball by failing to perform any privilege review at all.

This is noble but misguided professional courtesy and/or self-limiting timidity. The time to cut the other side slack or to present oneself as a measured thinker isn't when the outcome remains uncertain and may still turn on the strength of your point.

Defendants cast their oversight as a forgivable, minor mistake for which they offer a quick solution at their expense. In their view, the failure to catch a few marginalia in the privilege net wasn't the worst thing in the world.

You have to persuade the court that defendants made a big mistake, not a little one. The big mistake is that they performed no privilege review at all. Consequently, they ask to be excused not for a minor oversight that allowed minutiae to slip through but for a major failure to take necessary steps to protect themselves. This is the serious affront to the moral matrix, the "disturbance in the Force." We tend to forgive persons who did their best and made a mistake but not to forgive persons who failed even to try to protect themselves.

Puzzler

Which is better, Version A or Version B?

> Version A: Plaintiff does not believe that the court's motion deadline applies to the new discovery issue.

> Version B: Plaintiff believes that the court's motion deadline does not apply to the new discovery issue.

A reader can more easily understand what plaintiff believes than what plaintiff does not believe. Also, Version B eliminates the potentially confusing internal sequence, "motion deadline applies." Your point is that plaintiff believes the motion deadline "does not apply."

For these reasons, Version B is better. ■