New Jersey Law Journal

VOL. CXCVII - NO.6 - INDEX 483 AUGUST 10, 2009 ESTABLISHED 1878

Be Selective, Not Linear, in Legal Argument

Control the material; don't let it control you

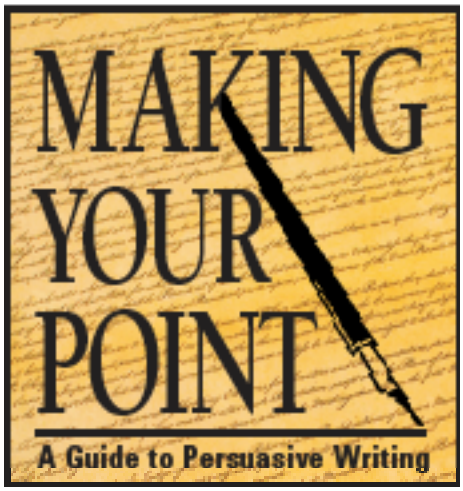
By Kenneth F. Oettle

Lawyers are both scholars and advocates. As scholars, they examine all sides of a question and, theoretically, seek the truth. As advocates, they take the side they are paid to take and present it as the truth.

Law students are scholars first and advocates second. They receive little instruction in advocacy, and aside from the occasional clinical program, they have nobody to represent. Consequently, when they emerge from law school, they have a scholarly bent. In brief writing, this manifests through, among other things, a tendency to over-report the law rather than use only what they need.

Scholars believe that credibility requires full disclosure. Under most circumstances, this is a trusty guideline for brief writers as well. But a brief writer who applies this principle without analysis is likely to be controlled by the material rather than vice versa.

Suppose, for example, that a plaintiff advanced money toward the purchase of securities directly from a corporation, but the securities were never issued, and the corporation refused to return the advance. The company didn't do anything affirmatively wrong. It just wouldn't return the money. Plaintiff asked the court to impose a constructive trust on the cash.



For no reason other than the perceived need to report fully, an associate writing a brief for the plaintiff began an argument point with the statement that constructive trusts are generally imposed only to remedy "wrongful acts." This dictum, which the writer dutifully included, traditionally begins the litany in cases that discuss constructive trusts:

> Generally, all that is required to impose a constructive trust is a finding that there was some wrongful act, usually, though not limited to, fraud, mistake, undue influence, or breach of a confidential relationship. [Citation] [The emphasis is mine.]

Unfortunately, the defendant corporation didn't, technically, commit a wrongful act — it just won't give the money back. Consequently, focusing on "wrongful acts" works against, not for, the plaintiff. When I read the draft brief, I asked myself, "Why is he saying that?"

Current law actually supports plaintiff. Recent cases state that a constructive trust can be imposed to prevent unjust enrichment, without need of a wrongful act. The writer's argument continued to that effect, piecing together dicta from three cases:

> Fraud was once thought to be an essential element of a constructive trust, but a court of equity "is not so limited today." [Citation]. Now, a constructive trust will be imposed in any case where failing to do so will result in unjust enrichment. [Citation]. A wrongful act is not required. [Citation].

If the writer's thesis is that a wrongful act is not required, why begin with, or use at all, the portion of the litany that seems to require a wrongful act? The traditional dictum adds nothing to the argument and sends the reader in the wrong direction. The argument should begin with a helpful principle:

> A constructive trust will be imposed in any case where failing to do so will result in unjust

The author is senior counsel and co-chair of the writing and mentor programs at Sills Cummis & Gross. Making Your Point, a Practical Guide to Persuasive Legal Writing, *a compilation of these columns published in 2007 by ALM Publishing, is available at LawCatalog.com. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every month.*

> enrichment. [Citation]. A wrongful act is not required. [Citation].

At that point, if you want to show familiarity with the history of the doctrine, you can add that the traditional dictum that a wrongful act is required for a constructive trust has been qualified if not superseded.

Because novices are afraid they will lose credibility by advocating too vigorously, and because picking and choosing from dicta — wisely, of course — is a tactic at which one can get "caught" when the court reads the case, novices often overreport dicta, as the writer did here. If you find yourself in similar circumstances and feel you have to acknowledge something in the case law, do so after you make a positive point.

Other Forms of Linearity

Brief writers often give their adversaries free "air time" (as on the radio) by flatly restating the other side's position before attempting to discredit it. For example, writers typically say, "Plaintiff contends that the contract is invalid because ..." (setting forth plaintiff's entire rationale), and then continue with, "Plaintiff is wrong." Initially, they give no reasons why plaintiff is wrong. They just say, "Plaintiff is wrong." I cringe every time I see this.

The motivation behind this weak approach isn't an excess of candor, as in the constructive trust example. The motivation is to save time and effort by using the handiest opener — the other side's point. After all, if the other side didn't make the point, the writer wouldn't have to oppose it. But that is just the rationalization. The real motivation is that the convention, "He says X; I say not-X" is easy to execute.

Like the repetition of irrelevant and potentially misleading statements of the law while under the influence of the candor mandate, the approach is too "linear." The writer chooses an opening by rote, not through a reasoning process that targets the reader's needs and preconceptions. The writer forgets to ask, "What will persuade?"

Just as the court won't be persuaded by a full treatment of the law of constructive trusts, the court won't be persuaded by an as-yet unsupported declaration that the other side is wrong. Worse, the naked reiteration of the other side's position will reinforce it in the court's mind.

Nevertheless, the convention of "Plaintiff says X. Plaintiff is wrong" is so convenient, and alternative approaches require so much thought, that brief writers will continue the practice. Some are unaware of what they are giving away; others sense it but suppress the awareness because time is tight and, frankly, because everyone else does it.

Another example of the linear approach is the preliminary statement comprised of the arguments to be made in the brief — again, an easy source of material — rather than a précis of the writer's strongest point. The latter, more focused approach requires the hard work of shaping and encapsulating a winning theme.

In all these instances, it's a question of controlling the material or letting it control you. Controlling the material takes more work, but it's more rewarding.

Puzzler

How would you improve the following sentence?

> When a contract is ambiguous, it will be construed against the party preparing it.

The subordinate "when" clause results in the writer having to make two references to the contract — the noun "contract" and the pronoun "it." The sentence would be crisper with "contract" rather than "it" as the subject of the dominant clause.

The "when" clause is also a weak lead-in because many things can happen when a contract is ambiguous, only one of which is that the contract will be construed.

"Drafter" is shorter than "party preparing it."

> **The revised version**: An ambiguous contract will be construed against the drafter. ■