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Choose an Approach That Will Appeal to the Court's Conscience

Show that the other side 'deserves' to lose

By Kenneth F. Oettle

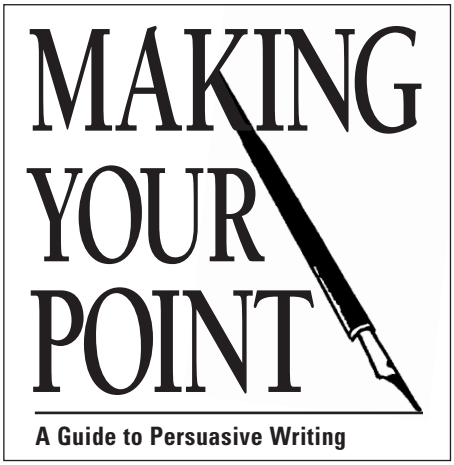
In *The Unforgiven*, Clint Eastwood has the drop on Gene Hackman and is about to discharge his Henry rifle at a range of one foot when Hackman says, plaintively, "I don't deserve this." Eastwood replies, "Deserve ain't got nuthin' to do with it."

In litigation, deserve has everything to do with it. Courts feel more comfortable taking something from a litigant (e.g., assessing damages for breach of contract) if the facts show that the litigant took something from someone else. That way, the books are balanced. Courts don't like to inflict pain gratuitously. If they must select a loser, they prefer that the person deserves to lose.

Suppose, for example, that in the dead of night, a drunken man breaks through a locked fence enclosing a construction site, climbs onto a bulldozer and falls off, suffering serious injuries. Would a court grant summary judgment to the contractor because the trespasser got what he deserved? Probably. The court would think the plaintiff brought it on himself. He deserved to lose.

Generally, we believe that people who are careless deserve to lose. People who break promises or deceive others deserve to lose. Even people who fail to make an effort to protect themselves deserve to lose. Almost any moral failing can create the impression that a person deserves to lose.

This is one reason litigation sometimes deteriorates into mud-slinging. In trying to show that the other side deserves to lose, advocates shamelessly seek to portray the opposing party as a bad person, whether the party's alleged bad acts are relevant to the matter at issue or not.



Regrettably, the tactic sometimes works, which is why lawyers keep using it. But it can also backfire. The court may see through it, be sensitized by it, and realize that the balance of the relevant equities tips decidedly against the mudslinger.

Even novice litigators know when dirt is irrelevant, but their devotion to precedent, their compulsion to try to fit their case within the four corners of a reported opinion, can divert them from the essential task of finding the fact or facts that show where "deserve" lies. (Sooner or later every litigator needs to realize, whether gradually or through an epiphany, that the facts control the law, not vice versa. The facts are the weights that sit on the scales of justice. If well-presented, they show how the balance tips, i.e., they show what is "fair.")

> NOTE: The argument that something is "fair" or "unfair" is, by itself, conclusory. Don't use the words fair or unfair until you have laid out facts that would persuade a trier of fact how the balance should tip. Even then, be careful that you aren't just tapping your gut sense of equity — which may be skewed by your loyalties — instead of doing the hard work of analysis.

Experienced lawyers build their arguments around "deserve." Even where the fight isn't over winning or losing per se but over valuing and dividing up assets, as in a divorce, advocates try to portray their side as deserving more, and the other side as deserving less.

To shape an argument, particularly in head-to-head litigation under the common law, where the focus is more personal than institutional, look for a fact or a fact scenario that purports to elevate the moral standing of your client over that of the other side, giving your client the "white hat" or the

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"high ground."

Show the adverse party to have engaged in morally challenged behavior, such as violence, promise breaking, deception, delay, self-indulgence, laziness or lack of care. If the moral offense "goes to" (is within the confines of) the issue in the case (and sometimes even if it is not — but be careful there), you will give yourself a good chance to persuade the court that your client "deserves" to win and that the other side deserves to lose.

Suppose that Developers A and B are competing for limited sewage capacity. Developer A invokes a 10-year-old contract with the local sewage authority that reserves most of the available capacity for Developer A in return for a contribution to the construction of the sewage treatment plant.

This apparent lock on capacity purports to block construction of a shopping center for which Developer B is ready to break ground. Developer B sues to free up the sewage capacity, contending that Developer A doesn't need the capacity because it doesn't even have a timetable for breaking ground.

Developer A invokes the sanctity of the contract: "A promise is a promise." Developer B argues that hoarding sewage capacity harms other developers and the community. Because Developer A isn't ready to build, its right to sewage capacity, though explicit, hasn't "ripened."

Developer B's dominant equity — the fact intended to persuade the reader — is "hoarding." Hoarding offends, and because it offends, it may persuade. "Hasn't ripened" is the legal hook on which the court can hang its hat. It is important to the argument, but courts don't hang their hats unless and until the dominant equity (the dominant moral element) makes them feel welcome.

Sometimes the dominant equity may be collateral to the factual core, as in a contract interpretation case where the key clause is so unclear that it is truly opaque to interpretation. The court may then ask whose "fault" it was that the clause wasn't clear. One way or another, the court wants to know who is at fault and therefore who deserves to lose.

Readers react adversely to morally substandard behavior because they identify with the persons who were harmed by it. They imagine themselves being hurt, and they perceive a threat. This is why readers feel that immoral actors deserve what they get. Readers don't like people who do immoral things.

A court's moral views should not be a mystery. If something seems wrong to you, it probably seems wrong to the court. You and the judge were probably exposed to similar religious training, similar school curricula, and similar print and electronic media, all espousing a relatively homogeneous moral code. The court's conscience is likely to be congruent with yours.

The court's conscience is also likely to be congruent with the law. After all, morality is the code of conduct on which people generally agree, and what people agree upon becomes law in a country under the rule of law.

Consequently, when you present the law (what courts did in prior cases), you are usually just confirming what the court already knows instinctively from its sense of right and wrong. The law strengthens the court's resolve and removes any lingering doubt.

In sum, the ultimate arbiter in litigation before a court is the court's conscience — its sense of right and wrong. Judges trust their sense of right and wrong to dictate a result congruent with the law. If the law is unclear, the court's conscience will suggest what the law should provide. Therefore, the theme of your argument should appeal to the court's conscience. This is the playing field on which litigation takes place.

Puzzler

How would you tighten and sharpen the following sentence?

> This appeal is the only chance that the parties to this suit have to seek appellate review of all of the decisions that the trial court has made prior to this time.

The possessive can save words, as by changing "the only chance that the parties…have" to "the parties' only chance" and by changing "the decisions that the trial court has made" to "the trial court's decisions." The word "appellate" is implicit and therefore unnecessary, as are the phrases "to this suit" and "prior to this time." Never say "all of," and here, don't even say "all."

> The revised version:
> This appeal is the parties' only chance to seek review of the trial court's decisions. ■