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Don't Take Pot Shots at Court or Counsel

Gratuitous zingers are offensive and unpersuasive

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When litigators become inspired with the perceived righteousness of their cause, they sometimes view the other side as evil and demonize them. If the lawsuit does not go well, and especially if the court gives counsel's arguments short shrift, counsel may demonize the court as well.

Below is an example of a lawyer allowing animosity toward the trial court to color an appellate brief:

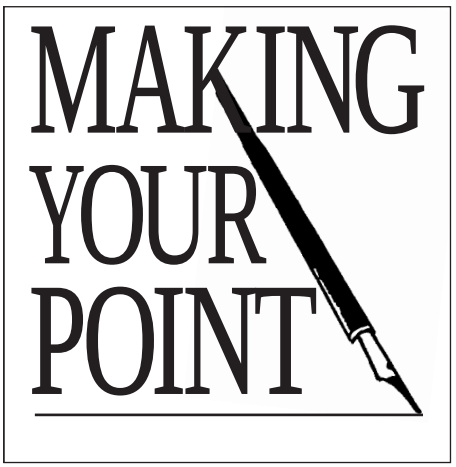
> After plaintiff's expert testified, defendant's expert disagreed with much of the testimony, but the trial court chose to disregard defendant's expert without justification.

Counsel truly believed the trial court had ignored the testimony of the defendant's expert without analysis. Suspecting bias, laziness, or just plain orneriness on the part of the trial court, counsel could not resist the urge to suggest — though counsel would not overtly say — that the trial court had breached its judicial duty. Instead, counsel left the accusation ambiguous:

> " … the trial court chose to disregard defendant's expert without justification."

This could mean either that the court knowingly disregarded the expert's testimony without analysis — a serious omission — or that the court, well-intentioned but misguided, merely misunderstood or undervalued the expert's testimony. Being angry, counsel probably hoped the reader would take the harsher meaning.

That was a mistake. "Chose to disregard … without justification" may irritate appellate judges, who have spent their lengthy judicial careers trying to do the right thing. They may resent any suggestion — because it reflects poorly on all judges — that a colleague acted unethically.



The writer should have said that the trial court disregarded the expert's testimony "without explanation," not that the court "chose" to disregard it "without justification." The toned-down approach is more persuasive because it is more accurate and carries no baggage. Counsel doesn't know the trial court's reasoning or intent. The court may have carefully considered the testimony but found it incredible.

A Second Example

The following gratuitous shot was taken in a plaintiff's reply brief:

> Defendant claims falsely that the court's decision not to hold a hearing and deprive plaintiff of due process was somehow within the court's discretion.

Suggesting that the court intentionally deprived the plaintiff of due process attributes a motive that counsel can't prove. Similarly, stating that defendant "falsely" claimed something strongly implies an intention to dissemble, which is hard to prove. The better word is "incorrectly," even if counsel is sure the adversary is lying. If the facts are well marshaled, the court will sense that the adversary is lying. Courts find mud slinging unseemly.

Re-written, the sentence might read:

> Defendant claims incorrectly that the court's failure to hold a hearing, thus denying plaintiff due process, was within the court's discretion.

Unfortunately, when we become indignant on behalf of the client, we may take things personally and may suspect, usually wrongly, that the court is out to get us, the client, or both. We may be so irate at what we deem the laziness, stupidity, or prejudice of the trial judge that we feel the only way to convey how far the court has strayed is to show disrespect.

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If you are about to vent such sentiments in an appellate brief, don't. At best, you will accomplish nothing, and at worst, you could find yourself at the wrong end of a disciplinary action.

I don't suggest that you stifle your indignation. Being worked up fosters optimism and sustains energy. It stimulates the juices and helps the words flow. Sometimes it even leads to good ideas. All that is productive.

But enthusiasm is neither evidence nor logic. A verbal manifestation of your anger cannot replace good facts and good law.

A Third Example

Suppose you are appealing an award of counsel fees where the trial court shaved plaintiff's arguably bloated fee application only minimally. You write:

> The trial court granted a minimal reduction of the more than $268,000 in claimed fees, *ignoring* plaintiff's failure to survive summary judgment on claims of malicious interference with contractual relations, malicious interference with prospective economic advantage, and intentional infliction of emotional distress. [Emphasis added].

The accusatory "ignoring" assumes an approach by the court that you can't prove. You don't know that the trial court ignored anything, and the appellate court knows you don't know.

The better technique is to say "making no adjustment for plaintiff's failure, etc." This is strictly factual, without editorial content. The appellate court will be well aware that in your view, the trial court's failure to make an adjustment was erroneous. You have to show why it was erroneous.

The right to have arguments taken seriously seems almost an entitlement. When a court fails to respond to a point, we feel as if the court has broken an agreement that all judges make with all lawyers — to give serious consideration to everything we assert.

Sooner or later, we realize that such an agreement does not exist. On the one hand, judges don't have infinite time to review and respond to briefs, and on the other hand, they know they can achieve substantial justice, or at least come close, without fully evaluating every point.

Like the illusion that we will live forever, the illusion that courts will read and analyze everything we write is dispelled slowly. Even senior attorneys are vulnerable to it (some of them don't plan to die or retire, either). Whatever our resentments and suspicions, we must not let them color what we file in court.

Puzzler

Which is correct, Version A or Version B?

> Version A:
> They began to home in on a better solution to the problem.
>
> Version B:
> They began to hone in on a better solution to the problem.

Once you know the preferred word, you will remember it, but initial confusion is understandable, given the similarity of the words "home" and "hone" in sound and function. We home in on a solution (proceed toward it, like finding our way home) but hone the solution once we find it (make it more effective, like sharpening [honing] a knife). We home in on the right answer (find our way toward it, like a homing pigeon) and then hone it (give it a sharper edge). Version A is correct. ■