Eschew Exaggerations, Disparagements, and Other Intensifiers

By Kenneth F. Oettle

An advocate's instinct is to disparage the other side. Motivated by indignation at the perceived insult to our intelligence and to the cause of truth, we say the other side's position is "obviously" or "clearly" wrong, their reading of a statute is "preposterous," and they cite no law "whatsoever." We almost cannot help ourselves.

Such characterizations of the other side's arguments are not effective writing. They are more likely to trigger disbelief than agreement because they are the known refuge of persons whose positions are weak. They are a way of pounding the table when you cannot pound the law or the facts. If you pound the table with *clearly*, *obviously*, and *whatsoever*, the reader may figure that you have nothing substantive to say.

Just as bad, if not worse, are statements disparaging the opposing advocate. In the following examples, the italicized words should be eliminated:

1. Plaintiff's *disingenuous* reading of the rule is inconsistent with the public policy that supports the rule.
2. Defendant *blithely* ignores the fact that he was present when the statements of which he claims ignorance were made.
3. *In an outrageous show of chutzpah*, the plaintiff blames his injury on the defendant rather than on his own inattention.

Words should speak for themselves—you should not have to speak for them. Consider the following intensifier in a brief submitted by a condemnee appealing for the third time from a trial court's refusal to value the condemned property fairly:

> An appalling ten years after the taking, condemnee comes before the Appellate Division for the third time.

The word *appalling* is unnecessary because the egregiousness of the condemnee's having to wait ten years for a shot at justice is evident merely in the recital, without need of editorial gloss. The passage of time speaks for itself, and the point is made just as well without *appalling*:

> Ten years after the taking, condemnee comes before the Appellate Division for the third time.

Some writers vigorously defend the use of "strong language," deeming it a matter of taste and contending that those who shy from the practice are wimps. This view has some merit, but not much. Aggressive writing may intimidate a few adversaries, and more importantly, it may give some clients the sense that you are vigorously advocating their cause. But experienced lawyers are not easily intimidated, and they frequently turn strong language back on the writer, portraying the writer (and, by dint of association, the writer's client) as offensive rather than thoughtful or thorough.

Judges are largely unmoved by intensifiers. If the words are ad hominem attacks on the other side (e.g., contending that an argument is "disingenuous"), the court may deem it unseemly. If they are used to pump up your own argument (e.g., contending that your point is "clear" or that a delay was "appalling"), the court may be insulted because you consider it necessary to point out the obvious (e.g., that a ten-year odyssey in court is appalling). If the facts don't speak for themselves, they probably aren't good enough facts.

Though you may wish to express indignation if the other side is caustic, don't sink to their level. In the end, the best way to persuade the client that you are a dedicated and effective advocate is to prevail in court, and the best way to prevail in court is to make your point and back it up with authority.

Persons who use intensifiers are often trying to make up for a failure to highlight good facts. Consider the following first sentence in the preliminary statement to our condemnee's brief, where the condemnee argued that the trial court had undervalued the condemned property. Which version would you use, A or B?

> A. Condemnee seeks a redetermination of fair market value based on the value

> If the facts don't speak for themselves, they probably aren't good enough facts.

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that a hypothetical willing buyer would have paid for the property at the time of the taking.

B. Condemnee seeks a determination that a person buying into the Jersey City waterfront real-estate boom in April 1986 would have seen the potential of this choice parcel and would have paid a premium for it.

The best fact for the condemnee is that its condemned property was situated in the midst of a waterfront real-estate boom, so a willing buyer would have paid a premium for the property. Using version B, the writer integrated the most important fact (waterfront real-estate boom) into the first sentence of the preliminary statement. With version A, the writer would have presented nothing more than a statement of the law. Thus, version B is persuasive, and version A is not. The facts in version B supply the "intensity" for which intensifiers are a poor substitute.

Just as someone always votes for the other side in an election, some writers would use version A anyway, reasoning that (1) they don't want to appear to be too much the advocate too soon or (2) it's important to invoke the key terms—such as *fair market value*, *hypothetical willing buyer*, and *time of the taking*—in the relevant principle of law. These rationales are unimpeachable as general statements, but taken in context, they are outweighed by the more important principle that persuasion begins with good facts. ■

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