

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

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's got nothin' to do with it."

In litigation, "deserve" has everything to do with it. Courts feel more comfortable taking something from a litigant (for instance, when 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 moral element is one reason that litigation sometimes deteriorates into mudslinging. 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; that's 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.

Novice litigators' 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—they show what's "fair."

Incidentally, the argument that something is "fair" or "unfair" is, by itself, conclusory. Don't use the word *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 when 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, the 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 the other side deserves to lose.

Suppose that Developers A and B are competing for limited sewage capacity. Developer A invokes a ten-year-old contract with the local sewage authority that reserves most of the available capacity for

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Developer A in return for a contribution to constructing 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's 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's 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 curriculums, 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, mo-

reality is the code of conduct that people generally agree on, and what people agree on 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. ■

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Kenneth F. Oettle is a graduate of Cornell University and Harvard Law School and senior counsel in the Newark, New Jersey office of Sills Cummis & Gross P.C., where he chairs the firm's writing program. His columns appear regularly in the New Jersey Law Journal and the Texas Lawyer, on Law.com, and in other ALM publications nationwide.