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Curb Your Editorial Urges

Consider carefully how you describe a court's actions

By Kenneth F. Oettle

When you find a favorable precedent, you are ecstatic. Not only are you pleased that the court ruled as it did, but you are certain the court ruled correctly because you believe your client is in the right, or was wronged. Sometimes you express your enthusiasm in an editorial comment, as in the following sentence from a brief:

The Supreme Court correctly recognized that any change in the law would have to be made by the legislature.

The Supreme Court probably was correct, but it is not for you to say. You don't have the stature. Claiming stature you don't have suggests you may claim other things you don't have, such as a good case. It taints your "ethos," your credibility as an advocate.

Suppose you delete "correctly":

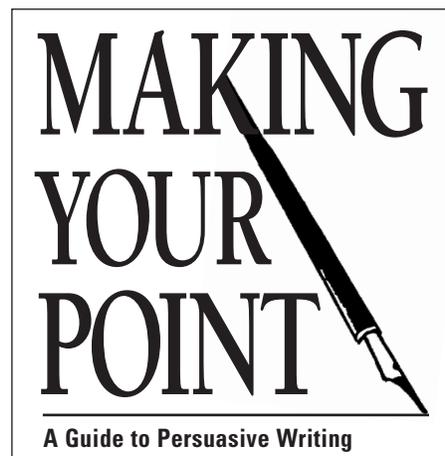
The Supreme Court recognized that any change in the law would have to be made by the legislature.

This is still an aggressive approach, but within bounds. To "recognize" something is to observe the truth of it. To say the Court observed the truth of

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something is to imply that you know the truth and can judge whether others know it as well. In other words, you place yourself in a position from which to judge the Court.

But you don't editorialize; you merely report. You don't say the Court acted "correctly" or "incorrectly" (an adverb). You say the Court "recognized" something (using a verb). In this manner, you suggest but don't actually say that the Court reached its conclu-



sion correctly.

Suppose you back off from the subtle but assertive "recognized" with something more neutral:

The Supreme Court ruled that any change in the law would have to come from the legislature.

"Ruled" is less judgmental than recognized, but it's also less precise. It is akin to "held." But the Supreme Court didn't hold that any change in the law would have to be made by the legislature. The Court didn't have to make that

comment to decide the case, so it wasn't a holding. It was "dictum."

A holding or ruling describes the application of law to fact. A typical holding is that a party breached a contract by supplying defective product or that a trial court acted within its discretion in refusing to overturn a jury verdict.

In short, "recognized" is better. Does it push the envelope? A little. Is that bad? No.

Can we find a word less aggressive than recognized but more precise than held or ruled? How about "stated"? Did the Supreme Court state that any change in the law would have to come from the legislature?

It did. But where does "state" get you? It is painfully neutral. A reader may expect you to be more assertive. If the intensity of your advocacy fails to meet expectations, like company earnings that fall short of earnings estimates, a reader may sense weakness.

What about "said"? Can you write that the Supreme Court "said" that any change in the law would have to be made by the legislature?

I wouldn't. It's too informal.

The denotations of "said" and "stated" are much the same, but the connotations are different. The more formal word ("state") shows better manners because it portrays the court in a more impressive light. By showing good manners, you avoid irritating your reader.

Good manners don't make your points better or your opponent's points worse, but they improve your relationship with the reader, especially if the reader is a judge. Choose the formal over the colloquial when describing what a court did.

For all important words, consider all possibilities. Even if you think you have a good vocabulary, keep a thesaurus handy. For the sample sentence

above, alternatives for “say” and “state” (from the thesaurus) fall short as follows:

The Supreme Court _____ that any change in the law would have to be made by the legislature.

Affirmed — double meaning

Asserted — too forceful; Court has no need to assert

Averred — word is rarely used

Declared — grandiose

Explained — didn’t, really

Opined — true, but probably too formal

Remarked — too casual

The demands of precision are relentless. Above, we examined a substantial menu to choose one word to describe a statement in a Supreme Court opinion. Such issues arise repeatedly. For most projects, you will not have time to resolve them all.

Absorb as much of this truth as you can bear.

Puzzler

How would you tighten and sharp-

en the following sentence?

After severing a relationship with a former client, the Supreme Court has forbidden an attorney to use knowledge or information acquired in the previous relationship against the former client.

The main problem is the “dangling participle” (the opening phrase). The Supreme Court didn’t sever the relationship with the former client. The lawyer did. Here, the information in the dangling participle isn’t even necessary. The word “former” will indicate that the relationship was severed.

I would not keep both “knowledge” and “information” even though the connotations may be slightly different. “Information” covers as much as “knowledge” here.

The five words that conclude the sentence, “relationship against the former client,” are awkward because the attorney did not have a relationship “against” the former client. Moving “against” to create the phrase “use against a former client” is a possible solution, but it, too, is awkward:

The Supreme Court has forbidden an attorney to use against a former client information acquired in the previous relationship.

It is awkward because the first question in the reader’s mind after seeing the verb “use” is, “Use what?” not “Use how?” Because the “what” is “information,” the next question in the reader’s mind is, “What kind of information?” Once that question is answered, the reader finally turns to “Use how?” The sequence is as follows:

Use what? (information)

What kind of information? (information acquired from a former client)

Use it how? (in a subsequent matter against that client)

The new version:

The Supreme Court has forbidden an attorney to use information acquired in a relationship with a former client in a subsequent matter against that client. ■