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Jealously Guard Your Credibility With the Court

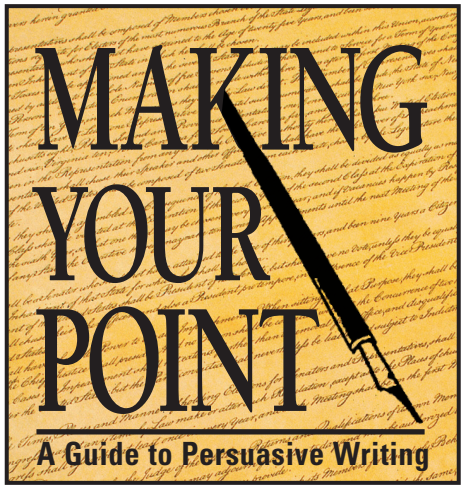
An untrustworthy act is like ink in the wash — it discolors everything

By Kenneth F. Oettle

For a long time, I have resisted the lure of hand-held e-mail devices. I don't want my private time to be invaded by the information explosion any more than it already has, and I don't want to become an e-mail junkie like those poor, immersed souls who poke at miniscule keyboards with their styluses, or thumb them, outside conference rooms, in restaurants, in airport waiting rooms and everywhere else. They usually look harried and always look obsessed.

A lawyer friend of mine recently bought a Blackberry™, was thrilled with it, and urged me to buy one. She said it is very convenient: She can always stay in touch with the office and with her husband and kids, and she can get back to clients immediately. She was exuberant about its virtues.

I was unmoved. With 12-hour workdays, six- or seven-day work weeks, and the relentless pressure of deadlines, who wants to stay in constant touch? Worse, who wants to lead people to expect that you will answer their questions at any hour and from any location? (I know. I know. "If you want to succeed in the fast-paced business world, you have to make yourself available…blah, blah, blah." If you do M&A work, I suppose that is true.)



Finally, my friend said something that moved me. She said that paradoxically, a hand-held device allows her more time away from the office because she doesn't have to fear the ire of a client or a colleague who desperately needs to reach her or perceives that they desperately need to reach her. She can attend social and professional events without feeling a steady undertow of stress.

I was immediately persuaded. I practically couldn't wait to jump from my chair, run upstairs to the office manager and order a hand-held device.

This is how persuasion works. When the point hits home, you are moved. It's the same with judges. When your point hits home, the judge is moved. But with judges, you may not have the luxury of running through six or seven arguments until one of them pushes the right button. You could lose the court's attention before you even get to your best point. At a minimum, the unpersuasive arguments will dilute your best argument and undermine your credibility. In litigation, you have to choose your best argument, commit to it, and begin with it, usually in the Preliminary Statement.

But the story continues. My friend sold past the closing, which young attorneys are taught never to do, and suddenly I didn't want a hand-held device anymore. She said, "Candidly, 90 percent of the time, I use my Blackberry™ for personal communications."

Boom! That was it. I didn't want the device anymore. I figured that if only ten percent of the machine's value would be work-related, then I didn't want it. It's just another invasive piece of technology.

I realize the device could still help free me from the office, even if I were to use it only 10 percent of the time for business. Nevertheless, the credibility of the advocate was compromised. I was no longer hearing a testimonial from someone who had found an extraordinary business use for it. I was hearing a testimonial from someone who had found an extraordinary personal use for the device. Because my interest in the device was for business purposes only, I lost my desire to have one.

"But that's illogical," she protested. "If the device can help you, why do you care what I use it for? Why cut off your nose to spite your face?"

"I know it's illogical," I said. "But I don't want one."

Ultimately, I may buy the device and not cut off my nose to spite my face. I recognize the illogic of my position. Either the tool will give me more

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freedom or it won't, and I should be able to make that decision dispassionately and use the equipment responsibly.

But part of me resents the device and looks for reasons not to buy one. And I don't know that the device will help me more than it hurts me. The supposed freedom may carry a serious price if I become addicted to e-mail and can't resist using it to the detriment of my own psyche and the inconvenience of anyone looking to have a personal, as opposed to a business, relationship with me.

The bottom line is that I don't have a sense of what the hand-held device will do for me, or to me. If I don't know the facts, I have to rely on what people tell me. If I can't trust the source, I don't take the advice. It's that simple.

This also applies to brief writing. When you misinterpret or overstate the holding in a case or omit or mischaracterize a key fact, the court will lose faith in you. No matter how good your argument is, the court will think, "Well, that sounds like a good argument, but I don't trust the messenger." This is why you must be trustworthy.

Never say a case stands for a proposition if it doesn't or that a case is inapposite if it is clearly on point. Don't ignore bad facts that are obvious, and don't make facts up. This includes treating ambiguities as if they mean only what you say and can't mean anything else. Never cite a case that has been overruled, even on other grounds, without so indicating. Courts become apoplectic over this.

Don't hide weak arguments in footnotes. Don't restate your conclusions several times in a paragraph because you can't think of enough facts to fill the space. And don't fake your sets, that is, extract subsets from sets to create long lists for apparent weight when you really have only one or two examples.

And be gracious. Never use sarcasm or inflammatory rhetoric. Never impugn the ability or integrity of a lower court. And rarely use intensifiers such as "clearly" and "obviously." Don't embellish, exaggerate or malign.

In short, be well-mannered and honest. You may be tempted to be acerbic because you are worked up, and you may be tempted to say that you didn't break the glass, spill the milk or chop down the cherry tree because you don't ever want to admit you were wrong, but you must resist those tendencies. Your credibility is on the line.

Puzzler

How would you tighten and sharpen the following sentence?

> Smith did not participate in the negotiation of any of the terms or conditions of the contract.

"Did not participate in negotiating" would be better than "did not participate in the negotiation of," but "participate" is a weak verb. What mental image do you get of a person who is "participating"? Replace "did not participate in the negotiation of" with "did not negotiate."

"Terms" is a set, and "conditions" is a subset. The set should suffice.

I think the writer meant to emphasize that Smith had absolutely nothing to do with the negotiation, so I would keep "any terms" and not cut muscle by reducing to "Smith did not negotiate the contract." I prefer the "new version" to the alternate version below because I like the power of "did not negotiate any terms," and I fear the momentary ambiguity in the fortuitous phrase "did not negotiate any contract."

> The new version: Smith did not negotiate any terms of the contract.

> Alternate version: Smith did not negotiate any contract terms. ■