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Make Your Point Before Accusing The Adversary of Ill Motives

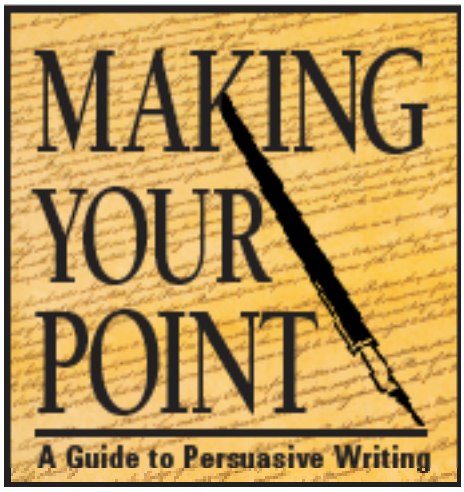
Earn the right to express moral disapprobation

By Kenneth F. Oettle

Nobody likes greedy or selfish people, for obvious reasons (they take more and leave less for you). And nobody likes people who lie, or who act with ulterior motives, because they can't be trusted ("False in one; false in all."). They make you feel foolish and powerless — you can't predict their behavior and thus tailor your own because you don't know what facts bear on their secret agendas.

Because such behavior is repulsive, litigators look to portray opposing parties and lawyers as greedy, selfish, or deceptive in an effort to tarnish their credibility. In the trenches, veteran lawyers seem to worry less about the law and more about how selfish and sneaky they can paint the opposing party and its counsel.

You hear these ad hominem arguments every motion day (and you can add "He dropped the ball," i.e., laches, as perhaps the most common accusation). But the ad hominem tactic can be overplayed, as in briefs that make moral



disapprobation the theme rather than just a tag-on clincher. Writers, who open with it, before developing support for it, seem not to understand that early finger-pointing is more likely to hurt than help.

Assume that in a contract dispute, plaintiff Small Business, Inc. serves a document demand on defendant Ultra Magnum Corp., requesting drafts of a long series of now superseded contracts and all e-mails and other documents regarding negotiation of those contracts. Plaintiff contends that the drafting history of all the contracts is relevant to interpreting the key clause in the current agreement.

Defendant contends that plaintiff doesn't need this burdensome and expensive discovery and that plaintiff's attorney is merely looking to bully defendant into paying plaintiff to go away. When the parties fail to compromise, plaintiff moves to compel.

Defendant begins the preliminary statement of its opposition brief as follows:

> Plaintiff is demanding burdensome and unnecessary discovery simply to create leverage to force a nuisance settlement.

This attack on plaintiff's motives in the opening sentence makes those motives the centerpiece of the opposition. Perhaps defendant is right. Maybe this is just a litigation tactic. But the court doesn't know it yet. Therefore, the accusation falls flat, and it may drag the rest of defendant's argument down with it.

The court may suspect that the defendant is resorting to motive-spotting because defendant's position on the merits of the discovery dispute is weak. The court may also react poorly to being told how to view the plaintiff's tactics before being given a basis for doing so. Writers should allow readers to draw their own conclusions, not tell them how to think. A reader who draws a conclusion tends to embrace it. A reader told what to think tends to resist.

Courts hear accusations of greed, selfishness, sloth, mendacity, and ulterior motive all the time. It's standard fare. Sometimes the accusations are true, and sometimes they aren't. As of the first sentence in a brief, the court doesn't know one way or the other. Why use prime real estate to build what the court may suspect to be a house of cards?

The court knows that plaintiff would like to force defendant into a generous settlement, and, frankly, the court can smell an overbroad, sloppily-drawn discovery request from a mile away. Whether plaintiff's document demand is viewed as bullying will be determined not by the ad hominem accusations with which the

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defendant begins the brief but by a close analysis of the demand. The court wants to see the analysis before dealing with motives because the court has to perform the balancing test required in any discovery dispute.

Until you make your point on the merits, the court will reserve judgment on the other side's motives. If the requested discovery is material, accessible, and not available from other sources, plaintiff is likely to be entitled to it, whether plaintiff's intention is to create trouble and expense for defendant or not. On the other hand, if the requested discovery is peripheral, duplicative, and hard to extract, the court may deny much of the request.

Before challenging motives, the defendant should argue the merits, e.g., explain that negotiation of unrelated clauses in earlier contracts couldn't possibly shed light on the meaning of the clause in the current contract, or that responding to plaintiff's broad request for electronic evidence would cost more than plaintiff could theoretically recover.

If the court is persuaded that the discovery demand is excessive, the court will be receptive to accusations that plaintiff is just trying to bully the defendant into a settlement. The court can then use plaintiff's apparent bad faith as supplemental justification for denying the document demand.

Like anyone else, courts want to feel justified in making a decision that will have negative consequences. A court will be more comfortable denying plaintiff's discovery request if the court feels that plaintiff was over-reaching.

In a discovery dispute, both sides may be pushing the envelope. One side is asking for too much. The other side is hiding something, lost something, or is looking to avoid censure for a conveniently cleansing document destruction program. Once the defendant persuades the court that the plaintiff is over-reaching, the bright light of moral disapprobation shifts to the plaintiff. Having reason to believe that plaintiff deserves to lose, the court can be comfortable denying discovery despite the ever-present risk that the defendant may have something to hide.

Puzzler

How would you tighten and sharpen the following sentence?

> On May 1, defendants took the deposition of the CEO of plaintiff, and on May 22, defendants filed a motion for summary judgment.

The phrases "took the deposition of" and "filed a motion" can be replaced by the active verbs "deposed" and "moved," saving words and picking up the pace. "Plaintiff's CEO" is tighter than "the CEO of plaintiff."

One might suggest that the expression "deposing a CEO" is ironic, that it sounds as if you are removing the head of the company as one would remove (depose) a monarch. Don't be concerned. The typical legal reader will read right through it, interpreting "deposed" as the technical term that it is.

> The revised version: On May 1, defendants deposed plaintiff's CEO, and on May 22, defendants moved for summary judgment.

> The alternate version: Defendants deposed plaintiff's CEO on May 1 and moved for summary judgment on May 22. ■