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Don't Let Advocacy Get Personal

Be wary of ascribing motives you suspect but cannot prove

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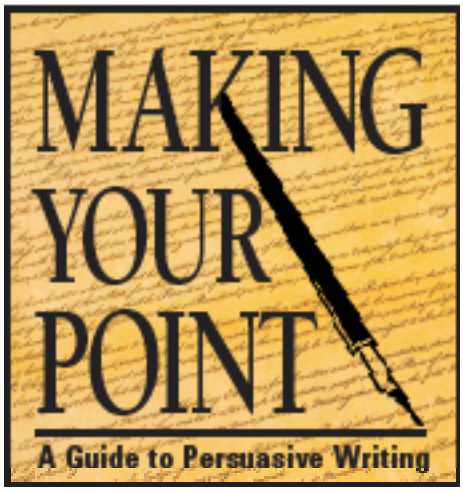

Litigation gets our blood up. We identify with our clients and feel their pain, and we feel our own pain when adversaries insult our intelligence or challenge our integrity. Inevitably, perceived mistreatment of our client and rhetorical attacks on us generate negative emotions, such as anger, hatred and paranoia. Channeling the energy of these emotions can stiffen our resolve and turn a negative into a positive. On the other hand, articulating the suspicions that these feelings engender can give the feelings a voice that shouldn't be heard.

Assume that in heated litigation between equal owners of a small business, the trial court appoints a retired judge as a provisional director to help ensure the continued operation of the business while the court determines which side should buy the other out. As the third person on the board of directors, the provisional director is in a position to break deadlocks between your client and the other 50 percent owner.

At a meeting of the three-person board, the provisional director joins the other owner in voting against a dividend, interrupting the company's long-standing practice of paying dividends annually. Your client is outraged because he believes the other owner voted against the dividend out of spite, knowing your client needs the money, and he is even more irate because the provisional director voted with the other owner, not with him. He thinks the provisional director has been bought off, and he wants you to state as much to the court in motion papers challenging the vote on the dividend.

You are sympathetic to your client's concern, and because of the company's well-established practice of paying dividends annually, you don't understand why the provisional director voted against it. You suspect that he is, at a minimum, biased in favor of the other side.

In a paroxysm of self-righteousness, you write the following in a brief in support of your motion challenging the vote against the dividend:

> It is apparent (for reasons that remain unclear) that the Provisional Director has aligned himself with the defendant and is doing defendant's bidding. He mischaracterized the status of the company's finances and voted against well-established company policy of declaring a dividend every year.

You have no hard evidence that the provisional director is biased, yet the words you've chosen suggest you do. Accusing him of doing the other side's bidding makes him sound subservient. Accusing him of mischaracterizing the status of the company's finances (because you disagree with his characterization of a balance sheet and income statement that are available to everyone) makes him sound corrupt.

You are convinced that the provisional director voted on the basis of a personal agenda because you don't see a basis for his decision, but you have no direct evidence of bias. As you say, the provisional director's reasons "remain unclear."

Consider the likely effect of this accusation on your audience, that is, on the judge who chose the provisional director to referee the dispute. Not only does the judge have an investment in this person because the judge chose him, but the provisional director is, in effect, a fraternity brother of the judge, being a former member of the judiciary. Because the judge is not only committed to but identifies with the provisional director, the judge will not be happy with your challenging the provisional director's integrity. In all likelihood, your accusation will accomplish the opposite of what you intend.

You are certain that the provisional director is a bum and deserves to be exposed, and you rationalize that you just want to "call a spade a spade." But

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a spade may not be a spade. If you had hard evidence that the provisional director was biased, you would move to have him replaced. If you don't know but merely suspect that he is biased, don't speculate. Name-calling is bad strategy because it goes beyond the boundaries of what your reader — the court — is willing to acknowledge without hard proof.

You also may be thinking, "Well, I'm an advocate, and if I don't accuse this guy of obvious bias, nobody will. I don't have to know if he is corrupt. All I need is a reasonable suspicion. Surely the court will see what is obvious. Facts speak for themselves."

The facts speak louder to you because you identify with your client. In other words, you are biased in favor of finding bias. Your feelings are, at least in part, a function of your loyalties. Because your suspicions spring in part from the paranoia generated by the adversary system rather than from verifiable factual support, you are likely to end up looking worse than the person at whom you point the finger.

I am not suggesting that you lack reason to feel paranoid in litigation. To the contrary, your adversaries are out to do you in. When someone is looking to do us in, we tend to think the worst of them (*e.g.*, that they destroyed the document that they claim does not exist). But accusations without hard evidence undermine your credibility with the court. Being an advocate isn't a license to act out.

Think of the suspected but unproved bias of a judicially-chosen professional as a poorly-called third strike in baseball. You are stuck with it. If you articulate your suspicions regarding the integrity of the umpire, you can be ejected from the game even if the umpire blew the call. The orderly functioning of the game requires it.

You don't have to remain entirely silent in the face of what you view as a bad call. You can still disagree with it. (*e.g.,* "We see no basis for that decision. To the contrary . . ."). Just don't get personal.

Puzzler

How many hyphens, if any, should be added to the following phrase?

". . . Five to six month project"

Punctuation sends signals. A period, for example, calls for a stop; a comma calls for a pause; and an apostrophe shows possession. A hyphen connecting a number to the word that follows it tells the reader that the number (here, "six") won't be a stand-alone adjective (as in "six months") but will combine with the noun to describe another noun (*e.g.*, six-month project).

The easy part of this problem is the hyphen between six and month. It tells the reader to sustain closure until the reader sees the noun that is modified (described) by the adjectival phrase "six-month." It signals that the writer didn't mean "six months."

The tougher question is whether a hyphen should follow the word "five," creating what appears to be a disembodied segment of a hyphenated word. The five does take a hyphen.

Without the hyphen after "five," the reader initially expects to be told about five "somethings" because five is an adjective. When five turns out not to be a stand-alone adjective but to combine with "month," the reader has to re-think the sequence. This takes energy and slows the reader down.

The revised version:
". . five- to six-month project."

A similar structure would apply to "pre- and post-contractual obligations."

Use a space between the hyphen in "five-"and "to" (and the hyphen in "pre-"and the word "and"). A closed-up "five-to-six-month" structure, with no space after "five-," would make "five-to-six" a unit, as in, "He has a built-in 'five-to-six signal' that tells him to terminate work at 5:55 p.m. each day." ■