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Resist the Temptation to Demonize the Adversary

Don't ascribe motives; let the facts reveal them

By Kenneth F. Oettle

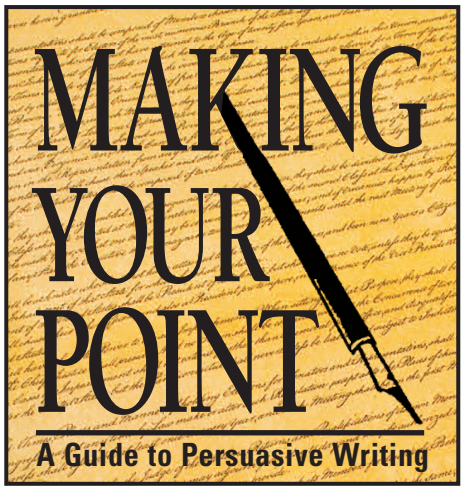
Sometimes you think you know exactly what the other side is up to, and you want to call them on it. You don't want them to get away with anything, so you tell the court what you are sure the other side is thinking (plotting), lest the court miss it. You don't mince words or pull punches. You say it right out, as in the following excerpt from a brief in support of a motion to dismiss:

> What clearly emerges from the pleadings is *plaintiff's true purpose in filing suit*, namely, to harass defendant with vexatious litigation. [Emphasis added].

Revealing what in your view are the other side's motives makes you feel good — everybody likes to expose a deceiver — but it has little persuasive value, if any. In fact, it may do more harm than good.

Suppose you represent a shareholder whose 20 percent interest in a closely held corporation (a corporation with few shareholders, also called a "close corporation") is being bought out by the other four shareholders. As the company's profits began to soar, the majority froze out your client, demoting him and reassigning the people who reported to him. He sued, and the court ordered that the majority buy out his interest at fair value.

Each side hired a valuation expert. Needless to say, your expert assigns greater value to your client's minority interest than does the other side's expert, who in your view is a total sellout and seems to be applying every valuation test with the intent of placing as low a value on your client's shares as possible.



Your suspicion that the other side's expert is biased is not mere paranoia. The expert knows on which side his bread is buttered, just as your expert knows on which side his bread is buttered. In fact, everybody knows on which side their bread is buttered. The inherent bias of experts is a given, and courts understand that.

The credibility of experts is a matter of degree. Your job is to convince the court that your expert is more credible than the other side's expert and to maximize the gap.

You warm to the task. You are sure that the opposing expert is creating a position from whole cloth and that the majority shareholders gave him specific instructions to minimize the value of your client's shares. You are sure of that because the expert's position is so outrageous.

You reason that mere bias cannot account for so unsupportable an evaluation. In your view, no rational person would take that position unless he was working backwards from an extreme result. So you write the following in your trial brief:

> Expert Jones, retained by the defendants to lower the value of the company at every possible opportunity, values the company at a mere $17.6 million.

The phrase "*this rapidly expanding, highly profitable* company" would have been better than just "*the* company," but even with that improvement, the sentence has problems. You don't know for sure that the defendants retained the expert "to lower the value of the company at every possible opportunity." You have excellent reasons to suspect it, but you don't actually know. You have no affidavits admitting motives, no confessions in depositions. As much as you hate to admit it, your suspicions are probably colored by your own bias, and the court knows it.

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In fairness to the author of this sentence and all sentences like it, the defendants probably did hire the expert with the intent that he ascribe as low a value to the company as possible so that buying out your client's interest would cost them as little as possible. They may even have told the expert explicitly what to find.

Nevertheless, effective advocacy requires that you hold your tongue. Be gracious. Don't purport to have access to the other side's motives.

Remember the expression, "It takes one to know one"? That old playground comeback reflects how we gain insight into others' motives — we project from our own. Consequently, when you impugn the other side's motives, you reveal your own. The court may not consciously draw this conclusion, but instinctively it knows that "it takes one to know one."

The court also knows, instinctively, that name-calling, of which motive-spotting is a subset, is often a substitute for rigorous argument. It's an "ad hominem" attack ("against the man"), aimed at the person rather than the position. Your use of an ad hominem argument suggests you may have a weak argument on the merits.

Motive-spotting is also a subset of the rhetorical offense of telling the court what to think rather than letting the court draw its own conclusions. Because people have more confidence in conclusions they reach on their own than in conclusions dictated to them, you should allow the court the experience of discovering the truth for itself.

Don't be concerned that the court may fail to see through the expert's illogic unless you flash a neon directional sign. If you discuss the expert's position thoroughly and accurately, "the truth will out." The court will see that the expert is blatantly (as opposed to conservatively, within acceptable tolerances) working backwards from the valuation desired by the other side. The court will "own" (embrace) the conclusion that the expert is a fraud and that the opposing parties were probably complicit. In contrast, if you insist on declaring that the expert lacked integrity, the conclusion will be your's, not the court's.

Your job is to show that the opposing expert was wrong at every turn — that he used the wrong legal test, made irrational assumptions and ignored crucial facts. If you accomplish this, the court will conclude precisely what you wish it to conclude about the motives of the expert and his clients. The facts will do the work for you.

Puzzler

How would you tighten and sharpen the following sentence?

> During the course of preparing the papers in opposition to defendant's motion to dismiss, additional facts were revealed which were not included in the complaint.

Plaintiff set forth facts in his papers opposing a motion to dismiss that he did not include in the complaint. He says that additional facts "were revealed," looking to suggest that he was not responsible for the facts being omitted from the complaint.

The passive construction is sluggish and loses more through weakness than it gains by evasion. Pep it up by giving plaintiff credit for discovering additional facts. The phrase "facts … not included in the complaint" merely highlights his omission. Say that plaintiff "discovered facts additional to those in the complaint."

For brevity, shorten "During the course of" to "While" and drop "which were" as unnecessary (it should have been "that were," anyway). Drop "defendant's" as implicit.

> The new version:
> While preparing papers in opposition to the motion to dismiss, plaintiff discovered facts additional to those in the complaint. ■