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Three Things Never to Write in Court Papers

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My experience on the state district court bench taught me that trial judges are a conscientious lot who read the briefs and want to get their rulings right. In light of that, here are three things a lawyer should never write in court papers for fear of turning off the judge and hurting a client's chances of prevailing at a hearing.

1. Don't use words like "clearly," "obviously" and "simply." Most disputes in litigation are not clear, obvious or simple. By the time a judge is reading briefs to prepare for a hearing, a few things need to have happened. Two parties (or more) could not solve a problem, and at least one of them has hired a lawyer and filed suit. Yet, based on the fact that there is going to be a hearing, those lawyers have proved incapable of moving the case forward without seeking help from the court.

A judge walks into the case without the emotional baggage of the clients or the lawyers. From the judge's perspective, it is unlikely that there is anything clear or obvious about the matter she is considering; if it were so simple, the lawyers would not be coming down to the courthouse for a hearing. Eliminating "clearly," "obviously" and "simply" from all court papers increases a lawyer's credibility with the court.

Attorneys believe their clients should win, or else they wouldn't have filed the motion or opposed the requested relief. But in the battle for credibility, the first step is acknowledging that the result is not obvious, even if an attorney arguing the point thinks it is.

Counsel can help the judge reach the desired conclusion by communicating the argument's legal basis, presenting the factual basis or evidence supporting the client's position, and acknowledging the opponent's argument while explaining why his client should win anyway. A straightforward presentation style coupled with these substantive steps will convey who clearly, obviously and simply should win louder than those words can.

2. Don't accuse opposing counsel of lying. Before the judge assumed the bench, she used to be a lawyer. Fortunately for those of us who appear in court regularly, judges like lawyers.

That's part of the reason why it's a big deal to tell the court that another lawyer has lied. In fact, an attorney confident enough to put that accusation in a pleading probably has a professional obligation to report the offending lawyer's misconduct to the State Bar of Texas pursuant to Texas Disciplinary Rules of Professional Conduct 3.03 and 8.03. Not reporting it means that the accusing attorney might be the one violating the disciplinary rules.

Instead of pointing the finger at opposing counsel and calling him a

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liar, how should an attorney explain this to the court in court papers?

First, he should attack the other party's legal argument and the factual evidence supporting it, concentrating his energy on distinguishing the purported silver-bullet case or by subpoenaing and cross-examining the other side's key witness. If opposing counsel is really stretching the law or the facts, this is the easiest way to prove it without taking an unhelpful swipe. An attorney should be able to demonstrate a flimsy argument's insufficiency to the court with ease rather than angry denunciations.

Second, he should propose a better solution than the opponent's. Judges are in the problem-solving business. If the opponent takes a persuasive legal or factual position, a lawyer should look for a better way to test that position's soundness than throwing around accusations of lying.

3. Don't threaten the judge with mandamus. Those are fightin' words (intellectually speaking) to any reasonable, fair-minded and conscientious trial judge.

Threatening a judge in court papers is counterproductive. It's human nature for a judge to balk at such a tactic. Would any lawyer ever tell a jury during closing argument that they must make a certain liability finding or arrive at a specific damage amount? This approach also is unwise when dealing with a judge.

Even if the court of appeals grants a writ of mandamus, the client will spend thousands of dollars and come right back in front of the same trial judge, who has lots of discretionary decisions in the future of the case. There's an old saying that's relevant when a lawyer is tempted to threaten mandamus: "You can either be right, or you can be happy." There is an easier and more productive road to getting the judge to come around to the desired decision.

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Lawyers should accept personal responsibility for helping create the unhappy situation. Remember, it is not the judge's job to understand the argument on her own; it is the attorney's job to explain his client's position in an understandable and highly persuasive way. Judges want to get their decisions right. A lawyer who thinks the judge is off course should tell her — respectfully and with specific reasons why.

Attorneys then need to take a deep breath and earnestly request the opportunity to do a better job of explaining the client's position. Counsel should look for opportunities to obtain the desired result while letting the judge feel like she is doing justice.

Writing a brief isn't just about finding the most persuasive law and applying it in the most persuasive way, though that is vitally important. It's also about using tact and common sense in interactions with a judge, ensuring that the client has every advantage possible. TNL

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