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Striking the wrong tone

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BENJAMIN G. SHATZ

Manatt, Phelps & Phillips LLP

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EXCEPTIONALLY APPEALING

Losing hurts. And when we're hurt, we want to lash out. But lawyers know -- or should know -- that lashing out is not professional. An attorney is someone who acts on behalf of another, and one reason for having professional representation is to ensure a professional tone. Clients are allowed to be as upset as they like, warranted or not. And lawyers are allowed to sympathize and get upset too. But they are not supposed to express their displeasure or their client's displeasure to the court. When they do, the results are often not good -- for either the case, the client, or the lawyer.

Business and Professions Code Section 6068(b) imposes on all attorneys the duty to "maintain the respect due to the courts of justice and judicial officers." More often than not, lawyers behave themselves -- especially on appeal, where the opportunities to go off the rails are limited. And yet, given even limited opportunities to interact with opposing counsel and the court (in briefing or at oral argument) some lawyers fall prey to the temptation to mouth off. Such cases are exceptional, and thus mete meat for this column's consumption.

A classic case of misbehavior in the trial court is *Rose v. Superior Court*, 140 Cal. App. 418, 425 (1934), which stands for the key proposition that apart from the actual language a lawyer uses, a sneering, sarcastic, and contemptuous mien alone can constitute contempt. *See also Gillen v. Municipal Court*, 37 Cal. App. 2d 428, 431 (1940) (tone and manner in which words are spoken is relevant to contempt). And, obviously, an attorney commits contempt by "impugn[ing] the integrity of the court by statements made in open court either orally or in writing. [Citations.] Insolence to the judge in the form of insulting words or conduct in court has traditionally been recognized in the common law as constituting grounds for contempt." *In re Buckley*, 10 Cal. 3d 237, 248 (1973).

Carrying a bad attitude over to an appeal, and giving in to the urge to attack the trial court, is exceedingly dangerous. *See Lazzarotto v. Atchison, TSFR*, 157 Cal. App. 2d 455, 462 (1958) (rancorous epithets and statements impugning the trial court are highly improper and unpersuasive; indeed they signal that counsel has nothing substantial to say); *Delger v. Jacobs*, 19 Cal. App. 197, 208 (1912) (counsel are "justly subject to censure for their apparent forgetfulness of the dignity and courtesy that should ever prevail in contests like this. It must be manifest that their untoward vituperation affords no credit to themselves and likewise neither entertainment nor enlightenment to the court."). In *People v. Jeong*, 2013 WL 98604 (B237998, Jan. 9, 2013), the court concluded that although "[v]igorous advocacy is always welcome," the briefing was "disrespectful in the extreme." The lawyer called trial court rulings "preposterous" and "bizarre," and took other shots at the judge. The Court of Appeal called this "scandalous," noting that "intemperate characterizations of the trial court are inexcusable," and struck an entire 14-page argument from the opening brief.

Unprofessional tone in appellate briefing is obviously unwelcome. In *Pierotti v. Torian*, 81 Cal. App. 4th 17, 32 (2000), the Court of Appeal noted that "the tone of counsel's brief suggests it was more cathartic than tactical," and chided that "an opening brief is not an appropriate vehicle for an attorney to 'vent his spleen' after losing" below. Employing a scholarly law-and-economics

approach to ethical writing, the court went on to explain that "an unsupported appellate tirade is more than just words on paper; it represents a real cost to the opposing party and to the state" in addressing the issue on appeal. Thus, "such an outburst, when committed to the pages of an opening brief, becomes an expensive proposition for all those concerned." The kicker: "Justice requires that those costs fall on the person (or persons) who unreasonably caused them." *Id.* at 32-33. Hence appellate sanctions.

Sadly, the past year provided ample examples of lawyers crossing the line on appeal. February 2019 saw a case that really "sucked" for appellate counsel, who "referred to the ruling of the female judicial officer as 'succubustic.'" *Martinez v. O'Hara*, 32 Cal. App. 5th 853, 855 (2019) (helpfully explaining that "A succubus is defined as a demon assuming female form"). *Martinez* was published "to make the point that gender bias by an attorney appearing before us will not be tolerated, period." Yet the message apparently did not get through. The point had to be reinforced in November, in *Briganti v. Chow*, 254 Cal. Rptr. 3d 909, 914 (2019), where counsel characterized the trial court as "attractive, hard-working, brilliant, young, [and] politically well-connected." Taking advantage of "a teachable moment," the Court of Appeal pointed out how this language reflected "gender bias and disrespect for the judicial system." The (obvious) lesson is not to comment on "physical or other supposed personal characteristics of superior court judges."

Briganti makes clear that commentary about the trial judge is a very bad idea, even if the comments were meant to be flattering. This is not a new point. Back in *Baron v. Fire Ins. Exchange*, 154 Cal. App. 4th 1184, 1186 n.1 (2007), the winning side's briefing engaged in a "fawning portrayal of the arbitrator as a 'practical, savvy former trial judge.'" This obsequious toadyism did not go over well, especially given how respondent's brief also took a "righteous, histrionic tone" that the court called an "unprofessional tone."

Displays of improper tone on appeal are not limited to comments about the trial court. The rubber really hits the road in rehearing petitions, where the imprudent become impudent with respect to the appellate panel itself. A memorable federal example is *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289 (7th Cir. 2010), where counsel for the losing side filed a rehearing petition that leveled "over the top" "accusations" against the panel, comparing them to "the cantankerous judge" from American Idol, Simon Cowell. The petition, filled with "tones of outrage," prompted the court to admonish counsel to "moderate his fury."

The quintessential "bad rehearing petition" case in California is *In re Koven*, 134 Cal. App. 4th 262 (2005), where counsel accused the appellate panel of conspiring to "fix" the case; being unfair, biased and result-oriented; ignoring the law; not reading the briefs or controlling precedent; and concealing alleged conflicts of interest. This offensively insolent attack prompted an order to show cause, after which counsel wisely apologized.

Another opportunity for counsel in a vulnerable situation to address an appellate court is in response to a warning that sanctions may be imposed. An unforgettable example is *Kim v. Westmoore Partners, Inc.*, 201 Cal. App. 4th 267, 273 (2011) -- "a cautionary tale for appellate counsel" -- which explained: "Those who practice before this court are expected to comport

themselves honestly, ethically, professionally and with courtesy toward opposing counsel." And also, of course, with courtesy toward the court itself: In *Kim*, when faced with an OSC re appellate sanctions, counsel's response was "both truculent and dismissive" -- contumaciousness that ended up costing $10,000.

And then there's good old face-to-face oral argument. This is where lawyers can look the judges in their eyes and sing from the heart. Only an exceptional lawyer would take that opportunity as a chance to insult the decisionmakers. And yet it happened recently in the Second Circuit: As was widely reported, a Queens-based, self-described "annoyance lawyer" was ordered out of the courtroom after making obnoxious remarks during oral argument. He answered one question from the bench with a sarcastically toned, "I see that you read the briefs thoroughly." If you can't resist a good cringe, listen to the 31/2 minute oral argument yourself. See (or rather, hear) *Doyle v. Palmer*, 2d Cir. No. 19-939 (argument on Dec. 11, 2019); *and see* 2d Dist. Doc #54 (post-argument letter, where counsel acknowledges he could have made his comments "in a more diplomatic matter" and regrets "not having had a productive oral argument" -- a lawyerly characterization that wins for appellate understatement of the year!). Even if questioning gets your goat, it is never appropriate to act unprofessionally, nor is it wise to display disrespect to the decisionmaker.

This column's readers are not elbow-and-attitude attorneys, and do not need a teachable moment about civility or common sense. No didactic or hortatory note is needed to end this piece. Rather, the value of this article, apart from amusing schadenfreude (or epicaricacy, the English word nobody really uses, because, well, the German is just so much richer), is to have collected some choice citations of exceptional cases for a possible motion to strike.

If absolutely necessary, feel free to write out all the scathing attacks you need to get out of your system in a draft. Then delete it. And embrace the wisdom of Abraham Lincoln, who pithily advised: A drop of honey catches more flies than a gallon of gall.