New Year's Resolutions We Can All Keep

The "Goldilocks Dose": Finding the Perfect Balance of Advocacy

By Jodi S. Green

At the core of legal writing is a practice both historically denounced, yet universally practiced. Despite striving for restraint, we succumb to hyperbole. It is not surprising, in an era punctuated by "fake news" and political bluster, that our temperature for exaggeration has risen. But overstatement is hardly a new phenomenon.

As zealous advocates, lawyers have always struggled to find the perfect balance of advocacy and authoritativeness to persuade the finder of fact. Like Goldilocks shunning Mama Bear's and Papa Bear's porridge as "too hot!" and "too cold!," we strive to find the right "dose" of emphasis in advocacy that is not too much, not too little, but "just right." The concept brings to memory this exchange from a beloved *Seinfeld* episode, during which Elaine berates a friend for not using an exclamation point:

> Elaine: See, right here you wrote "Myra had the baby," but you didn't use an exclamation point.
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> ***
>
> Jake: Well, maybe I don't use my exclamation points as haphazardly as you do.
>
> Elaine: You don't think that someone having a baby warrants an exclamation point?
>
> Jake: Hey, I just chalked down the message. I didn't know I was required to capture the mood of each caller.
>
> Elaine: I just thought you would be a little more excited about a friend of mine having a baby.
>
> Jake: OK, I'm excited. I just don't happen to like exclamation points.
>
> Elaine: Well, you know Jake, you should learn to use them. Like the way I'm talking right now, I would put exclamation points at the end of all these sentences! On this one! And on that one!
>
> Jake: Well, you can put one on this one: I'm leaving!

Akin to Elaine, we as writers want to portray enthusiasm, but we must at the same time prevent it from appearing "haphazard." The lessons below offer some guideposts for finding the "Goldilocks dose" of advocacy.

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Resolution # 1: *Flee Hyperbole*

"Clearly," everyone agrees that we should avoid intensifiers such as the word "clearly." But even the best writers are predisposed to reminding the reader that "clearly" or "obviously" their position is correct. In fact, dissenting United Supreme Court opinions tend to use "clearly" and "obviously" more often than their majority counterparts. Stacy Rogers Sharp, *Crafting Responses to Counterarguments Learning from the Swing-Vote Cases*, 10 Legal Comm. & Rhetoric: JALWD 201, 224 (2013). Ironically, dissenting judges' use of these words increases as "things become less clear." *Id.* These findings illustrate that rather than signaling a position of strength, the use of hyperbole signals the opposite—a position of weakness. As one jurist cautioned, "A brief littered with 'clearly' is one whose reliability most judges will discount." Raymond M. Kethledge, *A Judge Lays Down the Law on Writing Appellate Briefs*, 32 GP Solo Sept./Oct. 2015, at 24.

At best, exaggeration positions the writer for defeat when the reader discovers that the answer, as with most legal questions, is not so clear. At worst, the writer loses credibility. The solution to this predicament: excise intensifiers from your text and "flee hyperbole." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 14 (2008).

Resolution # 2: *Avoid Attacks*

As with overstatement, the use of inflammatory language signals a position of weakness, lacks professionalism, and defies our ethical duties of civility in the legal profession. In a recent case, a jurist chastised counsel for using "unsupported rhetoric, sarcasm, unsupported conclusions, unsupported 'facts,' disingenuous arguments, and inflammatory labels such as 'false narrative,' 'newly minted allegations' made out of 'whole cloth,' and 'intentional material misrepresentations,'" noting that it "added nothing to the merits." *Univ. Cmty. Hosp., Inc. v. Prof'l Serv. Indus., Inc.*, No. 8:15-CV-628-T-27EAJ, 2017 WL 2226578, at *3 (M.D. Fla. May 19, 2017). In sanctioning an attorney for an "insolent and disrespectful" tone and a "deliberate disregard for the principle of civility," another court admonished: "advocacy cannot be an excuse for unfounded accusations and childish vitriol. Counsel, the court, and the profession deserve

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better." *Bossian v. Anderson*, 76 A.3d 143 (R.I. 2013).

Even seemingly modest attacks on an opposing party's position should be shunned, even in counterargument. When viewed from an outsider's lens, incivility and exaggeration that may seem innocuous to the writer come into focus. In that regard, few best practices offer greater rewards to legal writers than a peer review. To be most effective, a peer review should be conducted by someone with little to no familiarity with your case, and someone who can offer unbiased assessments of your writing and arguments.

The same is true when you are on the receiving end of criticism. Rather than respond to "cheap shots," consider using a "deflating opener," as in this brilliant example from Bryan Garner's "The Winning Brief": "Lacking in authority, Pound resorts to hyperbole to obscure the facts that support the valuation opinions. He denigrates Holden's damage proof with pejoratives such as 'inflated,' 'overreaching,' 'cavalier,' 'breathtaking'…."

The string of indignities continues, but you get the point. Instead of responding in kind, recite and denounce the most egregious rhetorical outbursts from your opponent's brief for a deflating effect. Further, rather than demeaning an opponent's view as "meritless, "incredible," or "absurd," consider recharacterizing, minimizing, or relabeling the opponent's argument instead. After recharacterizing the opponent's argument, follow with a direct, non-inflammatory response, such as "that is not so." Like the sound of silence, which highlights the force of the notes that follow (for example, after the iconic four-note opening of Beethoven's Fifth Symphony), the timely use of concise and emphatic statements in rebuttal is equally powerful. The forceful simplicity of the rebuttal sentence focuses attention on the explanation to come. Alternatively, when responding to a series of misstatements, inaccuracies, or attacks, try classifying them into categories to offer a combined response.

Above all, lawyers that honor the standards of civility receive high regard. As one jurist announced, "I like, *to the point of being unduly swayed by*, a brief that contains not one pejorative adjective or innuendo concerning one's opponent or the trial judge." Hon. Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* (1994) (emphasis added).

No perfect formula exists for finding the "Goldilocks dose" in legal writing. But we can all get a little closer to finding a balance of advocacy that is "just right" by implementing the two resolutions above. FD