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Justice Scalia on Originalism

Justice™ Staff

Justice Antonin Scalia was guest speaker at Florida State University's College of Law this month where he raised a few eyebrows in need of being raised and challenged the modernist theories of more than a few of the college's professors – not to mention a host of Florida lawyers who disagree with the Justice's view of the U.S. Constitution.

Scalia calls his view "Originalism", the idea that our Constitution is not a "living document" that can be coaxed into saying whatever the nine Supreme Court Justices presently in power choose to say it says!

He told faculty and students, "The Constitution is not an organism. It is a legal text."

Justice™ agrees!

Just like a promissory note, a mortgage, contract, or lease agreement – it says what it says, not what we choose to "interpret" it as saying ... and the People need to know it will not be twisted out of context to please the palates of any private interests.

Scalia said, "It's whole purpose is to be a rock."

He added, "Originalism is nothing new. It used to be orthodoxy."

Only the latest few Courts have chosen to see our Constitution as a flimsy tool that can be wielded by politics.

The Constitution says what it says, and it doesn't say anything more!

Winning Courtroom Etiquete

Everyone knows, "You catch more flies with honey, but sometimes you need a fly swatter!"

That's certainly true in court.

There's a fine, critical line you must walk between being polite and respectful and standing your ground to demand Justice!

You need to learn this ... if you want to win!

Bullies don't win points.

Pansies don't win lawsuits!

You must be bold, but polite at all times.

This is not always easy but, in every single case, it is the very best posture for those who wish to win.

You need to achieve a proper balance between bowing and scraping to judges and butting heads to no purpose!

Etiquette Rule #1: This is not the judge's courtroom. He (forgive me, ladies, I'll just use the male pronoun here, but we all know some wonderful judges are women) may pound his gavel and shout disdainfully at you, "This is my courtroom!" But! It's not. It belongs to the people who pay for the building, the bailiff, the clerk, the electric bill, and his salary with our taxes!

Moreover, that courtroom you're standing in was paid for by the blood of some wonderful young people who gave the ultimate sacrifice so you and I could enjoy "Justice" in our courts! Never forget this fact. It will give you the correct attitude to take when standing your ground in court! Your right to be there is a "right", not a "privilege" conferred by the gorilla in a black robe sitting on the high bench above you.

He is not the law!

He is an employee charged with the responsibility of seeing that the RULES OF COURT are obeyed to-the-letter!

Our courts are for us common people!

They belong to US!

They are our POWER TO CONTROL CORRUPTION!

Etiquette Rule #2: Nobody likes a show off know-it-all!

Humility is powerful. Indeed, some have said the very definition of humility is power under control.

Another way of expressing this rule is remembering what some famous person said about those who may be thought a fool but then open their mouths and dispel all doubt.

Stick to the RULES, and you won't need to pontificate on the arcane obscurities of jurisprudence nor find it necessary to use big words you don't yet fully understand (like those three).

Be a human!

The judge may be a pompous egotist, but he is human, after all, and if you want to get a judge on your bad side quickly, just come across as thinking you're smarter than him ... *even if you truly are!*

Always use the K.I.S.S. principle. Keep it simple, stupid!

Losers try to impress the judge and jury with concepts they barely understand, instead of talking to the court as they might talk to a close friend.

Arrogance is lethal to your cause.

Etiquette Rule #3: You must control the judge!

Ok. That probably sounds contrary to what I said above, but it should be Rule #1 ... but for the vital fact that the first two rules are more important. The human equation is always present in court. You must deal with human flaws, human emotions, human bias.

But!

You must control the judge by timely objections, properly framed motions, the controlling case law that strikes terror into the judge's too-often stony heart, making certain the proceedings will be recorded and that you will be able to get a transcript to use on appeal if the judge rules against you, and many other things too numerous to list in this brief article.

Judges are not gods!

Judges are employees who work for the People!

Being disrespectful will get you nowhere.

Staring at your shoes and apologizing for taking up the court's valuable time will also get you nowhere.

Dress your best, so the judge cannot get into his head that you cannot afford to appeal him or that you're just not smart enough to win on appeal. Judges hate appeals. Part of the power you have for winning is making it crystal clear to the judge that ruling against you will have certain consequences not to his liking!

Polished shoes, a freshly dry-cleaned suit, and a recent haircut put the judge on notice you did not just fall off a turnip truck.

Strike fear into the judge's heart, *but be polite doing it!* Cite the rules and case law that explain the rules. Cite the common law and case law that explain it. Cite the statutes and case law that explain them. Cite constitutional provisions and case law that interpret them.

Your opinion means absolutely nothing in court!

Written opinions of appellate courts that can overturn the judge's decision or criticize him for missing the mark are the only "opinions" that will carry the day for you. If it's a federal case, the only opinions that count are written decisions of the local District Court, the controlling Circuit Court of Appeals, or the United States Supreme Court. If you're in state court, the only opinions that count are written decisions of the state appellate court that controls the trial judge, the state supreme court, and the United States Supreme Court.

Nonsense ideas learned from would-be legal gurus who send junk email to your in box each week will only get you into deeper water ... and likely result in your drowning in a sea of ridiculous legal theories that have no control at all over the judge.

Pleadings with Power!

Everyone knows, "The best defense is a good offense!" Why, then, do so few pro se defendants use one?

And, why do so many pro se plaintiffs write "letters to the judge" instead of drafting powerful complaints?

Or, even lawyers, for that matter?

In my more than 24 years as a practicing lawyer winning cases in state and federal courts, I found most experienced lawyers failed to use the case-winning power of a good defense or claim!

Both sides have to fight!

I'll tell you about defenses first, then look at claims later in this article.

In most cases I've seen (and in thousands of emails we receive from people just like you who've been sued) the plaintiff files a complaint (could be foreclosure, to collect a debt, or any other claim), and the defendant ignorantly files an answer!

That's NEVER good enough!

Filing an answer to a complaint without filing affirmative defenses is like tying one hand behind your back!

It makes no sense!

It is lawsuit suicide!

What's more stupid is filing affirmative defenses without alleging all the ultimate facts that must be proven to prevail on those defenses!

Defendants who don't try to avoid answering a plaintiff's complaint by filing a "flurry of motions" (as explained in my course) are helping their opponents to win!

If the "flurry of motions" fails so filing an answer can't be avoided, most lawyers and pro se litigants dive in head-first and file an answer without filing powerful affirmative defenses.

They're like prize-fighters leading with their chin!

If affirmative defenses are not properly drafted and filed along with the answer, you leave yourself with no power to win!

So, what are powerful affirmative defenses? And, how should they be filed?

The U.S. Supreme Court recently ruled in *Bell Atlantic Corp. v. Twombly*, 550 S.W. 533 (2007) and *Ashcroft v. Iqbl*, 129 S.Ct. 1937 (2009), that not only complaints but affirmative defenses also must allege sufficient ultimate facts to put the other side on notice as to the factual grounds for each of their respective positions - i.e., factually.

For 50 years prior to Twombly, many courts applied a liberal "notice pleading" standard, allowing plaintiffs to allege causes of action with minimal facts and allowing defendants to simply list the bare names of affirmative defenses alone (i.e., estoppel, res judicata, statute of limitations, etc.) without alleging the factual grounds by which they might be able to prove these defenses.

Stupid, but true!

That's changed and should have changed years ago!

Plaintiffs should *always a*llege all ultimate facts needed to establish the essential elements of their claim.

Similarly, defendants should *always* allege all ultimate facts necessary to establish the essential elements of each affirmative defense - *though most courts did not require it until Twombly!*

Facts win cases - not fancy suits or clever arguments!

No matter what a fight is about or where it's held, the biggest obstacle is knowing what the fight is about!

If you are having a disagreement with your spouse (or significant other) and are in-the-dark about what facts are genuinely at the heart of the contested issue, you're lost before you even begin! Yet, that's the way many courts have allowed lawyers to drag out lawsuits and drain their clients' last dimes all because litigants were not required to state all the ultimate facts in controversy!

Plaintiffs were held to a somewhat higher standard, and a claim that failed to sufficiently allege facts to meet what the courts called the "plausibility" standard might lose on a motion to dismiss, but invariably plaintiffs were allowed to re-write complaints (adding only the barest minimum facts possible to get past another motion to dismiss).

This was never true for affirmative defenses - until *Twombly* and its progeny case *Iqbal*. Before Twombly, it was common for defense lawyers to list 10-12 defenses merely by name without stating any facts that might put the plaintiff on notice of the grounds of each defense.

Tricky? Yes! Good pleading? No!

It might sound like a good idea, but when litigation gets down to "brass tacks", as my grandpappy used to say, we need to know what facts must we prove to win?

If lawyers are involved, you can bet they will do all in their power to keep those facts as confusing as possible so they can drag out the proceedings until their clients are completely penniless. Some will even wait until the client is bankrupt, then bail out before trial, leaving the client to fight an unwinnable battle alone.

When YOU are fighting for your life in court, you want to get in, get it done, and get out!

Pleadings, whether claims or defenses, are not simply "letters to the judge". They are tools designed to do a certain job and do it in a certain way. Claims should state the facts that must be proved to win. Defenses should state the facts that must be proved to win. The winner is the party who can prove the most facts!

All defenses stand (or fall) on essential fact elements, just like complaints.

A powerful defense comes right out and states all facts necessary to prevail on the defense.

Then all a defendant must do to win (and get on with his or her life) is to prove the facts alleged.

That's where your 5 discovery tools come in: to prove what you've alleged in your pleadings (whether you're the plaintiff or defendant).

How the justices in our highest courts could for so many years overlook such a simple principle is beyond me.

Rest assured, they now finally see that the better path to justice is to list all the essential facts you need to win!

Then use your 5 discovery tools to prove those facts!

REMEMBER: You are not lawyers! You cannot win by making your case drag on for 5 years or more. That's how lawyers get rich, but it won't help you! You gain nothing by keeping your facts a secret. Lawyers "hide the ball" routinely, then tell their clients how clever they are by making the other side work to find the truth. In fact, the practice of hiding the ball only puts more money in the pockets of lawyers.

Hiding the ball never helps honest people!

Do what the U.S. Supreme Court finally understands (after more than 50 years of letting lawyers drain their clients dry): Whether you're plaintiff or defendant, allege all facts necessary to establish your claim or defense and then use your 5 discovery tools to prove those facts by the greater weight of admissible evidence.

That's all you need to do to win! So! Win your lawsuit and move on with your life!

Litigation may seem amusing to some people. There are a few who send me emails about how much "fun" they're having making the other side dig through mountains of paperwork. If that amuses you, then go for it.

But, if you're a normal, sane and agreeable soul who'd like to lead a life filled with pleasantness and peace, state all facts you need to prove to win, then use your 5 discovery tools to prove your facts.

Move the court for a favorable judgment.

Go home and enjoy the rest of your life!

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