

The Scrivener: Modern Legal Writing



Professional Courtesy¹

by K.K. DuVivier

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The greater man, the greater courtesy.
Alfred, Lord Tennyson
Idylls of the King,
"The Last Tournament"—Line 628

Respectfully,² Plaintiffs' argument on the First Amendment suggests they have the brains of potted plants.

Defendants' discussion of the First Amendment is an "Alice-in-Wonderland" concoction.

Defendants' cynical reliance on the First Amendment to procure an unfair competitive advantage should be recognized as the sham it is and disregarded by the Court.³

If you have encountered in an opposing brief any personal attacks⁴ similar to those quoted, you've probably felt tempted to respond in kind. Resist the urge.

First, remember your audience. It's not opposing counsel, to whom you would be targeting your counterattacks. Instead, your audience is the court. You can best influence that audience by making the court's job easier with a brief that is enjoyable to read. It's not enjoyable to read a battle between bickering rivals. Instead of being impressed with your gumption in responding, the court more likely will be irritated that both parties have stooped to enter the fray.

Second, personal attacks can make you look desperate. My fifth grade daughter had her first lesson in debate at school this year. Here's the advice she brought home from her coach:

"When you can't think of anything else to say, just respond with something like, 'That's the stupidest argument I've ever heard.' That will make the other guys mad and distract them from thinking of ways to respond to your arguments."

Although this technique may work in debate, it's not a good strategy for briefs. The difference is in the objective. With sprinting, the goal is to see who can run the fastest, regardless of form.

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.



In contrast, gymnastic floor exercises are judged entirely on form; finishing fast—ahead of one's music—is penalized.

The objective of a brief is not to show who is tougher or wittier at comebacks. The objective is to present the more persuasive, rational argument to the court. Attacking opposing counsel personally does not achieve this objective. In fact, such a personal attack may alert judges schooled in debate that you are using a diversionary tactic because you have no rational response. Avoid the impression that you are desperate.

Third, remember your client's interests, not your emotions, should be the focus. If you must vent your frustrations with opposing counsel, you may want to write a response, with clever repartees and strong words, because it feels so good to fight back. But you should be writing this version on your own time, for your own benefit only. You will better serve your client if you then shred the impassioned version and start over, this time concentrating on the legal arguments instead of on emotions.⁵

Although courts strive to be objective and fair, it's human nature to be swayed by style. Even among justices on the U.S. Supreme Court, caustic and personal attacks are counterproductive. Reports are that Justice Antonin Scalia has thoroughly alienated Justices O'Connor and Kennedy through branding their positions as "irrational," "preposterous," and "comical."⁶ Because these justices hold the swing votes, in many cases, Scalia's position loses even in a Republican-dominated court.⁷ Don't risk allowing *your* rudeness to compromise your client's position.

Attorney professionalism is a hot topic in Colorado. Colorado attorneys who wish to keep their licenses active now must earn seven ethics credits over a three-year period. Ethics credits are awarded not only for discussion of the Rules of Professional Conduct, but also for discussion of "how attorneys should interact and properly conduct themselves."⁸ Many judges have told me that aggressive personal attacks in briefs display a real lack of professionalism.

In conclusion, I will let some judges speak for themselves on the issue of courtesy. "Do not sling mud—you will only get mud-

K.K. DuVivier is an instructor of Legal Writing and Appellate Court Advocacy at the University of Colorado School of Law, Boulder.

dy."⁹ "Be a model of decorum. The contrast will be to your advantage."¹⁰

NOTES

1. Not the courtesy professionals show to one another by providing free services, but the true courtesy professionals should show to one another.

2. Just as adding the word "clearly" does not make a concept clearer, neither does adding the word "respectfully" metamorphose a rude comment into one that is respectful.

3. These are slightly modified quotes from briefs I've seen filed in the U.S. District Court for the District of Colorado.

4. In logic, personal arguments, as opposed to those appealing to reason, are called *ad hominem* (attacks to the man himself, rather than to his argument).

5. "A recent article in the *Fort Worth Journal* indicates that lawyers from a Dallas firm managed to do little more for their client than

offend United States District Judge David O. Belew and his staff. Before Judge Belew listened to the merits of an on-going discovery dispute between the parties, he informed the attorneys that 'my staff thinks most of you are jerks.' (Not a good way to begin a hearing in which the attorneys are asking the judge to order the other side to turn over documents.)" Broodo and Haloftis, "Practice in the Federal District Courts from the Law Clerk's Perspective: The Rules Behind the Rules," 43 *Baylor L.Rev.* 333, 348 n. 29 (1991).

6. Savage, "Scalia's Anger Alienates Justices," *The Denver Post* 9A (July 22, 1996).

7. *Id.*

8. Memorandum concerning "Ethics Credit for Lawyers," from Alan Ogden, Board of Continuing Legal and Judicial Education (May 13, 1996).

9. Schwerin, "Judges' Advice to Lawyers," *Chicago Bar Association Record* 22, 24 (April 1996).

10. *Id.*

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