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Professional Courtesy

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Professional Courtesy

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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-

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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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ANNOUNCES . . .

UPCOMING PROGRAMS:

- | | |
|---|--|
| <p>November 1
Denver</p> <p>November 7
Denver</p> <p>November 15
Denver</p> <p>November 16
Denver</p> <p>December 4
Denver</p> <p>December 4
Denver</p> <p>December 12 & 13
Denver</p> | <p>Advanced Trial Advocacy: Winning Your Case on Cross-Examination
Featuring Larry Pozner, Esq. & Roger Dodd, Esq.
The Hyatt Regency Hotel, 1750 Welton Street, Denver</p> <p>Wade/Parks Colorado Law of Wills, Trusts & Fiduciary Administration & Colorado Estate Planning Forms
Featuring Jim Wade, Esq.; Stan Kent, Esq.; & Jim Buchanan, Esq.
The Westin Hotel Tabor Center, 1672 Lawrence Street, Denver</p> <p>Employment Law for Professional Firms
CLE In Colorado, Inc. Classroom, 1900 Grant Street, Suite 300, Denver</p> <p>1996 Professionalism Seminar
Last Time Offered in 1996!! (Note: If you fail to attend during the 3 year compliance period set by the Colorado Supreme Court for newly admitted lawyers, you risk being suspended from the practice of law. Applies to attorneys admitted to practice after January 1, 1995.)
University of Denver College of Law, Lowell Thomas Law Building</p> <p>Transactional Ethics
CLE In Colorado, Inc. Classroom, 1900 Grant Street, Suite 300, Denver</p> <p>Ethical Concerns of In-House Counsel
CLE In Colorado, Inc. Classroom, 1900 Grant Street, Suite 300, Denver</p> <p>1996 Annual Survey of Colorado Law
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LEGAL SUPPORT BRIEFS

New Professional Association for Legal Support Staff

On September 5, 1996, the Mile High Association of Legal Support Staff held its organizational meeting, adopting the following objectives and purposes: to establish good fellowship among the members of the association and to promote and encourage a spirit of loyalty and cooperation between employer and employee; to further knowledge of the law and to uphold its honor and dignity; to create and promote a high standard of ethics among members; and to further the professional interests of legal support staff. Membership is open to all individuals licensed to practice law; engaged as secretaries, legal assistants, paralegals, administrators, or clerks in any law office; employed in the trust department of a bank or trust company; or employed by any public or private entity directly engaged in work of a legal nature. Associate membership is open to students and individuals not directly employed in the legal field.

Monthly meetings will provide educational programs as well as an opportunity for members to meet and share ideas over dinner. The October meeting featured Denver trial attorney Daniel S. Hoffman, who spoke on "Bizarre, Humorous, and Outrageous Happenings Over 38 Years of Practice." The next meeting is scheduled for November 18.

Individuals who desire additional information are invited to call Valerie Gonzales in Denver at (303) 832-1122.

Colorado Association of Legal Support Staff Established

The Colorado Association of Legal Support Staff ("CALSS") recently incorporated as a Colorado nonprofit organization dedicated to furthering the knowledge of the law and professional interests of legal support staff, establishing good fellowship among the members, promoting and encouraging a spirit of loyalty and cooperation between employer and employee, and promoting a high standard of ethics among members. Active membership consists of those individuals licensed to practice law or employed in a legal support capacity with any law office, court, bank, or trust company, or in any public or private institution directly engaged in work of a legal nature.

The following individuals were installed to serve as officers of CALSS for 1996-97: President Gwen Duran, Denver; President-Elect Audrey Brekel, Boulder; Vice-President Pauli Ingwersen, Colorado Springs; Secretary Karen Hartley, Colorado Springs; and Treasurer Lisa Ritter, Fort Collins. Valerie Gonzales of Denver was appointed Parliamentarian.

For information about CALSS membership, contact membership chair Lynn Charlebois in Denver at (303) 449-6161.

ALAC Announces Legal Directory Fundraiser

The Association of Legal Assistants of Colorado, Inc. ("ALAC"), a nonprofit corporation, in conjunction with Legal Directories Publishing Company, Inc., announces advance sales of the newly reformatted 1997 *Colorado Legal Directory*. Currently an annual publication, the *Directory* includes information that was previously included in the *Mountain States Legal Directory*.

The *Directory* includes complete federal and state government listings, as well as attorney listings alphabetically and by county. There is also a biographical section for law firm listings.

Cost of each hardbound directory is just \$30, plus shipping and handling. The directory also is available on disk or CD-ROM for \$100. For further information about this and other ALAC programs, call ALAC President Brenda Mientka in Colorado Springs at (719) 444-0190.

Legal Administrators to Meet November 21

The Mile High Chapter, Association of Legal Administrators, will hold its monthly luncheon meeting on Thursday, November 21, from noon to 1:30 P.M. at the Denver Petroleum Club. This month's speaker will be Sally Schmidt, president of Schmidt Marketing, Inc. in Minnesota, founder of the National Law Firm Marketing Association, and author of *Marketing the Law Firm: Business Development Techniques*. She will speak on "Putting Clients at the Heart of Your Firm."

More information is available by calling Connie Proulx at (303) 295-8069 or Elizabeth Lipscomb at (303) 866-5123.

NFPA Mid-Year Convention: November 14-17 In Charleston, S.C.

The National Federation of Paralegal Associations, Inc. ("NFPA") will hold its mid-year convention in Charleston, S.C., on November 14-17. The theme is "Tour the Past—Prepare for the Future." Call Lu Hanglely at (816) 941-4000 for additional information.

CBA Legal Assistant Committee Forms Speakers Bureau

The Legal Assistant Committee of the Colorado Bar Association has formed a Speakers Bureau to meet requests from CBA members and the legal community. The Committee is looking for both paralegals and attorneys to speak on paralegal issues and paralegal practice. If you are interested in serving on the Speakers Bureau, contact Brenda Mientka in Colorado Springs at (719) 444-0190.

Organizational Membership Information

Association of Legal Administrators (ALA), Mile High Chapter:

Lois Sweet, Denver, (303) 861-2100

Association of Legal Assistants of Colorado (ALAC):

Brenda Mientka, Colorado Springs, (719) 444-0190

Colorado Association of Legal Support Staff (CALSS):

Lynn Charlebois, Denver, (303) 449-6161

Colorado Bar Association Legal Assistants Committee:

Julie Petersen, Denver, (303) 860-1115 or (800) 332-6736

Denver Association of Legal Support Staff (DALSS):

Perri Morris, Denver, (303) 830-1698

Mile High Association of Legal Support Staff:

Valerie Gonzales, Denver, (303) 832-1122

Rocky Mountain Paralegal Association (RMPA):

Nora Ablutz, Denver, (303) 866-0431

THE BAR HISTORY — AT LAST EL PASO COUNTY BAR ASSOCIATION 1902-1995

With no previously compiled and well-researched history of the El Paso County Bar Association since its incorporation in 1902, this book is the definitive resource on the Association. There was an enormous amount of detail and enthusiasm put into this history by the Committee on Legal Biography and History, chaired by G. Scott Briggs, Esquire. Fourteen uncompensated authors and many other invaluable contributors created chapters such as "Growth of the Bar," "Fourth Judicial District History," and "Women in the El Paso County Bar." Over 100 photographs were unearthed from archival sources and reprinted here.

Proceeds will go towards financing the publication of the Bar History. Any additional proceeds will go to the preservation of bar archives, photographs, and memorabilia.

This is a limited edition which we hope will sell out. To get your own copy, simply return the order form today!!



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