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## The Aikido Technique for Rebutting Opposing Authority

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## THE SCRIVENER: MODERN LEGAL WRITING

# The Aikido Technique for Rebutting Opposing Authority

by **K.K. DuVivier**

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A larger and stronger adversary lunges toward you, teeth bared, eyes blazing. Do you respond with equal fury, hoping in some way to match him? Or do you simply remain calm and centered, using your adversary's own energy to overpower him? The calm approach is the Aikido way, and this same approach can be an effective way of responding to negative authority in an opponent's brief.

### Ignoring Opposing Authority

One way to respond to opposition is to ignore it. The result of such inaction may be the same in legal battle as it is in physical combat—assured defeat. Although you need not counter every authority, if your opponents have addressed a significant case, you must respond. Otherwise, readers may assume you are conceding your opponents are correct and hand them victory.

### Distinguishing Opposing Authority

Another way of responding to contrary authority is to resist head-on by distinguishing a case. You may have heard the advice: If the facts are in your favor, pound on the facts. If the law is in your favor, pound on the law. And if neither is in your favor, pound on the table. The same advice can be applied here. First, you can distinguish a case on the facts. No two cases have exactly the same facts, so a distinction based on facts is always an option. However, make sure the differences between your client's facts and those in the precedent are legally significant.

Second, you can distinguish a case by focusing on the law. Perhaps you can find a split of authority to show that a troublesome precedent has not been universally followed by the courts. Another approach is to focus on policy: a policy that makes sense in the context of property law may not translate well into tort law. In addition, the case may be inconsistent with trends in that or related legal fields.

Third, you can distinguish a case by pointing to weaknesses in its pedigree. Is the case out of date or decided by a divided court? This last approach can work if the arguments are strong or coupled with one of the other approaches—for example, out of date and contrary to modern trends in the field. However, if a precedent contains one of these infirmities, and yet is well reasoned, few courts will be convinced to discard it. Furthermore, be careful not to emphasize minor concerns; otherwise, it may seem that you are pounding on the table.

### Using Aikido to Respond to Opposing Authority

Perhaps the most effective way of dealing with contrary authority is to use the Aikido technique to make the authority work for you rather than against you. Aikido, a Japanese martial art developed in the early 1900s, combines self-defense with a spiritual focus on perfecting and “centering” the self. The practice has gained recognition for its ability to help a small person—working from the most powerful point, the center of the body—to overcome a much bigger or stronger opponent by using the opponent's own energy to flip him.<sup>1</sup>

To apply the Aikido techniques in a legal context, examine the authority to which you are responding. Instead of resisting an authority, look deeper into it to see if you can find ways to make it work to support and strengthen your theory of the case. While a case's holding may seem unfavorable, the court's reasoning or methodology might support your client's position.

#### DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the *Scrivener* column. Send your questions to: [kkdುವಿವಿ@law.du.edu](mailto:kkdುವಿವಿ@law.du.edu) or call her at (303) 871-6281.



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Here is an example:

**Opposing Authority:** The Colorado Supreme Court refused to award damages for infliction of emotion distress in *Tims*.

**Distinguishing on the facts:** *Tims* is distinguishable because the plaintiff in that case was distressed by a single event, a gas explosion, and here the plaintiff fears an almost imperceptible, yet deadly, disease—cancer.

**Aikido Technique Response:** Although the Colorado Supreme Court did not award damages in *Tims*, in that case the court applied § 436 of the Restatement of Torts to abolish the physical impact requirement for recovering emotional injury damages. Section 436 allows recovery as long as there are some physical manifestations of emotional distress such as headaches or sleeplessness. The

plaintiff here has documented headaches and loss of sleep because of her fear of cancer. Thus, the plaintiff has exhibited the physical manifestations of emotional distress that § 436 requires.

## Conclusion

The next time you are confronted with a case that seems to present a daunting challenge to your position, don't panic. Take a deep breath, get centered, and remember to use Aikido techniques to turn a case that seems to be your enemy into your friend.

## NOTE

1. Aikido Association of America, *History of Aikido*, [www.aaa-aikido.com/history.htm](http://www.aaa-aikido.com/history.htm). ■

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## Attorney Peter C. Guthery To Chair IRS Tax Exemption/Governmental Entities Council

CBA member Peter C. Guthery, of the Denver law firm of Guthery & Rickles, P.C. recently was selected to chair the Tax Exemption/Governmental Entities (“TE/GE”) Council for the Internal Revenue Service’s (“IRS”) fourteen-state Central Mountain area. The Central Mountain area includes Colorado, Nevada, Utah, Wyoming, Nebraska, Montana, Minnesota, North Dakota, South Dakota, Iowa, Kansas, Missouri, New Mexico, and Arizona. The TE/GE Council is comprised of forty-three tax professionals and is responsible for tax matters involving nonprofit tax-exempt entities, pension and employee benefit plans, tax-exempt bond financing, governmental instrumentalities, and Native American Tribal entities. The TE/GE Council meets regularly three times each year, once jointly with the Great Lakes and Gulf States Councils, to discuss current tax issues facing the sectors covered by the TE/GE function, in an attempt to assist in resolving problems dealing with tax compliance responsibilities of the IRS. Guthery is a member of the CBA Business Law, Health Law, Taxation Law, and Trust & Estate Law Sections.