

# Have You Made A Last-ditch, Desperate, and Disingenuous Attempt to Subvert the Legal Process Today?

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*... leave the anger out of your court documents ... it’s against the law, and ... it absolutely does not work.*

It has been a long time since we’ve been wrong about anything. It has been even longer since we were incorrect, and together we cannot remember the last time that we misread a case. This is not to say that either of us is especially smart or perceptive. It’s just that, over the past few years, we’ve noticed a trend in the language we see in briefs and pleadings. We’ve somehow gone from being “wrong” to being “absurd,” “ridiculous,” and “disingenuous,” “myopic” in our view of the world, and “prone to wild exaggeration.” Now, instead of just being “incorrect,” we’re “hopeless”—we “engage in subterfuge,” “obfuscate the facts,” “muddy the water,” “employ a selective memory,” “conveniently forget” facts in the record, and generally spend all day trying to “pull the wool over the court’s eyes.” Our pleadings “smack of desperation” and serve as gross “admissions of failure.” Opponents call us on our “scurrilous allegations,” which are, sadly, “as baseless as they are preposterous.” We have made many an “eleventh-hour attempt” to do this or that on the basis of distorted facts, all to divert focus or mislead the court. We weave arguments out of “whole cloth,” and most everything we do these days is “transparent,” “desperate,” “last-ditch,” or amounts to an “about-face” of one kind or another. The pleadings telling us so are filled with so much underlining, bold print, and capitalization that they are basically black.

From our conversations with practitioners and judges, we know that we are not alone in noticing—and resenting—a trend toward the increased use of inflammatory language in pleadings. Everyone with whom we’ve spoken agrees that letters, pleadings, and briefs laced with attack and insult make life a little worse for all of us. We all understand that accusing someone of being “disingenuous” or describing opposing counsel’s position as a “pretext” is just an elegant way of calling another lawyer a liar. No one seriously contends that this language serves a useful purpose in the practice of law.

But you don’t have to take our word for it. Over the past few months, we’ve conducted research and engaged in discussions with a number of judges and justices on the subject of civility in pleadings. The results are enlightening. Based on our investigation, we offer two good reasons—neither remotely disingenuous—to leave the anger out of your court documents: first, it’s against the law, and second, it absolutely does not work.

## **Demeaning Language Is Against the Law**

Use of demeaning language in court documents runs contrary to the Principles of Professionalism, the Virginia Rules of Professional Conduct, and the *Code of Virginia*.

## **Principles of Professionalism**

The Principles of Professionalism for Virginia Lawyers is a set of ideals endorsed by the Supreme Court of Virginia and the Virginia Bar Association. ([http://www.vsb.org/docs/2008-09\\_principles.pdf](http://www.vsb.org/docs/2008-09_principles.pdf)) The preamble to the principles reminds us that in our oath, “all Virginia lawyers pledge to demean themselves professionally and courteously.” The principles go on to instruct us to “treat everyone as [we] want to be treated—with respect and courtesy.” “Everyone” includes clients, judges, court personnel, and opposing counsel and their staffs.

We are further cautioned to “avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as [we are] trying to serve [our] clients,” to “avoid reciprocating unprofessional conduct by opposing counsel,” and “to resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.” While these principles lack the force of rules or law, they provide a clear statement that our profession does not approve of discourteous conduct, including written insult.

### Virginia Rules of Professional Conduct

Rule 3.4 of the Virginia Rules of Professional Conduct, which deals with fairness to opposing parties and counsel, provides that a lawyer shall not “intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings,” and that a lawyer shall not “file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” Admittedly, these provisions do not explicitly command lawyers to avoid inflammatory language in written documents. But Comment 8 to the rule states that

in adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feelings should not influence a lawyer’s conduct, attitude, or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

It would seem that the drafters of the rule contemplate that “fairness” to opposing counsel necessarily includes an element of courtesy.

Oddly, Virginia has not adopted another rule, which appears in the American Bar Association Model Rules and has been held by courts to directly address intemperate language in written documents. ABA Model Rule 8.4(d) provides that a lawyer shall not “engage in conduct that is prejudicial to the administration of justice.” While this is a broad pronouncement, courts have held that the provision subjects a lawyer to discipline

for the use of “offensive and sarcastic language.”<sup>1</sup> The comment to Virginia Rule 8.4 provides no indication as to why the Virginia rule omits this subsection. The omission seems to eliminate one means of redressing intemperate and offensive language in written documents.

### Virginia Code § 8.01-271.1

Virginia law, however, does provide a means by which the courts may sanction intemperate language, at least when that language is directed to the courts themselves. Virginia Code § 8.01-271.1 — Virginia’s equivalent to Federal Rule 11 — has been held by the Supreme Court of Virginia to prohibit offensive writing directed at a tribunal. In *Taboada v. Daly Seven Inc.*,<sup>2</sup> the court responded to a petition for rehearing that contained several very clear instances of what it termed “intemperate language.” The Court found that the language was intended “to ridicule and deride the court,” which it held to be an “improper purpose” for a pleading within the meaning of Code § 8.01-271.1(iii).<sup>3</sup> The filing attorney was sanctioned accordingly.

More recently, the Supreme Court of Virginia upheld sanctions imposed by a circuit court for the use of contemptuous language in a pleading. The Court agreed that a pleading containing such language was filed for an improper purpose within the meaning of Code § 8.01-271.1(iii). It stated that “[c]ontemptuous language and distorted representations in a pleading never serve a proper purpose.”<sup>4</sup> In both cases, the Supreme Court of Virginia reminded practitioners that Code § 8.07-271.1(iii) “is designed to ensure dignity and decorum in the judicial process,” and that it “deters abuse of the legal process and fosters and promotes public confidence and respect for the rule of law.”<sup>5</sup>

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Taken together, these principles, rules, and laws make it clear that inflammatory language for its own sake is improper.

### Uncivil Language Doesn’t Work

There is a second and perhaps even more powerful reason to leave the loaded language out of your court documents: it simply does not work.

**Not Effective Advocacy**

In the course of preparing this article, we spoke with a number of sitting judges and justices. Without exception, they felt that the use of inflammatory language is hopelessly ineffective as a persuasive technique—and some found it to be affirmatively counterproductive. Virginia Justice Lawrence L. Koontz Jr. summarized the general consensus when he told us, “I can’t think of a reason why a lawyer would take that approach.” He finds it disturbing to see inflammatory language in briefs, and sometimes wonders what has happened to the concept of courtesy, which he says, “ought to be as natural as breathing.”<sup>6</sup>

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This makes perfect sense. Judges are trying to do a job—specifically, they are trying to arrive at the legally correct result in a given case. The proper purpose of a brief or pleading is to help the judge arrive at this result. Careful legal analysis and an accurate recitation of the material facts will aid the judge; invective will not. Accordingly, as Koontz told us, “[a] strong brief is based on analysis, and application of the facts to the law,” while inflammatory language is “not effective and is at minimum a distraction.”<sup>7</sup>

Further, the judges all stressed that their time is extremely limited and jealously guarded. One state trial court judge told us in no uncertain terms that “[f]or a judge, time is the most valuable commodity... Lawyers who wish to waste the time of the court—for which their clients are paying—to no useful end are a scourge on the profession.”<sup>8i</sup> Overstating the facts or law or engaging in ad hominem attack wastes time that the court could be using to analyze the issues. Michael F. Urbanski, a magistrate judge of the U.S. District Court–Western District of Virginia, agreed that shrill language “gets in the way. ... It’s annoying, it’s distracting, and it wastes the client’s money.”<sup>9</sup>

In fact, the best treatment that an overly aggressive lawyer can hope for is to be ignored. Judge Martin F. Clark Jr. of the Patrick County Circuit Court told us that he finds overblown language in pleadings to be so pervasive that it does not even register anymore; he characterizes it as “stagecraft.”<sup>10</sup>

Because judges have limited time to devote to your case, anything that you write that does not affirmatively advance your client’s position necessarily hurts it.<sup>11</sup> Superfluous language dilutes the

force of your arguments and increases your risk of error. Error, in turn, will erode your credibility and your effectiveness as an advocate. Further, an unending stream of angry rhetoric tries the patience of the average judge; it gets on judges’ nerves the same as yours and mine. Judge Clifford R. Weckstein of the Roanoke City Circuit Court invoked Oklahoma federal Judge Wayne E. Alley’s classic cry of disapprobation: “If there is a Hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.”<sup>12</sup>

**Weakness in Argument**

Inflammatory language is not only annoying and distracting to the judge but, as several jurists told us, it signals weakness in the underlying legal argument.<sup>13</sup> Koontz noted that when the justices see certain language, “it’s an indication that counsel does not think his or her case is strong on the facts and the law.”<sup>14</sup> As Weckstein phrased it, “the judge assumes that if you have the goods, you will go with the goods instead of resorting to smoke and mirrors.”<sup>15</sup>

Even though judges may be inured to a certain degree of hyperbole, some words indicate deficiencies in the underlying argument so strongly that they will likely prompt questioning from the court.<sup>16</sup> Virginia Justice Donald W. Lemons offered some examples of phrases that particularly catch his attention, and not in a good way:

- a statement that an opponent is “disingenuous”;
- a claim that an opponent’s position is merely a “pretext”;
- an assertion that opposing counsel “would have the court believe” something;
- a statement that “opposing counsel misstates” the facts or the law;
- anything that amounts to a personal attack on the trial judge or opposing counsel.

He advised us that a lawyer who accuses another of misrepresenting the law or the record—even euphemistically—likely will be called upon to justify his or her statement.<sup>17</sup>

Several judges made it clear that such an indiscretion will never directly hurt a client’s cause. The courts are “unlikely to hold one way or

another because they find a lawyer’s conduct to be unprofessional.”<sup>18</sup> But unseemly conduct may divert the court’s attention from the key issues in the case. Accusing opposing counsel of misrepresenting an appellate record, for example, may prompt the court to explore the issue at oral argument. That, in turn, will require the accusing lawyer to spend precious minutes of argument off-point, explaining to the court whether a given record citation fully supports, only arguably supports, or does not support his opponent’s position. The result cannot be beneficial to the client.<sup>19</sup>

Just because a judge won’t penalize your client because of your behavior, however, is not a license to misbehave. Each judge and justice with whom we spoke reiterated the importance of a lawyer’s reputation. A notoriously difficult lawyer who finds himself in a bind is likely to find that opposing counsel are less cooperative than they might be.<sup>20</sup> He might even find that the court is less receptive to requests for discretionary relief, such as continuances. Although Weckstein conceded that “every lawyer is entitled to one bad day,” he also told us that “[i]f you are a pettifogger, your name will come up in judicial conversations. And where a judge might otherwise think you’re having a bad day, he or she will know that you’ve had bad days before.”<sup>21</sup>

**How to Respond to Uncivil Language**

How should a lawyer respond to less-than-civil behavior? The jurists with whom we spoke offered a variety of solutions.

Lemons suggested engaging the issue head-on — for example, by noting that the opposing brief is replete with emotionally charged language and hyperbole, ceding victory in the name-calling contest, and getting back to the merits.<sup>22</sup>

By contrast, Urbanski suggested that a lawyer faced with venomous language in a pleading should not even acknowledge it. He or she would be better served by simply addressing the merits of the case. Urbanski noted that, “[a] judge’s job is to do justice, not be a kindergarten monitor. . . . It’s not my job to play referee.”<sup>23</sup> He believes that an attorney should look past incivility unless it causes injustice — and at that point, the proper recourse is a motion for sanctions, not a reply in kind.

Koontz tends to agree with this approach. When faced with a brief full of name-calling, he suggested that the safest course of action is to “[i]gnore it. You never want to sink to that level of conduct, and you can ignore ad hominem attack with a certain degree of safety, because it won’t be ignored by the court.”<sup>24</sup> ■

Endnotes:

- 1 See, e.g., *In re: Abbott*, 925 A.2d 482 (Del. 2007). Mr. Abbott was sanctioned for statements he made in two briefs to the effect that opposing counsel presented a “fictionalized” account of a hearing, offered an “imaginary, make-believe set of reasons” to support their position, “fabricated” conclusions, made “ridiculous” arguments, and engaged in “pure sophistry” to “magically transmute” the law and create decisions “from whole cloth.”
- 2 272 Va. 211, 636 S.E.2d 889 (2006).
- 3 *Id.* at 215-16, 636 S.E.2d at 891.
- 4 *Williams & Connolly LLP v. PETA*, 273 Va. 498, 519, 643 S.E.2d 136, 146-47 (2007).
- 5 *Id.* at 519, 643 S.E.2d at 146, quoting *Taboada*, 272 Va. at 215-16, 636 S.E.2d at 891.
- 6 Interview with Hon. Lawrence L. Koontz Jr., Justice, Sup. Ct. of Va., in Roanoke, Va. (Nov. 19, 2008).
- 7 *Id.*
- 8 Interview with Hon. Clifford R. Weckstein, Judge, 23d Judicial Cir. of Va., and Hon. Martin F. Clark Jr., Judge, 21st Judicial Cir. of Va., in Roanoke, Va. (Nov. 11, 2008).
- 9 Interview with Hon. Michael F. Urbanski, Magistrate Judge, U.S. Dist. Ct. for the W.D. of Va., in Roanoke, Va. (Nov. 17, 2008); see also Weckstein & Clark, *supra* (opining that name-calling is unprofessional and “gets in the way” of efficient case resolution).
- 10 Weckstein & Clark, *supra*.
- 11 For a full and thoughtful discussion of the point that anything that doesn’t help, hurts, from which this section borrows, see generally ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).
- 12 Weckstein & Clark, *supra*.
- 13 Koontz, *supra*; Weckstein & Clark, *supra*.
- 14 Koontz, *supra*.
- 15 Weckstein & Clark, *supra*.
- 16 Koontz, *supra*; telephone interview with Hon. Donald W. Lemons, Justice, Sup. Ct. of Va. (Nov. 6, 2008); Weckstein & Clark, *supra*.
- 17 Lemons, *supra*.
- 18 *Id.*
- 19 *Id.*
- 20 Urbanski, *supra*.
- 21 Weckstein & Clark, *supra*.
- 22 Lemons, *supra*. For some excellent examples of this technique, see BRYAN A. GARNER, THE WINNING BRIEF 341-43 (2D. ED. 2003).
- 23 Urbanski, *supra*.
- 24 Koontz, *supra*.