

## Legal Writing

BY BRYAN A. GARNER

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THINK OF SOMEONE YOU know who's high-strung, excitable, overreactive, and often frazzled. Someone whose panic threshold is pretty low. Someone whose words you often have to discount because they're melodramatic and exaggerated. Someone with a tendency to fire off angry e-mails. You do know such a person, don't you? Don't we all?

That person has little credibility with others. The person may in many ways be lovable, but not believable, and hence unsuited to a profession in which credibility is the be-all and end-all. If you want to be a lawyer—an adviser and counselor whose words are supposed to carry weight—make sure you're not such a person.

So what does this have to do with legal writing? Everything. It has to do with managing the tone of your prose, with your emotional stance toward your reader, and ultimately with the degree to which anything you say or write is believable to others. Here, then, are five rules for cultivating the right demeanor for being taken seriously as a professional.

**1. Develop a calm, temperate demeanor.** A good lawyer needs to be all but unflappable. You'll seem more reliable. Being unflappable doesn't mean that you should seem unconcerned or uncaring. It means staying relatively calm in the face of others' excitement.

Consider Walter Hagen, one of the greatest golfers in the history of the sport. He's the one, by the way, who popularized the phrase about "stopping and smelling the flowers." He approached each round of golf, even in the most important tournaments, with the idea that he would sometimes have some really bad luck and that he'd sometimes hit some truly lousy shots. Still, he always remained unfazed. His opponents reported that he would hit his ball in the water and watch the shot as if it had gone exactly as he intended. He'd walk to the appropriate spot, take his penalty, and continue as if everything were going as anticipated. Meanwhile, his attitude undid many of his competitors, who became convinced that he'd never crack under pressure.

As Thomas Jefferson said in an 1816 letter, "Nothing gives a person so much advantage over another as to remain always cool and unruffled under all circumstances."

**2. Be prudent: know when to refrain from putting something in writing.** Lawyers, of all people, should know that some thoughts are best left unrecorded. A famous example occurred recently when an associate at a major law firm wrote an e-mail saying, "I think we committed malpractice here!" In the ensuing malpractice lawsuit, you can be certain that the plaintiffs' lawyers, throughout the trial, displayed that quotation on a billboard in the courtroom. By the time of trial, naturally, that associate was no longer with the firm.

If you're dealing with matters that could be prejudicial to your client, your employer, or yourself, reconsider any urge to put your thoughts in writing. A phone call or face-to-face meeting might be more appropriate.

**3. Whatever the provocation, write with a smile.** The novelist Henry Miller wisely said, "Always write with a smile, even when it's horrible or tragic." Perhaps the best model is the writing of Charles Dickens, who never tells readers that certain characters in his novels are despicable. He shows us. And wrote about some of the seediest characters imaginable, always with an amiable smile.

Let's say you're in a pretrial dispute. You've just concluded a phone call with another lawyer and agreed to (1) a 15-day postponement for a document production and (2) a mediation with Leona Burgess, subject to a conflicts check, during the week of December 7. Ten minutes later, you receive a fax "confirming" that you've agreed to (1) a 30-day postponement for the document production and (2) a mediation with Ms. Burgess on December 10 at 2:30 p.m. Believe it or not, this type of occurrence is lamentably common.

These time-wasting shenanigans are potentially upsetting. But you fax off a nonchalant response:

Dear —: Your faxed letter is at hand. I hasten to say that all we agreed to is (1) a 15-day postponement for the document production (until 5:00 p.m. on November 30) and (2) a mediation before Ms. Burgess, subject to a conflicts check, during the week of December 7—not December 10 at 2:30 p.m. (I'm afraid I can't do it then, as I have a longstanding commitment outside the office.) Please revise your calendar accordingly, and let me know whether December 7 at 9:00 a.m. or December 11 at 9:00 a.m. would be possible for you. I've scheduled a telephone call at 2 o'clock this afternoon with Ms. Burgess to discuss possible conflicts. Would you like to participate in the call? I'll be sure to take careful notes.

**4. Realize the difference between expressing indignation and evoking it.** Your job isn't to show the court how outraged you are, but (if possible) to make the court feel outraged at the injustices perpetrated by the other side. The minute you express anger or indignation, the judge feels like the only level-headed person in a room full of hotheads. To the extent that you show yourself to be a calm, deliberate thinker, you've aligned yourself with the judge.

**5. Play fair with the evidence: cultivate a reputation for understatement.** Sometimes your adversary will have a good point or two. Concede the power of countervailing points of undeniable strength. Then go on to show that as strong as they may be, your own points are even stronger.

Let's say you're with a state attorney general's office. The father of a 14-year-old boy in foster care seeks to take the boy out of the foster-care system and assume financial and parental responsibility for him. The father's lawyer says again and again that the state is spending needless resources on this boy, that the father wants to take responsibility, and that the state shouldn't be getting in the way. It's good public policy for fathers to take care of their sons.

You, on the other hand, know the story rather differently. The father was convicted of wife-beating when the boy was only eight—the year the boy was taken from his parents—and the father has had three DWIs in the past two years. But most tellingly, the father has sired three out-of-wedlock children by a 23-year-old mentally retarded woman who was formerly his ward. Meanwhile, the boy has been flourishing with his foster parents, achieving a B– average in school for the first time ever.

After acknowledging that everyone admires a parent who takes responsibility, you state those facts. With 999 out of 1,000 judges, that's all you need to say or write—and drawing further conclusions would be counterproductive.

**A final thought: a theorizing rationale.** Here's the ultimate reason why you should never let a judge or jury see you upset: listeners and readers tend to conclude that you've gotten upset because you've realized that you're losing. And once a listener or reader—especially the decision maker in your case—concludes that you believe you're losing, that tends to become the foreordained result. You seem as if you should lose. Hence you lose.

So master your best poker face—even in your writing.