



The courtroom: no place for personal attacks

*Putting on an act in the courtroom
may not be as entertaining as you think.*

By MICHAEL MORTIMER

This is Part Two of my motion opposition series. Last month's article dealt with logistics; subsequent articles will talk about substance and tips/tricks I have learned over the years.

This month I want to talk about personal attacks that lawyers sometimes include in their pleadings filed with the court. The attacks I am referring to are known by most lawyers, because either they have been on the receiving end of a barrage of ridicule or they are guilty of hurling barbs at the opposition.

What are personal attacks?

Personal attacks come in various forms, but some of the more common ones are:

- Plaintiff counsel lacks professionalism.
- Plaintiff counsel is being disingenuous.
- Counsel's papers evidence a total lack of understanding of even the most basic principles of law.
- Counsel is not being honest with the Court; his papers are a disgrace to the profession.
- Having nothing intelligent to say, plaintiff counsel resorts to spewing poorly written cheap shots against this counsel and her clients.
- Counsel's papers are so poorly written and confusing that it took this attorney

hours to figure out what counsel was trying to say.

- Counsel intentionally misleads the Court with misrepresentations of fact and law. Counsel should be sanctioned and his conduct reported to the State Bar.
- Counsel's opposition papers are a moronic attempt to confuse the Court with fluff and fancy words.
- Counsel's papers are nothing more than a "copy and paste" job that borders on plagiarism.

What is wrong with personal attacks?

Since I am a strong proponent of teaching by example (war stories, if you will) permit me to answer this question with a war vignette:

It was a cold, overcast day in September 2005. I was plaintiff trial counsel appearing in a San Francisco federal courtroom, there to attend a pretrial conference. The case definitely was going to trial. No big deal; I enjoy trial. I had defeated summary judgment and otherwise valiantly fought various battles in this war.

Although the defense team had three lawyers, lead trial counsel was a senior partner. He and I walked up to the bench where the Honorable Jeffrey White was going to tell us how he would conduct the trial. As we waited for Judge White to start speaking about the trial

procedures, he instead took us out to the proverbial woodshed:

I do not like lawyers engaging in personal attacks against each other in a case. It slows things down. It is a waste of time. It is unprofessional. It is a disservice to your clients. Personal attacks distract the Court from attending to the serious issues it must decide.

"[I'm thinking by this point 'No problem, I have never insulted or attacked defense counsel.']"

In this case, I have seen both sides engage in personal attacks, conduct that is offensive and it will not be tolerated. For example, in a Defendant's pleading I see [Judge quotes a line from one of Defendant's pleadings.] In Plaintiff's pleading, counsel said [Judge reads an example.]

Trial counsel are on notice that I do not tolerate this kind of behavior in my court, especially during trial. If at trial I see either side engage in anything close to personal attacks, I will not hesitate to sanction the offending lawyer and deal with him or her accordingly, including holding that lawyer being held in contempt and having that lawyer taken off the case.

So there we were, two big shots ready to go to trial in federal court. Instead, the first thing the Judge does is spend ten minutes chewing us out, this when the gallery was filled with lawyers waiting for their matters to be called. How embarrassing.



The point of my going into such detail about Judge White's dressing down is that he pretty much covered the main reasons why it is a fool's errand to litter your pleadings with even a hint of personal attacks against opposing counsel.

But what's really wrong with throwing a few rocks at opposing counsel?

Despite repeated admonishments from appellate justices, judges and experts that personal attacks waste time and serve only to cast counsel in an extremely negative light, attorneys persist in assaulting opposing counsel with vicious personal attacks in their pleadings. You must realize that from the court's perspective, *any form of personal attack is unacceptable and not permitted.*

Of all things judges complain about when reading lawyers' papers, judges universally dislike lawyers using pleadings to throw rocks at each other. Judges DO NOT want to see pleadings littered with insults, ridicule, snide remarks or accusations. From seminars, articles, speeches and case law, here is what judges collectively think about personal attacks in pleadings:

- **Attacks are not authority.** What do I mean by this? It's simple, just think about it logically. If judges do not take personal attacks into account when making decisions or rulings that means the caustic words in your pleadings have no weight or value. The evidentiary objection for such attacks would be that they are irrelevant (and maybe lack foundation). If personal attacks are irrelevant, are not authority, and have no value or weight, what's the point of including them in your papers?

Personal attacks detract. Judges agree that personal attacks made in points and authorities detract, diminish or take away from a lawyer's arguments. I recall one judge comparing personal attacks in pleadings to listening to a beautiful symphony on a CD with scratches. The scratches ruin the enjoyment derived from the music, just like

personal attacks in pleadings ruin the persuasiveness of your position.

- **Personal attacks damage an otherwise good reputation.** All that a lawyer has in life is his or her reputation in the legal community. For example, last year I was representing the plaintiff in a contentious case where the defendant was represented by a major defense firm in San Francisco. When we were discussing possible settlement, defense counsel told me, "People around town have mentioned you. They tell me you know your stuff, you are an honest man and a straight shooter." We then went on to talk about resolving the case. That comment reminded me that the only thing of value we lawyers have is our reputation among colleagues and the courts.

- **Lying lawyers ultimately lose.** While chatting with another judge I know, we discussed lawyers that lie and those that approach every case like rabid pit bulls. This judge told me that he keeps a list in a drawer on his bench. On that list are the names of the lawyers that the judge knows have lied to him or who come into court screaming and yelling, hurling accusations about opposing counsel. He refers to the list so that he can remember who those lawyers are the next time they appear in his court.

How to handle personal attacks or avoid them completely

Here are my tips on how to handle being attacked and to avoid personal attacks in your pleadings.

- **Keep it in the office.** Litigators have feelings and emotions. Expressing our feelings to others in the office is normal behavior. To be sure, letting out feelings of anger, dislike, ridicule or mockery can be amazingly therapeutic. However, what is said in the office must stay in the office. Just because your office colleagues and staff listen and agree with your comments, don't be tempted to include a few zingers in your pleadings. Remember, the court does not want to see them.

- **Don't be tempted to respond in kind.** No attack warrants a response

from you. Don't be baited into slinging mud back at opposing counsel. The court does not know "who started it" nor does the court care. All the judge sees is, "Here are another two lawyers in a pissing match." Don't sink to bellicose counsel's level and respond in kind. If you resist this temptation, the Court will take notice of your discipline and professionalism.

- **Take the high road and note it in a footnote.** The way I respond to personal attacks by opposing counsel is to include a footnote in my pleading that simply says: "Although defendants' moving papers contain a number of personal attacks against this attorney (e.g., see where defense counsel calls counsel "disingenuous," "a liar," "moronic," and "unprofessional"), plaintiff counsel will not respond in kind. Plaintiff counsel objects to defense counsel's attacks as irrelevant to the issues before the court. Plaintiff counsel remains available to respond to counsel's words and descriptions should the court require."

- **Don't be cute or crafty.** An attack is an attack. You might think calling opposing counsel a *prevaricator*⁴ will not sound as offensive as calling counsel a liar. But do you really think the judge will conclude, "Oh, calling someone a *prevaricator* is acceptable, I just don't like seeing the word *liar* in pleadings." Do not be cute by disguising attacks with crafty workarounds.

- **Know how to criticize.** If opposing counsel has seriously lied to and misled the court, you certainly should bring it to the court's attention. However, there is a proper way to do that.

Example: If opposing counsel misstates an appellate opinion, and you know it is intentional, don't call opposing counsel a liar. Simply say, "Defendant's reading of the case is incorrect. The case actually said. . ." Note that I used the phrase, "Defendant's reading. . .", To avoid making my statements look like a personal attack against opposing counsel, I use the word "defendant" instead of "defense counsel."



JANUARY 2009

Example: If defense counsel mischaracterizes deposition testimony to support a critical point raised in his or her summary judgment motion, don't say, "Once again defense counsel is telling lies to the Court, and coincidentally he lies only on the important issues before the court." Instead, say, "Defendant says that Plaintiff's deposition testimony was 'blah, blah, blah.' The defense is mistaken. Plaintiff's testimony was that. . ."

•**Scan your pleadings for attacks.** After I have finished writing my document, I review it to see if at any time I attacked opposing counsel. If I find any words or phrases that might be considered a personal attack, I take them out. Also, have another person or a staff member review your pleadings for offensive remarks. Something that isn't offensive to you might be offensive to someone else. If that is the case, take it out.

•**Taking pleasure in personally attacking opposing counsel.** Throughout this article, I have repeatedly said that

judges do not like personal attacks. If the reason you behave unprofessionally is because it makes you feel good to publicly mock opposing counsel, there is nothing that can be said or done to get you to stop.

Some lawyers take personal pleasure by being condescending, insulting and disrespectful. They relish the opportunity to fill their pleadings with ridicule and insults. Those lawyers take great pleasure knowing their personal attacks are now a matter of public record.

Judges have universally agreed that personal attacks make the attacking lawyer look bad, not the attacked counsel. If you still want to litter your papers with rude and offensive attacks against your opponent, go ahead. You are simply being stupid, immature and unprofessional.

Conclusion

Judges are extremely wise and street smart. They can detect when a lawyer is telling lies or misrepresenting facts and

law. Judges do not need you to tell them what they can discern. Judges know a liar when they see one. They know who the jerks are. Judges rule in your favor because the law was on your side and your arguments were persuasive, not because you were an aggressive attacker.



Mortimer

Michael Mortimer is a federal court trial lawyer located in San Francisco. His practice emphasizes competitive business litigation and employment law. He is a graduate of the University of California at

Berkeley and the University of Oregon. Visit his Web site at <http://www.employlaw.com>.

Endnote:

¹ A person who speaks falsely; a liar. A person who speaks so as to avoid the precise truth; quibbler; equivocator. See <http://dictionary.reference.com/browse/prevaricator>.