Cultivate the Right Demeanor for Effective Legal Writing

By Bryan A. Garner

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 be in many ways 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. Seeming unflappable doesn't mean 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 have some really bad luck on occasion and that he'd hit some truly lousy shots. He remained always unfazed. His opponents reported that he would hit his ball in the water and watch the shot as if it had gone exactly as planned. 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 associated 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 in which you 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

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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 you show yourself to be a calm, deliberate thinker, you've aligned yourself with the judge.

> [N]ever let a judge or jury see you upset: listeners and readers tend to conclude that you've gotten upset because you've realized you're losing.

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 those points having some undeniable strength. Then go on to show that strong as they may be, your own point is 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 take financial and parental responsibility for the boy. 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-battering 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 that 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 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. ■

Reprinted from Bryan A. Garner's ABA column in The Student Lawyer.

Bryan A. Garner (lawprose.org) teaches legal-writing and drafting seminars for more than 6,000 lawyers and judges each year. He is editor in chief of Black's Law Dictionary *and author of more than 20 books on writing, including* Making Your Case *with Justice Antonin Scalia,* Garner on Language and Writing, *and* Garner's Modern American Usage.

Last Month's Contest

Last month, I invited you to revise the first sentence of current Federal Rule of Evidence 407:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

The winner is Cynthia Bostwick, the Probate Register for the Washtenaw County Trial Court. Her revision, slightly edited:

> When actions taken after an injury or harm would have made the injury or harm less likely, they are not admissible to prove negligence, culpable conduct, a defect in a product or a product's design, or a need for a warning or instruction.

Compare that version with the restyled version:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.

The contest will be taking a break for a while, but it will return. My thanks to the dozens of participants each month, and I hope you'll forgive my not being able to respond to each one. Stay tuned.

—JK