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## The Argument Clinic

By Trent Collier

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There's a lot of wisdom in comedy. "The Argument Clinic" from *Monty Python's Flying Circus* is Exhibit A—and its primary audience should be lawyers.

The sketch begins with Michael Palin paying a receptionist for "an argument."<sup>1</sup> The receptionist refers Palin to Mr. Barnard in Room 12. There, he finds Graham Chapman sitting behind a desk. Chapman immediately lays into Palin:

"What do you want?"

"Well, I was told outside—"

"Don't give me that, you snotty-faced heap of parrot droppings!"

The insults continue until Chapman calls Palin a "vacuous, toffee-nosed, malodorous pervert."

That prompts Palin to exclaim that he was just looking for an argument.

"Oh!" says Chapman. "I'm sorry. This is Abuse." He cheerfully directs Palin to Room 12A.

Too often, judges and lawyers feel like Michael Palin in "The Argument Clinic"—looking for an argument and finding abuse. That feeling is a sign of bad advocacy.

## At a Glance

Loading our briefs with abuse hurts our clients most of all.

Connect the law to the facts, connect the facts to your conclusion, and you have a winning argument. Connect those dots clearly and you've advanced your client's cause. Fail at connecting those dots and you've set your client back. And abuse prevents you from connecting the dots.

When you start treating your opponents as thoughtful, decent human beings, you're more likely to develop effective responses to their arguments. Your clients benefit.

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### You'll serve your clients better with argument than with abuse

We are, in fact, supposed to be civil—and not just the stuffy, with-all-due-respect, my-learned-colleague sort of civil. We're supposed to be *genuinely* decent to other lawyers, in form as well as substance.

Every attorney swears to “abstain from all offensive personality” when joining the bar.<sup>2</sup> We're also subject to MRPC 6.5, which requires attorneys to treat others with “courtesy and respect.”<sup>3</sup> And MRPC 3.5 directs attorneys to act in a dignified and courteous manner toward courts.

So the rules are clear. We are supposed to engage in argument, not abuse.

As a profession, we've had mixed success in being civil. Abuse is the default setting for many lawyers. Even those of us who care about civility sometimes cross the line into abuse—and, yes, I have my own sins to confess. That's really the problem: we all know we're supposed to be civil and we fail time and time again.

This dismal track record probably has a lot to do with how invested we are in our clients and their cases. We take our obligation to zealously represent our clients very seriously.

We spend our days in the trenches with our clients, where we belong. Their battles are our battles. So cultivating a clinical distance is not a sound strategy for increasing civility.

Rather, we should cultivate civility *because* we're in the trenches with our clients. We keep talking ourselves into thinking that abuse is necessary to win cases. But the opposite is true. Loading our briefs with abuse hurts our clients most of all. It harms those we're supposed to protect. Here are three reasons why.

#### 1. Abuse is noise and distraction.

A successful legal argument connects three dots: the law, the facts of your case, and the conclusion you want the court to reach. That's the essence of the IRAC method (issue, rule, application, conclusion) we all learned in law school. Connect the law to the facts, connect the facts to your conclusion, and you have a winning argument.

Judges want you to connect these lines, too—and quickly. They have never-diminishing piles of briefs to read and an unending number of decisions to make. In each case, they must decide which side connects the dots more persuasively. Connect those dots clearly and you've advanced your client's

cause. Fail at connecting those dots and you've set your client back. And abuse prevents you from connecting the dots.

Suppose you're representing Samuel Pickwick in a breach-of-contract lawsuit against Augustus Snodgrass. Summary disposition briefing focuses on one critical case: *Winkle v Tupman*. Snodgrass argues that *Winkle* favors his position. You think he misconstrues the case, so you let them have it:

Defendant Augustus Snodgrass claims that *Winkle v Tupman* allows parties to use extrinsic evidence to establish the terms of a contract. But Snodgrass conveniently fails to mention that the *Winkle* court limited this rule to fraud-in-the-inducement claims. Snodgrass's "argument" is nothing but an attempt to mislead the Court. The Court should not only deny summary disposition but also sanction Snodgrass for making false statements—a continuation of the malicious behavior that has characterized Snodgrass's defense from the start.

Take that, Snodgrass. Now consider a different approach:

Defendant Augustus Snodgrass claims that *Winkle v Tupman* allows parties to use extrinsic evidence to establish the terms of a contract. *Winkle* does mention the use of extrinsic evidence. But it limits its use to fraud-in-the-inducement claims: "When alleging fraud in the inducement, a party may rely on evidence of negotiations and other extrinsic matters." Pickwick does not assert a fraud-in-the-inducement claim. So *Winkle's* extrinsic-evidence rule is inapplicable.

If you're the judge, which makes your job easier? Option A says Snodgrass gets *Winkle* wrong and demands Snodgrass's head on a platter. Option B says Snodgrass gets *Winkle* wrong and—well, that's it. For a busy judge, Option B is more helpful.

Imagine expanding these paragraphs into full briefs and you'll get a sense of why nastiness doesn't help. Turn Option A into a full brief and the incivility grows exponentially. That's more and more nastiness for the poor judge to wade through. And none of it goes to the substantive legal issue the court must decide. Incivility wastes the court's time and hurts your client's case.

## 2. If you're heaping abuse, you may be missing an argument.

Incivility might also make it harder for you to figure out what matters. The U.S. Sixth Circuit Court of Appeals made this point in *Bennett v State Farm Mutual Automobile Insurance Company*.<sup>4</sup> Apparently, the defendant characterized the plaintiff's argument as "ridiculous."<sup>5</sup> Judge Raymond Kethledge wrote that "[t]here are good reasons" not to characterize an opponent's argument this way.<sup>6</sup> "The reasons include civility [and] the near-certainty that overstatement will only push the reader away (especially when, as here, the hyperbole begins on page one of the brief)."<sup>7</sup> In addition, "the better practice

is usually to lay out the facts and let the court reach its own conclusions."<sup>8</sup> And calling an opponent's argument "ridiculous" may signal that you have missed the point: "[H]ere the biggest reason is more simple: the argument that [defendant] derides as ridiculous is instead correct."<sup>9</sup>

Just imagine if the defendant in *Bennett* had taken the plaintiff's argument seriously. It might have come up with a better way to counter it. Instead, it backhanded the plaintiff's argument as "ridiculous," never really got to the point, and lost the case.

The same chess move can look like a brilliant gambit or a foolish error. If you presume your opponent is a decent chess player, you'll analyze that move carefully, looking ahead to see what your opponent might have in mind. If you presume your opponent is a nimrod, you're not going to give it much thought at all. Treating opponents as if they're thoughtful human beings makes *you* a better player.

So, too, with litigation. When you start treating your opponents as thoughtful, decent human beings, you're more likely to develop effective responses to their arguments. Your clients benefit.

## 3. Abuse turns your reader away.

A third reason to avoid abuse: no one wants to read it. If you're the author of an abuse-laden brief, you're offering fetid heaps of insults. You've undermined your client's case by tarnishing your own credibility. And you may have prompted the judge to close your brief as soon as possible. That's never a good reaction from an audience.

Sure, some jaundiced part of the human psyche likes name-calling and nastiness. Millions of Americans tune in every night to watch talking heads yell at each other about politics. Clearly, nastiness appeals to some of the people some of the time.

But you know who *doesn't* like nastiness? Someone who's trying to make a decision. If you have a job to do and need input from others, the last thing you need is fighting and name-calling. Maybe you've had this experience:

You: Kids, what movie should we see tonight?

Kid #1: I want to see *Plastic Man*.

Kid #2: You *always* get to pick. I want to see *Age of Voltron*.

Kid #1: That movie looks stupid.

Kid #2: You're stupid.

Kid #1: Your face is stupid.

That conversation stopped being helpful as soon as it turned from comments about what movie to see to comments about the people debating what movie to see.

Legal argument can turn into this kind of debate very quickly. Once you go from discussing *Winkle v Tupman* to

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discussing who tried to misrepresent *Winkle v Tupman*, you're no longer helping the judge. The judge just wants to know if *Winkle v Tupman* applies.

Judge: Does *Winkle v Tupman* apply here?

Attorney #1: Absolutely, Your Honor. It expressly allows the use of extrinsic evidence.

Attorney #2: That is a complete falsehood. Your Honor, Attorney #1 has been dishonest with the court since Day One. He very well knows that *Winkle*—

Attorney #1: Your Honor, may I speak? Attorney #2 is once again attacking me personally instead of engaging with the substantive law that clearly favors my client. The court should not tolerate this kind of abusive, irrelevant—

Attorney #2: Your Honor, I can't believe she even read *Winkle v Tupman*. Even a first-year lawyer would know that *Winkle*—

Which one of these attorneys is helping their client? Neither is doing a very good job of focusing on the decision the judge has to make—what *Winkle v Tupman* means. This is time wasted and credibility lost.

Yes, there will be times when you must raise another party's malfeasance. There will be times when you must defend yourself against accusations of malfeasance. But you know the story of the boy who cried wolf. Who's more effective at raising malfeasance—the lawyer who always accuses the other side of malfeasance or the lawyer who rarely raises that kind of issue? And which lawyer is better able to serve his or her client?

## You can avoid abuse by watching for red flags

So far, we've established that abuse is unhelpful and that, though we know we're supposed to avoid it, we inevitably lapse into it from time to time. How can we avoid this trap? How can we make sure we're not attacking the opponent behind us by driving our sword through our own belly? There are a few red flags to watch for.

### Bad-actor claims

First, any argument that takes on a person rather than an idea is a red flag. You can group these under "bad actor" claims:

- The court should deny the motion because my opponent is trying to run up my client's legal bills.
- My opponent's argument is an attempt to distract the court from the real issue.
- My opponent is disingenuous.
- The lower court had no interest in applying the law but was motivated from the start to find a way for the plaintiff to win.

Instead, try giving opposing counsel the benefit of the doubt. Suppose they genuinely believe whatever they're asserting. Then try to demonstrate that they're wrong with *facts* rather than personal attacks:

According to Yutani's brief, Franny Glass testified that she passed out drunk in the restroom. But Glass actually testified

that she barely touched her martini. She told her companion that she “felt funny,” then fainted when she was near the bar: “They say I weaved a trifle, then fainted.” Glass added, “I guess I was on the manager’s couch for about five minutes. Lane called a cab for us or something.”<sup>10</sup>

You’ve cited your opponent’s position. Then you’ve explained—with proof—why your opponent is wrong. The judge may well conclude that your opponent is disingenuous. But you didn’t have to call your opponent disingenuous to lead to that conclusion. You served your client much better with facts than with abuse.

### Hyperbole

When I was a new lawyer, I opened a motion hearing by saying something like, “It’s hard to imagine a more obvious case of fraud than this one.” The judge interrupted me immediately. “Counsel,” he said, “I’ve been a judge for a long time. It is *very easy* for me to imagine a more obvious case of fraud.”

We use hyperbole a lot. “This is the worst case of spoliation in the history of Michigan.” “My opponent’s brief doesn’t say a single thing that’s accurate.” “Plaintiff filed this case solely to harass and humiliate the defendant.” You may think you’re doing the client a service by using overheated rhetoric, but you’re not. One overstatement makes everything you say less credible.

Imagine what the judge in my example thought of my argument after I opened with hyperbole. He knew I didn’t have a full appreciation of fraud claims, so he probably—and rightly—took everything I said with a hefty grain of salt. By overstating my argument, I hurt my client’s case.

### Adverbs and adjectives

Notice how Chapman’s abuse in “The Argument Clinic” is a series of (very inventive) adjectives? Every single adverb and adjective in your legal writing is a sign of an argument gone awry. Sure, you might want to keep some of them. But most of them should go because they’re signs that you’re overstating your case, being a jerk, or both.

- The plaintiff *blatantly* ignores *Winkle v Tupman*.
- Maizey, Inc.’s *disingenuous* argument is that *Winkle* supports its position here.
- Herondale’s brief evinces a *complete and utter* lack of respect for the rule of law.

Adverbs and adjectives are the canaries in the coal mine of incivility. Root them out of your briefs and you’ll build arguments based on law and fact. And you know whom that helps? The person paying your bills.

### Nits

Then there are all the little things we do to make the other side look lazy. If your opponent’s brief includes a typo, you make sure to quote it in your brief—except you add a nice, big [SIC] next to it so the court *knows* your opponent made a mistake. Or if he cited the wrong part of the statute, you make a whole footnote out of that non-point: “Titus cites MCL 600.3925(C)(3)(a)(ii). The actual citation is MCL 600.3925(C)(3)(b)(ii). This cavalier approach to research is further proof that the court should deny Titus’s motion.”

What exactly do you think the court will presume about *your* case if you’re arguing about obvious typos? It’s not exactly a sign of strength. And it doesn’t provide the kind of facts and law the court needs to resolve the case.

### Conclusion

Thinking the worst about people is no way to have a substantive dialogue. And substantive dialogue is what courts want. It’s what they *need* to do their jobs. If we’re not participating in that substantive dialogue—if we’re only providing abuse—then we’re not helping our clients. And helping our clients is the reason we do all this lawyering stuff in the first place. ■

*This article originally appeared in Laches, the Oakland County Bar Association journal. It is reprinted here, in edited form, with permission.*



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### ENDNOTES

1. “The Argument Clinic” originally appeared in *Monty Python’s Flying Circus*. A transcription of the sketch is available at <<http://www.montypython.net/scripts/argument.php>> (accessed February 3, 2020).
2. *Lawyer’s Oath*, SBM, available at <<https://www.michbar.org/generalinfo/lawyersoath>> (accessed February 3, 2020).
3. Emphasized in *Grievance Adm’r v Fieger*, 476 Mich 231, 246; 719 NW2d 123 (2006).
4. *Bennett v State Farm Mut Auto Ins Co*, 731 F3d 584, 584 [CA 6, 2013].
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. The facts and some of the words are taken with apologies from Salinger, *Franny and Zooey* (Boston: Little, Brown and Co, 1961).