

# Editor's Page

By Michael Franklin Smith



Greetings and happy new year. I recently received a daily question and answer journal as a gift. Each day it poses a short question that prompts me to briefly write thoughts about various aspects of life. A question I recently read asked, “Who inspires you?” I immediately answered without hesitation, “Lawyers who can do their jobs ethically and without making personal attacks against opposing counsel. And people who stand up to bullies.” Later that evening I pondered why that answer came so quickly. I had spent much of my time that very day replying to a seven-page response brief that accused me of “glossing over facts,” “quoting cases out of context,” “purposefully omitting the critical conclusion of a quoted sentence,” “neglecting to mention the rest of the discussion,” “trying to steer the court into clearly reversible error,” and “misstating the law.” Of course, none of the accusations were true. It was, instead, nothing more than a desperate attempt to muddy the waters and bias the court against me and my client in a case involving a rather mundane question of claim preclusion. In my written reply, I took the high road, focused on the merits of the legal arguments, and did not address my opponent’s uncivil rhetoric.

Any attorney who exhibits this kind of lack of civility tarnishes the entire image of the legal profession. Don’t worry, my opponent in this instance was not a member of the International Association of Defense Counsel. I believe we are civil and professional in all of our legal endeavors.

*Ad hominem*, which stands for the Latin term *argumentum ad hominem*, is basically a response to an argument that attacks the person’s character rather than the logic or content of the argument. *Ad hominem* attacks against opposing counsel are uncalled for and unprofessional. And yet, they are more pervasive in the legal profession than any of us care to admit. A quick search in one legal database retrieved 1,634 cases discussing “*ad hominem*.” There were an additional 324 cases discussing “lack of civility.” It saddens me to see our esteemed profession tarnished by this kind of behavior.

Civility and respect are important to me, and I assume they are important to most legal professionals. Litigation is, in my mind, like a game of chess. Each argument, brief, or action is a strategic move with a singular focus—to capture the king, i.e. to win. But that desire for victory is not a license to “win at any cost.” I have loved litigating cases for the past 25 years and I look forward to litigating cases for many years to come. I love the thrill of going up against a competent opponent who advocates for their client with solid legal arguments rather than acrimonious hyperbole. There are, however, those dark days when I have to read and respond to a brief that attacks my personal or ethical character rather than the merits of the legal arguments. Fortunately, at least in my personal experience, this is the exception and not the rule. When I experience one of those exceptions, I always take the high road. My hope is that a civil response to an *ad hominem* attack will bring civility back to the litigation arena.

In 2017, and beyond, I pledge to always take the high road and never advocate for my client by attacking my opponent rather than their argument. I challenge each of you to make the same pledge. Peace and civility to you and yours in this new year.

Michael Franklin Smith  
*Editor and Chair of the Board of Editors, Defense Counsel Journal*  
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