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By and large, most lawyers are polite and professional, and stay away from unseemly, annoying and rude conduct. Unfortunately, that does not mean that all lawyers avoid such behavior.

I recall a friend, a defense lawyer, who once got so mad at me that he called me a s**thead, and later stiffed me on a shared cab ride. Of course, he later gave me some really terrific bottles of wine, so you could say I came out ahead.

Still, it seems we will always need some skills for litigating with jerks

If you are a trial lawyer, then you know that no one else in the case is much interested in your problems, or generally even much interested in your opinions. Your client certainly isn’t. Your opponent is more interested in pleasing his or her client than pleasing you. The adjuster wants to keep his or her bosses happy, and the judge simply wants a smooth and fair trial. And finally, the jury cares only about the case (and getting back to their families) and not at all about the lawyers. Nobody really cares about you or what you think, and absolutely no one cares about your opinion about your opponent.

So here are some pointers for dealing with bad behavior and avoiding it yourself.

The bad client

Most of the time, a plaintiff’s lawyer has five audiences: his or her client, the defense counsel, the defendant’s risk manager, the judge and the jury. There is an occasional sixth audience, a mediator or arbitrator. None of those audiences are ever going to be moved toward a party because the party or the party’s lawyer is a jerk.

The hardest bad behavior to deal with is your client’s. You don’t want any stage of the litigation to revolve around bad things your client is doing. Sometimes the bad behavior comes from your client’s fear. Sometimes your client is just a bad person. Learn to tell the difference. If the problem is your client is not capable of good behavior, then you don’t want that person as a client. I once had a client who expressed his annoyance at the defendant and its lawyer by pulling out an enormous Bowie knife during his deposition and using it to clean his fingernails. That proved to be a costly manicure for the client. But if the bad behavior comes from fear engendered by the case or the litigation, you need to help your client understand and control those fears.

The bad lawyer

Dealing with a lawyer’s bad behavior is actually easier. To begin with, bad behavior is counterproductive. A lawyer who is spending time fighting with opposing counsel is not thinking about how to present the case to a jury. He or she is thinking about defeating his or her opponent instead of helping the jury understand a particular view of the case. A badly behaved opponent is not only wasting time, but may be poisoning the well from which you both must drink.

As a plaintiff’s lawyer, it does you no good to be the good lawyer in a trial that the judge, and later the jury, come to hate. Once the decision-makers begin to find your case tedious and unpleasant, the fact that your opponent is responsible for the sorry state of affairs will do your client little good.

My advice for dealing with an un-
pleasant, ill-mannered, overly-combative lawyer is to ignore the lawyer and focus on your case. And the best way to deal with a professional, courteous and competent lawyer is to focus on your case.

The way to do that?

1) Assume that your opponent is reasonable, until proven otherwise. One lawyer I know will invite a lawyer to coffee at the outset of a case if he hasn’t worked with the person before.

2) Don’t squabble. Judges and juries hate squabbling lawyers. They find lawyers who are overweening, combative and competitive to be really annoying, at the very least, and, more typically, unprofessional and untrustworthy. Judges don’t forget bad conduct. Even worse, juries often punish the clients of such lawyers. The focus is much more likely to be on your evidence and your client’s story when you are seen as reasonable.

In one case, three lawyers became furious at me over my assertion of marital privilege in the deposition they took of my client’s husband. They could scarcely contain their anger. My client thought I was going to be attacked. However, the judge who had to hear the defendants’ motion to compel had no dog in the fight and wasn’t the least interested in anything beyond the question of whether the privilege applied. She obviously resented the defendants’ efforts to drag her into their squabble with me. She ruled in my favor. I never got mad, never made it personal.

When my opponents saw that their combat with me was counterproductive, they calmed down, and the litigation became less contentious. So no matter how argumentative your opponent may be, do not roll around in the muck. Always be the competent, reasonable advocate.

3) Avoid arguing with your opponent. A disagreeable, nasty opponent will not change his or her mind about the merits of the case or a motion based on your superior logic, your admirable grasp of the facts or your commanding knowledge of the law. In fact, the more you argue, the more persuaded your opposing counsel will become of the righteousness of his or her cause. Say what you need to say to satisfy the conferral rule, see UTCR 5.010, or to get the deposition scheduled or to get your extension. Always be the voice of reason because being unreasonable will not get you anywhere with anyone, and judges have long memories. Moreover, if you have a disagreement, pick up the phone. Even apart from our duty to confer, it’s as easy to have a reasonable conversation as it is to have an unreasonable email exchange. By the same token, keep your emails brief, especially if your opponent insists on litigating you instead of the case.

No competent lawyer reacts well to threats. A lawyer once told me that his settlement offer of $10,000 was meant to send a message. That foolish attempt at intimidation was motivational for me and made the $500,000 verdict all the more satisfying. In another recent case, negotiations stalled a month before trial on what I considered the adjuster’s misevaluation of her risk. In that case, the adjuster sent me an email that read in part:

I have been a liability claims adjuster for many years. I have recommended and sat through many trials. I am part of the High Impact team that handles only high exposure cases. I have been involved in four trials this year alone where we have received a defense verdict in each case. As background I want to share with you my most recent trial. . . . As you can imagine an employee who fell and sustained such a traumatic injury would surely generate sympathy. However, the jury found no negligence on our insured. I relay this to you only so you know that our company understands risks, but we have tried cases where sympathy is a factor and we have still received defense verdicts.

I simply did not respond. I continued preparing for trial. When the adjuster wrote that email, she was thinking about her boss and the other adjusters, not my case. The case settled for seven figures shortly before trial, more than twice the offer that the adjuster swore she would never increase.

In both of those circumstances the overly aggressive and personal conduct of the defendants did nothing more than harden my resolve. But I know my opponents will react the same way to my threats.

4) If your opponent launches accusations against you, ignore them. Never personalize your advocacy. No matter what your opponent does, don’t call your opponent names. Don’t accuse your opponent of lying, misleading the court, not understanding the law or misstating the facts. In fact, never refer to your opponent at all. Instead, if you disagree with an opponent’s characterization of the facts,
simply point out the evidence that is inconsistent with the defendant’s assertion. So, for example, you might argue, “The defendant’s brief is based on its assumption that the defendant had a green light. However, the police report discloses that in fact the defendant’s light was red and the plaintiff’s was green.” You can be certain that your opinion that the defense lawyer is an unregenerate liar is of no interest to the court. The existence of particular facts and law, however, is the only thing the court will care about. The same is true for your analysis of the law of your case. Even though you may want to point out that your opponent is a congenital liar whose writing suggests only a weak familiarity with the English language and basic logic, your rebuttal should address your argument, and not the moral probity and legal acuity of your opponent. In one case where I was local counsel, a federal judge stopped my associated counsel in mid-argument to chide him for his *ad hominem* attacks on his opponent. We lost that motion.

Jurors dislike interpersonal conflict among lawyers even more than judges do. Most jurors take their duties seriously. Lawyers who squabble with each other impede the jury’s effort to decide a case fairly. An argumentative lawyer who wants to air his hostility towards opposing counsel will persuade a jury only of his immaturity and will do nothing to advance his client’s cause. If a lawyer wants to litigate your conduct instead of the case, accept the gift gratefully and remain focused on your case.

5) Watch out for adverbs and superlatives. I associate the use of such words with boorish conduct. Lawyers who talk over their opponents or won’t stop talking often carry those habits into their writing. For some reason, some advocates think that if they fail to state that a fact is *extremely important* or that an argument is *exceptionally misguided*, a decision-maker will be fooled into accepting the opponent’s argument. You should consider opposing briefs laced with adverbs and superlatives to be a favor to you. Don’t waste the favor by responding in kind.

In reality, such words tend to signal only weakness. If the assertions and arguments are well-founded, burying them in adverbs and adjectives will only blunt the force of an otherwise concise and indisputable argument. But if the facts and logic of your brief are not compelling, attaching adverbs and superlatives will not save you.

6) Follow the Golden Rule. You should do this for four reasons. First, it’s easier to always be reasonable then it is to occasionally not be. You have far more important things to think about than whether it is appropriate to be nasty. Second, if the record of your effort to schedule a deposition or resolve differences is ever an issue, the advocate who most resembles the adult in the room will have an advantage with the judge who must rule on the dispute. Third, don’t expect your opponents to go out of their way to help you prepare. It will create conflict that is unnecessary. After all, they don’t expect assistance from you. Being reasonable and actively assisting the other side are not equivalent.

The fourth reason is the most important. The touchstone of everything we do is our commitment to putting on the best case in trial that we can. Responding in kind to bad behavior serves only our egos and never our clients.

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