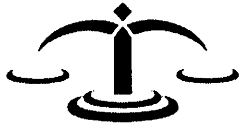

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Attorneys

Uncivil Action

By Helen W. Gunnarsson

Despite all the energy devoted to collegiality and professionalism, lawyers sometimes confront aggressively rude, even hostile behavior in opponents. Here's what to do about it.

Scenario 1: Already shell-shocked by the impending death of a member of your immediate family, you're dumbfounded by opposing counsel's curt response to your request to extend litigation deadlines: "File your motion."

Scenario 2: Opening your mail, you find a motion from your opponent filled with scurrilous lies about your personal life. Even if true - which they're not - the allegations have no bearing on the relief requested.

Scenario 3: You've sent a courteous e-mail to opposing counsel suggesting three alternative times when you'd be available to discuss and resolve differences on a draft settlement agreement. Opposing counsel responds, not with alternative times or even with a statement that your times don't work, but with "Please adjust your schedule. Prior commitments prevent me from adjusting my schedule."

Earlier in discovery, the same lawyer sent you documents to which your client was entitled in an electronic format that you could neither identify nor open. The response to your request for hard copies? "I really do not think that I am obligated to send you multiple copies of a document in different formats."

Each of these scenarios happened to an ISBA member in recent months or years. In each case, the lawyer on the receiving end was stunned and frustrated by the opposing counsel's unprofessional behavior and at a temporary loss for an appropriate reaction.

In short, uncivil behavior among lawyers, especially in litigation, continues to occur even after decades of the

legal profession making civility a rallying cry (see sidebar).

Research studies have found that experiences with unprofessional behavior affect people's moods far more strongly than experiences with professional behavior. See Robert I. Sutton's book *The No Asshole Rule* at pp 30-31.[1] It's understandable, then, that on experiencing or even merely hearing of such unprofessional actions, many lawyers may become angry.

How should lawyers react when presented with churlish behavior from opposing counsel in litigation? Should they fight fire with fire and give back as good as they get? Is turning the other cheek the better answer, or is that naive? Should lawyers respond to obnoxious behavior by filing motions for sanctions or complaints of ethical violations, even where the behavior does not clearly violate any rules of court or professional conduct? Are there other options?

Document for the court - but don't cry wolf

Noting that most unprofessional behavior occurs not in the courtroom but in external pretrial stages, especially discovery, Chicago-based federal district judge Marvin Aspen recommends that lawyers document unprofessional behavior on the part of opposing counsel as best they can. "If the unprofessional behavior occurs in discovery and it causes you unnecessary work, resulting in more expense to your client, when you respond or object to a discovery request, document it so that the court is aware of it."

Judges want to know about unprofessional behavior, Aspen says, because it consumes the court's time as well as the lawyers'. "Is the unprofessional behavior impeding the settlement or getting the case ready for trial?" If so, make a record of it so that, if need be, you'll be prepared to file a motion for sanctions or other relief.

Resources

At the same time, Aspen says that documenting and alerting the court will only work where the bad behavior is serious and unambiguous. For invoking a judge's aid, the unprofessional behavior "needs to be something that objectively someone is doing wrong," Aspen says.

Otherwise, lawyers seeking the court's aid risk not merely inaction but also, as Rock Island lawyer Robert Park points out, being perceived as petty whiners who can't solve their own problems. Both of those outcomes can play into calculating unprofessional lawyers' hands, since their objectives may include proving that they can get away with behaving badly.

Park and Chicago lawyer Robert Markoff point out an additional downside of explicitly invoking the assistance of the court: tit-for-tat sanctions motions that rapidly escalate from a side show into a war, distracting everyone, lawyers and judge alike, from the substantive matter that brought them and their clients together in the first place.

Markoff, who represents creditors in collection matters, has faced his share of obnoxious behavior over the years, including sanctions motions that he felt were not well grounded. Generally, Markoff says, "I refuse to engage in filing responsive sanctions motions. It draws attention away from what you're really talking about."

Consider the case from your client's view, he suggests: "We shouldn't vilify opposing counsel and we shouldn't engage in side battles. They put lawyers in a position adverse to their clients because you can't zealously

advocate for your client while you're defending yourself [or attacking the other lawyer]."

Markoff also opines that "95% of motions for sanctions are ridiculous." And from his perspective, judges agree with him. "You can see it in their body language. They roll their eyes, they sit back in their seat, they don't want to listen to it." If you do contemplate filing such a motion, Markoff warns, "be sure your own conduct has not been wrong."

The power of forbearance

If invoking the assistance of the court seems unwise, how should you handle less extreme but still unacceptable behavior? Do you respond in kind? Is it important not to allow the churl to get the last word, even if it means a shouting match?

You can't outbully a bully. Remembering a lawyer who, years ago, was playing discovery games in a case he was handling, Ottawa lawyer Michael T. Reagan says, "Early in my career I thought long and hard about how to deal with such people. I decided I was not going to respond in kind to such behavior of my opponents, no matter how egregious." Instead, Reagan says, "Work harder and use the intricacies of the law to your advantage. It works. But it doesn't mean that you have a pleasant time of it."

"We lawyers like to get the last word," acknowledges Chicago lawyer Annemarie Kill. "I'm right, you're wrong. But how many times does that last word ever elicit the response, 'Yes, you're right, I'm wrong?' Never, never. It only leads to more fighting. We need to convince the judge and jury, not opposing counsel."

Though Park recognizes that behaving well with respect to a churl can be a challenge, he believes "you need to decide how you're going to treat people. If you're going to treat people well, you need to do that even when they treat you poorly."

Park also believes that "in the long run, reacting nastily will come back to bite you. It's better to treat people courteously, even when they don't treat you that way."

On a practical note, says past ISBA president Cheryl Niro, now a principal with former ARDC Administrator Mary Robinson, of RobinsonNiro LLC, remember that jerks are probably better at being jerks than you are. "Never try to outbully a bully. I can't do it. It would be a waste of my time and energy to try to outdo someone who's made it part of their professional style."

Showing that virtue isn't always its only reward, Markoff tells of a case in which he chose to ignore a childish taunt from opposing counsel. Focusing on the substance of his client's case, not only did he win, but months later he started receiving business referrals from that lawyer. Had he responded in kind to the offending conduct, he says, he might have made a lifelong enemy and certainly wouldn't have received any referrals.

Though he acknowledges that he doesn't necessarily become pals with those who have behaved badly to him and that he's lost cases he believes he should have won, "You lose twice if you let opposing counsel know how angry you are. And you don't need enemies."

Anger management. Anger, certainly, can be very difficult to channel into outward calm, but Robinson says lawyers can do it. "Consider why it is irritating and then decide why that matters to you. I find that most of the time, what is merely irritating can be ignored." Responding with tit for tat, Robinson says, may feel good for a few minutes, or even a few days, but that feeling will quickly wear off as the new problems arising from an unprofessional response start consuming even more of your time and energy.

Skokie lawyer Laurie Wasserman says maintaining her focus on her client's goals assists her in remaining professional at all times. "You're off balance and not serving your client well if you're constantly responding to unprofessional behavior." And, she points out, lawyers can never recover their own lost time. "If I'm embroiled in unnecessary disputes, I really am wasting my time. I need to achieve my client's objectives, and I don't have time to waste."

Getting caught up in a fight when angry also makes it difficult to use logic or judgment about your client's or your own goals, says Robinson. Providing a practical reason for deciding in advance on a general rule for behavior, she says, "You need a default plan because you rarely have time to analyze the nuances. If your default solution is to return a nasty dig in kind, you will become the prisoner of your nasty opponent."

Indeed, your opponent's goal may be precisely that: to push your buttons and take control away from you. "Sometimes people act like jerks to try to elicit a reaction from you," says Park. "If you do react, you play into their hands and may do something you'll regret." Remember the school playground? "It's always the kid who hits back who's caught."

The Committee on Civility and the Commission on Professionalism

Malice or stupidity? Park refers to "Hanlon's [or Heinlein's] Razor," for another reason for forbearance: "'Never attribute to malice that which can be adequately explained by stupidity.'"

Recommending against taking offense readily, he says that instead of assuming that an opponent is being deliberately unprofessional or unethical, "A better policy is to assume that they either didn't know or forgot the rules." It's also possible, notes Robinson, that the churlish behavior is a sign of a deeper problem, such as substance abuse, mental illness, or a personality disorder.

Don't, however, confuse taking a hard line on behalf of a client with churlishness, lawyers warn. The former is not synonymous with and need not be accompanied by the latter.

Though unpalatable, lawyers may also find it in their clients' and their own best interests either not to respond to bad behavior or to agree - or at least not to object - to an opponent's unreasonable and churlish position. Suggests Robinson, "For your client's sake, be open to the opportunities to do something the opponent wants that happens to be consistent with what your client wants even though it would be fair to be obstinate."

Wasserman says there have been times when she's refrained from engaging in a discovery dispute even though the law was on her side. "Is the information in these documents worth the hours I'm going to have to put in to get them?" Fighting for documents likely to have no more than marginal utility isn't the best way of spending time on a client's behalf, she observes.

Get back on the high road. What if you have succumbed to temptation and given as good as you've gotten from an obstreperous opponent? All agree that you must stop your own bad behavior immediately and get back on the high road. Some also recommend that you apologize for your own behavior, even though you believe it will be futile. After all, you might be pleasantly surprised.

"It's always worth a phone call," says Kill. Aspen agrees. "It's a no-lose situation to approach opposing counsel." Remember, says Niro, "Disputes become more difficult to resolve, more costly, and more painful

when the attorneys allow their behavior to get in the way."

It's a small world

Sometimes ignoring unprofessional behavior is impossible. In those cases, advises Niro, "Don't whine. Speak affirmatively about your values and let other lawyers know the boundaries you have established for conduct. Explain what you expect and stick to it." Adds Wasserman, "Be dogged, but judicious."

Markoff recounts one case in which he departed from his general rule and brought opposing counsel's churlish conduct to the attention of a tribunal, though not the one before which they were litigating. Appearing in a downstate circuit, the lawyer on the other side approached him and said, in a tone not suggestive of pleasure at encountering someone of a different ethnicity, "You must be from a Jewish law firm." (The lawyer later denied making the comment.)

Recalls Markoff, "At first I wasn't going to do anything. Then, after I thought about it, I decided to send a report to ARDC." Though Markoff re ceived a letter from ARDC some time after advising him that the agency had decided to take no action against the lawyer at that time, still later ARDC contacted him again with respect to his report. By that time, others had sent reports of their own to the agency complaining of unrelated instances of unprofessional behavior from the same lawyer.

ARDC ended up filing charges based on Markoff's and the others' reports. The lawyer was suspended with a period of probation conditioned on, among other matters, enrollment in an anger management program. At presstime, the ARDC Review Board had recommended a six-month suspension the for lawyer.

"Don't be reluctant to share your story with other attorneys," Aspen says. "The code of ethics doesn't require silence, and obstreperous lawyers shouldn't be given anonymity. Reputation is the most important commodity a lawyer has."

The legal community isn't really so large, even in Cook County and even across the country, that churls can count on never seeing their opposing counsel again, particularly in this age of multijurisdictional practice and nationwide bar association internet discussion groups. "Once your reputation is made, it's much more difficult to practice. Other lawyers won't be willing to accommodate you," Aspen says. Other lawyers may also provide cooler heads and fresh sets of eyes for counseling you on how to proceed and, indeed, whether you are reasonable in taking offense at the be havior in question.

Niro, a former executive director of the Illinois Supreme Court Commission on Professionalism, says, "In all the time I've been working with professionalism, every conversation I've ever had with a judge has ended with 'don't these lawyers think we judges talk to each other?' They know who you are and what you do and it inevitably gets factored into the treatment by the court."

As Robinson notes, "Most cases do not have a required 'fair' outcome. There are shades and nuances and often the law gives the judge a wide range of discretion. A lawyer who is a persistent jerk risks losing the close calls on the facts as well as the benefit of the judge's discretion."

Though churls may win some battles, either because or in spite of their churlish behavior, Aspen confirms that unprofessional behavior is likely to hurt those lawyers in the long run. "Judges make lots of snap decisions that aren't even conscious. If a lawyer has no credibility, the judge may give greater weight to the other counsel's arguments."

It is a hard fact that life is not fair, bad guys sometimes win, and churlish behavior sometimes inures to the churl's benefit. Reagan acknowledges this point as a philosopher.

"You have to have a bit of faith and believe in the law. If you don't, it's going to be a long and difficult life," he says. "You're never going to reform the jerks, but most cases these days have multiple parties. Most of the other parties, and most judges, recognize appropriate behavior, which has its own ultimate rewards, including professional and personal satisfaction and friendships with other lawyers who attempt to behave in an appropriate manner."

Helen W. Gunnarsson, a lawyer in Highland Park, is an Illinois Bar Journal *contributing writer.*

1. As part of a personal plea for civility, the author suggests substituting the underused word *churl* for the all too commonly heard term appearing in Sutton's title.

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