

DEALING WITH THE DIFFICULT LAWYER

DELAWARE STATE BAR ASSOCIATION

and

ST. THOMAS MORE SOCIETY

ENHANCED ETHICS AND TRIAL ISSUES SEMINAR

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Dealing with a difficult lawyer requires a nimble balance between two Biblical responses to insult: “an eye for an eye and a tooth for a tooth” and “turn the other cheek.”¹ The secret is knowing what situation demands which response, or even more precisely, which gray area between responses. The professional and ethical challenge is realizing it is ultimately not your eye, tooth or cheek at issue, but rather, your client’s, and that she expects you to protect her.

Here are the “top ten” rules I use to make dealing with a difficult lawyer more bearable.

1. KNOW THE RULES.

Master the Rules of Evidence, Procedure and Professional Responsibility. Many times, a difficult lawyer is just a “windbag” who tries to intimidate you with volume and static. A precise, pinpoint citation to the Rule, clarifying why you are right and he is wrong, is often helpful.

2. PREPARE AND DOCUMENT.

Know thy opponent. You know what to expect with most lawyers. With most, our word is our bond. With a few, we must confirm every little thing in writing. Bring copies of the documentary correspondence, Rules and controlling authority to proceedings involving the difficult lawyer.

3. MOVE IN LIMINE.

File Motions in Limine to prevent prejudicial arguments, improper evidence, and “blurt outs.”

4. CREATE A RECORD.

Have a good, qualified Court reporter at arbitrations, depositions, and hearings. Note clearly and concisely your objections on the record. If necessary, telephone the judge for a ruling if your objections do not cure the problem.

¹ Matthew 5.38-41.

5. VIDEOTAPE.

Many difficult lawyers are less likely to cause mischief if the deposition is videotaped. The video record tells a different story, with sound, tone, timbre, cadence, volume, and visuals; when compared with the cold written transcript.

6. BE THE PROFESSIONAL.

Someone in the room has to be “The Delaware Lawyer.” It should be you. Do not stoop to the level of a “baiting” adversary. A difficult lawyer may be attempting to “knock you off stride” with spurious objections, personal affronts, or distracting rudeness. Focus on the task at hand. Ignore boorish behavior when possible, after creating the appropriate record. See, Paramount Communications, et al v. QVC Network, Inc., Del. Supr., 637 A.2d 34 (1994).

7. BEWARE OF THE “TAG TEAM” DIFFICULT LAWYER AND CLIENT.

Your opponent may have an uncontrollable client, or even worse, may tacitly or expressly encourage such a client with the lawyer’s own acts or omissions. The lawyer has a duty to “reign in” a vulgar, evasive, or offensive client. State v. Mumford, Del. Super., 731 A.2d 831 (1999).

In addition to being “out numbered” you will probably experience natural human emotions of anger, frustration and embarrassment. However, the wise attorney will control those emotions, make a record, attempt to cure the misbehavior, and eventually, seek court intervention. Mumford, supra; see also Cascella v. GDV, Inc., et al., Del. Ch., C.A. No. 5899, Brown, V.C. (Jan. 15, 1981). Do not permit the difficult lawyer to “cue” his witness during deposition with verbal or non-verbal communication; long, rambling objections; or other impermissible actions. See, e.g. In Re Asbestos Litigation, Del. Super., 492 A.2d 256 (1985).

8. DO NOT ALLOW UNREASONABLE DELAY TO GO UNNOTICED.

Due to the pressure of practice, some lawyers do not respond to written discovery in a timely fashion. Most of us understand the need for flexibility and give reasonable extensions. But, the “difficult lawyer” can abuse such courtesies, or not seek them at all. Document failure to respond to written discovery, and move to compel responses when necessary. See, e.g., Superior Court Civil Rule 37.²

9. RESPECT YOUR OPPONENT’S NEED TO FOLLOW CLIENT DIRECTIVES.

A “Difficult Lawyer” is not one who cannot give an extension, settle a case, stipulate to an obvious fact, etc., due to client directions. Sometimes, more experienced practitioners use language to help us understand, without coming out and saying “I’m sorry, it is not me, but my silly client who will not . . .”

Watch for code phrases such as “My client has directed me to advise you . . .”; “I do not have authority to . . .”; “I am at the limits of my authority . . .”; “The insured has a consent to settle provision . . .”; etc. When you hear these phrases, give your colleague an understanding nod, and some silent sympathy, for she probably has a difficult client.³

10. LOOK IN THE MIRROR.

If it seems that every lawyer you encounter is “difficult,” it may be time for self-evaluation. Or, if judges, partners, colleagues, opponents, family members, staff or friends notice you “have not been yourself lately”, beware, you may be experiencing the dreadful metamorphosis into the “difficult lawyer.” It can begin innocently enough: refusing to give your

² Superior Court Civil Rule 37(e)(1) requires “certification by the moving party detailing the dates, time spent, and method of communication in attempting to reach agreement on the subject of the motion . . .” The Court no longer requires such certification for motions pursuant to Rule 37(d) (Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection).

³ If this occurs too often, the difficult lawyer may be hiding behind his unwitting client. Perceptive counsel will usually know the difference.

colleague an extension to answer the Complaint when he is leaving on a family vacation; moving for default judgment on day 31 after your opponents' interrogatory answers were not received; seeking sanctions when your opponent is two days late in filing a financial report (Lee v. Lee, 193 WL 331914 (Del. Fam. June 28, 1993)),⁴ referring to opposing counsel in "a crude, but graphic, anal term" (In re Ramunno, Del. Supr., 625 A.2d 248 (1993)); being late for court, not apologizing, and being sarcastic with the judge (In the Matter of Hillis, Del. Supr., 858 A.2d 317 (2004)); losing your temper with your clients or your staff; and similar behavior.

We should all have the courage of our convictions when we take a position we believe to be right. Making new law; winning the "unwinnable case;" achieving a large verdict or settlement in the case no one else would accept; convincing the judge your creative theory should survive summary judgment -- are all the things that make for a vibrant, exciting, rewarding practice. But just as important is the grace to accept victory or defeat with elegance; to show mercy; to say "I'm sorry"; and to practice the golden rule. We have all been given a great gift to be able to practice in our Delaware Bar. There is no excuse not to treat our colleagues and judges with dignity and respect. Our tasks are difficult enough, without our members being "difficult."

The Delaware Supreme Court has issued this warning:

We note a troubling increase in the number of reported incidents of incivility by counsel in the courtroom. Although an attorney's obligation is to zealously represent his or her clients, "to be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil."

Incivility in open court infects the process of justice in many ways.
It compromises the necessary public trust that the system will

⁴ "The attorney time and judicial time which have been consumed by this pettiness could have been better spent elsewhere. There is a definitive line between aggressive lawyering and vindictive lawyering. I suggest that in the future, the former be pursued with gusto. I hope the latter will be eradicated." Lee, supra.

produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process. In other words, “An attorney who exhibits lack of civility, good manners and common courtesy tarnishes the image of the legal profession . . .”

* * *

The Delaware Bench and Bar have long been admired for the collegiality among and between its members. Members of the Bench and the Bar will no doubt, even in the sometimes frenetic and intense arena of open court criminal work, continue to work toward exchanges that reflect mutual respect and consideration. When, however, situations present themselves where misunderstandings cause passions to flare, the ultimate focus is and must be to reflect respect and confidence in the Court’s authority. Nothing less will suffice for the efficient administration of justice.

Hillis, *supra*, at 324-325.