

What To Do When Opposing Counsel Is A Jerk

By **Juan Carlos Rodriguez**

Law360, New York (June 25, 2014, 10:30 PM ET) -- Attorneys often predicate their relationships with opposing counsel on professional courtesies that help reduce the grind of litigation or negotiation — but there are some who stray from the civilized path and pepper their interactions with bullying or deception.

Whether their behavior stems from their personality or is a tactic to unsettle opposing counsel, lawyers who rely on dirty tricks can gum up the legal process and sow disharmony in even routine legal matters. Agreements may not reflect what was discussed in face-to-face meetings. Deposed witnesses may become upset. Unreasonable discovery demands may be made.

But Gerald L. Maatman Jr., a partner and co-chair of Seyfarth Shaw LLP's class action defense group, said that unprofessional lawyers, when handled correctly, can actually cause more damage to their own cases than to those of opposing counsel.

"They might get an admission in a deposition that they normally might not have secured, but for their bullying of a witness. So it might work for them in that regard, in terms of a soft, or short-term gain, but in my experience, in the long term, it turns off judges, and those sorts of lawyers don't secure better results than those who play by the rules," Maatman said.

Here are five ways to handle a lawyer who's prone to rude, deceitful or otherwise unprofessional practices:

Vigilance Is a Virtue

Yaron Dori, a partner and co-chair of Covington & Burling LLP's communications and media practice group, said much of the practice of law occurs behind the scenes, in offices and at meetings between the parties that don't involve the decision makers. So when an opposing counsel reveals himself as a jerk or an otherwise untrustworthy opponent, it's time to circle the wagons and make sure all Ts are crossed and Is are dotted.

"You always have to bring your A-game to every matter, but I think you have to be especially alert in these situations. If you're dealing with somebody who likes to bully, or misrepresent what you've said, you're going to have to pay especially close attention to every statement that's made by this person and every email that comes across and make sure you're setting the record straight," Dori said.

Walter L. Cofer, a partner at Shook Hardy & Bacon LLP and chair of the firm's global product liability group, said he tends to give an attorney the benefit of the doubt at first, and attempts to clear up any misunderstandings in a somewhat informal fashion.

"But you do become wary at some point. And when that happens, make sure you paper the record, confirm agreements in writing, or on the record. Essentially, you proceed in a more formal way than you would otherwise," Cofer said.

He said even with person-to-person phone calls, it's important to immediately follow up with an email that creates a record of the discussion and any agreements that were reached.

Maintain Professionalism

It's important not to get caught up in a tit-for-tat battle with a troublesome opposing counsel, and to remember that the goal is a full and fair airing of the facts and that justice be done, Maatman said.

"It's not warfare; it's supposed to be a civilized system for resolving disputes and identifying problems and adjudicating differences of opinion between people. That system is entirely dependent upon the oath, ethics and appropriate behavior of lawyers. The system begins to break down if people don't follow the rules," he said.

Cofer said that when bad behavior erupts during a trial, judges, court staff, bailiffs, clerks and juries notice it.

"People get fed up with it. Trials are high stress. There's a lot of work on everyone's part, and if the court personnel and the judge perceive that one side really is trying to be courteous and professional and act in good faith, and the other side isn't, it never benefits the person who's being difficult," he said.

Dori and James K. Langdon, a partner and co-head of the class action practice group at Dorsey & Whitney LLP, said lawyers should remember they're part of a community, and that what goes around comes around.

"If you get a reputation, if you don't deal civilly or fairly with other lawyers, you won't get the kind of cooperation that, in most circumstances, you need from either side to be able to conduct a litigation, particularly a longer-running one," Langdon said.

Give 'Em Enough Rope

When opposing counsel is resorting to histrionics or underhanded tactics, it can be a good idea to allow a certain amount of the behavior so that it becomes evident to all the parties involved that it's a pattern. That evidence can then be used to either obtain some type of sanction or at least curb the behavior.

Maatman said this tactic works particularly well with the yellers and screamers who are extremely inappropriate in depositions.

"Typically, one way to fight that issue is to videotape the deposition, and let that person hang themselves by exhibiting those characteristics on film," he said. "To the extent something has to go before the judge, I think judges appreciate people who are reasonable, people who play by the rules, people whose word can be trusted. It's one of the best ways to keep that type of attorney in check."

And if it's a matter of an opposing attorney not living up to their word, Maatman said he's found that judges tend to frown on that behavior. Although it should be a last resort to involve the judge, if that becomes necessary, a lawyer should make sure it's obvious that one person is clearly out of line and acting inappropriately.

Change the Conversation

Paul J. Labov, a partner in Edwards Wildman Palmer LLP's restructuring and insolvency department, said another way attorneys can try to correct bad behavior is by attempting to get at the root of what's causing it.

"If I'm across from someone who's yelling or screaming or pounding the table, I have to quickly, on my feet, figure out where the guy is trying to go with this," Labov said. "That is just the front. You've got to get past the front to get to what he's trying to accomplish and marry that to what I'm trying to accomplish."

Sometimes the dramatics might be to impress a client, sometimes it may be an attempt to intimidate the opposing lawyer, and sometimes it may signal a weakness, Labov said, a bit like a cornered animal might react in a bad situation.

"So what I'll do with them is, when we're out of the room, I'll call them on the phone, or go to their office, and say, 'OK, it's just us, where is it you need to get to, and let me see if I can help you get there,'" Labov said.

He said another trick is to redirect the conversation. For example, if an attorney is haranguing opposing counsel or otherwise misbehaving, an unexpected change of topic can derail the rant and recalibrate the dynamics of the situation.

Langdon said another way to deal with bullying is to deflect it with humor.

"You can be self-effacing, to kind of pop the bubble. Because a bully is always looking for a fight, and if you don't fight back, then you've been successful," he said.

Report the Behavior

In the event that a situation between counsel deteriorates to the extreme point that a judge must be involved, there are remedies that can help the lawyer who's taken the high road.

"As a defense lawyer, not only do I have defenses based on the case law, I now have defenses based on the behavior of the plaintiff's lawyer I would not have had, had that lawyer played by the rules. So it has armed me with additional ammunition to get rid of the case and get a good result for the client," Maatman said.

All the attorneys interviewed agreed that judges don't want to become involved in these types of disputes, but sometimes it is necessary. Maatman said an attorney can bring a motion to dismiss a case, but that for discovery abuse, that doesn't happen very often. Out-of-line attorneys can be monetarily sanctioned, or there can be an evidence-limiting instruction or a more specific dismissal of a certain part of the case.

“There are many things short of an outright dismissal that a judge has in his or her toolbox to surgically try to prevent attorneys from acting like that,” Maatman said.

But he said judges are put in the position of deciding whether to punish a litigant for their attorney’s behavior, so it really depends on how far beyond the pale it was.

“What I typically find is there’s a wake-up call. And the lawyer realizes they’re getting their client in trouble, and they realize they’re making what they thought was a good case, a harder case to prove,” he said.

--Editing by Elizabeth Bowen and Edrienne Su.

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