

LITIGATORS CORNER: What I Would Do If I Were Boss



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After many years spent in courtrooms and in depositions, I have seen lawyers pull nearly every stunt. One of my partners has a tape from a deposition; the lawyers begin arguing, one insults the other, the second one says, "Take that back!" The next sounds on the tape are punches, scuffling, and repeated cries of "Ow!" and "Oof!" We've all seen lawyers lie through their teeth, telling a judge the legal equivalent of "the dog ate my homework" or "Johnny did it." In one of our cases, one lawyer put his hand on another lawyer's arm; three pages later, the latter lawyer said "Ouch." A huge sanctions battle was started by the poor victim of the "injury." It wasted everyone's time. We called it the "Bicep Thumb-Digging Incident."

Some of these incidents occur in the heat of the moment, and mature individuals forget about them. We argue with and interrupt each other, accuse other attorneys – without a scrap of evidence – of being frauds and cheats, resist providing discovery when doing so would benefit our own clients, snipe at each

other with long letters (and then bill our client for launching these stupid missiles), and smile at an opponent while knifing him in the ribs. In short, we've all seen lawyers do just about everything an immature adult can do. And it isn't limited to lawyers who got their degrees from what Bob Newhart used to call "Mrs. Gray's Storm Door and Law School Company." This rubbish goes on even with lawyers from the largest firms, and from the most prestigious law schools, who seem to think that big name institutions are an excuse for intimidation, sort of like wearing gang colors. I once had a lawyer from a large and prestigious firm accuse me of unethical conduct because, during a break in a deposition of a third party, I spoke to the third party and his lawyer while the accusing lawyer was out of the room. Most, but not all, of this nonsense takes place outside the presence of a judge. But I have seen judges and magistrates tolerate it, do nothing about it, or fall for a line of banter. They often seem to throw up their hands and act as though nothing can be done.

What is it about some lawyers? Their level of maturity seems inversely proportional to the extent of their so-called educations. Perhaps you recall the infantile doctors on St. Elsewhere; the wisest person in the hospital was the janitor, played by Eric Laneuville. There ought to be someone to blame for the upbringing of these twit lawyers, either the parents who didn't civilize their children or the schools that charge \$25,000 a year in tuition. I tend to blame the parents, but I also occasionally wonder if some law schools would serve the public better as parking lots or off-track betting parlors. After all, didn't Abraham Lincoln become a lawyer by apprenticeship, without ever going to a law school?

But the assumption that this nonsense in a lawsuit cannot be controlled is wrong. The bad behavior can be reduced and, to a large degree, eliminated. It requires that the judge or magistrate control the case, and show everyone – especially the bully, if there is one – who is in charge. There was a judge who had a perceptive observation once about the judicial system. He said that his job was not finding the truth (our modern mantra), but rather, ensuring that the process operates with some rules, because rules maximize the chance of the process working right, and thus help to ensure a more just result. This has always seemed to me a profound insight about the value of sensible rules, which of course, have to be enforced before they can be said to exist.

We all know that the well-run lawsuit has the best chance of a just result. We've seen it happen. We know that when decisions are reached in a just manner, even if we lose, we have an entirely different taste in our mouths about the fairness of the process. So why don't we achieve such a result in more cases, especially after all the commentary in recent years, and after the various rules changes that have occurred? One problem is that we are routinely hampered by "the jerks." These attorneys make up a small percentage of lawyers who drag the whole system down to its lowest, and most common, denominator. They enjoy manipulating the system, and have no internal rules. Another problem is that none of us is perfect, and all of us err from time to time. Some rules are needed. I'd like to share some thoughts about just a few aspects of discovery, with some day-dreaming about How I Would Handle It If I Were the Boss.

I am convinced that an apt analogy to a courtroom is a primary grade schoolhouse, preferably kindergarten, and that the closest analogy to the deposition is the schoolyard during recess, a place out of sight of any teachers or hall monitors. If I were writing a questionnaire to use with prospective judges and magistrates, my first question would be: "Have you ever been a primary grade school-teacher?" My second question: "How did you handle it when your back was turned to the class and a spitball flew past your ear and splattered on the blackboard?" I'm reminded of *The Kindergarten Cop*, where a police officer played by Arnold Schwarzenegger had to learn how to deal with tiny incomplete human beings – that is, five-year-old children. One can often think of lawyers as five-year-olds who behaviorally never made it to first grade. I suppose my analogy might be gauged a bit extreme. But from that analogy flows an important idea about how to deal with the erring lawyer or lawyers, or even the juvenile delinquent, in and out of the courtroom.

The best teacher deals with problems when they are small, before they escalate. Nor does the best teacher, when the spitball zings past, turn around and make the whole class stay after school. (You know the little twerp will do it, or something like it, again, so all you have to do is lay a trap, and then nail the so-and-so).

Judges are turned off by discovery; it's a messy, intractable process, not the neat, clean, sophisticated legal reasoning we all were supposed to learn in law school. In my view, judges dislike being put in the middle of arguments and being forced to choose which of two people they should not believe. In other words, they don't want to supervise a classroom, or the schoolyard where so much that occurs is out of sight. Judges fob this off on magistrates. But it's a big mistake not to monitor discovery, because that is where lawsuits start. It is where most of the participants spend their time. It consumes most of the resources. Almost inevitably, it is the place

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where a lawsuit begins to spin out of control. Small problems become big ones. Mischief-making lawyers figure out very quickly that there are no rules. Johnny can yank Suzy's pig-tail. Billy is big, so he can extort candy from Jimmy in the schoolyard during recess just by digging his thumb into Jimmy's arm. Even the good lawyer eventually realizes it's a gutter fight, and the only way to defend himself and his client is to punch back, because a magistrate doesn't want to hear about it.

The discovery stage is where a lawsuit turns into a monster. Not doing something about discovery is like leaving the kindergarten class on its own, and expecting the children to have completed their coloring assignments and pasting projects by the end of the day. One might as well expect cattle to herd themselves.

One of our cases is symptomatic of these problems – oops, not “problems”; we call them “issues” these days. Our court allowed unlimited depositions, including a deposition of an inventor that lasted sixteen days. There is so much deposition testimony that, by my estimate, presenting even part of it at trial would require two months to read it all. Any sane jury would riot after a few days of this droning. Our judge complained about one of the parties making more summary judgment motions because of the burden it imposed, and then let the party do exactly that. Our magistrate did not uniformly enforce the local rule requiring an honest effort to reduce or avoid discovery disputes. Our adversary usually had its motion to compel written and was filing it as the discovery conference was underway. The local rule was tossed out the window more often than not. The absence of rules was depressing, and the cynicism it introduced to our case was appalling.

If I were a judge, in line with my kindergarten theory, I would recommend a different tack to deal with problems in discovery before they get out of control. First, I would make

lawyers in my cases submit copies of depositions from time to time. A law clerk would review them, looking for, say, more than ten objections over five or ten words long, or stretches of pages of attorney colloquy, and flag the relevant pages for me to review. If I concluded that the lawyers were behaving like children, with speaking objections, unwarranted instructions, and the like, I would call them in to deal with the problem before it got out of control. I'd treat them just like my second grade teacher, one of the inimitable Sisters of Providence, who could see anything in a 360 degree arc, even though she wore a habit having a starched cowl that resembled a section of pipe. (For those of you who aren't Catholic, or who didn't go to a parochial school, think of the nun at the top of the orphanage stairs in *The Blues Brothers*. She glided eerily backwards through a door, which silently closed without the nun ever touching it and without any observable movement of her feet or arms.) At any rate, my second grade teacher would call forward any of us who were misbehaving, and smack us on the knuckles with a wooden ruler. It didn't sting for long, but it made the point. Then we all went about our business, a bit chastened.

So too with miscreant lawyers. I'd call them in and give them a knuckle-rapping just like my second grade sister gave us. But there would be no sanctions, no transcripts, no written opinions, no citations of cases, and no monetary awards: just a gentle, but clear, warning that the nonsense must stop. If the warning is early enough, the nuclear weapons needn't be dragged out, and we don't have to worry about collateral damage. In other words, nip it in the bud, and let any bully know that someone is in the schoolyard, watching.

If that didn't bring more order to the depositions, I would put into play my “negative piece-work” theory. I would appoint a hall monitor to attend depositions at the parties'

expense. But I would allocate the expense of the hall monitor according to how much trouble each party was causing. I'd have someone add up the words each lawyer used to make objections and to argue. If one lawyer used 500 words and the other used 100, the noisier fellow would have to pay five-sixths of the cost of the hall monitor. That's what I mean by negative piece-work. Mr. Blah-Blah would have to pay for every extra blah.

Interrogatories are another problem. You all know the interrogatory response written by some lawyers: “This interrogatory is burdensome and seeks irrelevant information and attempts to invade the attorney-client privilege. Moreover, this interrogatory seeks contentions which cannot be provided until discovery is over.” Worthless, right? In line with my kindergarten theory, I'd grade the homework. A sample review of interrogatory responses revealing these kinds of evasive responses would get an F, followed by make-up homework.

There are more examples, but you get the idea. Lawyers, like children, need clear, simple rules. (Ironic that people who spend their lives studying and using rules often have so little regard for them.) They need to be nudged back into line, or separated before the fighting starts. They need to know that someone is responsible for insuring that the class is orderly, and that the homework gets done. The worst of us need to know that someone is keeping an eye on us. I'm an instrument-rated airplane pilot, and we are taught that a good landing in bad weather results from a stabilized approach begun long before the landing. A well-run lawsuit, with the best chance of a just result, is the same: a good result begins long before, in discovery. **IPIT**