

LITIGATORS CORNER: Don't Mud Wrestle!



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One of my partners is fond of saying that some lawyers like to root around in the mud. Don't join them, he says, because everyone gets a coat of slime. He's right. Don't mud wrestle. Mud wrestling, arguing, sniping, accusing other lawyers of all kinds of nasty misdeeds, including perjury, is not a worthwhile endeavor.

I am still amazed at some of the awful things some lawyers will say about other lawyers, including accusing each other of lying, calling each other "irrational" or "bizarre," and even commenting about another lawyer's religious background. These are just a few of the kinds of insults I have heard over the years that never should have been said. I am even more amazed when courts don't tell these lawyers to either back up their nasty accusations (and be prepared to accept the consequences of being proved wrong), or to stop it.

Of course, there are those lawyers who believe that such accusations are perfectly

acceptable tactics. They figure if they make themselves sufficiently obnoxious, their adversaries will settle just to get rid of the annoyance. But unless you are a professional troublemaker, accusations like these are simply not worth making. Think about it: If your accusation is wrong, you are poisoning the atmosphere and possibly hurting your client's chances of a negotiated resolution in the future. Conversely, if your accusation is true, nothing is gained by making it because, if the subject of your criticism is as bad as you say, he (or she) probably couldn't care less about your point of view.

We've all seen at least one or two such lawyers; I personally know of three. Two of the three are the most accomplished and smoothest prevaricators I have ever seen; they have absolutely no shame. Like con men in a scam, they could sell you — or more likely, an unsuspecting judge — anything. They think that being a lawyer means being obstructionist, deceitful, rude, condescending -- and even worse, but only outside court. In court, they are righteous and angelic. Perhaps they went to a law school run by Vince McMahon's World Wrestling Federation. Or maybe they inverted the Boy Scouts' oath, and use that inversion as their code of conduct.

Of course, when an attorney accuses you of something awful, there is a tendency to respond, to meet trash talk with more trash talk. But resist the urge. Don't do it. Such behavior plays into your adversary's hands, and reduces lawyers to the level of juvenile delinquents. Almost as important, it is a tremendous waste of time, energy and money.

LEARN FROM CONTINGENT FEE ATTORNEYS

One of the problems with cases conducted on a billable basis is that, in order to earn more money, some lawyers tend to waste time with antics such as those I have described. For instance, discovery is prone to become important for its own sake. Instead of limiting discovery to what is really needed, the tendency is to take a bunch of depositions because some of the people *might* know something. The waste can be enormous. In one of our patent suits,

the defendant deposed about fifty people. The expense was great, and the benefit minimal. In fact, as the volume of discovery increases, it actually creates a disadvantage, not just because of its expense, but also because it buries the party taking the discovery in too many facts and documents to deal with at trial.

But, for obvious reasons, lawyers in contingent fee cases have to work hard to *not* waste time (and money) on this kind of nonsense. Contingent fee lawsuits tend to be different from the norm in that they must be conducted extremely efficiently, since the client often doesn't have the resources or inclination to engage in wide-ranging discovery, on the off-chance that something might eventually turn up.

My point is this: in a contingent fee case, the lawyer is investing his or her time in hopes of a recovery that will pay for the invested time. This focus on achieving a result, which must be the focus in any contingent fee case, reduces the incentive to waste time, to engage in excessive discovery, or to write lots of argumentative letters. (No self-respecting lawyer should ever bill his client for a lot of the correspondence I have seen.) In contingent fee cases, depositions aren't taken as an excuse to run around the country, or to "be on the safe side." Because the lawyer is investing his or her own time, it means keeping focused on the goal of the case, and putting aside anything that doesn't serve that goal. Arguing with and sniping at your opponent, or responding to your adversary's efforts to start trouble, is detrimental to the goal of a well-run contingent fee case. It should also be the goal if your client is paying by the hour.

WHAT'S THE SECRET TO NOT WASTING TIME?

Rule One: Don't engage in letter wars. The longer or more inflammatory a letter is, the shorter your response should be. Make the style and content of your letter matter-of-fact. A short response to a long harangue is often the best revenge, anyway.

Rule Two: Don't use correspondence as a weapon. Some lawyers like to put words in your mouth. For instance, suppose you get a letter after a discovery conference that is slanted and purports to reflect all the promises you made, and none of the promises made by the other guy. Do *not* argue or write back with an equally long

letter. Instead, respond by saying that you don't engage in lengthy correspondence arguing about who said what, and that you disagree with the characterization that has been made. If you are dealing with a really mischievous lawyer, have a court reporter transcribe your discovery conference. I did that in one of our cases, and it stymied the opposing lawyer, who was frustrated that he could not waffle. The transcript prevented him from writing more accusatory letters misdescribing our commitments.

Other lawyers play a different game. These folks will write you a letter, and if you don't have anything to say, will act as though you agreed with whatever their proposals or comments were. We are dealing now with a lawyer who likes to engage in extended negotiations by a series of letters. His letters make various proposals, modify some of his earlier proposals, and so forth. The process is confusing, and probably deliberately so. His tactic is aimed at getting you to agree to something other than what you think you are agreeing to. Don't fall for it.

Rule Three: Don't be diverted by nonsense in a deposition. Time in a deposition (soon to be limited by amendments to the Federal Rules of Civil Procedure) is precious. Other lawyers may start arguments and make critical remarks to disrupt your depositions, hoping you will eat up the time for examining the witness, wasting it on responding to objections and

arguing. Don't do it. Ignore the opposing lawyer and focus exclusively on the witness. Repeat the same question, or have it read back. The latter is often better because it forestalls objections that have already been made, unless your opponent is really dim or abusive. If the lawyer makes lots of speaking objections, there are a couple of things you can do. One is simply to cite Rule 30(d)(1) that prohibits speaking objections. If it persists, call a magistrate. There is another tactic that is also useful, because it turns your adversary's objection against him. By this I mean that you want to turn the noisy objection into evidence against the noisy lawyer's client. You do that by incorporating the objection into a question. After some windy interjection, ask the witness if he hears his lawyer. He will say yes. Then ask him how he can answer your question without considering the lawyer's words that are already in his head. You've turned the lawyer's argumentative nature against him. You've gotten testimony, or at least a waffling witness. Whatever you do, don't respond to the invitation to argue.

Rule Four: Don't turn your briefs into attacks on the other side's lawyers. I have seen a lot of briefs that attack something the other side's attorney has said or done. But the lawsuit isn't the attorney's. Rather, the lawsuit belongs to the clients. If you have reason to attack, the attack should be made on the litigant, not

the attorney -- except in some special circumstances.

Rule Five: Try to avoid becoming a witness. Unfortunately, many of our courts require declarations or affidavits from lawyers. In our district (Northern Illinois), some judges require a declaration that an attempt was made to resolve a discovery dispute before it can be brought into court. Another example is the Northern District of California, which requires that a lawyer authenticate (in a declaration) all exhibits and documents provided with a motion. These kinds of declarations have always seemed useless to me. Lawyers are subject to the disciplinary rules of any court in which they practice, and judges have the power to hold a lawyer in contempt. Requiring a lawyer to make a declaration is superfluous.

The negative effect of a declaration is that it turns the lawyer making it into a witness. That witness is then contradicted by a lawyer on the other side, who makes a conflicting declaration. The upshot is a swearing contest between lawyers, which is exactly what should be avoided.

Rule Six: Remember that no matter what you do, you can't eliminate all the problems that a deceptive adversary can cause. But you can maintain your dignity, preserve your credibility, reduce the trouble these people with law degrees can cause, and persevere until you win which is, of course, the best revenge. **IPT**