OVERCOMING OBSTACLES PRESENTED BY THE TEMPERMENTAL JUDGE AND 
THE DIFFICULT ADVERSARY

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THE DIFFICULT ADVERSARY

The first question raised by this subject is of course, who is a “difficult adversary.” If your adversary is “difficult” because he or she is knowledgeable, hard-working and tenacious, it goes without saying that the only way to overcome that obstacle is to be equally or more knowledgeable, hard-working and tenacious. A plaintiff’s lawyer has one advantage on that score. To some degree a plaintiff’s attorney can control when a lawsuit is filed (with the exception of statute of limitations concerns). Therefore, if you know ahead of time who your adversary is and that he or she will be “difficult,” prepare as much as you can before you file your complaint. Research the issues you expect to come up, prepare your discovery demands, and gather your client’s documents, all before filing the complaint. It’s good practice in any event.

How does one deal with the adversary who is difficult in more troublesome ways -- not returning telephone calls, stalling and outright refusing to provide discovery, obstructing your depositions, misrepresenting your position to the court, etc. You know the type. I could go on
and on with nasty tactics and tricks that have been played on me but I don’t want to give anyone any ideas. There is certainly no miracle solution but here are some pointers I try to follow and have found somewhat successful.

1. AVOID ESCALTING THE DISPUTE AND DO NOT RESPOND IN KIND UNLESS ABSOLUTELY NECESSARY TO PROTECT YOUR CLIENT’S INTERESTS. At all times bear in mind that the litigation is not you against your adversary but your client against his or her employer. In other words don’t let your ego get in the way of good (and efficient) lawyering. As galling as it may be to let your adversary "get away" with something, your client may be better off if you don’t fight every transgression of the rules. And resist the temptation to respond in kind. A vituperative letter sent off in a moment of anger may end up in front of the judge. Refusing to produce documents because your adversary has done so may result in your client being precluded from using those documents at trial. It’s not worth it. Similarly, do not start out with the assumption that every violation of the rules is intentional. Sometimes simply pointing out what the rules require in a civil way may be all you need to do. I have seen lawyers escalate one slight (or violation of a discovery rule) into a full fledge war that affects the entire course of a litigation. In learning which battles to pick, it may help to remember that very often obstructionist and obnoxious tactics may actually help you on the merits. In particular, a party’s refusal or failure to produce relevant documents can be used at trial to preclude the introduction of exhibits that should have been produced early on in the litigation. Moreover, I have found that juries react very negatively to lawyers who in their view do not play fair and/or are abusive to witnesses and adversary attorneys. That obnoxious adversary may turn out to be your best weapon at trial. Also as a plaintiff’s attorney, so long as I
have made a record of the extra work I have been required to do because of my adversary’s tactics, if I prevail, I may be rewarded in the attorneys’ fees decision.

2. MAKE A RECORD. It is important if you are going to seek court intervention (see point 3) to have a clear record of what you are complaining about as well as a record of trying to remedy the situation short of court intervention. Making a record may in and of itself stop the activity or at least deter future misbehavior. Thus, with adversaries who consistently miss deadlines, confirm agreement to dates and deadlines immediately in writing. If your adversary says something objectionable in a telephone conversation, restate it in a letter, asking him or her to reconsider the position. A particularly effective technique to deal with attorneys who interfere with the taking of a deposition is to videotape the deposition. People seem to behave better with a video record and use at trial of a videotape deposition in which the adversary attorney was constantly interrupting and trying to prevent you from conducting an inquiry could be very effective. In a deposition, make a record of your objection to your adversary’s conduct. If the obstruction with your ability to take a deposition is extreme, consider adjourning the deposition and going to the judge with a few sample pages of the deposition demonstrating the interference.

3. ONLY GO TO THE COURT AS A LAST RESORT. It is first important to know your judge, and his or her rules. Some judges are more open than others to intervening in disputes between counsel and all courts and judges have different rules about how you obtain the court’s help. Sometimes it may be as simple as a telephone conference. In other courts, you may have to write a formal motion. The cost obviously affects whether the issue is important
enough to raise with the court. Even in situations where the court is open to a quick conference or telephone conference to resolve a dispute, most judges are not happy to be involved in mediating petty disputes between counsel. Make sure that you resort to the court only after you have exhausted all other efforts, have made a record of the problem, and are not guilty of the same or similar behavior. Otherwise you risk the judge throwing up his or her hands and saying – “just go work this out counsel.” (In my experience even in situations where you have done everything to try to obtain your adversary’s cooperation and have all the equities on your side, a busy judge may still send you off to work it out, which is why going to court should be your last resort.)

THE TEMPERMENTAL JUDGE

Much more difficult than dealing with the difficult adversary is the “temperamental judge” for as all litigators know, in dealing with an adversary you at least have the potential to be on equal footing, not so with the judge. Keeping that imbalance of power in mind (your only remedy is appeal or mandamus, neither particularly likely), try the following:

1. DO NOT ANNOY THE MIND YOU ARE TRYING TO PERSUADE

Even though in most employment cases you will have a jury trial, you still have to 1. Get to the jury (overcome summary judgment); and 2. Keep the jury verdict if you get one. Along the way there are numerous other points where the judge can make or break your case –
discovery rulings, in limine rulings and sometimes even simple scheduling. (I had a judge intentionally schedule a trial for my adversary’s vacation because he had annoyed the judge so much!) Thus it is important to try to stay on the judge’s good side, always consistent with your obligation to zealously advocate on behalf of your client. The easiest way to try to get on a judge’s good side is to be respectful. It may seem obvious but remember to always stand up when you address the court, and always address the judge as “Your Honor.” Never interrupt the judge (or your adversary) and ask permission before you address the court. These simple rules should always be followed.

2. BE PREPARED

Be prepared and ready to proceed every time you have contact with the judge. That means at the initial pre-trial conference too. If the judge asks you a question about the facts of your case, you had better know the answer. For example, at initial pre-trial conferences I have had judges want to know if and where my client is working, and expect me to know my client’s back pay to date. If you don’t know the answer to a question about the facts or law, apologize and offer to provide the answer in writing. Especially as an attorney representing the plaintiff, always be prepared to go forward with your case.

3. TRIAL

Again being well prepared, with witnesses available, will go a long way to endear you to even the most cranky judge. Have your exhibits pre-marked, read and be familiar with the judge’s trial rules, and if possible talk to the judge’s deputy clerk or law clerk ahead of time to
find out as much as you can about how the judge conducts a trial. Go watch another trial in front of the same judge. I have found the most troublesome aspect of judge-attorney relations at trial is how to create a record of evidentiary issues without unduly aggravating the judge. Many judges I practice before try to move their jury trials very quickly and thus limit, or even eliminate, sidebars. The best solution I have come up with is to request, though the judge’s clerk, a few minutes on the record before the judge brings the jury in for the day for the purpose of raising anticipated issues and if necessary, making an offer of proof.

Finally, as with difficult adversaries, sometimes a difficult judge may end up helping you in the end. I have had jurors tell me after a trial that they heard the judge yelling at me in the robing room and that the perception of both the Court and the big employer ganging up against my client and me helped the plaintiff in the deliberations.