

Coping Successfully with Difficult Opponents And Temperamental Judges

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Much has been written recently about maintaining, (or in some cases restoring), dignity and professionalism to the practice of law. Try as we must to do this, our efforts are not infrequently hampered by difficult opponents and, sometimes, by temperamental judges. The first step toward dealing successfully with difficult attorneys and temperamental judges is recognizing what behavior requires confrontation and when confrontation is most effective at protecting your client's interests. Then you must decide what form that confrontation and opposition should take. Above all, don't stoop to their level. Tit for tat, as satisfying as it momentarily may be, is a response that shows you are taking the behavior personally and it rarely works. Remember, when you get down in the slop to wrestle with a hog not only will you get filthy, the hog will enjoy it.

The arenas in which difficult attorneys can be most problematic are depositions and trials; however, what applies to handling difficulty attorneys at depositions and trials can readily be applied to all other stages of the trial proceedings. Depositions and trials are settings that allow you effectively to make a record and protect your client's interests, which of course is paramount. So not only is it important to recognize when confrontation is necessary, but it is equally important to be cognizant that you are making a record and you want that record to reflect that you are taking the high road and it is your opponent who is flaunting the rules. As this article indicates, maintaining professionalism, following the rules and keeping your cool are

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critical to effectively dealing with difficult attorneys and temperamental judges. And it's the right thing to do.

Behavior That Violates The Rules

Let's say you're taking the deposition of the opposing party, a difficult attorney may deliberately violate the rules with inappropriate speaking objections designed to coach the deponent or obstruct your questioning. For instance, he may say "objection, that question contains an assumption or calls for speculation." Not surprisingly, the witness then answers, "In light of that objection, I can't answer." Or when you have asked a pointed question that is slightly but materially different from an earlier question, he may appreciate the material difference but say "objection, the witness already answered that question," and the witness responds, "I answered that." When you repeat the question, he interferes again and the witness professes to not understand the question.

Typically, the parties stipulate that all objections except as to form are reserved at depositions. Depositions are also to be conducted as if at trial. Accordingly, all opposing counsel should say is "Objection" or "Objection as to form" so as to alert you to his belief about the impropriety of the form. If you want to know the basis of the objection, you can ask. Almost invariably you won't and if you recognize it to be a question improper in form you will rephrase it.

In the face of this tactic, our practice is to state that the parties agreed that all objections except as to form are waived and if I want to know the reason for the objection, I will ask, otherwise the opposing party's rights are fully protected and there is no need to state the basis of the objection. Moreover, the deposition is conducted as if it is at trial and therefore no

explanation need or should be given. Accordingly, please don't offer an explanation for your objection.

There are several points to be made about the foregoing everyday confrontations. First, with difficult opponents you must, we emphasize "must," know the rules. Second, you should show your opponent you know the rules. Third, show him or her too that you are willing and able to invoke them. Fourth, be scrupulous about following them yourselves. If your attempt at invoking the rules is inaccurate or insufficiently confident, you lose credibility. You do not want your opponent to perceive this as a weakness, because an aggressive lawyer will use this to challenge you at every opportunity which will both undermine your effectiveness and distract you from your objectives in taking the deposition.

Fifth, avoid unnecessary accusations or confrontations -- don't accuse your opponent of coaching when you don't have to. Keep your eye on the ball -- with a difficult opponent you want to get through the deposition with the minimum amount of disruption. Don't give him or her excuses. Remember what hogs are fond of. Thus, make a judgment as to whether you are being hurt by the opponent's tactics. If you are not, bite your tongue and keep moving unless you judge that you need to take a stand to attempt to prevent obstruction recurring at future critical junctures in the deposition. At the same time, be persistent. If you are not getting answers to your questions because of opposing counsel's tactics, calmly repeat the questions until they are answered. You are the one following the rules, so don't be intimidated by his or her accusations about your "improprieties," "bullying" or "intimidation."

You will be tested. The more difficult attorneys are persistent, and if one tactic doesn't work others will be tried. Your opponent may continue to make speaking objections. He may improperly coach the witness between questions and answers. He may improperly invoke a

claim of privilege and instruct the witness not to answer. He may interfere or obstruct the deposition by, for instance, pointing to parts of a document during the question or answer, in which case you need to remember that unless you say something the record will not reflect the improper conduct. In those situations, know that a direct confrontation may, (if your opponent is unscrupulous), provoke a denial which makes for an unclear record. So you may want to consider the subtle, indirect approach by noting to the witness that you are, or are not “referring to the document that your counsel just put in front of you.” In any event, your subtle as well as direct attempts to stop improper behavior by invoking the rules and requesting (nicely, of course) compliance with them may well be unavailing.

What we try to do here is get an agreement on the record with the other side to stop or we will suspend the deposition until we can get a ruling from the court. The agreement may take the form of an agreement only to state “Objection to the form” and no more or an agreement not to consult or speak with the deponent between question and answer. Here you must make a judgment as to whether a sufficient record has been made for you to prevail at court. Recognize that all judges hate these kind of discovery disputes. They feel they are in the sloop with the hogs. Rarely will you get the satisfaction you want and deserve. Moreover, the exercise will be time consuming and costly.

Therefore, going to court should be a last resort. If the opponent doesn’t make the agreement, you should judge whether the record at the deposition is sufficiently supportive of the sanctions and future protections you will seek. If you judge it is not, then you may want to continue and indicate you expect even in the absence of an agreement, opponent will conduct himself or herself appropriately. Often the behavior will improve sufficiently if not cease entirely. In fact, rare has been the occasion when we have had to either stop a deposition or

contact the court. However, if the conduct does not stop, note briefly your protest on the record and when you judge the record sufficient, suspend the deposition after giving your opponent one more chance to agree on the record to cease the behavior. The agreement may come as you are about to walk out the door. Prior to going to court, you may also want to cite to opposing counsel the governing law as to sanctionable conduct at depositions. See e.g. Friends of Animals, Inc. v. U.S. Surgical Corp., 131 F3d 332 (2d Cir. 1997); Heinrichs v. Marshall and Stevens, Inc., 921 F2d 418 (2d Cir. 1990); Webb v. District of Columbia, 189 F.R.D. 2d 180 (D.D.C. 1999); In re Stratosphere Corp. Secs. Litig., 182 F.R.D.2d 614 (D. Nev. 1998); Van Pilsum v. Iowa State Univ. of Science and Tech., 152 F.R.D. 179 (S.D. Iowa 1996); VMP Intern Corp. v. Yushkevich, 1993 WL 33463 (S.D.N.Y. 1993); Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993); Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994); Hagabourne v. Campbell, 1997 WL 781922 (Conn. Super. 1997).

Behavior Beyond The Rule: Personal Attacks And Other Monstrosities

Difficult opponents may quickly make the deposition personal. They may make ill-tempered, obnoxious or even false accusations about your tone of voice, your facial expressions, your gestures, and your questions. Whether this is an unrestrained lack of professionalism or a calculated attempt to disrupt your legitimate conduct, don't rise to the bait as difficult as that sometimes may be. Remember the hog. Protect your client's interests and your equilibrium by recognizing the effect of this behavior. It may well be done precisely to upset your equilibrium and focus and make you less effective, or it may be done because your opponent is himself or herself taking the matter personally and lashing out at weaknesses in his or her case.

Try ignoring it or try humorously to dismiss it. Briefly and calmly point out on the record your disagreement with the assertions. If it is affecting your ability to take the deposition

or if it is, in other circumstances, affecting your witness's testimony, you need to take action. You don't have to nor should you put up with an abusive situation. If you judge it to be that, use the same techniques you would with behavior that flaunts the rules. Threaten to go to court or go to court only as a last resort. Make sure the record is adequate. In that regard, make sure you stay on the record. With difficult opponents, resist agreements to go off the record. The record is your primary ally. If you deem it appropriate and necessary, take a break from the deposition to allow emotions to subside. Though your emotions may say "don't back down, fight back," a break may be an effective way to deal with the situation.

Your witnesses also should understand how to deal with difficult lawyers. If it is your witness who is being deposed, and you know your opponent is likely to jump ugly as part of his or her repertoire, prepare the witness by pointing out that you are there to protect his or her rights and that the witness should not, in any circumstances, respond to the opposing lawyer's tactics. Explain that sarcasm and other obnoxious tones may occur and that gestures may be made. Tell the witness you will protect him against the truly offensive and the improper. Tell the witness if he or she is bothered by the opposing lawyer's demeanor, to tell you privately and you'll call a break. Then you can discuss how best to handle the offensive behavior, what the state of the record is, when it will be appropriate to do more, and what the options are. Point out the importance for the witness to be and act unaffected by the lawyer's tactics. Difficult opponents like nothing better than to know they are affecting you or your client. It encourages them. Remind the witness as well and give him or her comfort by saying that you know it to be true that time wounds all heels.

Offensive Trial Tactics

The key to dealing with difficult lawyers at trial is the judge. One wants a firm, no-nonsense judge who runs a tight courtroom. The judge may be tested by the difficult lawyer who may try to make speaking objections, gestures and asides to the jury, comments on the testimony before, while and after asking questions. Usually all you need to do is point out to the judge the impropriety of the behavior if the judge hasn't noticed it. Nonetheless, in jury trials, with a difficult lawyer on the other side, we try at all times to have someone watching the other lawyer and bring any concerns to the judge such as the opposing lawyer leaving exhibits or his client's family photos within viewing distance of jurors.

With judges who run a more laissez-faire courtroom, the tight-rope you walk is trying to maintain your professionalism and not getting in the slop with your opponent before the jury while he or she pushes constantly into impermissible areas and uses improper tactics. Again, the record is your ally. Make a good one. Object to and fight over before the jury only what you judge hurts your client's cause. Difficult lawyers often force you constantly to be objecting. If speaking objections and arguments before the jury are being permitted, try to have the judge curtail them. If they are allowed to continue, be prepared to make brief, pointed ones geared to the jury's ears. If personal attacks or asides are made and dealt with tepidly by the judge, remember rule one - - don't slide into the muck. Deflect as much as you can with humor. Figure too that the jury will be unimpressed by these tactics. Don't put your professionalism and credibility up for grabs. That's what the opponent desires, particularly in a case going badly.

Just like it is critical to be aware of when you are on the record, and use it to your advantage, it is critical to be aware of the jury's presence. While you do not want your opponent to think that he or she is getting to you, a forceful and sometimes emotional appeal to the judge

for assistance may be necessary. However, you need to be concerned how that is perceived by the jurors, so you need to appropriately time your outrage at opposing counsel's tactics. Choose your moments wisely. When outside the presence of the jury, repeatedly ask the court on the record for guidelines to be imposed for the conduct of counsel and provide those guidelines to the judge, e.g., no comments on the testimony or exhibits while examining a witness and no speaking objections during opposing counsel's examination of a witness. If that is insufficient, provide the court with a memorandum citing the court's authority to control opposing counsel's improper conduct. Finally, scrutinize carefully what will be before the jury. With difficult attorneys, all too often something "inadvertently" is sent to the jury that shouldn't be.

A motion for mistrial may be warranted based upon opposing counsel's conduct. Difficult lawyers whose conduct is unrestrained can create an atmosphere that prejudices the fairness of the proceeding. As with any motion for mistrial, first consider your motivation – is your case going badly or are the proceedings truly tainted. And if your case is not going badly but going well and opposing counsel's conduct is outrageous, don't lose the forest for the trees and automatically move for a mistrial. While they rarely are granted, you should be careful what you ask for. The last thing you want to do is snatch defeat from the jaws of victory. Opposing counsel's outrageous conduct may well be his or her reaction to problems with his or her own case or may be a calculated effort to provoke a mistrial.

Temperamental Judges

The vast, vast majority of judges want to be fair and see justice done. It is why they went on the bench. Sometimes, however, some may want to give what they perceive as justice a helping hand. And in a rare, rare case, a judge may not, for whatever reason, take a liking to

you, your client or your case and may plant his or her thumb firmly on the scales. Or if your conduct is perceived as improper and you are seen by the judge as the unprofessional and difficult lawyer, he or she may give you less leeway than opposing counsel. Whatever the reason, you sometimes may face judges who appear to be leaning towards your opponent and will have effectively to address this for your client.

Often a judge's inadvertent gesture at trial, tone of voice or slip of the tongue may prejudice your client. Respectfully, ever so respectfully and deferentially, point that out to the judge. Usually it is to good effect and the behavior stops and a curative or helpful instruction is given. If, however, the judge by comments, gestures, tone of voice or otherwise is not being the impartial arbiter the law requires him or her to be, you have to confront this behavior. Nothing is more difficult at trial than the difficult lawyer pushing to and beyond the envelop of propriety being tolerated and even aided by the judge. Again, the record is your primary ally. Focus on the effect of what has occurred and the prejudice visited on your cause. Keep to the facts of what occurred in making your arguments and avoid characterizing a judge's behavior unless necessary to your argument.

As with opposing counsel, it is equally, (if not more), important for you to know the rules and make clear to the judge that you know the rules and follow them. You must be familiar with the rules governing your conduct to know whether the judge is engaging in appropriate behavior with you. If you are the reason the judge is temperamental or appears biased, that will not bode well for your client or you before an appellate court. Appellate judges are not likely to look approvingly on an appeal criticizing the trial judge's conduct when counsel was by his conduct provoking the judge's reaction.

But you also must be familiar with the rules governing the judge's conduct and the varying levels of discretion he or she will be afforded by an appellate court, depending upon the matter at issue. Familiarize yourself with the case law in your jurisdiction that discusses what judicial conduct is or is not beyond the pale. In matters where the law grants the trial judge a great deal of discretion, such as rulings on the relevance of evidence, be careful not to accuse the judge of bias prematurely. As advocates, we often become overly enamored with the strength of our position. A judge's disagreement, (or several successive disagreements), with us about our argument does not make for a claim of bias. No one among us likes to lose, but in litigation there are winners and losers in every case. So you need to be careful and decide whether your judge actually may be biased for some reason unrelated to the merits of the case or he or she is just ruling against you because you're wrong. If you believe there is bias, make sure the record is clear and substantial before confronting the judge, and you should only rarely, if ever, have that confrontation in front of the jury. In most cases, jurors look to the judge as the one person in the courtroom they can trust. Unless the judge's bias is so blatantly obvious that the jury has lost confidence in him, you will not endear yourself to them by confronting the judge.

Don't overreact to a judge trying to level the playing field. For instance, if you are a seasoned lawyer opposing an unseasoned lawyer, you may find you can and should do little when the judge helps the other lawyer by encouraging objections with a tilt of the head or raise of the eyebrow particularly when the judge may think the inexperienced lawyer is being taken advantage of. When, however, the playing field becomes tilted severely in your opponent's favor by the judge then you have to act. Such judgments are often difficult; err on the side of caution.

In matters where the trial judge is afforded less discretion, such as allowing you to mark exhibits for identification even if they are not admitted or allowing you to make a proffer of evidence for the appellate court to see even if it is being excluded from the jury, you can confront a judge more directly. You are entitled to do certain things, but if you don't know the rules you won't know when to claim those entitlements. A judge's initial decision may be the result of many things, and if you simply point to the rule or case that supports your position the vast majority of judges will be fair and follow the law. Above all, however, always be courteous and respectful. Regardless of how you may feel about the judge he or she still wears the robes in that courtroom and deserves to be treated with respect. Again, the jurors know the judge is in charge and expect you to respect that. They generally understand that your job is to protect your client's interests, but you need to understand that if you are disrespectful toward the judge you probably are not protecting your client's interests. Even if the judge rules against you and disregards the rules, you must make a sufficient record for your client.

You have two very dangerous tools to deal with a truly difficult judge – motions for mistrial and disqualification. Rarely will motions for mistrial or disqualification based upon the judge's conduct be granted, and it more often will serve to fan the flames of what already is a very uncomfortable and difficult situation. These are the ultimate challenges to a judge's authority and credibility, and they should not be made lightly. Because they are not likely to be granted, your principal audience is no longer the trial judge but the appellate court. You are making a record. It should be done respectfully but forcefully. In deciding whether and when to make such a motion you should first consider whether the judge's conduct is sufficiently egregious to meet the governing standards for such a motion or you are reacting to the fact that your case is going badly.

On the other hand, don't miss an opportunity to make either motion if you think it's warranted. An appellate court may reject arguments on appeal about the trial judge's conduct when you haven't made the motion. Similarly, your argument about the propriety of the trial judge's conduct may lack credibility – if it was as bad as you now say it was, why weren't you outraged at trial. If you think either motion is warranted, be sure the record contains sufficient evidence to support the conclusions you are making about the judge's conduct. As with any confrontation with the judge it should almost always be outside the presence of the jury. Finally, be careful what you wish for. Be sure you want a mistrial. Such motions do get granted. They should not be used as a tactic to attempt to restrain a judge's inappropriate behavior.

Conclusion

Professionalism and civility, (even in the face of unprofessionalism and incivility), are critical to the effective practice of law. Therefore, when dealing with difficult opponents or temperamental judges you must avoid at all costs stooping to their level. The primary objective in any setting is protecting your client's interests. Keep your eye on that ball, and follow the rules and make your record.