

Strategies for reacting to a rude opponent

By: Nancy Crotti May 9, 2013 0

Jerks: Everyone's encountered a few in their lives. In the courtroom or out, they can make you forget all those manners you learned growing up, triggering reactions you might later regret.

The problem is sufficiently widespread that the American Board of Trial Advocates addresses it in its "Civility Matters" continuing legal education classes at area law schools to prepare students for how to comport themselves.

Fortunately, there are several strategies one can employ when confronted by rude or outrageous behavior by an opponent, whether in an email, on the phone, in a deposition, or in court.

Jan Marie Gunderson, a shareholder at Bassford Remele in Minneapolis and an ABOTA member who recently participated in a "Civility Matters" session, said lawyers were much less likely to fire off a written response to a jerk years ago when communication was by snail mail. A lawyer would dictate a letter to an assistant, who would type and return the finished product, sometimes with a gentle hint that the attorney might want to reconsider some of the wording.

"You'd come in the next day and cooler heads prevailed and you used better judgment," Gunderson said. "If you get an email and it's a little harsh or a little sharp, particularly if you have just gotten a phone call from the school that your kids have misbehaved and so on, there's a danger that you're going to fire back in kind. That's not in everybody's best interests."

Gunderson's advice: Back away from the keyboard.

Gary Gordon, a 40-year veteran attorney who is of counsel with McCollum, Crowley, Moschet, Miller & Laak, Ltd. in Minneapolis, described some difficult lawyers as "Rambo litigators" who believe they must add friction to represent clients better. They refuse to grant continuances, abuse the discovery process, and sometimes behave intolerably in



Nancy Crotti

depositions.

"They can't help themselves. This is the way they are," Gordon said. "They will do that with everybody until basically somebody pushes back."

Another ABOTA member and "Civility Matters" presenter, Gordon offered several ideas for dealing with difficult legal opponents.

"It basically depends upon the conduct," he said. "You can certainly first try to reason with them and basically say, 'Look, your conduct is not acceptable.' Sometimes you can embarrass people into behaving themselves. It also helps to set a good example."

If opposing counsel is known for histrionics, Gordon has found that videotaping depositions can prevent outbursts.

"Other times you can tell someone, 'I will not communicate with you other than in writing,'" he added. "Put it in writing and we'll have a record. Records tend to scare these people, whether it's letters or videotapes or transcripts and emails."

If none of that works, an attorney can ask the judge to sanction the offending counsel.

Lawyers are less likely to misbehave in court than in discovery or other lawyer-to-lawyer dealings, according to U.S. District Court Judge Ann Montgomery. That doesn't mean judges are clueless. Misbehaving lawyers are often fodder for discussion among judges, she allowed.

"Lawyers have to a certain extent trust the judges will be able to get a feel when they get into court what went down," Montgomery said.

Some lawyers, for tactical and strategic reasons, will not object if their opponent misbehaves before a jury. If the sparring is part of the lawyers' advocacy, Montgomery says, she won't get involved unless she's asked. When bad behavior offends the dignity of the court, Montgomery has a tried-and-true method for restoring order.

Several years ago, Montgomery said, she called two misbehaving lawyers up to the bar and informed them that she was calling for a 10-minute break. During the break, she said she would check the law of contempt and suggested the sparring partners do the same.

"That took care of it," she said.

Montgomery also teaches new judges during what she and other experienced jurists call "baby judges school" in how

to deal with such situations. The lessons don't always sink in, according to Gordon.

"There are a lot of lawyers who become judges and forget what it's like to be a lawyer in the trenches and juggling a caseload," Gordon said. "They become unpleasant to deal with" and suffer from what some attorneys call "black robe fever."

Despite best efforts toward civility, some conflict with opposing counsel may be unavoidable. Susan Dickel Minsberg, a St. Paul solo practitioner who chairs the Solo and Small Firm Section Council of the Minnesota State Bar Association, once hung up on another attorney who would not stop screaming at her, despite Minsberg's pleas.

Another time, opposing counsel accused her of "being untruthful" during a deposition, Minsberg said. She reacted negatively because she felt her integrity as a lawyer was being attacked. Generally, however, Minsberg tries to keep her cool and act professionally, including in emails, which may become exhibits that the judge will see.

"Nothing is to be gained by countering, by attacking someone who's attacked you," Minsberg said. "You might feel better momentarily, but it's not worth it. You will feel much better in the long run by rising above it."

Minsberg recommended another tactic to get the other lawyer to stop and consider their behavior. She suggested asking the other lawyer, "Is everything OK with you? You seem very upset," she said. "That can be a way to show concern and get them to realize that they're going over the top."