Professional Courtesy v. Zealous Representation

I've been thinking a bit about the balance between professional courtesy towards opposing counsel, and zealously representing your client.

Does anyone have any real life examples that they can share?

It can be a difficult balance to maintain, and sadly it appears that far too many of us consider it a zero sum game.

I think our culture tends to mistake kindness for weakness.

We also do deal with people who are hurt and tend to want to lash our through us to their adversaries, lawyers or not.

Look forward to further discussion of this interesting thread.

Jim Moriarty, Iowa

I think a good example of this situation can be found right here on SoloSez with a thread posted about OC not providing the Sezzer with the discovery requests OC had served on the Sezzer's client before he became involved.

Ryan Phillips. South Carolina

Personally, for me, it comes down to the following: Zealous representation includes strategy, which the client is part of setting and has a lot of input into. Tactics, the means I use to make sure the overall strategy happens are solely within my control as the lawyer. This means that things like offering the other side a continuance are strictly within my control. (For more on the differences between Strategy and Tactics, see: http://www.dummies.com/how-to/content/strategic-planning-strategy-vs-tactics.html)

I also feel that it is very rare that a situation will require no continuances. I have personally never handled such a case, but were I to do so, I would be up front with the other attorney from the very beginning, before they ever even asked for a continuance. I would let them know that due to the rare and extraordinary circumstances of this case, that I am not in the position to offer any extensions. (The only example of something like this that I can think of would be a situation where immediate, irreparable, and extraordinary harm out of all proportion to what the client is seeking would occur to my client were there any delays.)

However, even with that type of situation, certain professional courtesies *must* still be in place. Sending electronic copies of discovery to OC, is a good example. Clients that want to

micromanage so much that I cannot do something that simple are clients that I do not want to deal with and will fire.

Frank J. Kautz, II, Massachusetts

I don't necessarily see them as being mutually inconsistent. Sometimes, yeah, but a lot of this can be avoided provided the lawyer remembers to keep his (or her) eye on the ball; the end result of the case; what are you trying to accomplish? To win the case, or at least to minimize the damage.

Insistence on technical points can be counterproductive; particularly where judges are likely to 1) deny the relief the technical point theoretically requires and 2) it just serves to tick off everyone, including the judge.

One of the very first cases I had was a divorce, (which I no longer handle); there had been some technical problem with the service of process, I forget the details, something like they served wife at former address, it had been accepted by her mother who passed it along to wife, something like that. But the point is, a motion to quash service of process would lie; maybe not granted, but it would lie. I'd spent a couple of weeks going over Trawicks while waiting for clients to call and knew my rules down cold. Client hired me late, but I told her I thought OC would grant me an extension without a problem.

So, I call up other lawyer, introduce myself, say I'm brand new lawyer, she just hired me, we got like 3 days to file an answer and I asked if OC would grant me an extension of time to file an answer. He gets a little huffy, says he's going to have to talk to his client, calls me back and says his client won't grant an extension of time for me to file an answer and if we didn't file one, he'd move for default. We're talking Friday afternoon here, answer due on Monday. I guess that was Zealous representation on his part, figuring he's going to take a hard line with a brand new lawyer. Butter wouldn't melt in my mouth, I go, Golly Gee whiz, that's fine, but, aw shucks, it looks to me like service was bad and I'm fixin to file a motion to quash service of process, explain what the problem with service was, it'll take us about what, 45, 60 days, to get a hearing? And if it's granted you're gonna have to re-serve my client, if it's denied the rule says I got 10 days after it's denied to file an answer, by the way, what's your fax number, Buddy? I want to make sure you get this in time, Monday afternoon at the latest, so's we can avoid a default. All of the sudden, he's like, well, lemme talk to my client again, calls me back and says "your motion isn't ENTIRELY meritless; and my client'll give you another ten days to file an answer".

Point is, 'zealous representation' on his part wouldn't GET him anything; but professional courtesy would. Now, where client is going to be really, honestly, prejudiced by professional courtesy, then yeah, you should stick to your guns. But just being a jerk for the sake of being a jerk isn't going to get you an advantage in most cases.

FWIW, he got all buddy buddy after that, talking about how we were in small town, and would be lawyers for long time and would encounter each other again, and how good it was to extend professional courtesy to each other.

Ronald Jones, Florida

The bankruptcy bar is generally pretty friendly. I had a creditor's counsel give me a heads up that he'd be objecting to my plan, so I knew going into my 341 meeting to ask for more time while we resolved the issue. It got resolved without need for a hearing and everyone got what they wanted.

On the other hand, I have had counsel intentionally file things after the close of business, so I would leave the office thinking there was no opposition, and come in to an objection in the morning. Sometimes I love that we can file documents until midnight and sometimes I hate it.

I had this discussion with some of my local nonbankruptcy colleagues, and the bar's position on civility varies widely depending on practice area. Generally speaking, the civil litigators in my area did what I consider to be dirty lawyer tricks on a routine basis and it was considered normal. If you tried that in my court, you'd be in a world of pain.

Happy Monday!
Corrine

Corrine Bielejeski, California

Those two are not mutually inconsistent. One should always strive for both.

Had an OC recently with whom there was no back channel. OC was too busy to talk on the phone, but any email - any email - I sent was likely to show up as evidence in the next motion. Several things in the case would have gone better for OC if we could have talked.

As an example of how zealous and professional fit together, when I have a first phone call with an OC on a new case, the calls mostly fall into one of three classes:

1. folks where we just talk.
2. folks who tell me my client and my case are losers, so I reply in kind, and then we talk.
3. folks who tell me my client and my case are losers, and never get beyond that point. We have the same conversation every single phone call. These folks have lost out on professional courtesy.

Rebecca K. Wiess, Washington

Really the judges set the bar on what dirty tricks are/aren't allowed. And it may even vary by attorney on what they do/don't allow a person to get away with.

That is because when they see stuff like this done, they turn a blind eye on the person or give a tiny slap and nothing major. And I get it that most of the time if they come down on the lawyer they are in reality hurting the client but 99% of the time the client choose that attorney because of their dirty play.

And yeah judges tend to get irrate over some of this stuff, but a judge giving a private lecture doesn't seem to bother them. But it will stop when the judges start dismissing the motions and offering up sanctions against opposing counsel for the behavior.

Erin M. Schmidt, Ohio

I agree, it all depends on what a judge will tolerate. Judges sometimes treat these problems like little boys squabbling in the sandbox and do nothing or blame all counsel regardless of what happened. However, I know of at least one instance in which counsel kept trying to rewrite an order which had been heard twice before. At the second hearing, the judge warned that any further hearings on this order had better be based on something new and not a rehash of what had been decided. Sure enough, OC came in again to rehash the order. The judge was calm and asked OC if the court had not previously ruled on this issue. OC did not back down. A small monetary sanction was ordered and the court refused requests to withdraw the sanction. OC had told other counsel in the case that the threat of sanctions was a paper tiger and no judge would issue sanctions.

The sanction was not important for the cost. What was important is that in most pro hac and attorney licensing applications any prior sanction order has to be reported.

Craig A. Stokes, Texas

The concept of civility modifies the zeaoous representation obligation.

CA has rules on this.

http://calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf

Roger M. Rosen, California

I'm up against a lawyer who feels the need to document everything in a "This letter is to memorialize our conversation. . . " Then I get a lecture on professionalism which is lacking in anybody who disagrees with him. Or civility. I can get along with most folks but attorneys who lie or claim it was just a mistake annoy me.

I don't mind losing but you and the judge really shouldn't slap each other on the back after court is over at least not in the court room.

John A. Davidson, Pennsylvania

See my discussion below about the opposing counsel who refuses to provide a copy of the discovery he propounded on my client when the client was pro per because it will give him an advantage when I fail to respond because I have no clue what to respond to. He refuses to provide a copy of the operative pleadings in the case as well forcing me to pay to obtain them from the court and refuses to explain how the judge ruled on his motion to strike when he and my client (again pro per) waived notice.

Nothing like not having a clue what the operative argument from your client is and I know if I propound discovery on something that was striken, he will object and further waste my time.

The other thing I once saw was an attorney who had a phone call with another pro per, telling the pro per not to respond to the complaint and that the pro per should just mail documents to the attorney for possible settlement and then the attorney filed for a default judgment against him. The judge's hands were tied as he repeatedly told the pro per to find an attorney to reverse the default.

Ricky S. Shah, California

Long time since I looked at it, but I believe the word ZEAL has disappeared from Code of Conduct most places. Yet, it seems to be the one word some remember as a cloak for whatever they want to do. For sure, it is not in FL oath, which says, in part.

"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

Point: our first duty is to our Oath. Within those limits, we owe DILIGENCE to our clients.

John Page, Florida

Zealous representation is still required in DC.

Emilie Fairbanks, District of Columbia
