Professional Courtesy

I'm a new attorney (less than 5 years practice) and my colleague and I differ regarding how this situation should be handled. I would like to call upon the collective wisdom of the group.

I work at a small (three attorney) insurance defense firm. I'm defending against a slip and fall at a store.

Plaintiff's counsel wanted to depose a non-party former employee of the defendant. I have been in contact with this employee several times. I forwarded the notice of deposition sent by plaintiff, suggested that plaintiff's counsel hire an interpreter, mailed a reminder letter to the employee before the deposition, called the day before and the day of the deposition. I spoke to employee the day before the deposition to confirm that he would be attending, but he did not answer on the morning of.

Plaintiff's counsel is located approximately 2 hours (one way) away from our office. Former employee did not show up for his deposition and was not answering his phone. Plaintiff's counsel was angry that employee did not show up, despite my explanation of all that was done(short of dragging him into the office by his collar). He claimed it was a waste of his time.

We just completed mediation. When the mediator made our offer, the plaintiff's attorney blew up and said he was angry that I wasted his time by not calling him to tell him that we were going to offer such a low amount to save him the 2 hour drive and that we had already wasted his time last week in the failed deposition, which he specifically mentioned to the mediator.

Question:

1. Should I have called plaintiff's counsel prior to the mediation to tell him about the authority I was given to save him the 2 hour trip?

a. Am I obligated to do so?

b. is this considered a standard professional courtesy?

c. or is he being unreasonable?

2. If I had doubts that the employee was going to show up:

a. was I required to express them to the plaintiff's counsel?

b. is this also considered a matter of professional courtesy

c. is he just being unreasonable?

(Without revealing my position, this is the major point of contention between my colleague and I)

I look forward to the responses I receive.

Posted Anonymously

New Attorney,

I don't believe based on what you have shared that you did anything wrong. The point of a mediation is to work through the various offers- typically starting at a point where there's a huge difference between the parties working down to a more workable position. The other attorney should be familiar with the process if they've participated in prior mediations.

You have no control of the party who is supposed to show up for the deposition and you had no way of knowing they wouldn't show up. It is unreasonable for the attorney to blame you.

It is up to an attorney to determine the requirements of providing representation for a client prior to the time they agree to take the client. This attorney should have included in his pricing and consideration that he may have to travel a bit in the course of representation. He didn't have to accept a client that was going to require longer travel time than he prefers. Sometimes more experienced attorneys like to intimidate those who are a bit less experienced. You can't allow the other attorneys' antics to make you second guess the choices that you made - even when you may have a colleague who feels otherwise.

Be encouraged!

Rhonda B. Kelley, North Carolina

Dear New Attorney,

I have litigated here in Illinois since 2005 from public service, to small firm, to mid-sized firm and I've come across your situation more than a few times. My stance is pretty simple: PC is just angry and unreasonable on this one.

Here in IL, I can think of no duty that you have to produce a former employee for deposition. Our rules of civil procedure would classify that person as an independent witness and whether they show or not is up to them. Both sides should be well aware of this unless, at some point, you made the assertion that you would be producing this individual for deposition. That would be the game changer in my experience.

As far as the mediation goes: professional courtesy only goes a certain distance. I can't see a point at which you should disclose the authority you've been given to settle the case, unless you're expressing to the other side that this is a final offer because your authority doesn't extend any further. I can see PC being upset if their demand is $1M and you went to mediation with $5k in authority when the case has a reasonable value above six figures. There it would be obvious that mediation isn't going to accomplish much. But I could throw out hypotheticals all day and get no closer to a point. So, I'll say that from the facts provided, I can't see where you made a misstep or didn't do what should have been done.

Please feel free to contact me off-list directly, if you'd like.

Sincerely,

Ryan N. Hejmanowski, Illinois

Sounds like plaintiff's counsel is being an ass.

1. Regarding the deposition, the former employee is not under your control. I think you actually went above and beyond the call of duty with the arrangements you made, unless this is going to be your witness at trial.

2. I have never, ever heard of an obligation (or courtesy or otherwise) to disclose the limits of your settlement authority prior to beginning a negotiation. I haven't done PI work in years, but that sounds absurd.

Finally, why is it your problem that he took a case 2 hours away from his office? Sounds like he is being a bully and trying to take advantage of your lack of experience.

kwg

Kevin W. Grierson, Virginia

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1. Should I have called plaintiff's counsel prior to the mediation to tell him about the authority I was given to save him the 2 hour trip? YES

a. Am I obligated to do so? YES

b. is this considered a standard professional courtesy? SADLY, NO, IT SHOULD BE

c. or is he being unreasonable? NO

2. If I had doubts that the employee was going to show up:

a. was I required to express them to the plaintiff's counsel? YES

b. is this also considered a matter of professional courtesy

c. is he just being unreasonable? YES, IT IS, AND NO, HE IS NOT BEING UNREASONABLE

(Without revealing my position, this is the major point of contention between my colleague and I) IF YOU AND YOUR COLLEAGUE DO NOT AGREE WITH AN ISSUE OF PROFESSIONAL COURTESY, EXTEND THE GREATER OF THE TWO.

THERE IS NO ETHICAL, CRIMINAL OR CIVIL PENALTY ATTACHED TO GRATUITOUS, UNREQUITED OR EVEN EXCESSIVE COURTESY OR KINDNESS.

IF YOU ARE AFRAID OF BEING SEEN AS WEAK FOR BEING KIND OR COURTEOUS, YOU ARE HANGING AROUND WITH THE WRONG PEOPLE.

James P. Moriarty, Iowa

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1. The attorney's obligation is to his or her client first, obviously. Because of that, I don't think there is an obligation to disclose the maximum settlement authority. I'd argue the opposite as telling opposing counsel the settlement authority essentially gives the negotiation away. Opposing counsel will just come in and ask for whatever the maximum settlement authority. Moreover, assuming that the offer was made in good faith, defendant counsel doesn't "know" that it's so "low"--it's a number the defendant believes is reasonable to settle the case. I suppose the attorney in this case could have said something like: "Just so you know before you drive down here, we're thinking this case is worth in the ballpark of X dollars." (Where X is something less than the max settlement authority.) But the opposing counsel could also just as easily have called and said "Hey, before I drive the two hours for the negotiation, my client won't settle for anything less than one bajillion dollars, a new Lamborghini, and a lifetime subscription to Playboy." Since opposing counsel is the one driving two hours, I would think they'd broach the subject.

2. I'm not sure what the attorney was expected to do in this case. I don't think they have an obligation to produce the former employee, but they talked to the former employee the day before who acknowledged the deposition. I suppose they could have called the opposing counsel the morning of when they couldn't get in touch with the former employee. But they didn't really know at that point that the former employee wouldn't show up. And what would they say? "I THINK he might not show up, but he might." Then opposing counsel doesn't come for the deposition and the former employee shows. Guess what opposing counsel does now. Opposing counsel blows up at defendant's attorney and says "You told me the witness wasn't coming, this is outrageous! You've shown no professional courtesy!"

Frankly, it sounds like opposing counsel is just trying to push your friend's buttons.

Kirk Sripinyo

If the deponent was still employed by your client, then your client had an obligation to provide the person and you should have gone through the client to have the employee appear. To do otherwise could open your client up to having to pay the plaintiff's attorney for his time and expenses, or other sanctions, if allowed under your discovery rules. If the deponent was no longer employed, then there would be no obligation and the plaintiff's attorney would just have to find his own way to require the deponent's attendance. Regarding the deposition, the easy one first, I would have told him that I had lost contact with the deponent.

Mediation - You are not required to provide your position to the opposing side. Mediation is intended to get the two sides to reach an agreement. Polarizing is not mediating. I have been a mediator for about 8 years now. I have also represented parties in mediation. As a mediator, it is always difficult to overcome the "my way or the highway" mentality. You always begin mediation with your initial position: The plaintiff always wants the moon plus the stars - while the defendant always takes a low position, sometimes below ground level. After the initial foray the goal is to find some middle ground. If the plaintiff would not come off of his initial position, even after the defendant makes a step upward, then further mediation can be fruitless. I had one case where it took 3 different mediations to get the other side to come off their position. (The first one was because the other side stole all of the money. The second one was after the money was replaced the defendant took personal aversion to my client. The third was after the defendant was able to think rationally, we settled.)

Frederick G. Irtz, II, Kentucky

Wouldn't giving away the authority undermine negotiations? If I was told my OC that she had authority to settle at X, why would I possible agree to settle for anything less than X?

I don't disagree that if you had a reasonable belief that a deponent wouldn't show, it would be nice to share that information, but I disagree there is an obligation with regards to a non-party individual.

Teri Robins, Illinois

Mr. Moriarty,

I love your quote, and with your permission, would love to share it!

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Amen!

Maria \"Tish\" Antill

I don’t think you had an obligation as it relates to the deposition. Although it would be nice if you had called opposing counsel to let him know.

As to the mediation, when I was doing defense work, and when I was an adjuster, if we didn't have a ton of authority, I would call counsel and just set their expectations. I have walked out of mediations as plaintiff's counsel if defense counsel comes with $500 more than was offered before.

Jonathan G. Stein, California

New attorney,

What does your court's civility guideline say? I was taught that we are always civil to opposing counsel, because we may keep running into him or her for the rest of our lives. 30-40 years is a long time to hold a grudge.

1. Should I have called plaintiff's counsel prior to the mediation to tell him about the authority I was given to save him the 2 hour trip?
It depends on the amount. Switch positions and think about it. Would you have been pissed? Were you given an appropriate settlement figure? Was this something his client could ever, reasonably accept? If no, then you weren't mediating - you were playing a game.

As far as obligations, etc., you have to look at your bar and courts in particular. Every section of the bar has different rules regarding civility. Civil litigation tends to allow for a lot more game playing than other areas of the law.

2. If I had doubts that the employee was going to show up:

It would have been nice to let them know that they were dragging their feet, but not a requirement. Maybe they would have brought along extra reading material. Maybe they would have rescheduled things. Were you

required to notify them? No - only if you received an evasive answer the day before or the person was supposed to show up at 2 and wasn't there yet.

Again, what would you want opposing counsel to do to you?

If the person you are disagreeing with has a completely different opinion than you on how to handle cases and how to interact with clients and opposing counsel, switch firms.
Seriously.
You do not want to get into hot water because your coworker, partner, boss, or paralegal is stomping all over the court's civility guidelines and pissing off half the bar.

Alternatively, if you feel the need to posture and grandstand, there are firms out there that will love you and take you in. You will be great at protecting your client during timed depos. You will be great at drawing a line and sticking to it. More importantly, opposing counsel will know that you aren't a pushover. Of course, many of us won't like you. Try not to take it personally.

Hopefully, you can do something in the middle.

Sincerely,

Corrine Bielejeski, California

As to the deposition issue, you were entirely reasonable. You already went

above-and-beyond what you were required to do, based on the facts you presented. Of course, if you had an objective reason to think the guy wasn't going to show up -- like, letters you sent were returned by the post office, or he told you he wasn't going to show up, or you left eight messages for him and they weren't returned -- then I think as a matter of professional courtesy you should have given a heads up to your adversary. But if you spoke to the guy the day before and he said he'd be there, there's nothing else you could/should have done. Your "doubts" aren't anything. Besides, what was your adversary going to do if you had expressed doubts? He still had to show up, just in case.

As to the mediation, it depends on the facts. If this were purely a voluntary mediation, and you knew that your offer was not even in the right ballpark, then professional courtesy might dictate that you tell him so that the mediation could be cancelled. You're not obligated to give your negotiating strategy away, but courtesy does dictate that if you don't intend to make an offer that has the remotest chance of being accepted and don't intend to negotiate at all, that you don't waste his time by making him participate. If the plaintiffs are demanding $500,000, and you come in and say, "I'm not offering more than nuisance value of $5k," then, yeah, you're wasting his time. But if you come in intending to make a good faith settlement offer, and to engage in good faith negotiations, then you have no obligation to do anything else -- the fact that you value the case much lower than the other side does is the whole reason for the mediation.

David M. Nieporent, New York

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> Question:Ã,

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> him about the authority I was given to save him the 2 hour trip? YES

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> Ã, Ã, Ã, c. or is he being unreasonable?Ã,   NO

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Jim is wrong here. You absolutely do not tell what your settlement authority is, unless it is "I am not authorized to settle this case for any amount and my client is demanding that we go to trial." You have an obligation to bring any settlement offer to your client, and/or to accept a settlement within your given authority. But if you have a max settlement authority of $25,000, why would you say that up front? Case in point, I had a recent small case where I had authority to settle at $2,000. My negotiation offer started lower than that. If I had started with "this is what I am authorized to settle for," then they would have known exactly what they could get. Also, remember that a settlement above your authority is not impossible. It just means that the client has to approve it first.
The other attorney forgot that.

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> 2. If I had doubts that the employee was going to show up:

> Ã, Ã, Ã, a. Ã, was I required to express them to the plaintiff's counsel?

> YES

> Ã, Ã, Ã, b. is this also considered a matter of professional courtesy Ã, Ã,

> Ã, c. is he just being unreasonable?Ã, YES, IT IS, AND NO, HE IS NOT BEING

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Jim is half-right here. No it isn't required, but it's a nice thing to do.
If it's not your witness and the Plaintiff is calling him all by himself
then you've gone above and beyond. But if you have doubts (like you
couldn't get him on the phone) then you might want to say something. But
UNLESS YOU WERE OBLIGATED TO PRODUCE THE FORMER EMPLOYEE, then it's not
your job to produce him. You didn't make him not show up.

> (Without revealing my position, this is the major point of contention

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> ARE HANGING AROUND WITH THE WRONG PEOPLE.

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Jim is right here. Courtesy gets you far. But it cannot interfere with your
representation of the client. That's a narrow path sometimes.

Justin Meyer, New York

I appreciate we all have different styles. But Jim isn't wrong, necessarily. There are times when I will talk to opposing counsel and we both lay our cards out there. This is especially true if it is someone I know and have worked with for a while. Maybe we find out that we are only a bit apart and we will both push our clients to close the gap. Maybe we find out that we have completely different views of the case and we are just going to try it. But there are times I have done it, on both sides of this. It may not be your style, but it doesn't mean it is wrong or not effective.

Jonathan G. Stein

The plaintiff's lawyer was trying to take a deposition--it was his responsibility to subpoena the witness and secure his appearance, and his failure to do so does not reflect on the defense attorney at all.

The mediation issue is a sore point with me--I have never had a voluntary mediation arranged at the suggestion of a defense firm that was anything except a tool for additional discovery, so my expectations are low. With that said, the attorney who was traveling could have asked easily whether the parties were even close in their numbers. I would not travel two hours one way for an exercise without some hope of a resolution and I would want some reassurance that my time was not being wasted.

So, in balance, I think the new attorney who inquired has no reason to feel awkward, maybe only a little manipulated.

T. B. Patterson, Jr. ("Brownie"), South Carolina

I hate inefficiency, so I don't like to have a mediation unless I have some reason to believe that the mediation will move the needle, if not reach a settlement.

I can't recall ever having a mediation in a case where I didn't discuss settlement with the other side first, to see if we were in the same ballpark, or at least neighboring states. If it's clear we're miles apart, I'd suggest we save our time and money and not mediate, unless there was some case-specific reason to do it (it might be court ordered, or the other side might say his client needs to hear reality from a neutral).

I know that I would be seriously pissed (I have been), when I arrive at a mediation to find that the other side's position differs from mine by orders of magnitude, and that they have no room to move.

I've been on both sides, and this applies to both plaintiff and defendant.

By the same token, an insurance company (I represent them) is typically going to have an thoughtfully arrived at settlement position, and authority to go with it. They are unlikely to change much during a mediation. For that reason, if I'm representing an insurer and the plaintiff is looking for 5x or 10x what we think the case is worth, I'll tell them something to the effect that we are never going to get close to what they're looking for. I don't want to spring something like that on the other side at a mediation. Unless the OC is an ass, and then maybe...

But you can't tell who is being unreasonable or unrealistic from the sidelines, without knowing the facts of the particular case

Patrick W. Begos, Connecticut

Intimidation, or attempts at same, is a standard tactic by some. On the other hand, sometimes you catch people on a bad day. I keep a poker face and my basic response is "that's nice, but let's focus on the issues." Some lawyers are notoriously obnoxious by disposition on every case, but others use it for tactical advantage.

Counsel can always subpoena a non-employee witness, and should unless assured of attendance. Even with the best of intentions, life happens and the witness status appears undetermined.

Mediation can be required or voluntary. One should look at comparing positions by asking for a demand pre-session or having a conversation. If the parties are worlds apart, then mediation can be a waste of time. Knowing that ahead of time can change timing on when a mediation occurs.

Local practices vary substantively, and getting a read on behavior is of value. I will not opine that either approach is necessarily bad. In some litigation, keeping the other side spooled up can distract them from the case and be beneficial. It can also be gratifying if the particular lawyer is obnoxious.

Distinguishing the case and any positions on the case from the individual is important on both sides. One tries to stay professional at all times and be courteous at a professional level. Here again, if opposing counsel is taking the low road, and you are calm and professional in response, the juxtaposition before the tribunal can be advantageous.

Win/lose and black/white approaches lead to gamesmanship, and advances the cause for neither party. I would take a broader view of behavior over course of case or several cases to determine appropriate conduct.

Darrell G. Stewart, Texas

My partner had a theory that the defense would not settle until they had fully billed the case. Often it ends up where you settle a case at or near the amount you first demanded for Plaintiff but, again, only after the defense had fully "worked up" the file. All the facts were usually in early on but time had to be spent/wasted before settlement could be agreed to after all.

Elizabeth C.A. Johnson, California

On Sat, May 9, 2015 at 2:44 PM, Russ Carmichael <rcarmichel@aol.com> wrote:

> You should definitely have called on the dep date when the ex-employee wasn't
> answering the phone.

Sorry, but that's just ridiculous. There are a million and one reasons why someone might not answer the phone on a weekday. The guy was an ex-employee: Anon had no obligation to do any of the things he did. He already went above and beyond.

If OC didn't want to travel to the deposition and/or mediation himself, he may have been able to find a per diem to cover for him (depending on where in the country this was).

Lisa Solomon, New York

I agree with Lisa that it's ridiculous to say that Anon should have called opposing counsel just because the guy didn't answer on the morning of. For all Anon knew, the guy was in the car on the way to the deposition, and couldn't pick up the phone.

Not only that, but what good would it have done? Let's say that Anon DID

call opposing counsel and said, "I tried to call him this morning, but he

didn't answer." Was opposing counsel going to call off the deposition

based on that information?

David Nieporent

As far as the mediation goes, you made an offer; they rejected it; for whatever reason. I don't know if you had previously discussed settlement or had talked range of numbers, but even if you didn't I'm not seeing where you are obligated to make a 'pre mediation offer"

Second, as far as the depo goes: I'm assuming that it was noticed by OC; in other words, you didn't set the depo. And you say it was of "ex" employee, non party witness.

Well, holy crud, if he sets the depo it's up to him to issue a subpoena. He an "notice" a party witness but he has to subpoeana a non party; that's pretty much black letter law, at least in Florida. And at least in Florida he'd have to offer witness fee. If he had subpoenaed them and they didn't object/seek protective order and didn't show up, he could have gotten order compelling.

That's his problem, frankly.

Professional courtesy is fine and dandy, but witness is not your client, nor party; he needs to subpoena them.

Ronald Jones, Florida

It's a fact of litigation practice that sometimes witnesses don't show up, regardless of the best efforts of the attorneys involved. In the past, when I got the feeling from witnesses who were friendly to my side but not under my control that they might be the kind that don't show up, I would give opposing counsel

a heads up. But you don't always have any forewarning, which is how your situation reads to me. If your witness had been responsive to your phone calls and letters previously and waited until the last minute to go into deep cover, then you had no reason to alert OC. His failure to issue a subpoena can't be held against you.

We have mandatory mediation here in NC, and low offers from defense counsel are fairly standard depending on the carrier and the nature of the case. If you persuaded him to attend a mediation on your turf when he wasn't inclined on the premise of resolving the case, only to make an offer you knew he wouldn't accept -- then I would say you had acted unethically. But if you made a predictably low offer at a mandatory mediation then I'd say he's being unreasonable, given the circumstances.

As for the travel time, he shouldn't take cases in a venue that far from his home base if he can't afford to spend the time on the road.

It doesn't sound to me like you acted unreasonably. Only you can know whether you did your best to accommodate and be respectful of OC within the boundaries of representing your client.

Martha S. Bradley, North Carolina
