If Incivility Strikes . . .

How Should You Respond With Civility In These Situations?

By the Professionalism, Ethics and Civility Committee of ABOTA

Civility problems can arise in a number of different ways. In an effort to provide some guidance, particularly to young lawyers, the members of the ABOTA Committee on Professionalism, Ethics and Civility have assembled a series of practical suggestions. While there is little question that civility requires maturity and patience, it does not require that you act or feel like a doormat. You can represent your client vigorously, without incivility. The next time you confront one of the following common situations, please consider the following civil options:

How should you respond to the nasty letter or toxic email sent by your opponent?

This is a common problem. Different approaches are available. Of course, one can always simply decline to provide any response where there is no substance which warrants one. Other times, you may feel it is necessary or prefer to respond to keep a strong profile. Suppose, after filing an appeal, your opposition writes a two page rant, calling your appeal frivolous, telling you how s/he will have sanctions imposed against you, among other things.

In response, it is best not to engage a lawyer like this. You are not likely to accomplish anything of substance, and psychologically you cannot win playing their game. If you try, you will only draw a longer, more viperous response. Instead, consider something like a two line response which says: "Thank you for your letter. I look forward to personally seeing you at the appellate hearing."

The same problem also arises, perhaps more frequently, during email exchanges. So-called "toxic emails" are an extension of the same problem. Often they are typed and sent without careful thought, leaving an unfortunate, permanent record.

As but one example, second year associate "A" emails his counterpart at the opposing firm regarding an intensive document production request. "Your client's response is now 20 days overdue and despite early reminders, we seem to have no cooperation from you." In response, Associate "B", who just had three additional projects dropped on his or her desk responds out of frustration, saying: "You'll get the documents when I get around to it! Stop being a pain in my ass!!"

Perhaps Associate B will, like all of us, occasionally regret the fact that s/he hit the send button so quickly. But, within an hour, supervising partners are involved and things can get ugly. Hopefully, the supervisors will reduce, rather than add to the pressures that are building. But, where there is no objective intermediary, full-scale costly discovery wars often break out. No one benefits in the long run.

Particularly when it comes to Blackberry's and rapid email responses, it is all too easy to send off missives that lack the thought and reflection which was easier to employ when letters had to be typed and proof-read. In the case of responsive emails, particularly toxic emails, do not hit the send button unless you are willing to see that email as a printed exhibit in court document. Often it is best to prepare your response, and then let it sit overnight. Then, when you are fully relaxed, you can decide whether to send it out.

What you do if your opponent is "hiding the ball" during discovery?

This tactic is uncivil and unprofessional, yet it has become far too common during discovery. Hiding the ball creates distrust and creates unnecessary expense and delay. It surfaces in the form of direct concealment as well as in failures to disclose during "meet and confer" exchanges which also require good faith. But, perhaps the most common examples involve the use of objections interposed in bad faith in responses to requests for production and endless privilege logs. Ultimately, all such tactics undermine the discovery process and harm the reputation of the lawyer involved.

The California 2007 Guidelines of Civility and Professionalism specifically address and highlight the various aspects of this problem:

As to document demands:

4. In responding to a document demand, an attorney should not intentionally misconstrue a request in such a way as to avoid disclosure or withhold a document on the grounds of privilege.

5. An attorney should not produce disorganized or

unintelligible documents, or produce documents in a way that hides or obscures the existence of particular documents.

6. An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.

As to interrogatories:

2. An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.

3. When an attorney lacks a good faith belief in the merit of an objection, the attorney should not object to an interrogatory. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.

Perhaps the best way to put an end to such tactics is to bring it to the attention of your opponent and encourage mutual candor. This is not a sign of weakness nor do you have to sacrifice your legitimate objections. You can simply agree to the following concept that changes the tone of discovery: If a reasonable request is made for something, I will provide it. Of course, this must be a mutual arrangement.

Where problems arise, it is often beneficial to arrange informal and inexpensive methods of exchanging information. These include informal "sit downs" or even lunch with your opponent. Document inspections can often be made easier by traveling to the source and simply sitting down with your opponent present, while you review their voluminous records, with an understanding that he will mark and copy only what you decide you need. Sometimes if a rapport can be created, it is even possible to jointly meet with witnesses or parties, with lawyers present, to avoid costly depositions, where they are not truly necessary.

The alternative is always available: expensive and time-consuming document exchanges, privilege logs, law and motion hearings and demands for sanctions. If you think your client may potentially benefit from you hiding the ball, consider the following. Sooner or later, the truth will likely come out. It almost always does. If you produced it as required, you can build your case around it. But, if your deception surfaces, both you and your client may face severe consequences, potentially including termination sanctions and disbarment.

How should you respond to an opponent who refuses to grant routine courtesies, like extensions of time or cooperative deposition dates?

Unfortunately, we all find ourselves in this situation from time to time. Acting as if still on the playground, obstreperous counsel employing such tactics are altogether too common. At least two clear alternatives are available to you in response.

One response is to return the discourtesy and escalate the problem. The other is to again take a deep breath and objectively assess your options. In this light, it often becomes easier to see that such inappropriate tactics are usually carried out in the relative obscurity of an office or behind a computer, where letters can be sent out without direct or immediate accountability.

But you can change that and in the process change the tone of your developing relationship. A good way to accomplish this transformation is to invite your opponent out of his or her secure hiding place. Sometimes, with a personal effort, miracles can occur. But, at a bare minimum, respond without anger or annoyance. To try and effect a "miracle", start by responding with a phone call, not a letter or email.

If possible, invite your adversary out to lunch or for "coffee". Many times, once confronted personally, even the most uncivil advocates change their demeanor and soften their approach. Give it a try. You might be pleasantly surprised. Once you have found some common ground, you can address some of the inconveniences you are experiencing and hopefully work them out. The more traditional alternative is to engage in a letter-writing campaign, which often costs your clients more and seldom produces meaningful relief.

How should you respond to the lawyer who is more interested in creating a "meet and confer" paper trail, than resolving disputes?

Sadly, this tactic is often indicative of a journeyman approach, with little concern for efficient or creative resolutions. While it is always a good tactic to respond with civility and attempt to create rapport rather than animosity, opponents who proceed in this fashion often leave little room for compromise.

In those cases where your efforts at cooperation and development of a personal rapport have not prompted a cooperative response, it is sometimes necessary to simply follow the rules of court and file motions to obtain the relief you seek. But, even if matters devolve to that point, be ever mindful of the importance of civility in your responsive letters, emails and courtroom behavior.

The court evaluating the issues will often be able to tell who has been trying to resolve the dispute…and who has fomented it. Particularly where the issues will ultimately find their way into court,

keep your focus on civility and professionalism. It will serve you well in this context, as in all others.

What should you do if your opponent persists in coaching his deposition witness?

To preserve your record, the first thing you must do is to make an appropriate objection. But, do so in a low key fashion. If the problem persists, you may wish to consider addressing the issue off the record with your opponent. This allows you to speak your mind without escalating the problem and gives your opponent an opportunity to save face without hurting his or her pride. Sometimes it is better to speak to your opponent in the hallway away from his client or his associate counsel. If this does not work, then you must continue to put your concerns on the record.

Under appropriate circumstances, you can stop the deposition, according to your local discovery rules, and seek assistance from the court. If you know in advance that you will be dealing with someone who routinely obstructs your efforts to obtain unfiltered testimony, you may wish to videotape the deposition. Such conduct is easier to capture on video tape and may avoid the problem in the first instance.

Courts can fashion protective orders or any number of sanctions to punish and prevent such conduct. For example, in California, Code of Civil Procedure, section 2023 identifies a number of misuses of the discovery process that are punishable by sanctions. These sanctions include monetary sanctions, issue sanctions, evidence sanctions, terminating sanctions and contempt sanctions.

Some states like California have promulgated civility guidelines. In July 2007 the California State Bar published Guidelines for Civility and Professionalism. Section 9, paragraph a(6) of these guidelines specifically addresses the issue: "Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers."

Paragraph a(8) of the same section also provides: "An attorney should refrain from self-serving speeches and speaking objections." While inappropriate, this kind of behavior is not uncommon. Usually, polite demonstration of your unwillingness to permit such interference with the testimony of the witness will suffice.

What do you do if an attorney makes rude and degrading comments about you or your client?

Initially, it helps to take a deep breath. Remain calm and attempt to follow the same "meet and confer" approach discussed above. If that does not work, be sure to make a good record of the conduct. Section 9 of the California civility guidelines provides: "An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer."

Section 9 a(4) of the guidelines provides: "An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal." The reference to "personal" evokes Sections 4 and 8 of the guidelines dealing with ad hominem or personal attacks. Disparaging another's intelligence, integrity, ethics, morals or behavior are personal or character attacks which are simply inappropriate. If your opponent persists in making such personal attacks you may have no other option but to make a good record and let the court deal with it. But, civility does not require that you act like a door mat. You should not tolerate such abusive behavior.

What do you do if oppressive deposition notices are served without any consultation or cooperation?

Trial lawyers have busy schedules. It is difficult to schedule depositions convenient for everyone's calendar. The best way to approach this scheduling problem is to pick some dates for a deposition and then call opposing counsel to cooperatively pick dates (or indicate the same by cover letter). Ideally, you should try to work it out before a notice is served. This approach might make it easier for your opponent, who in turn might produce witnesses without the necessity of expensive subpoenas.

There are many ways that scheduling issues can arise, including situations where someone notices a future deposition and then opposing counsel retaliates by noticing an even earlier, related deposition. Section a(1) of the California guidelines addresses this issue, stating: "When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement."

Deposition scheduling should not be a game. All parties should attempt to cooperate to work out a sane schedule. If your opposition refuses to do so, make your record, but continue to act with civility, regardless of how they respond. Your conduct reflects upon you. As difficult as it may seem, incivility from your opponent cannot justify and should not prompt you into making uncivil responses.

What if the witness stretches out his answers to make it impossible to finish a deposition?

This tactic can backfire and often will benefit the attorney taking the deposition because he can keep the deposition open,

review the transcript and come back another day to ask more questions. However, it is sometimes used by opposing counsel for delay and oppression. A classic example of that was documented in the recent case *GMAC v. HTFC Corp*., 248 F.R.D. 182 (E.D. Pa. 2008). This was a commercial dispute and plaintiff GMAC was deposing the CEO of the defendant. After a very long and windy response, the following exchange occurred between the plaintiff's lawyer and the witness:

> "Q: Are you done?
>
> A: No, I'm not. I'm going to keep going. I'll have you flying in and out of New York City every single month and this will go on for years. And, by the way, along the way GMAC will be bankrupt along the way and I will laugh at you."

The trial court punished the witness with substantial monetary sanctions for exploiting the deposition process. This is yet another misuse and abuse of the discovery system. The lawyer who permitted the witness to act in this fashion was also sanctioned. Common sense and the "golden rule" are good guidelines to follow.

What if your opponent persists in questioning your witness from documents without supplying you and other counsel with copies?

This seems very straightforward but it happens often. Surprisingly, counsel for deponents often let their opponents get away with it. Section 9, paragraph a(5) of the California guidelines addresses the issue: "An attorney questioning a deponent should provide other counsel present with a copy of any documents shown to the deponent before or contemporaneously with showing the document to the deponent."

Of course, if many depositions have been taken and all the attorneys have notebooks of the documents being used, extra copies are unnecessary. But, keep in mind that so long as the deponent is not being shown a document, there is no requirement that the deposing attorney provide any copies of source material s/he may be using to formulate questions.

What do you do when there is an objection, instruction not to answer, and a dispute about whether to call the court to get an immediate ruling?

Interposing an objection and instructing a witness not to answer can be obstructionist and unprofessional if done without substantial justification. Experienced counsel will only do so where the testimony sought is privileged, immune as work product, or would significantly invade some real privacy interest of the witness. Most other objections are inappropriate if interposed at a normal discovery deposition.

Similarly, repeated threats to call the court can be contentious, unproductive and lack civility as well. Careful counsel will try to avoid a telephone call to the court in this situation, not wanting to appear too contentious or to provoke the ire of judges who seem to hate dealing even with good faith discovery disputes, let alone ones that must be ruled upon immediately. In short, calling the court can be a high stakes gamble for both sides. A few simple rules will help avoid the appearance of incivility.

First, make certain that you have a real, finely-honed dispute. Counsel asking the objectionable question should simply state why the question is appropriate, while the objecting party should state, not simply why the objection was made for the record, but why counsel cannot allow the testimony to be elicited. Counsel should explore whether some protective order could be fashioned, that portion of the deposition sealed, or otherwise permit the testimony without waiving privileges and immunities.

Civility requires that counsel try to work our some arrangement that protects the legitimate interests of both sides, but allows the deposition to go forward. Even where a deal is not possible, consideration should be given to making a clear record of the positions of the parties and preserving the dispute for a later time when it can be handled by routine motion to compel. Calling the court should be limited to situations where such calls have been invited or time constraints make it absolutely necessary.

Finally, where such problems seem to recur, consideration should be given to asking the court to appoint a special master under Federal Rules of Civil Procedure, Rule 53, or corresponding state authority, to resolve any future disputes.

When should you consider seeking appointment of a special discovery master or referee?

It is appropriate to request the appointment of a special discovery master or referee when your opponent has shown an unreasonable pattern of incivility and unprofessionalism, which may or may not include rules violations or a violation of legal ethics.

It is now obvious that much of the trial battle has shifted from the courtroom to the discovery practice. If the rules of civil procedure are not consistently enforced on a timely basis, there are those within the profession who will violate these rules in an attempt to gain an advantage. A special discovery master can perform a useful function because he or she is able to either settle these disputes on a timely basis, enter an appropriate order, or make appropriate recommendations to the presiding judge.

This speeds discovery, produces

an accurate result, and encourages all parties to abide by the rules. In some jurisdictions, special masters are paid by the parties and the master is allowed to recommend a reapportionment of his or her fees once the master's function is completed. This is not a sanction. It is simply a recognition by the master that one or more parties is more at fault for the problem than others. In many cases, the parties are equally at fault, but in some cases reapportionment is appropriate.

If the parties know that once a knowledgeable master is appointed, fees can be reapportioned, it generally limits attempts to violate the rules. This, in and of itself, saves the parties money. Even if the parties cannot cooperate on a professional and civil basis, it is in their best economic interest to do so, because it is less expensive to pay the master then it is to file motions to compel, argue them and then wait for a decision.

If your opponent does not consent to the appointment of a special discovery master or referee, the court, either under Rule 53 of the Federal Rules, or under an appropriate local rule, or in accordance with the inherent authority of the court to conduct its own business, can appoint a special discovery master or referee, in appropriate circumstances, without the consent of all parties. The court can also order that the master or referee be paid by the parties.

You will need to convince the court that it is in the interests of justice to appoint a special master and that the circumstances of your case warrant it. It may be that both parties believe they are factually and legally correct in their positions and, therefore, a master is likely to vindicate their position.

If one of the issues dividing the parties has to do with privileged documents, or statements, many lawyers file extensive privilege logs because they do not wish to waive any particular privilege. Many lawyers do not wish the court to examine their privileged documents because they are damaging to their case. A special master can examine those documents, in camera, without disclosing what is in those documents to the court itself. This can be a substantial benefit to the party filing the privilege log.

One word of caution. Many judges are not familiar with the benefits of special masters. Since they have not used special masters, they are not familiar with how to draft the appointment order. This is not a simple procedure. Under the Federal Rules, there are special requirements that must be met, and there are provisions that should be included that are not specifically set forth in the rules. Therefore, you will need to research this issue before requesting the appointment of a special discovery master, and it is recommended that you draft a detailed model appointment order so the judge can easily and conveniently appoint the master.

Then the only issue is obtaining a qualified special master. You and your opponent may agree on this, but if you do not, you may submit a list of recommendations to the court which can be helpful.

Hopefully, use of some of the more personal avenues available to you will resolve most of your incivility problems. We commend them to you. But, if you simply cannot work through them any other way, a special master or referee can make a big difference.