PRESIDENT'S COLUMN

Let's Put the "Civil" Back in Civil Litigation

by Kenneth M. Sigelman

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A couple of months after I first started practicing law, my then-boss dispatched me to take the deposition of a defendant doctor in a medical malpractice case. The case involved a delay in diagnosis of breast cancer due to a misread mammogram. My client was a 60-year-old woman whose breast cancer was at a very advanced stage when finally diagnosed. The deposition was set at the defense lawyer's office. Opposing counsel was, at that time, a preeminent Los Angeles medical malpractice defense attorney who later gained national prominence.

The deposition began unremarkably as I examined the doctor regarding basic background information. As we moved into substantive areas, the defense lawyer began objecting, usually when there was no colorable legal basis for doing so, and was coaching his client through speaking objections in a manner worthy of Vince Lombardi. My protests to the opposing lawyer's conduct were alternately sneered at and ignored. I then moved to a particularly crucial area of questioning. The defense lawyer refused to let his client answer any of my questions, not withstanding the fact that they indisputably did not seek privileged information and were not asked in a harassing or badgering manner. I refused to leave the subject area and continued to re-word the questions slightly differently each time. The defense attorney then added a snide insult to each of his instructions. Not to be outdone, I responded in kind. The last bit of colloquy before the eruption went as follows:

Defense Lawyer: "Last time I heard, you hadn't been licensed long enough to be a Muni Court judge."

Me: "Evidently, your hearing is every bit as defective as your legal analytical ability."

At that point, the defense lawyer began screaming at me and threatened to call the police: "Get out! Get out of my office or I'll call the police and have you thrown out!" He then stormed out of his office along with his client. I remained long enough to complete my record with the court reporter and then left.

When I returned to my office and related what had happened, I was hailed by my then-boss as a conquering hero. When the transcript arrived a few days later, he proudly showed it to the other lawyers in the office and lauded my handling of the situation as exemplary.

At the second session of the doctor's deposition, it was clear that his attitude toward the case had become hardened. He never consented to settle the case and, accordingly, no offer was ever made. The case proceeded to trial, resulting in a defense verdict.

Several years later, shortly after starting my own practice, I was defending the deposition of another client, a young woman with breast cancer whose condition was terminal because of a negligent failure by her primary care doctor to refer her for evaluation of a breast mass. Although my client lived at that time in California, the case was venued in Washington, D.C., where the events in question had occurred. The defense lawyer was a senior partner at a high powered D.C./Maryland/Northern Virginia malpractice defense firm. His manner while questioning my client was abrasive, even, at times, insulting. As a result, he and I had more than one heated exchange during the deposition.

At the end of the day, the defense lawyer and I discussed the treating physician's deposition that was scheduled for the following day. He asked, in his now familiar abrasive tone, for directions to the deposition which was about 25 miles away (remember, this was some years before anyone ever heard of MapQuest), and wanted to know what the approximate taxi cab fair would be. For reasons that to this day are not entirely clear to me, I immediately replied, "Don't worry about it. I'll pick you up at your hotel and drive you there, since it's pretty much on my way." While traveling together to the deposition the following morning, we talked about various subjects, none of which were law-related. The conversation was free, easy, and punctuated by generous amounts of laughter. The treating physician's deposition proceeded without incident. When I dropped off the defense attorney at the airport, he thanked me for my courtesy, and said he looked forward to seeing me in Washington for his client's deposition in a few weeks.

At the defendant's deposition, his lawyer conducted himself aggressively but professionally and, especially considering that the adjuster was also present, with remarkably little posturing. The defendant was a train wreck of a witness. Shortly after returning to my hotel room, I received a telephone call from the defense lawyer. He started by telling me that he now knew what his defense was going to be. When I inquired, "What might that be?", he responded, "Contributory negligence -- your client was negligent for ever going to see my client to begin with. That had to be one of the worst depositions ever given by one of my clients." After we both stopped laughing, he told me that the adjuster wanted to know my settlement demand. Two weeks later, the case settled very favorably (thankfully, Washington D.C. had no MICRA-type caps).

Obviously, the different outcomes of the two cases cannot fairly be attributed in any significant part to my relationships with the defense lawyers involved; in fact, my relationship with the opposing lawyer in the first case was amicable after the initial deposition. The respective facts were materially different. However, each case provided a valuable lesson during my formative years as a lawyer. From the first case, I learned that "winning" an exchange of mutual gratuitous nastiness does not in any way enhance the prospects of winning the case. Pettiness and hostility displayed to the opposing party, or, heaven forbid, in front of your own client, raises the other side's emotional temperature, thereby sabotaging prospects for an expeditious, amicable resolution. Such behavior also detracts from the particular lawyer's professional stature, and also reinforces negative stereotypical views that non-lawyers may have about attorneys and/or the legal system. In time, I came to realize that the way to handle an obnoxious, obstreperous lawyer on the other side was not to trade insults until he "lost it" completely.

The second case taught me that, even when the other lawyer displays initial inappropriate hostility, a little bit of common courtesy (offering to drive him to the deposition on the following day) can go a long way toward modifying unacceptable behavior. Even if the defense lawyer had not responded as positively as he did, I would have felt good about the fact that I had taken the high road and remained calm and polite throughout.

As a recovering "bad boy" litigator, I am heartened by the San Diego County Bar Association's current Professionalism and Civility Campaign. Heather Rosing, this year's County Bar President, has launched this very worthwhile initiative in order to focus our awareness on the importance of establishing and maintaining professional and cordial relationships with opposing attorneys and with the bench. The campaign is intended to remind us that by behaving nicely toward our counterparts we help to maintain a positive image of the legal profession throughout the San Diego community. From a law practice perspective, smooth working relationships with opposing attorneys are cost effective and enhance the quality of our professional lives.

The co-chairs of the County Bar Campaign Committee, Ed Chapin and Patrick Hosey, are both CASD members as well as former defense lawyers. Jon Williams, a member of the CASD Board of Directors, also serves on the committee. The committee will, among other tasks, update the San Diego County Bar Association Code of Conduct that was drafted some 20 years ago. The current County Bar Civil Litigation Code of Conduct is well worth reading. Although much, if not all of it is common sense, we have all seen instances when lawyers (including ourselves) have fallen well short of the Code's aspirational goals.

Civility is not a partisan issue. Neither the plaintiffs' bar nor the defense bar has a monopoly on civility or on lack of civility. All of us owe it to our clients and to ourselves to at all times behave ethically, professionally and cordially to opposing counsel and the bench, all the while representing our clients as zealously as possible.

Good manners and good advocacy go hand in hand; the former should be considered an important element of the latter. The law is a learned and honorable profession and we must all strive every day to be worthy of the privilege of practicing it. CASD applauds and wholly supports the County Bar's Professionalism and Civility campaign and encourages all of our members to do the same.