

Civility: Ten Litigators to watch out for^ψ **Wendy Matheson, Torys LLP**

What is it about litigation, and litigators, that makes civility a constant challenge? I expect that a panel of expert psychiatrists could muse endlessly on this question. Instead, I have referred to my own experience and that of some of my colleagues, and suggest ten types of uncivil litigators you may encounter in your practice. These categories are not mutually exclusive – you may see litigators with one, some or several of these characteristics. You may see some of these characteristics in yourself.

Are you dealing with a “fight fire with more fire” litigator, or a showman, or a fair-weather professional? Whoever, it may be easier to address the problem if you recognize the characteristics.

1. The “Rambo” Litigator

These lawyers are the “I am litigator. I go to war.” litigators. The concept of professionalism does not come into their practice. They use rudeness as a weapon, and show disrespect in court as if it were a sign of strength against adversity.

A variation on the “Rambo” litigator is the litigator who has only read one line of the Rules of Professional Conduct – the part that says you should be a zealous advocate for your client,¹ and has thrown the rest of the Rules of Professional Conduct in the garbage.

These litigators do not understand that you can be a zealous, tough and aggressive advocate without being rude or demeaning, or engaging in sharp practice. They do not understand that there is nothing to be gained by unrestrained aggression in our practice and before our courts.

2. “Fighting Fire with More Fire” Litigators

These litigators may normally be civil, but things seem to escalate out of control:

- one counsel does something mildly intemperate;
- the opposing counsel reciprocates, turning it up a notch;
- the first lawyer reciprocates in turn;
- and so on, and so on...

^ψ Based on a speech given at the OBA Central East Advocacy Conference on Civility.

¹ LSUC Rules of Professional Conduct, Rule 4.01(1) Commentary: The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will advance the client’s case... The commentary goes on to say that the lawyer must discharge this duty by fair and honourable means.

- and before you know it, you have an all out war where each side thinks the other is the instigator.

For some people, all it takes is one “govern yourself accordingly,”² and the letter war is on.

If you are in a “letter war” or even worse an “e-mail war” with opposing counsel, think about whether the above pattern is the cause, and break the pattern. Choose not to escalate. There is a good chance the other side will not escalate either.

3. The Showman³

These lawyers behave civilly when dealing with you on the telephone or in person, and then write “zinger” letters that bear little or no relationship to your discussions, copying their clients, presumably to impress them. One of my colleagues got a letter from opposing counsel that read: “Your arrogant and block-headed attempt to bludgeon opposing counsel into submission with Rule 57.07...provided my client with a nice bit of entertainment”.

This can also occur in court when their client is present in court. These lawyers may drive you to put everything in writing. But beware of the risk of becoming a “fighting fire with more fire” litigator.

4. The Novice

These lawyers are young and inexperienced litigators who, in the absence of training and mentoring, flail about in their practice and in court not yet knowing how to behave. They therefore occasionally behave badly. It is hoped they will be given guidance, rather than retribution, from other litigators with more experience.⁴

5. The Mimic

A variation on the novice is the inexperienced litigator who has learned bad habits by bad example, in court, on TV, or in their dealings with other lawyers. These litigators assume that if it is OK for someone else to behave a certain way, it is an acceptable way to behave, not knowing any differently. Again, guidance will often produce civility.

6. The Stressed Out Litigator

These litigators are normally civil. But, with the pressure of practice, demanding clients, and the fast pace of life, anyone can get stressed out from time to time. This can lead to a short temper. Remember, everyone can have a bad day – this should not provide a reason to start World War III.

² a phrase that serves no productive purpose, but is guaranteed to irritate most recipients

³ or, show woman

⁴ An excellent source of guidance, in addition to the LSUC Rules of Professional Conduct, is The Advocates’ Society publication “Principles of Civility for Advocates”.

If the bad day was your opponent's, don't over-react. If the bad day was yours, you can fix it. One of my colleagues, uncharacteristically, hung up on opposing counsel. The next day, she gave him a rose.

7. The Pawn

Some litigators act as they do on the direction of their clients, not realizing that you do not "take instructions" on professionalism.

8. The Junior (or "the Devil made me do it" Litigator)

These young litigators act as they do because their senior tells them to. When you speak to them about the issue, they will often tell you that they would rather not have done things that way, but they were told to by the senior lawyer on the file. I know of one young lawyer who quit litigation altogether out of dismay for the approach advocated by the senior litigator at his firm.

This is a particularly problematic category in that the senior lawyer should be providing a good example, not directing the junior to act uncivilly. It is also one example of a situation where the senior lawyers should discuss the issue directly, and hopefully address the real problem

9. The Bully

These litigators, either as a result of personality or ego, treat people miserably until someone makes them stop. Bullies freely accuse other lawyers of unprofessional conduct. One of my colleagues, whilst *still on the phone* with opposing counsel, got a fax from opposing counsel accusing him of inappropriate conduct. The advent of e-mail and text-messaging has made it much too easy to engage in this conduct.

Bullies are particularly hard on junior lawyers, and may be perfectly civil with senior lawyers on the same matter. Again, in this case it can be helpful for the senior lawyers to speak about the issue directly. If your junior (or clerk, or staff member) has been subjected to abuse, you should, at the very least, register your dismay with opposing counsel and ask that the conduct not be repeated.

10. The "Fair Weather" Professional

These litigators behave civilly right up until the point when their case starts to go badly. At that point, they begin to lash out at everyone, including counsel and even the court, making often extreme and totally unwarranted allegations of misconduct. These storms can be weathered. Ultimately, like all uncivil conduct, this type of behaviour reflects badly on that litigator's case, not yours.

In sum, there is no perfect solution to the problem of the difficult opponent, but the following may help:

- decide which of these types of litigators you are dealing with;
- be firm but never escalate;
- talk the problem over with other counsel: everyone has had to deal with these problems; and,
- remember that life is too short to let yours be ruined by an uncivil opponent.