

By Wendy Matheson

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. Nevertheless, I can turn to my own experience and that of some of my colleagues to identify 10 types of uncivil litigators that you may encounter in your practice. These categories are not mutually exclusive; you may come across litigators with one or more of these characteristics. You may even recognize some of these characteristics in yourself.

Are you dealing with a showoff or a fair-weather practitioner or a litigator who fights fire with more fire? Whoever it is, you may find it easier to deal with the person if you recognize the characteristics of the following types of litigators.

1. The Rambo Litigators

The Rambo type is characterized by “I am litigator. I go to war.” The concept of professionalism is foreign to these litigators. They use rudeness as a weapon, and show disrespect in court as if it were a sign of strength.

A variation on the Rambo litigator is the person who has read only one line of the *Rules of Professional Conduct* – the part that says you should be a zealous advocate for your client¹ – and has thrown the rest of the Rules 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 nothing can be gained by unrestrained aggression in our practice and before our courts.

2. The “Fighting Fire with More Fire” Litigators

Litigators who fight fire with more fire may usually be civil, but allow things 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...
- and before you know it, you have an all-out war in which 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.

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.

If you are engaging in a letter war or, even worse, an email 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 Showoffs

Showoffs 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. 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 Novices

Novices 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.³

5. The Mimics

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 – not knowing any different – assume that if someone else behaves in a certain way, that is an acceptable way to behave. Again, guidance will often produce civility.

6. The Stressed-out Litigators

Most 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, anyone can have a bad day, but this should not provide a reason to start World War III.

If the bad day was your opponent’s, don’t overreact. 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 Pawns

Some litigators act as they do on their clients’ directions, not realizing that you do not take instructions on professionalism.

8. The Junior (or “the Devil made me do it”) Litigators

Some junior 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 because senior lawyers should be providing a good example, not directing juniors to act uncivilly. It is also one example of a situation in which senior lawyers should discuss the issue directly and focus on the real problem.

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

³ An excellent source of guidance, in addition to the LSUC *Rules of Professional Conduct*, is The Advocates’ Society publication *Principles of Civility for Advocates*.

9. The Bullies

Bullying 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, while *still on the phone* with opposing counsel, got a fax from this counsel accusing him of inappropriate conduct. The advent of email 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 Litigators

Fair-weather litigators behave civilly until their cases start to go badly. At that point, they begin to lash out at everyone, including counsel and even the court, often making 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.

What to Do?

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

- Identify which type of litigator you are dealing with.
- Be firm, but never escalate the situation.
- Discuss the problem with other counsel; everyone has had to deal with these problems.
- Remember that life is too short to let yours be ruined by an uncivil opponent. **T**