

Legal Battles

Rude behavior and personal attacks are not a necessary part of the litigation.

A number of years ago a seasoned litigator told this wet-behind-the-ears attorney that "no trial lawyer is worth his salt until he is on at least his second or third marriage." The puzzled look on my face led him to clarify: "Not cynical, deceptive or mean enough."

I did not need long to understand fully that he was talking about all the posturing, manipulation, stonewalling, and piling on of needlessly broad and burdensome discovery and about the rude behavior and personal attacks that so many lawyers believe are a necessary part of the litigation process. For example, litigators often express glee about serving motions or discovery late on a Friday afternoon of a three day weekend or, worse, immediately before or during opposing counsel's vacation (if she or he is foolish enough to reveal it).

Some trial lawyers deliberately misconstrue statements from friendly conversations with opposing counsel and submit declarations based on those conversations to support a position before the court - using every means, no matter how unsavory, to gain a perceived tactical advantage.

I once witnessed two experienced attorneys in a discovery battle before a court-appointed referee engage in personal attacks that reached the point of bulging veins and fighting words. It was so distressing that I expressed concern over their health and physical well-being to the two combatants. The referee concurred when he told me in front of them that they were going to take this battle to their graves. Neither of us was shocked to learn that one of them suffered a lethal heart attack only months later.

As a mediator, I have seen lawyers invite each other outside to settle a legal battle with fisticuffs, refuse to allow an opponent to finish a sentence and resort to name calling and even death threats.

Much of the time this vehemence comes from the client's own animus toward an opponent. Some clients wish not merely to prevail; they want their lawyer to humiliate and destroy the other side. Some lawyers willingly take on the role of mercenary. Litigation is often compared to a war in which the mission is to annihilate the opposition, often at any cost.

Truth is, this sometimes works by wearing the opposition down financially or emotionally. More often than not, however, it only escalates and exacerbates the dispute. Trial lawyers are generally aggressive and competitive by nature. The old sayings "an eye for an eye" and "what goes around comes around" were tailor-made for litigators. Not surprisingly, litigators on the receiving end of inappropriate behavior or attacks respond in kind, leading to a vicious circle of counterattacks. And the war rages on at an incredible expense.

Sports agent and lawyer Leigh Steinberg wrote in his book "Winning With Integrity" that what people who engage in such a battle "fail to understand is that war damages and destroys. The very act of war can turn the warrior into a monster. It can exaggerate and exacerbate those features of people's personalities that are most dysfunctional: animosity, hyper-aggressiveness, the need to humiliate and dominate, dishonesty and manipulation."

These kinds of lawyers take on subhuman personas and engage in conduct that they would not tolerate from family, friends or even strangers. Steinberg wrote, "Too many people separate the business of doing business from the business of being human. They adopt situational ethics, playing the role of unselfish, caring parent and congenial friend away from work while feeling the law of the jungle prevails in the workplace."

There is a better way, another very different approach that I learned early in my legal career. It was a lesson taught by the senior partner of my firm, Bill Levin, a mentor who had a much different view on how attorneys should treat one another.

I had prepared a 10-page position letter on a newly filed case setting forth the facts and arguments in what I believed was an entirely persuasive manner. When he asked me what I was working on, I was quite proud to show him a draft of my masterpiece. It was a document I believed would devastate the other side's position.

Bill's response was to point out that opposing counsel would certainly hate me for sending a long position letter at the beginning of the case. "They won't read it," he politely admonished. "Or worse, they'll respond in kind."

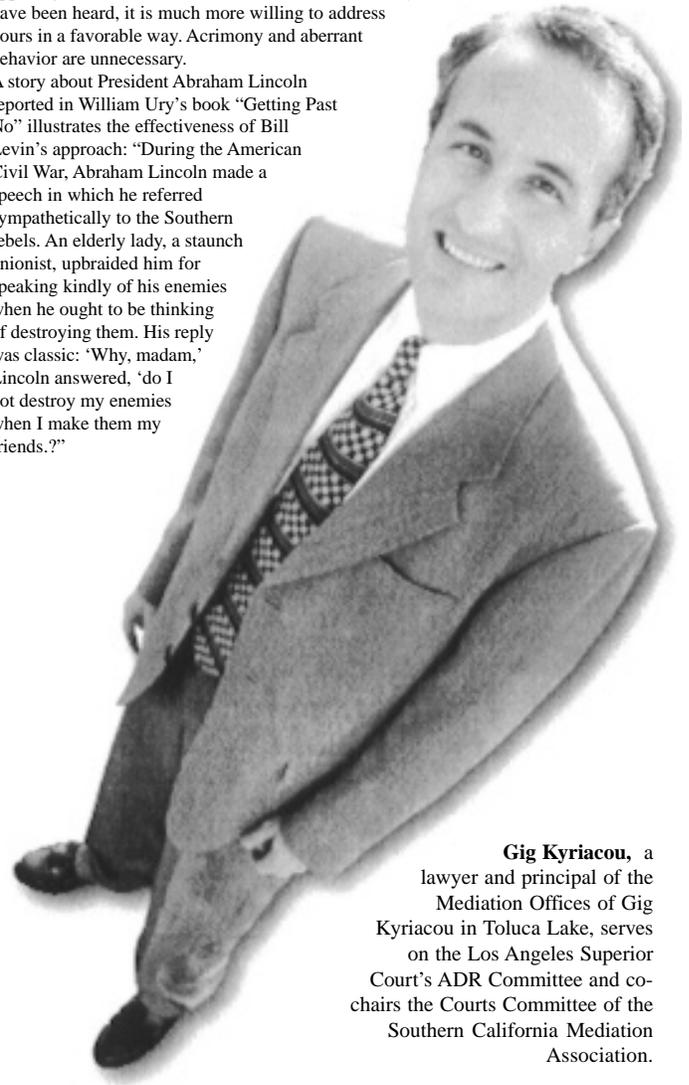
He explained that anything I had to say could be said in two to three pages. I didn't believe him. I had spent a great deal of time drafting and editing the letter. I thought that I had done the best I could to set out the complex factual and legal arguments in a concise manner.

He took a copy of the letter and returned fewer than two hours later with a two-page draft that said everything that needed to be said. "However," he said, "I intentionally left out one paragraph. Figure it out."

After several failed attempts and humbled by the earlier experience, I gave up. "Let the other side know that you have only heard one side of the story and you are willing to listen to their client's side," he advised. "Invite them to discuss the case over a cup of coffee or lunch."

That approach has worked for me ever since. It successfully resolved that first case, hundreds more as an attorney and even more as a mediator. If the opposing side believes that its issues and concerns truly have been heard, it is much more willing to address yours in a favorable way. Acrimony and aberrant behavior are unnecessary.

A story about President Abraham Lincoln reported in William Ury's book "Getting Past No" illustrates the effectiveness of Bill Levin's approach: "During the American Civil War, Abraham Lincoln made a speech in which he referred sympathetically to the Southern rebels. An elderly lady, a staunch unionist, upbraided him for speaking kindly of his enemies when he ought to be thinking of destroying them. His reply was classic: 'Why, madam,' Lincoln answered, 'do I not destroy my enemies when I make them my friends.?'"



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