

A. Written Incivility and Motion Practice

An employee for a railroad sues her employer alleging that she was injured due to the railroad's negligence. You are defense counsel.

After the conclusion of discovery, you move for summary judgment. Plaintiff's counsel realizes that she may lose the motion and that she needs more time to do additional discovery. In her responsive brief, she writes, "Defense counsel has knowingly attempted to distort the facts on what the plaintiff knew or should have known about her medical condition." Plaintiff's counsel goes on to state that you are a "complete imbecile" and that you have "repeatedly obstructed the discovery process in an attempt to manufacture evidence in support of the railroad's motion for summary judgment." There are no specific examples provided by plaintiff's counsel, and the assertions are completely unfounded.

You, as defense counsel, are in the process of preparing the reply brief and are considering how best to respond to these personal attacks and inaccuracies.

1. Do plaintiff's tactics sometimes work with judges? What can judges practically do to discourage these tactics?
2. Should you address these criticisms in your reply brief? At oral argument?
3. Should you accuse plaintiff's counsel of professional misconduct?
4. Should you file a motion to strike the offending language?
5. What if the allegations were not against you personally but were against the corporate defendant (e.g., "the railroad has consciously hidden and destroyed evidence")? Would your answers be any different?
6. Can you bill your client for the time you spend responding to these personal attacks? Under what circumstances?

B. Inappropriate Comments, Body Language and Rude Behavior

This is a hotly contested civil matter. At a hearing on a motion, before the judge enters the courtroom, opposing counsel tells you it looks like you have put on weight and look older, and makes similar comments about your client, and jokingly threatens to get the scheduling clerk fired because the case was placed near the bottom of the morning calendar. The bailiff tells the judge about this exchange before she takes the bench. During oral argument, counsel says you are acting like a first year law student.

The case does not settle and goes to trial. During your opening statement, witness testimony and your closing argument, counsel rolls her eyes, sighs loudly, smirks and talks over you. Your client begins to act in kind. During a morning break, counsel tells you that you are incompetent.

1. Should the court deal with the remarks directed at the scheduling clerk? How should the court address the derogatory statements counsel made during the hearing on the motion? What can you do to prompt the judge to respond?
2. What action, if any, do you believe judges in your district would take? If insufficient in your view, what can you do to encourage more?
3. How have you addressed similar situations in the past? How have you wished you had addressed them?
4. What should you do about your client's "in kind" reactions?

C. The Difficult Client - I

Your partner has been retained by the president of a corporation (your firm's second largest client) to commence a trademark infringement action against a strong competitor. The client has instructed you to oppose extensions on discovery or continuances of any variety. The client goes on to indicate that he wants everything in the lawsuit scheduled as inconveniently and expensively for the other side as possible.

Your partner solicits your advice. Should your partner:

1. Promise to do exactly what the president of the company has asked because he has an obligation to respect the client's wishes?
2. Tell his valued client that he needs to get another lawyer (thus costing the firm more than \$400,000 annually)?
3. Explain to his client that scheduling is within the discretion of the lawyer so long as it does not prejudice the client?
4. Attempt to explain that such an attitude and conduct is unacceptable and inconsistent with his professional obligations both to opposing counsel and to the court?

Are there any additional ways that a lawyer requested to take this approach should respond?

C. The Difficult Client - II

Acme Industries has been sued by Mom & Pop Company for breach of contract. Acme's new general counsel employs your firm to defend the case with the following instructions:

"We want this lawsuit defended very aggressively, at any costs. In particular, we want you to prepare extensive written discovery that seeks as much information as possible. This will force them to devote enormous time to locating records and documents. We also want you to depose of as many people as possible. However, all discovery requests must be defensible under Rule 26. Mom and Pop Company have limited financial resources. Therefore, an aggressive discovery strategy may encourage them to throw in the towel and accept a low settlement offer."

In response, should you:

1. Welcome the opportunity and follow the client's instructions completely?
2. Give Acme a vague assurance that your firm will defend the case aggressively and try to do as much as you can get away with in giving the client what it wants?
3. Try to persuade the client that a less onerous approach to discovery could be more successful?
4. Advise Acme that as counsel of record, the firm will have to use its own judgment on use of discovery but that the client's concerns will be weighed carefully in making the judgment?
5. Take only that discovery which the firm believes is warranted on the merits but erring on the side of more rather than less when the issue is close, in deference to the client's wishes?
6. Proceed with discovery without regard to the client's instructions, telling the client that anything more would be improper?
7. Advise Acme that you do not practice law that way and Acme should take a hike?

D. Discovery - I

Defense counsel deposes your plaintiff in an employment sexual discrimination case involving alleged emotional distress damages. Questions are posed relating to plaintiff's past sexual abuse history that resulted in substantial psychological counseling. These questions visibly distress plaintiff. You are worried she will break down and not want to proceed with her lawsuit.

You, as plaintiff's counsel object to the line of questioning and instruct your client not to answer on grounds it constitutes harassing, oppressive questioning and is irrelevant. Defendant's attorney insists on responses. The questions are at least arguable within the scope of discovery. However, you maintain your instructions not to answer. No answers are given.

Prior to trial, in advance of trial, the court issues an order stating that admissibility of evidence concerning plaintiff's prior sexual abuse history is under advisement and, further, that no mention shall be made of said history until the court rules. Notwithstanding, in his opening statement, defendant's counsel suggestively alludes to plaintiff's "sad, yet scandalous abuse" history in his opening.

1. At the deposition, was your instruction to the client not to answer the questions on her past sexual abuse the right thing to do?
2. During the opening statement, when defense counsel refers to the past sexual abuse, what are your options?
3. How should the judge respond?
4. What type of remedy is appropriate?
5. Aside from possible curative instructions, how would you want the judge to address defense counsel's behavior?

D. Discovery - II

In May 1991, Plaintiff suffered extensive injuries in a motorcycle/truck collision. At issue in the resulting litigation, *inter alia*, was the speed of motorcycle upon impact. In July 1991, a deputy from the investigating sheriff's department returned the motorcycle to Plaintiff but its handlebar assembly, including the speedometer and tachometer, were missing. Later, (July, 1992), the sheriff's department told Plaintiff's representative that the handlebar assembly had been destroyed. In reality, under the misimpression that he was a representative of Plaintiff or Plaintiff's insurance company, a sheriff's deputy had released the assembly to an independent claims adjuster employed by Defendant's insurance company.

In May 1994, the claim was placed in suit. In discovery, Plaintiff requested, *inter alia*, photographs and/or physical evidence. Defense counsel objected to production of physical evidence, did provide photographs of the handlebar assembly, but despite the fact that counsel had received from the insurance company a memorandum from the independent claims adjuster indicating that he had the handlebar assembly, did not disclose that fact. Defense counsel (after February 1995) later claimed that the memo was part of a large volume of documents received and thus not noted.

In his deposition in September 1994, Plaintiff testified that it was his belief that the handlebar assembly had been destroyed. Shortly thereafter, (September 1994) defense counsel received a letter from Defendant's insurance company underscoring that the independent claims adjuster continued to have possession of the handlebar assembly.

Throughout discovery, which contained the standard "up-dating" language, Plaintiff's counsel continued to ask about the existence of the assembly. Four (4) months after September 1994, Plaintiff noticed the deposition of the deputy sheriff who had mistakenly turned the handlebar assembly over to the independent claims adjuster. Approximately five minutes before that deposition was to begin in January, 1995, defense counsel told counsel for Plaintiff of the existence of the handlebar assembly, and one week later supplemented written discovery answers to that effect.

1. What are your options as counsel for Plaintiff?
2. What are the appropriate remedies/sanctions the Court should fashion under this factual scenario?
3. What should have been the duties of the defense counsel as the time it became clear that the handlebar assembly existed?
4. What other issues are raised by this factual scenario?

D. Discovery - III

Assume you represent a business in a large commercial dispute involving thousands of documents. Opposing counsel has been acrimonious and contentious about discovery matters.

You have had all the documents scanned and put into an "imaging" computer data base. You know that a great majority of documents are not relevant, but will be very cumbersome and expensive for opposing counsel to obtain through discovery, organize, and review.

1. Do you offer to greatly reduce the costs of discovery by sharing your data base if opposing counsel agrees to share in the costs?
2. Under what circumstances?
3. What factors should you consider?
4. Is your answer any different if you believe sharing the documents may help opposing counsel become more prepared and hence harm the advantage you have in the case?

Opposing counsel serves broad discovery requests. You know there are many thousands of responsive documents that are not relevant to the dispute, and based upon the volume of responsive documents, opposing counsel may miss the important documents if you produce them all. You also know that the copy costs for all the documents are significant.

1. Should you consider suggesting counsel limit discovery requests?
2. Under what circumstances?
3. Must you solicit the opinion of your client and allow your client to make that decision?

You know that your adversary's witnesses and president are terrified about giving a deposition and disclosing marginally relevant, but embarrassing personal facts. Your client asks you to do it for the purpose of being more aggressive, to intimidate the witnesses and president, and to create the impression this information will be the focus of a public trial, when you know you have no basis for using the information at trial.

1. Should you seek such information in the deposition?
2. What should you tell your client?

You have a deposition with an inexperienced lawyer who allows you to make objections in such a way that in explaining your objection you are able to "coach your client." You have been advised by the senior lawyer of your law firm to attempt to do this.

1. What should you do?
2. Assume instead that you are the young lawyer faced with the senior opposing counsel who makes objections during a deposition in a way that coaches his client. What should you do?

Now assume that you are the judge. Counsel from the deposition call your chambers seeking court intervention based upon opposing counsel's "coaching" during the deposition.

1. What should you do?
2. What are your options if the coaching has proven successful for key issues discussed during the deposition, in other words, the "bell has rung"?

E. Unsolicited Communications to the Judge

Opposing counsel has not responded to your discovery requests or reminder letter. You call him and ask what his intentions are. He asks you why you are suing without a legal basis and asks you to name a single case allowing you to file this kind of lawsuit in the absence of any evidence. You say that you want to keep the conversation focused on the outstanding discovery. He says your refusal to answer proves the point. He hangs up. He then faxes a letter to you confirming that you basically admitted that you had no legal authority for your claim. He also complains about your hostile and unprofessional tone in the conversation. The bottom of the letter indicates that he sent a copy to the presiding judge.

1. Are judges sometimes influenced by letters such as this?
2. What should you do?
3. What should the judge do? Should the judge take any action if you do not respond?

F. The Pro Se Litigant

You have been retained by a local hardware store. A customer has sued claiming to have been injured by a product purchased from the store. After retaining and discharging several attorneys, the plaintiff appears at trial unrepresented. The judge opens with a brief explanation of the process to be followed and asks whether there are documents to be admitted. You each have documents you have not exchanged. The judge has determined to proceed.

1. What duty, if any, do you have to the pro se party prior to the trial? At the trial?
2. What duty does the judge have to the pro se party at the trial?

The pro se party is cross-examining the store's witness. He is having a hard time asking questions, and you as the store's attorney, repeatedly object. The pro se party is upset and frustrated and seems ready to give up.

3. What should you do? Does it matter if a jury is present?
4. Can and should the judge take any action if the judge suspects there may be good bases for cross-examination?

Frustrated by his inability to ask questions without interruption, the pro se party turns to the judge and starts to explain the "real facts" and why the witness's story is wrong.

5. What should you do?