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Making Misconduct Matter

What to do (or not) when your opponent engages in misconduct

By Chip Rice

Most laypeople think lawyers get away with murder, and it's often hard to disagree. Almost every litigator has war stories about opposing counsel who broke the rules and their own agreements or changed their story at the last minute.

Unfortunately, it is usually impossible to obtain complete redress for such misconduct. Judges and arbitrators are reluctant to impose sanctions and, even if you obtain a monetary award, your motion will usually cost more than what you recover. It is even harder to persuade a judge or arbitrator that your adversaries' misconduct shows a fundamental lack of integrity that should undermine their entire credibility.

Of course, one person's misconduct is another person's aggressive advocacy or unintentional mistake, so it is dangerous to generalize. I suspect that most judges feel that litigators complain about each other far too often, but most litigators that I know agree that attorney misconduct is a serious problem that wastes time and money and can cause serious injustice.

In order to be an effective advocate for your client, you need to make good decisions about whether your opponent's misconduct really matters. And you need to recognize the obstacles to convincing your judge or arbitrator that such misconduct should make a difference in determining the ultimate result. Most importantly, you need to keep your eye on the prize: winning your case, not punishing your adversary.

■ *Limit your expectations*

If you want to be effective in seeking relief for misconduct by opposing counsel, start by trying not to let your personal feelings affect your judgment. When your adversary hits below the belt, you're no longer just an advocate. You become an aggrieved party and a witness. In a sense, you become your own client, and we all know the old line about how dangerous that is. Given this strain on your objectivity, you should definitely consult with your colleagues before taking any action so that you can get a better sense of how a judge or arbitrator will react.

You may simply have to let some things go. What you see in the heat of litigation as intentional misconduct can often be explained as an unintentional mistake — whether or not it truly was. You may seem petty or even vindictive if you make a big deal about it. For example, if your opponent breaks an oral and relatively minor agreement about a deposition or other discovery, you will be justifiably irritated but you may not have an effective remedy. Under such circumstances, it would be futile — and probably counterproductive — to complain to the court.

In fact, it is difficult to obtain relief for attorney misconduct except in the most egregious situations. Most judges and arbitrators seem to have a high tolerance for aggressive advocacy and a skeptical attitude toward counsel who cry foul. Confronted with squabbling counsel, they often seem like parents who care more about just getting the shouting to stop than about resolving the underlying argument. And counsel who believe that their adversary has misbehaved also face the classic problem of anyone who has to make a complaint: Nobody likes a whiner.

Judges' reluctance to punish attorney misconduct in the middle of a proceeding is not always a bad thing for the system as a whole. The point of the proceeding is to resolve the underlying dispute, and judges and arbitrators have to be careful about holding the sins of the attorney against the client. And, of course, litigators complain about each other constantly so courts are reluctant to encourage them by devoting too much time to such complaints. But the system would often work better if misconduct could be policed more effectively.

■ *Make your record*

Despite the obstacles, sometimes you just have to complain to your judge or arbitrator about the opposing counsel — even if you doubt your chances of winning any interim relief. But you should not complain before you have built a compelling record, usually with one or more letters to opposing counsel.

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The "letter for the record" is a neglected art. I have never seen it featured in law school or continuing legal education courses, but it is one of the more important and difficult things that we litigators draft. Such letters are one of the very few opportunities for us to actually create evidence. And since they are usually the only evidence in disputes involving attorney misconduct, you need to make sure that your side of the record is clear, complete and concise.

Letters for the record must be crafted to work for several different audiences: the opposing counsel, the opposing party and, most importantly, the judge or arbitrator. Far too many litigators use these letters to opposing counsel to vent their frustration or anger with blustery bravado or snarky sarcasm. I get that out of my system by putting all of my nastiest lines in the first draft, but then try to make sure that stuff ends up on the cutting-room floor.

A good letter for the record is calm and conciliatory — written more in sorrow than in anger. In essence, your letter is a first draft of your motion for relief and should stand by itself as a clear statement of all of the relevant facts and law. You want any neutral reader to wonder what the other side can possibly say in response.

■ *Changing stories*

A lawyer who changes stories is not always guilty of misconduct. After all, the law has a long tradition of allowing liberal amendment of pleadings. And it is difficult for the best of lawyers to get all of the details — or even the correct sequence of events — out of the clients and documents in time to meet filing deadlines. As a result, judges and arbitrators can't always punish attorneys — much less their clients — for changing their story as they go along.

But changing stories can often be more than an innocent mistake. It can be a sign of the kind of opportunistic dishonesty that should be a red flag to the finder of fact. And it can waste huge amounts of time and money.

When you encounter such dishonesty, you need to build a record as calmly and carefully as you would for more obvious misconduct. But you need to build your record against the opposing party, not just the opposing counsel, because it is the party's honesty that ultimately matters most. If you are worried that the other side is going to change its story, you should try to depose the key opposing witnesses as soon and as thoroughly as possible. Make sure that you get them to commit to their story so that any change will taint their credibility and not just the credibility of their lawyer.

■ *The big picture*

The biggest challenge in dealing with misconduct by an adversary is keeping the right perspective. Our job as litigators is to maximize our client's results, not to teach anyone a lesson. But it is hard to keep that in mind when our adrenaline starts pumping over some dirty trick. Unethical conduct is a little like trash-talking on a basketball court. It can get you thinking about proving something to your opponent instead of just winning the game.

The best approach is usually to rise above an adversary's misconduct as much as possible. Complain only rarely and briefly, and focus instead on presenting your own case in a forthright manner. The contrast with your opponent should increase your effectiveness in the long run.

Fortunately, at least in my experience, misbehaving counsel usually lose their credibility and their cases eventually. When that happens, it never quite seems to me to be sufficient punishment, but it is ultimately the best way to make misconduct matter. ❖