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Avoiding discovery wars

Every hour wasted in discovery wars is an hour that could have been better spent on more productive activities

By John P. Blumberg

> "I want considerate people to listen to the voice of Aikido; it is not for correcting others. It is for correcting your own mind."
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> *Morihei Ueshiba 1883-1969*
> *Founder of Aikido*

The discovery process is often contaminated by needless and time-consuming disputes. This article is *not* about what threats and overpowering strategy you can use to vanquish the intransigence of the opposition. This article *is* about how to adopt an attitude that will help you overcome obstacles so you can get what you need. You will learn a counter-intuitive approach to litigation: Giving in to get your way.

When you wrestle with a pig in the mud, you'll both get dirty, but only the pig will like it

The defense gets paid to mess with us; we don't get paid extra for discovery battles. If we allow ourselves to be drawn into conflict with opposing counsel, we are playing their game and not our own. Exchanges of angry letters? They win, we lose. Motions to compel? They win, we lose. Their opposition to our motion? They win, we lose. Our reply to opposition? They win, we lose. The judge grants part of what we want and awards no sanctions or a fraction of what we deserve. They win, we lose. Every hour wasted in discovery wars is an hour that could have been better spent on more productive activities.

In the battle between the irresistible force and the immovable object, nobody wins

In litigation, for every lawyer who fancies that he is an irresistible force, there is an opposing lawyer who is out to prove that she is an immovable object. If you approach the conflict thinking that you will overwhelm the other side, you will often be met with equal opposing force. Think outside the box. Change the dynamic. Find a way to get what you need by other means.

An Aikido martial arts approach

We are the managers of conflict. We are asked to assert rights and defend interests. It is fantasy to believe that we can overcome an immovable object with irresistible force. The martial art of Aikido recognizes this truth by maximizing power without head-to-head force. The word "Aikido" is actually three words in Japanese, "ai," "ki," and "do." Roughly translated, "ai" means "harmony" or "agreement"; "ki" means "energy"; and "do" means "path." Together, A*ikido* describes the confluence of energy and harmony. Stated another way, it is the antithesis of force vs. force; it is a way to redirect force aimed against you to your advantage.

Head-to-head force

Head-to-head force (known in Aikido as "the line of force") occurs when two people are engaged in direct disagreement with each using the same method. Picture this scenario: Two nine-year-old boys are having an argument:

"Oh yeah?"
"Yeah!"
"Says who?"
"Says me!"
"Whaddya going to do about it?"
"I'm taking my ball and going home!"
"Go ahead, crybaby!"
"Who you calling a crybaby?"
"You!"
"Wanna fight?"

Now, fast forward 20 years, and these boys are now lawyers in a deposition:

"Objection, the question calls for speculation."
"No it doesn't!"
"Yes, it does."
She was there when it happened, so I insist that she answer it."
"Well, I instruct her not to answer."
"You can't do that!"
"Says who?"
"Says me!"
"Well, I'm terminating this deposition and we'll see what the judge says."

In the above example, each participant fancied himself either an irresistible force or an immovable object. Just as the conflict between the young boys was not going to be resolved, neither was the conflict between the two lawyers in deposition. No matter how strong you are as an advocate (*i.e.*, the irresistible force), you will not move a competent adversary (the immovable object.)

Get off the line of force

An argument can occur only when two people are participating. Using the example of the deposition, above, let's see what happens when lawyer number 2 refuses to play the objection game:

"Objection, the question calls for speculation."

"Hmm. Maybe it does. I'll ask it a different way."

It really doesn't matter whether the question called for speculation or not. There are probably a dozen different ways to ask a question, and you can figure out another way to get the information. How much money have you wasted while paying for pages of colloquy with opposing counsel? You've fallen victim to the other lawyer's game. He's being paid by the hour and you're not. He's not paying for the transcript, you are. Hence the adage: "You can wrestle with a pig in the mud, and you'll both get dirty, but only the pig will like it."

Consider it a gift

We have seen how ineffective it is to fight opposing force. When we harbor the paradigm of immovable object/irresistible force, our mindset will always propel us to the methodology of the nine-year-old boys.

When opposing counsel makes objections, you can change the rules of the game by interpreting the opposition as a gift and not as a roadblock. After all, an objection to the form of a question is really a reservation by opposing counsel to prevent you from reading that question and answer to the jury at trial. Instead of getting angry or exasperated, consider the objection a gift.

Consider that your opponent is telling you this: "My friend, your question, as phrased, isn't quite good enough to be used against my client at trial. If you change it slightly, you will be able to use it to your advantage." You see? It's a gift!

And when you receive a gift, what do you say? "Thank you."

Using the opposing force to your advantage

You can't fight irresistible force, but you can use that force to your advantage. Remember, your object is to get answers to your questions in the least amount of time without having to waste energy or deal with an impasse. Don't fall victim to your opponent's game. By changing the rules of the game, you can take control. When you get an objection, say, "Thank you." When you get another objection, say, "Thank you for pointing that out." When you get another objection, say, "Thank you for assisting me." When you get another objection, say, "You're right; I can ask a much better question than that." When you get a series of objections, say, "How would you suggest that the question should be phrased?" Sometimes, the other lawyer will want to show you how smart he is and will ask the question. Then, you can say to his client, "Answer your lawyer's question." After awhile, your opponent will see that you aren't playing his game.

Strive for harmony by allowing your opponent to save face

"Face" refers to one's image, both to oneself and to others. A face-saving approach is an approach that does not damage one's own or the other side's image; it makes neither side appear weak, inept, or otherwise as a failure, but makes them look like they are wise and victorious, even when they are not. President Kennedy recognized this concept during the Cuban Missile Crisis when he and Khrushchev were striving to figure out how to retain honor with each other to avoid a nuclear confrontation. When writing about the crisis, "Don't humiliate your opponent" was one of the seven lessons Kennedy said he learned.

In a conflict, if opposing counsel has no way to save face, it is unlikely that they will back down. This is particularly true when their client is present during a deposition. After all, who wants to look like a loser to the client? Remember, your goal is to get answers to questions, not to vanquish the adversary. A lawyer on the losing end of an argument is much more likely to end the struggle if he or she is given a way out of the situation that is not terribly embarrassing, and does not force them to admit they lost. If there is some way to frame the outcome of the dispute so all sides can claim at least some success, it will make it much easier for the losing side to back down. One suggestion is to say, "Let me come back to that" and then revisit the subject later.

Maintain your balance

Remaining in control of a situation requires a cool head. When we receive a nasty letter, fax or e-mail, our first impulse is to respond. But why? "Because it will show him I can't be pushed around!" is not a good reason. What if it's an unfair accusation? A stinging response will seldom change the dynamic; it will only satisfy the antagonizer. (Remember the pig and the mud?)

Under no circumstances should you send an e-mail. Such communications give no time for reflection or second thoughts. Stay balanced. Remember your goal. A spitting match will not further your persuasiveness. And if a response is necessary, do not dignify the insult with an in-kind response.

At most, write something like, "I will not respond to your characterization." If your fees are contingent, you should focus on what is productive. If your fees are hourly, your client should not have to pay for mutual name-calling that does not further his interests.

Maintaining flexibility

Unwillingness to bend, to compromise, or to acknowledge fault is not the mark of a skilled advocate. It is distasteful when we observe it in our opponents and when our opponents observe it in us.

Being flexible requires a willingness to give in when we are wrong or when it will serve a larger purpose. For example, in a debate over deposition priority, you might "submit" to the demand that your expert be deposed first, because you will be able to interrogate their expert about his disagreements with your expert's testimony. And your expert's opinions about the other expert's positions will remain unknown to the opposition.

Similarly, if you represent a plaintiff, your "submission" to the defense demands that their physician-client be deposed in his office allows you to copy all of the titles of journals and books on his shelf, or to ask him to identify them. That might come in handy when a chapter in one of his books is contrary to his opinions or actions**.** The concept might be best understood as an allegory:

> *A stream chuckles along between its banks. In the middle of the stream stands a large rock, commanding with all its presence for the waters to stop. But the waters keep churning and flowing along; bouncing, streaming, and flowing over the rock. The water has direction – it has flexibility. Be the water, not the rock.*

Civility

At the heart of much conflict in litigation is the failure of civility. We are taught in law school that we must represent our clients zealously. But zealous representation does not require acrimony. We can be strong and forceful advocates, but in a manner that does not destroy our professionalism and effectiveness.

In Taming of the Shrew, Shakespeare said: "And do as adversaries do in law – strive mightily, but eat and drink as friends." Collegiality encourages cooperation. So, instead of sending a flaming fax or e-mail, make a personal connection. A tailgating driver on the freeway would likely not engage in such conduct if he were face-to-face. So, remove the barrier that encourages nearly-anonymous bomb-throwing. Pick up the telephone. Have a conversation.

Final thoughts

These suggestions will not always be successful. And you must be prepared to write meet-and-confer letters, file motions, go to court, and show that you are prepared to fight. But these should be measures of last resort. *If you treat the practice of law as a rat race, even if you win, you're still a rat.* Conducting yourself honorably and treating your opponent with respect is its own reward, transforming a rat race to professionalism.

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