

ZEN AND THE ART OF THE LITIGATION PRACTITIONER: Some Strategies for Dealing with the Unexpected and the Uncivil

By Greg Richards

We live in an imperfect world. Plans are carefully made but the unexpected arises. Many speak of civility in the practice of law but, all too often, we encounter the opposite. What to do? Is there a magic wand we can wave to make it all better? We all know the answer to that one. Are there some practices we can follow to help minimize occurrences of the unexpected and reduce encounters with the uncivil? Possibly. What follow are a few tips that I believe may assist. Some of them concern no more than trying to achieve a state of mind. Others involve simple, but practical, courses of action to help smooth the litigator's path.

1. We're in It Together

Remember, we've all been there. *Everybody* experiences tough moments as a litigator.

2. The "Atticus Finch Rule"

Obey the "Atticus Finch Rule": take a walk in the other person's shoes (whether that person be the judge, a witness, opposing counsel or your client). Ask yourself: "What does the world look like to them?" This will help you do and say things that make sense to your listener, reduces the likelihood of an unexpected response on their part and minimizes the instances of uncivil behaviour being directed your way.

3. Great Lawyers Are Good Listeners

When someone speaks, *listen* carefully. A good *talker* can sometimes be a good lawyer, but only a good *listener* can be a *great* lawyer. An inability or unwillingness to listen inevitably results, to quote the iconic words of the prison warden in *Cool Hand Luke*, “a failure to communicate”. More conflicts – from wars between nations to squabbles between counsel – are caused by a failure to communicate than anything else. Minimize the unexpected and uncivil by following three simple steps: (1) listen, (2) think, ... and only then, ... (3) talk.

4. Find Serenity Through Simplicity

Confusion fosters frustration; frustration fosters hostility. Dodge these bullets: *keep things simple*. Your job is to cut through complicated facts, confusing case law and complex cases. It takes a lot of time and even more work. Constantly ask yourself: “If I were the judge, a witness, opposing counsel or your client, what would I like to receive to understand this?”

5. Avoid Taking Penalties

In the way of the world, violence begets violence. To break the vicious circle of conflict, do not return fire with fire. Mahatma Gandhi said: “An eye for an eye will make the whole world blind.” Leave the “cheap shots” to others. If a judge, witness or opposing counsel is abusive or hostile, *do not reciprocate*. Keep your cool. Respond by stating your position clearly, firmly and calmly. You will be far more effective and will appear reasonable in the face of irrationality. Exhibiting grace under fire leaves a lasting, and favourable, impression.

6. Try Being the Message

Remember, *you are the message*. Everything you do and say – your tone, attitude and comportment – all have an impact and leave an impression. Every step you take should be consistent with your intended message.

7. Strive To Be Relevant

Relevance is a great comfort and a safe harbour. Know how a question you are asking or submission you are making is relevant to the issues that the court or tribunal has to decide. It will help you focus your presentation, simplifying it and making it shorter. You will find that, as a result, your listener is more attentive and has an increased appreciation of what you have to say.

8. Remember, Point First

We live in the “Age of the Sound Bite”. Attention spans are short. Have a point and get to it quickly. (See Point 4 above about keeping it simple.) This will avoid disinterest, distraction or hostility arising in your listener.

9. Make It Visual

We also live in the “Age of Computers and Television”. Where possible, make it visual: charts, tables, graphs, chronologies, photographs, videos, 3-D models – all of the above and more – are welcome in courts. These are the tools we use to make complex things simple. Consider as well that documents (e.g.,

motions, written submissions, factums etc.) argue for you after you've left the courtroom and, at the same time, help build a record for appeal should this be necessary. Clear, inviting material will make others – the court and your opponents – more disposed to your position.

10. Add White Space

Remember, good artists use white space. A *pause*..... can be used to great effect. Watch the judge's pen: allow time for a witness's evidence or a submission you make to take root. A disinterested or distracted audience (whether it be a judge or jury) will often be brought back, or remain more attentive in the first place, if they occasionally experience the sound of silence. Think the same way when you are preparing written materials: cut the clutter; give the reader some space.

11. Be Genuine, and Genuinely Thoughtful

Rule #1: Remember the "little people". Be genuinely kind, courteous and respectful to the parking lot attendant, the person copying your brief of documents, the court clerk, and anyone else you happen to meet in a given day.

Rule #2: Everybody – the judge, opposing counsel and, yes, you yourself – is a "little person".

12. The Front Page Test

We live in the "Age of Instant Communication". We can fire off a blistering response to opposing counsel in under 10 seconds but – like a bullet leaving the muzzle of a gun – once it's gone, there's no bringing it back. Therefore, before pressing "Send", ask yourself this question: "Would I be comfortable in having this communication appear on the front page of the newspaper?" If the answer feels remotely close to "No", then tie down your trigger finger and think matters through.

13. Let's Leave the Schoolyard Behind

School children constantly ask teachers doing yard duty to decide their disputes. In the vast majority of cases, the teachers say, "Solve your own conflicts, children." Fast forward a few years and picture the school children as lawyers and the teacher as the judge, because that is how it looks to the judge in your case. He or she wants to hear and decide matters that affect your respective clients' rights, not petty squabbles between counsel. Only if the conduct of opposing counsel is genuinely affecting the justice of the case should you take the "school yard squabble" to the "Principal's office".

14. Try Building Bridges, Not Barriers

Remember this: it is a long and winding road. On this road, the wheels are always turning. And the most important wheel of all, the one that *never* stops turning, is the wheel called "Fortune". Strange, but the lawyer we insulted in that case two years ago gets appointed to the bench and is deciding the injunction application we are arguing next week. The moral of the story? — make friends, not enemies.

15. Bullies Are Cowards

Bullies at their core are cowards. They get a charge out of upsetting you because it makes them feel superior and in control. Stand up to a bully in a calm, rational and firm way — he or she will back down. Whatever you do, don't give them the pleasure of losing your cool.

16. Losing Through “Losing It”

Getting angry (i.e., “losing it”) can feel good. It provides a quick release of pent-up emotion. Regrettably, it is not so good for a case and, invariably puts your client in a weaker position. To a judge, opposing counsel or the opposing client, an angry lawyer looks like an irrational lawyer, and irrational lawyers don’t win cases.

17. Manufacturing Good Fortune

Persistence pays off. To paraphrase Stephen Leacock, “I’m a lucky guy, and I find that the harder I work, the luckier I am”. Luck has been said to occur when “preparation meets opportunity”. The reality is that there are no shortcuts in litigation. But thorough preparation will give you the knowledge, confidence and psychological reserves to show grace under fire and, more often than not, will produce some luck along the way.

18. Practice Your Mount Rushmore Look

Litigation lawyers have to be good poker players. No matter how badly or well your case may be going, don’t let your facial expression betray your inner emotions. If your witness is self-immolating in the witness box, hold an expression as if this is exactly what you had planned all along. If you win a motion or an evidentiary ruling, resist behaviour that is the equivalent of pumping the air with your fist or “high-fiving” with your co-counsel. Show some class at all times.

19. Be Calm

Be calm. A calm demeanour is infectious. And when things get really rough, remind yourself, “This too, shall pass”. There will be a break, a lunch hour, the end of a day, or an intervening weekend. You will have an opportunity to regain your composure (and your perspective). People are rooting for you. You’re not alone. Recall Point 1: we’ve all been there.

20. At the End of the Day, Be Brave

When all else fails, take a deep breath, and stand your ground. Be brave. You owe it to your client. Giving our all for a client – diligently, resolutely and fearlessly – is the hallmark of our profession.

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