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Dealing with unsavory attorneys: Be patient, let them sink themselves

This space is usually dedicated to the topic of alternative dispute resolution (with a sprinkling of decision science). After many years litigating primarily in Illinois state and federal courts and observing firsthand the unnecessary expense and damage to relationships that clients experience in the court system, I became fascinated with mediation, negotiation and interest-based problem-solving.

I began mediating, teaching and writing because I saw first-hand how creating a space for respectful dialog and listening can result in efficiency and creative solutions. I also find the science and possibilities relating to human decision-making endlessly inspiring.

Along the way on this journey, I began to believe that in most negotiations it is worth at least exploring a good-faith and strategic exchange of information to try to find common ground. While I certainly do not recommend giving away the store, I no longer believe that a lawyer should always hold back every speck of information unless directly in violation of discovery obligations.

There are times, however, when it may be a waste of time to negotiate a creative solution or use common sense to end a dispute because the party or lawyer on the other side is a scoundrel. I hesitate to write this, because one of the greatest problems in our litigation system (and now our political system), is that communication is frequently poor or nonexistent, and lawyers often assume that the opposing counsel or party is a scoundrel in nearly

every case they handle.

This assumption is known in social psychology as fundamental attribution bias. In sum, when we ourselves send a terse e-mail, produce only some of the documents or fail to return a call, we see it as due to our difficult circumstances — it happened because we were on trial or navigating a family health crisis. When someone else does the same things, however, we immediately attribute it to their defective personality and assign bad intent.

It is important to be aware of fundamental attribution bias and to try to represent clients without falling into this trap. But it is also important to recognize that there really are scoundrels out there.

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Over the years I have dealt with only two opposing counsel to whom I would apply the scoundrel label. Although I was able to get some favorable rulings in my clients' cases based on their bad behavior and lack of credibility, including a judgment in a bench trial, I never had enough information to make a disciplinary charge and asking a busy

BEYOND DISPUTE



TERESA F. FRISBIE

Teresa F. Frisbie is the director of the Loyola University Chicago School of Law Dispute Resolution Program and a mediator and arbitrator. She has been named as one of the Top Ten Women ADR Neutrals in the State of Illinois by Leading Lawyer. She welcomes questions and comments at tfrisbie@luc.edu.

judge whose whole life seems to be nothing but discovery disputes to hear the full extent of my grievances was a nonstarter.

In both instances when performing completely unrelated legal research years later, I happened upon cases where federal

judges took them to task. One afternoon a name I knew too well leaped out from the page, and I read with a bit of schadenfreude about jail time for tax evasion, obstruction of justice and suspension of a law license.

In the other case, again, long after I had stopped thinking about the lawyer, I saw his name in an

opinion that cropped up in my legal research. I read with satisfaction how a judge found the lawyer to have filed frivolous motions, conducted immaterial examinations of witnesses and conducted himself throughout the case with the goal of obscuring the facts from the court.

There are people who are skilled enough to deal with scoundrels. Angela Merkel was described by Paul Hockenel in the Jan. 31 issue of Foreign Policy Magazine as being constantly underestimated but having the self-discipline and “steely patience” to go through long, arduous negotiations and handle “domineering, ethically challenged alpha males” and other bullies like Vladimir Putin.

The piece included an anecdote about how she is “impossible to bait” and described a scene where she met with Putin, and he, knowing she has a fear of dogs, deliberately let his large dog into the room where they were meeting. She kept calm, smiled and told the German reporters later that “only insecure types resort to such tricks” ... and through them “is how you discover their vulnerabilities.”

Perhaps the next time you are frustrated with a lawyer you suspect is dishonest or unscrupulous, after checking to make sure that you are not influenced by attribution bias and doing your best to channel Angela Merkel (without violating your ethical duty to report unethical attorney behavior), you can remind yourself that there is a good chance that a judge will eventually catch up with a true scoundrel.