

BEING NICE IS POWERFUL

By Elizabeth A. Starrs



When I was a relatively new lawyer, I began representing professionals in malpractice cases. I was selected by their insurance carriers and my clients were generally (not always) resigned to accept the attorney appointed to handle their case. Imagine the look on the face of a man who had been practicing medicine for thirty five years and has never been sued in his life, when he meets his lawyer, a 5'2" woman who could be his granddaughter! Moreover, I was rather congenial and nice, not having an aggressive or dominant style. Didn't all clients want a pit-bull attorney who was mean and crushed the opposition? How was I supposed to gain his confidence?

When I attended depositions, I was often faced with the uncontrolled advocacy of other lawyers who were not only older and bigger than I, but condescending toward me. I did not have the same physical presence nor the same natural aptitude for one-upmanship. These tactics were unsettling to me. How in the world would I ever survive?

I imagine there are more lawyers out there who are in similar situations and wondering why you ever wanted to be a lawyer in the first place when you're not naturally aggressive and abrasive and you really don't want to fight with opposing counsel all the time. Can a lawyer be nice and still be an effective advocate? Can you cooperate and still be strong? The answer to both of these questions is a resounding "yes!"

There is much written about our need as lawyers to act with professionalism and civility, whether we're litigating a case or handling a transaction. Certainly our ethical rules require it (*see, e.g.*, Model Rule of Professional Conduct 4.1, prohibiting lawyers from knowingly making false or misleading statements of fact or law, and Model Rule of Professional Conduct 4.5(a) prohibiting a lawyer from making certain types of threats to gain an advantage for her client). Academically, we agree and certainly don't think we're part of the problem.

However, what is often overlooked is the situation many young lawyers find themselves in: Your opposing counsel is being very confrontational and aggressive and, although you know that you're supposed to be professional and polite, he or she makes you so angry, frustrated and anxious that the only way you think you can survive is by responding in kind, so your client and opposing counsel both know who's in charge. Please – resist this urge.

Many attorneys believe that acting as outrageously as their clients is important so their client feels well-represented and secure. I disagree. Whenever I see lawyers conducting themselves in this manner, I think they may not have communicated effectively with their client. Clients must be informed that your behavior is designed to get the best possible result for them, that it is much better for their case for you to be in control of your demeanor and emotions, and that incivility hurts the cause you're prosecuting or defending or may polarize the parties when you really need

an agreement to be reached. Once clients are informed that your actions (and inactions) are deliberate and the interaction with the opposing counsel is more like a chess game than a bar-room brawl, the clients are more confident in you.

Being nice is powerful. Being respectful is powerful. Being cooperative reflects confidence, not insecurity. It is easy to be critical of unprofessional conduct by your opponent but be careful not to excuse your own behavior in the process. If you are baited, don't respond in kind. If you do, you will be out of balance and have less control over the situation. If you don't react when your buttons are pushed, if you remain calm, you and your client will fare much better in the deposition or negotiation. The baiting will not continue if it has no effect on you.

Yes, this is acting professionally. Yes, this conduct is more polite. But equally as important, this type of behavior is strong and strategic. Your quiet confidence – not passivity – may actually heighten the feelings of fear and anger in your opponent and thus increase the tone of confrontation; but if and when this happens, resolution is far more likely to occur on your terms, rather than on your opponent's. Assert your authority – but quietly. Listen to the others and don't interrupt but make your position known and don't apologize for it. This will be seen as professional and cordial but also strong and persuasive.

You can – and should – be nice in your work as a zealous advocate for your client. Such behavior is not only consistent with all applicable rules governing lawyers' behavior, it is the best way to reach a favorable result for your client. **How** you act in resolving clients' problems is just as important, and requires just as much attention and hard work, as determining and analyzing the relevant legal issues.