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Litigation gamesmanship

By Kenneth J. Ashman

What lies in the murky water beneath the surface of crystal-clear ethical conduct and above the sludge of outright wrongdoing is "litigation gamesmanship" — not quite as bad as conduct that will land an attorney before the Attorney Registration and Disciplinary Commission, but certainly not as good as striving only to achieve justice.

This is the trench of litigation warfare, where slight dishonesty, deliberate mischaracterization, disingenuity and incivility lie.

I recently sat on a panel with judges and other practitioners on the subject of "Countering Litigation Gamesmanship," sponsored by the Illinois State Bar Association. The all-day seminar covered every stage of the litigation process. The panelists offered their opinions and experiences with respect to a series of hypotheticals, and I learned a great deal from the insights of my co-panelists.

Before assessing whether one should "counter" litigation gamesmanship, one should define the term. After all, attorneys are charged to represent clients zealously, and, to the extent it is ethical, perhaps they have an obligation to engage in gamesmanship if it is in their clients' interests.

One attorney's gamesmanship is another's strategic advantage. Indeed, perhaps attorneys would be better served by a seminar on the topic of "Furthering Litigation Gamesmanship."

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Litigation gamesmanship belongs on a spectrum. On one end is outright unethical or illegal conduct that constitutes a clear and direct violation of the Illinois Rules of Professional Conduct. On the other end is conduct that serves the ends of justice — determining who should prevail on the merits.

Somewhere between these two extremes falls "gamesmanship," which itself can be divided into those games that, perhaps, one ought to play and those one ought never to play.

Assume that a client has defaulted on a promissory note, the creditor has filed suit and the client seeks more time to see if he can raise funds to pay off the note, or at least have enough with which to bargain.

There is very little defense on the merits; on the other hand, the attorney sees a legitimate — albeit a long shot — motion to dismiss on standing grounds. The filing of the motion would not likely "serve the ends of justice" (after all, the client did default), but most attorneys would agree that the filing of the motion is the type of "game" that ought to be played. The motion would ensure that the proper party has brought the suit, and its filing would further the client's goal of delaying entry of judgment for an ostensibly legitimate purpose.

A little closer to the line is an act of discourtesy. Discourtesies are annoying and frustrating, leaving one with the feeling that one's opponent is a jerk.

In my own firm's practice, we afford courtesies as a matter of policy. That said, although it is nice to be nice, there is nothing compelling in niceness. As such, as long as someone is upfront and candid about their discourtesy — refusing, say, to grant an otherwise inconsequential extension — it does not seem to rise to the level of impermissible gamesmanship, although the position is admittedly arguable.

The conduct that crosses the line is the slight dishonesty, deliberate mischaracterization, disingenuity and incivility mentioned above. As to incivility in particular, one should draw a distinction between an upfront discourtesy and being uncivil — yelling and the like. As for the others, they all share the common trait of altering the truth. This is particularly reprehensible when the object of the alteration is an attorney rather than his client, placing the attorney in a false light.

The examples of this type of conduct are legion, with as many variations as there are unsavory characters.

It might be a court-submitted misrepresentation that one has made "numerous" attempts to conduct a conference pursuant to Illinois Supreme Court Rule 201(k), when in fact only one date had been suggested; a communication that counsel had acted "unreasonably," when the record would demonstrate otherwise; a dubious claim of the failure to receive service of documents, with the implication that serving counsel submitted a false certification; the copying of a court or arbitrator on correspondence that contains an inaccuracy; a charge that opposing counsel has been dilatory, when the record reflects that there has been no unreasonable delay; or the suggestion that discovery or motion papers were served for an improper purpose, when they are in fact legitimate.

The common denominator in these types of "games" is that the inaccuracy does not relate to a hard fact; rather, it falls more in the nature of an opinion — "numerous," "unreasonably," "dilatory," "improper purpose" — but it is damning nonetheless.

Much effort is typically required to counter the misimpression (imagine the effort an attorney must expend to prove that he acted "reasonably"), and courts may look with as much consternation on the attorney seeking the correction as the one who created it, viewing it as petty bickering.

It is difficult to stem this type of behavior, as it falls at bottom of one's own moral code and value system: "don't lie."

When confronted with this type of conduct, one has a choice to make.

If the matter is one of relative insignificance, requiring more time and effort to correct than it is worth, let the matter slide.

If, on the other hand, the matter has some importance, or is particularly irksome because of its personal nature,

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inform the court of the truth-alteration in the next responsive submission. By so doing, the true character of the one engaging in the impermissible conduct is exposed.

Litigation gamesmanship is a part of the adversarial process, and, as attorneys, we have the dual responsibility of playing the game where appropriate and countering it when it crosses the line of impermissible conduct. The line is not always clear, unfortunately, but when one alters the truth through slight dishonesty, mischaracterization or disingenuity, or otherwise is uncivil, the line is crossed, and we are obligated to counter the "game."