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**FEATURE**

# Discovery Mud Fights: Why They Happen and How to Avoid Them

Not only do lawyers spend lots of time on inconsequential disputes, but they get furious with each other about them.

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Who among us went to law school with the idea that, wow, am I ever looking forward to spending untold hours duking it out with my opponents in nasty, name-calling, down-and-dirty discovery battles?

Not I. In 1976, when I began law school, the country was still in the post-Watergate glow in which attorneys were seen as heroes who had spoken truth to power and thereby had helped to save the nation. I went to law school viewing the law as an honorable profession that offered endless opportunities for lawyers (and judges) to do good, no matter the area of law in which they practiced. Nearly 45 years later, I still see the law in that way. My guess is that you do as well.

So why do lawyers spend so much of their time and energy in vitriolic discovery battles? During the nearly two decades that I engaged in the discovery process as a lawyer, and then the 21½ years I oversaw the discovery process as a judge, I have seen discovery battles increase both in volume and intensity—and too often devolve into personal nastiness.

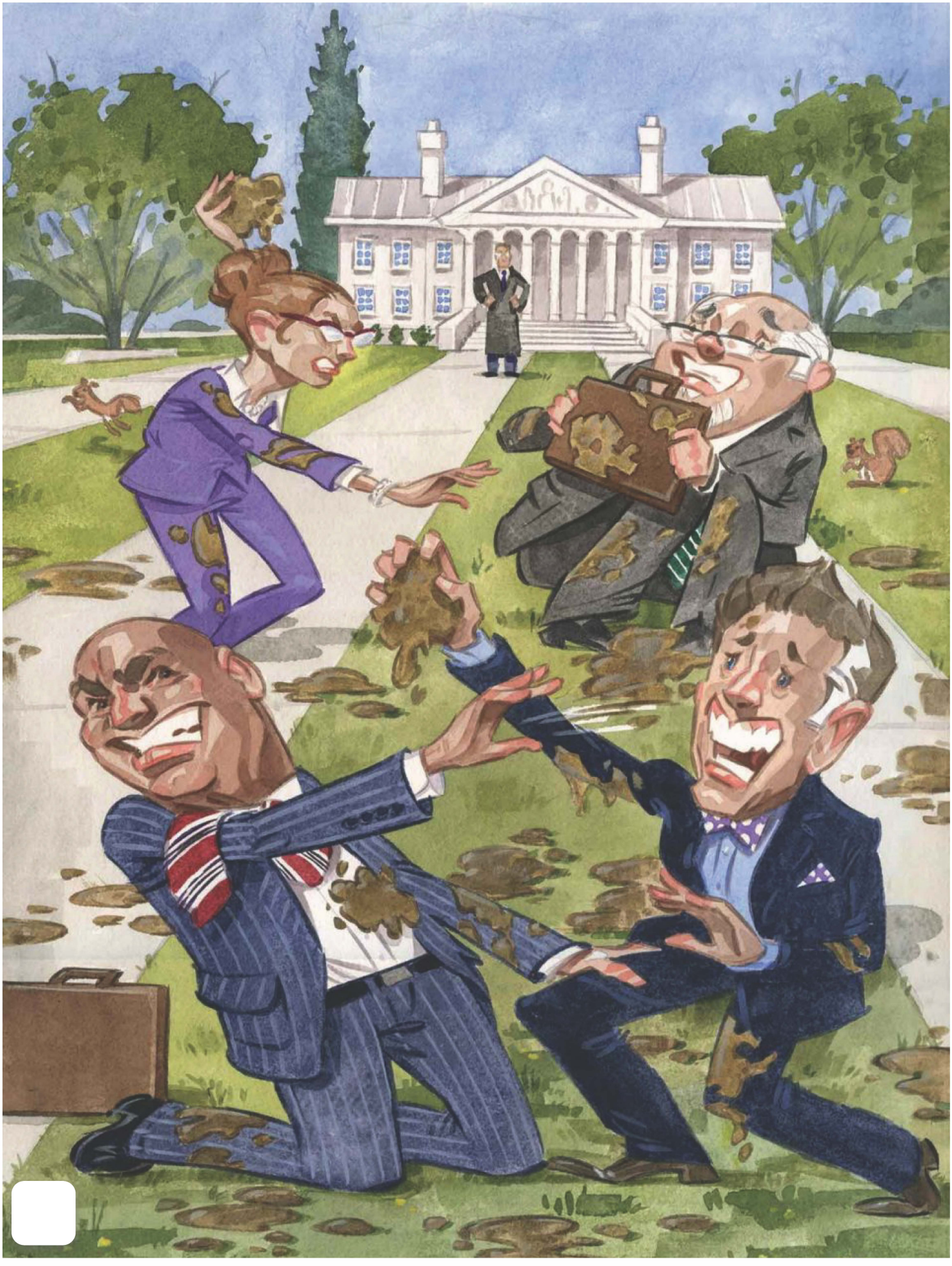

Illustration by Darren Gygi

To be sure, often there can be legitimate differences of opinion that can lead to discovery disputes that are meaningful in a case. Questions about privilege or about the cost of the discovery sought as measured against its value in the case are examples that frequently come up. But if we are honest with ourselves, we would concede that a number of discovery disputes are about matters that, in the broad arc of a case, are just not worth the time and energy devoted to fighting about them. For example, I have not seen the fate of a case turn on whether a proper counting of the subparts of interrogatories results in a sum of 28 rather than 25 or whether a party gets 11 depositions rather than 10 or whether the depositions last four hours rather than five.

Not only do lawyers spend lots of time on inconsequential disputes such as these (in addition to serious discovery disagreements), but they get furious with each other about them. And they say or—more often—write things about each other, and sometimes about their respective families, that I'll bet in hindsight they regret.

Why does this happen? And, when you are the target of the nastiness, what can you do to avoid being sucked down into a mud fight? Those are the two questions on which I offer some thoughts.

## Civility in Litigation

The issue of civility in our litigation process—or the lack of it—has been a topic of discussion for at least three decades. In about 1990, Judge Marvin E. Aspen of the U.S. District Court for the Northern District of Illinois chaired a civility committee at the request of the then chief judge of the Seventh Circuit, William J. Bauer, who had heard from lawyers that things had gotten "a little bit rough" in the practice, with some attorneys playing games in the discovery process and exhibiting a lack of civility. *See An Interview with Judge Marvin E. Aspen: A Judge Who Shaped the Court, the City, and the Nation* (Feb. 27, 2019). The committee held hearings in the three states that make up the Seventh Circuit (Illinois, Indiana, and Wisconsin), received comments from the bench and bar, and issued a report proposing standards of conduct for attorneys and judges. The

standards of conduct set forth in that report were then adopted by the Seventh Circuit (*see* Standards for Professional Conduct Within the Seventh Judicial Circuit) and are still in effect some 30 years later.

The preamble to the Seventh Circuit standards states, in the very first sentence, that "[a] lawyer's conduct should be characterized at all times by *personal courtesy* and professional integrity in the fullest sense of those terms" (emphasis added). The preamble goes on to recognize that lawyers have a duty to vigorously represent their clients but that lawyers nonetheless must be mindful that our legal system "is a truth-seeking process designed to resolve human and societal problems in a *rational, peaceful and efficient manner*" (emphasis added). The standards then set forth the expectations of the Seventh Circuit concerning how attorneys should treat each other in the discovery process.

## Why the Battles Are Waged

Many discovery battles today are far from rational or peaceful, and are not characterized by personal courtesy. Why is that the case? I am sure that there are some attorneys who thrive on nastiness and enjoy a name-calling contest. But I submit that these attorneys do not make up even a significant minority of the attorneys engaged in litigation. For most attorneys, I believe that engaging in nasty discovery battles only increases the stress of an already difficult job and decreases the satisfaction they get from being a lawyer. So why do attorneys for whom discovery battles are just not fun nonetheless engage in them? From my experience as a lawyer and a judge, I can posit the following as some of the reasons.

**"I think I can intimidate the other side."** Some attorneys may believe that the louder and more derisively they talk to the other side, the more likely they are to prevail by wearing the other side down. There are times when, unfortunately, that approach may succeed. However, with a capable opponent on the other side, that approach is at best unproductive and at worst counterproductive. I would caution against underestimating either the skill or the mettle of your opponent. If you have a strong argument, huffing and puffing is not needed. Rather, it can be seen as an effort to compensate for a weak position. Carl Sandburg famously quipped, "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell." If you huff and puff to cover up an otherwise weak position, then the other side—and the judge, if it gets that far—likely will see it for what it is.

**"I must show the other side how tough I am."** I was once a young attorney, going toe to toe with older and more seasoned opponents. I know the feeling of being "tested" to see if I was tough enough to stand by a position. But demonstrating your resolve to the other side is not advanced by a showing of "faux toughness"—by that, I mean pounding the table or using vituperative language to support your position. If anything, that kind of show of "toughness" may convey just the opposite.

**"The client wants me to show the other side who is the boss."** There is a reason that Standard 2 of the Seventh Circuit standards states that "[w]e will not, *even when called upon by the client to do so*, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from acrimony toward other counsel, parties, or witnesses." (Emphasis added.) Clients often are driven by the anger and emotion they feel about the actions of the other side. It is easy for a lawyer to channel that anger and emotion in dealing with opposing counsel, in an effort to show that the client has a fierce advocate who truly believes in the client's position. But I strongly believe that when people act out of anger or emotion, they often make unwise decisions. That is true of both lawyers and their clients. A lawyer should be a critical filter between a client's emotions and the actions taken in a lawsuit. One of the roles of a good lawyer is to serve not merely as a fierce advocate but also as a wise counselor who can offer a dispassionate and clear-eyed assessment of an issue to the client. When the lawyer channels the client's emotions, the lawyer deprives the client of the dispassionate counsel that is a central part of the attorney's role. When the lawyer acts out on that emotion in dealing with opposing counsel, the level of discourse often falls as the level of vitriol rises.

**"This is just the way people talk to and about each other."** In recent years, we have increasingly seen the level of public discourse become pretty rough. It is not enough to say that one who disagrees with you is mistaken or misguided; in our public and political discussions, we often see people go much further and speak about those with whom they disagree in demeaning ways. That kind of playing rough that we see in other walks of life can find its way into the legal process. And, I am sorry to say, judges do not help elevate the level of discourse when in written opinions they make snarky comments about parties, lawyers—or other judges. That kind of bad example can make some lawyers think they have license to do the same.

**"This discovery is so important that I must fight to the death for it."** Much has been made in recent decades about the "vanishing trial." It is certainly true in federal courts that trials rarely occur. Leaving out more recent numbers influenced by COVID-19, for the 12-month reporting

period ending March 31, 2019, fewer than 1 percent of all federal cases throughout the country were resolved through a trial. My observation is that the rarity of trials has affected how lawyers conduct discovery. Many attorneys who seek discovery, and then fight the ensuing discovery battles, have rarely, if ever, tried a case. That makes it more challenging for them to assess the true importance in the courtroom of discovery they may seek or oppose, and it leads them to fight fiercely about some discovery matter that in reality would have little or no importance at trial. By contrast, an experienced trial attorney might not even seek the discovery because it would not matter much at trial, and might not object to discovery sought if it would be of little consequence nor take much effort to produce. The wise trial attorney certainly would not engage in a bitter, personal dispute with the other side about it.

**There is a lot more stuff to discover.** The proliferation of discovery involving electronically stored information (ESI) is by no means solely responsible for the existence of nasty discovery fights. Recall that the Seventh Circuit standards were promulgated as a result of the concern about lawyers being "rough" with each other some 30 years ago, well before the proliferation of ESI and discovery of it. But the existence of more information to seek in discovery surely provides more occasion for disputes about discovery—and more opportunities for pitched warfare between those attorneys who are so inclined.

**The lack of personal relationships between attorneys.** When I started in the practice, it was very common for me to run into attorneys in multiple cases. Through those experiences in several cases, we forged good working and personal relationships. Those relationships allowed us to keep perspective and to deal with each other in a reasonable and civil way, knowing that if we did not do so, our opponent would remember it in the next case. At least in certain areas of practice, I see fewer instances of lawyers running into each other in multiple cases. For an attorney so inclined, it is easier to be a jerk to an opponent if the attorney never expects to see that opponent in another case.

**Emails and texts.** Emails and texts are wonderful technology that allow us to reach each other with ease. The dark side of that technology is that emails and texts also make it easier to be nasty to the other side. I have seen emails in which people say things (often very late at night) that they would never say to a person face-to-face.

**The stress of the job.** Attorneys today are under great pressure to generate revenue, a greater level of pressure than I believe existed when I started in the practice. Client relations are less

durable than they were when I started in the practice, which creates an additional level of pressure. When people constantly feel they are under the gun, they often are not their best selves. They tend to be more volatile, and they say things out of anger or emotion that they would never say in a calm moment.

**Losing sight of the big picture.** A lawsuit is a marathon and not a sprint. A short-term gain is not worth a long-term loss. In most lawsuits, at some point you will need the cooperation of your opponent (for example, for additional time to file a pleading), and you will sit down with your opponent at the negotiating table to see if a settlement can be reached. You will greatly complicate those efforts if you have poisoned the relationship with your opponent by treating him or her with disrespect during the discovery process.

Staying out of the mud when your opponent goes there requires, at the outset, the recognition that you should indeed try to stay out of the mud—however tempting it might be in the moment to respond in kind to bad behavior. Hopefully, you already have drawn that conclusion from the foregoing discussion about the Seventh Circuit standards and some of the costs of rolling in the mud. Even if you do not start the mud fight, if you engage in one, it is nigh unto impossible to avoid getting splattered yourself.

Let me emphasize one other cost of engaging in a mud fight: Judges hate them. Just as most lawyers did not go to law school dreaming of the nasty discovery wars they would fight, judges do not eagerly await discovery battles. Yes, it is an important part of the job, and the judges I know want to move cases forward by helping the parties resolve legitimate discovery disputes that may arise. But nasty, name-calling discovery disputes are another story. Personal venom complicates discovery motion practice by blinding the lawyers to resolutions that might be achieved if cooler heads were to prevail and by creating diversions that do not help the judge decide the motion. As a magistrate judge, I was constantly amazed that attorneys thought it useful to attach in support of their discovery motion or response long chains of nasty emails that they wrote to the other side. In my experience, most judges who see those kinds of emails find them wholly unpersuasive and evidence that the lawyers who write them need to get a grip. You do not want the judge handling your case to have that opinion of you.

## How to Avoid the Mud

Of course, even if you recognize that nastiness in discovery disputes is a bad idea, your opponent may think otherwise. So what do you do when that happens? Here are some strategies to avoid your opponent's invitation to join him or her in the mud.

**Pick your battles.** Not every discovery issue is worth going to the mats about. A mark of a good lawyer is knowing, as the late country singer Kenny Rogers sang, when to hold them and when to fold them. If the discovery requested by your opponent or sought by you is just not that important, consider letting it go. Or consider making a reasonable compromise. Save your powder for a discovery issue that really matters.

**Try to calm the troubled waters.** If your opponent wants to start a fire with incendiary words, you do not have to throw gasoline on it. Appealing to your opponent's better self is an approach that sometimes can work. Long ago I was defending a deposition and the opposing lawyer—who was not really a bad guy—was screaming and out of control. Rather than reply in kind, I told him he was a better person and lawyer than that, so we should lower the temperature and have a civil discussion about our disagreement. In that case, the approach worked—things settled down, and we developed a very good working relationship. It will not cost you anything to give that approach a try.

**Remember that you can disagree without being disagreeable.** This is particularly important for a young attorney to remember when dealing with an adversary who wants to drag you into the mud. Choosing not to respond in kind does not mean that you have to be a pushover. You can stand your ground and be assertive without stooping to personal attacks. If you firmly assert why the facts or the law or both support your position and refuse to back down in the face of someone who wants to engage in personal attacks or just "yell like hell," my bet is that you will demonstrate to your opponent your resolve. And you will be in a far better position if the dispute makes its way to the court.

**Take a breath.** Restraining yourself when confronted with bullying tactics is easier said than done. One way to do so when the nasty communication is in writing is to wait a bit before responding, to make sure that you have cooled off and that you confine your response to the merits of the dispute. Then, when you do write the response, do not hit the Send button too quickly. Read the response over again to make sure you have kept to the high road.

Likewise, when the provocation is made in an oral discussion, resist the temptation to respond reflexively and immediately. The old line about counting to 10 before answering gives you the time to think before talking—which is always a good idea!

**Seek help from a colleague.** This can be a bit tricky. You do not want a partner or another colleague of yours to think you are overwhelmed by your opponent. Even less, I think, do you want to have your colleague intervene directly with your opponent unless you see no other choice. Once that happens, your opponent may always then bypass you and deal with the colleague instead.

But using a colleague as a sounding board is often a great idea. Sometimes we can be too close to a dispute and can benefit from a fresh and less emotional assessment. By all means, run your issue with the opponent by a trusted colleague, and have your colleague read your response to the opponent to make sure it strikes the right tone.

**Go to the judge.** I recommend this as a last resort. I do not say this because I am a retired judge, protective of my colleagues still on the bench who deal every day with discovery disputes. We are in an era in which judges are expected to be active case managers to control the cost of discovery and to expedite the resolution of cases. That is part of the job of a judge, and I can assure you that the former and current federal judges I know—present company included—accept that obligation and work hard to resolve discovery disputes in a fair manner.

At the same time, no judge likes to deal with disputes in which the lawyers are fighting about things of little consequence, in an uncivil manner. If you are considering bringing a discovery dispute to the judge or if you think the other side will do so, I suggest that you keep three things in mind.

*First*, if you see things starting to spiral in the wrong direction, you can ask your judge for a discovery conference. Not every judge is eager to have one, but if your judge is one who will do so, then you have a chance to front discovery issues in a setting where the other side should be less inclined to "just yell" and will have to put on the table why his or her position has merit. Of course, be careful what you ask for. If you seek such a conference, you should feel comfortable about the merits of your positions and about your ability to keep your cool even if the other side tries to provoke you.

*Second*, if you are planning to take the other side to task for nastiness, make sure you can prove that the other side has in fact taken the low road. Lawyers who are nasty in their dealings with you outside the presence of the court often have a way of cleaning up their act when in the courtroom, which can make it challenging for a judge to figure out what really took place. Have in hand the emails from your opponent that show the nastiness.

Proving the nastiness may be more difficult if it has been done exclusively in oral communications. Difficult, but not impossible. If the other side has been sly about documenting its nastiness, there are approaches you can take to confront that tactic. You can insist that all communications be in writing. Or you can insist that if there is a discovery conference between the lawyers to try to resolve a dispute, that the conference take place in the presence of a court reporter. There were times as a judge when I saw troubled relationships between the attorneys and, as a result, ordered one or both approaches. It was always interesting (and amazing) to me that even when there was a court-reported discovery conference, lawyers sometimes could not resist resorting to nasty comments about the other side. At least then I had documentary proof of what had occurred.

*Third*, make sure that you have not descended to nastiness yourself. The pot calling the kettle black is never persuasive to a judge. I had one memorable discovery motion in which both sides attached to the briefing the vitriolic emails they had exchanged—typically after midnight. They each excoriated the other side for its conduct and often in the most personal and demeaning terms. I concluded they were both correct; each side had acted in a nasty and disrespectful way to the other side. To avoid recurrence of that conduct, I ordered that they not email each other between the hours of 11 p.m. and 7 a.m. (hoping that a good night's sleep might help change their conduct), and I made them read responsively in open court the 10 or so Seventh Circuit standards they had violated. I told them if I ever again saw from them the kind of emails that were in their motion papers, the sanctions would be severe.

I never heard from those lawyers in the case again—until they both came to chambers, unannounced, six months later, to report that the case had settled. They told me that they were both very angry about what I made them do at the time of the hearing. On reflection, it made them take a step back and think about their conduct. As a result, they not only stopped the nastiness but also developed a good relationship that allowed them to work together productively to get the case settled. So there is proof positive that appealing to the lawyers' better selves can reap positive dividends!

**Take the long view.** I know that when someone insults you, it is tempting to reply in kind. As cathartic as that might feel in the moment, consider the longer view. If you write that nasty email at 1:00 a.m. or say something unfortunate on the record at a deposition, you can be sure that your words will show up in a briefing before the court if there is motion practice. And will the judge reading those words in the cold light of day be impressed by your conduct? Or will the judge be more impressed if you keep your cool and keep things rational and civil? I think you know that answer to that one.

Part of taking the long view is keeping in mind that the discovery dispute that everyone is so lathered up about is often one of many skirmishes in the long war of a lawsuit, and its resolution will almost never dictate the outcome. Never confuse the battle for the war. At some point in virtually every case, there will be settlement talks. I can assure you that having a civil relationship with opposing counsel can be enormously helpful in paving the way to a successful settlement.

Another part of taking the long view is keeping in mind that today's adversary may be tomorrow's potential source of referral for a case. The relationship you establish with your opponent will determine whether he or she sees you as the kind of attorney to whom an important matter should be referred. If the opponent uses nastiness to test you and try to throw you off your game, you will not gain points by responding in kind. Instead, by showing that you can keep your eyes on the prize and not get sidetracked by nastiness as a tactic, you can earn the respect of that adversary—and perhaps future business!

"Rough" conduct by some attorneys has long been with us, and there is no way that I know to eliminate it entirely from litigation. Perhaps an understanding of why nasty conduct may occur and why it almost never is helpful to the process will lead lawyers to adopt strategies to stay clear of the mud.