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Communication Across the Aisle: How to Work Effectively with Opposing Counsel

William Toles and Paul Wingo

Author Contact Information:

Paul Wingo
Hamilton Wingo
Dallas, TX

pwingo@hamiltonwingo.com

214-234-7900

William Toles
Smith, Sharp & Vitullo LLP
Dallas, TX

wtoles@feesmith.com

972-980-3288

I. *OVERVIEW*

Unlike in any other country, the American adversarial system has a complex method in which the opposing parties' counsel advocate head-to-head for their client's protection under the law. Personal injury cases between private parties are, of course, no exception. The adversarial system is governed by laws and rules, including codes of professional responsibility which require candor, as well as peaceful and equitable conduct on the part of counsel for the parties. Despite codes of professional responsibility, determining how to communicate with opposing counsel can prove challenging, especially in high stakes automobile accident cases.

The nature of civil litigation is rarely pretty; as Brian Tannebaum said in an article for the ABA, "nothing causes a nasty fight like a theoretical pile of money on a conference table."¹ In 2019, there were nearly 60,000 cases filed in Texas for injury or damage involving a motor vehicle. These cases alone make up 14% of the civil filings in the Texas Courts, and the number continues to increase exponentially from year to year.² In Texas, for example, the filings from 2019 to 2020 increased nearly 10%. With the sheer number of cases being filed, it is essential that both the Plaintiff and Defense Bar work collaboratively and effectively communicate with one another regardless of the value or exposure in the case. This is better for all involved as it facilitates the adversarial process and lays the foundation to resolve issues in the case, and often, the entire case. While every practicing attorney in the country is subject to ethics rules, such as the Texas Code of Professional Responsibility for those barred and/or otherwise practicing in this state, to "look to

¹ Bruce R. Kaliner & Erica J. Dominitz, *Let's Talk: Cooperation with Opposing Counsel Can Contain Discovery Costs*, 249 N.Y.L.J. 1 (2013).

² David Slayton, *Annual Statistical Report*, 14, (2019).

the formal rules for guidance on how to behave and [to act as though] everything not mentioned there is fair game is a large part of why we ‘enjoy’ the reputation we have today.”³

To effectively communicate and litigate in our adversarial system, it is imperative that attorneys walk into cases understanding that “opposing counsel are normal human beings.”⁴ We not only need to be civil, but we also need to encourage all counsel, no matter how heated the case, to also be civil, leading by example. Petty unprofessionalism, like not agreeing to extend deadlines—particularly when it is for reasons that are personal to your opposing counsel and/or his or her client—is sadly all too common and creates unnecessary friction. Your denial may provide you with the jolt of revenge you were looking for because that counsel was rude or inconsiderate, but, absent some *fair* strategic advantage for your client, you will at some point need a favor from that lawyer. And often you will still get your jolt from having the upper hand. Even being tough and saying, e.g., “yes, I will give you the extension despite the fact that you did not grant me the same courtesy or professionalism” can go a long way. That may be a small, but well-deserved slap, but it did not, e.g., keep your opposing counsel from his daughter’s kindergarten graduation. Something like that could leave a scar with your name on it—well beyond the instant case. Few of us need a code or rules to know how we should act or what behavior ultimately will be in the best interest of *all our clients*.

For attorneys who find themselves focusing increasingly more in one area, creating a positive working relationship with the opposing counsel, and cooperating when appropriate, will almost always prove beneficial as you are likely to have multiple cases throughout your career with the same opposing counsel. The adversarial system in the United States can be cumbersome;

³ Bruce R. Kaliner & Erica J. Dominitz, *Let’s Talk: Cooperation with Opposing Counsel Can Contain Discovery Costs*, 249 N.Y.L.J. 1 (2013).

⁴ *Id.*

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