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GETTING GOOD RESULTS FOR CLIENTS BY BUILDING GOOD WORKING RELATIONSHIPS WITH “OPPOSING COUNSEL”

JOHN LANDE*

I. INTRODUCTION

Lawyers’ relationships with their “opposing counsel”¹ make a big difference in how well they handle their cases. Lawyers often say that they can predict how well a case will proceed once they know who their counterpart lawyer is. If the counterparts have a good relationship, they are more likely to be able to exchange information informally, agree on procedural matters, take reasonable negotiation positions that recognize both parties’ legitimate expectations, resolve matters efficiently, satisfy their clients, and enjoy their work. On the other hand, if the lawyers

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1. People often use the term “opposing counsel” referring to lawyers representing different parties in a dispute. These lawyers often do oppose each other, sometimes quite vigorously. Often, however, they cooperate with each other. In the normal course of litigation, lawyers need to cooperate on many procedural matters. In some cases, the lawyers also cooperate to achieve their respective clients’ substantive interests. It is not unusual for “opposing counsel” to believe that both of their clients are taking unreasonable positions that prevent them from negotiating an agreement that would advance both of their interests. These lawyers may work together to craft such an agreement and try to convince their clients to accept it. Thus the term “opposing counsel” therefore distorts the complex relationship between lawyers for different parties. For an excellent discussion of how lawyers sometimes function as “agents of cooperation” for their clients, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994). See generally Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27 (2002). This article uses the term “counterpart” to avoid implications about the level of opposition or cooperation between lawyers in a case. For ease of discussion, this article assumes that there are only two parties in a dispute and each party has a single lawyer.

have a bad relationship, the case is likely to be miserable for everyone involved. Lawyers may decline to grant each other routine professional courtesies (such as extensions of deadlines to file court papers), bombard each other with excessive and unjustified discovery requests, file frivolous motions, make outrageous negotiation demands, yell and scream, and generally behave badly.²

In fact, “opposing counsel” often work together quite respectfully and professionally.³ It is not surprising that people pay particular attention when lawyers act out a conflict in a flamboyant fashion, and many lawyers are confused by the mythology that has grown around the former duty of “zealous advocacy.”⁴ Sometimes this outdated doctrine is erroneously interpreted to mean that almost “anything goes” and, indeed, lawyers are *required* to take the toughest possible approach within the bounds of the law to get every possible advantage for their clients.⁵ But in workaday practice, most lawyers act appropriately by using a more balanced approach. Lawyers regularly cooperate because they believe that it is consistent with their professional identities, they find it unpleasant to fight all the time, and, most importantly, they believe that it is usually in their clients’ interests to cooperate.

2. See Shiel G. Edlin & Janis Y. Dickman, *The S.O.B. Lawyer*, FAM. ADVOC., Winter 1994, at 46, 48-49 (categorizing types of obnoxious lawyers including “stubborn mules,” “fighting Rambos,” “screaming meanies,” “dirty tricksters,” “shopping-network dealers,” “courthouse settlers,” and “Mr./Ms. Ozone”).

3. See *supra* note 1.

4. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1332 (2003).

5. *Id.* at 1332-36 (demonstrating that under the current Model Rules of Professional Conduct, lawyers are not required to take extreme positions or use “hardball tactics”). Professor David Luban points out that “if a lawyer obtains a satisfactory outcome for a client, it is hard to imagine the lawyer being disciplined because, with a lot more hustle and ruthlessness, she could have wrung out a few dollars more.” David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1012 n.32 (1990). The American Academy of Matrimonial Lawyers adopted ethical guidelines entitled “The Bounds of Advocacy” to supplement the Model Rules of Professional Conduct. AM. ACAD. OF MATRIMONIAL LAW., BOUNDS OF ADVOCACY (2000), available at <http://www.aaml.org/library/publications/19/bounds-advocacy>. Part 7, entitled “Professional Cooperation and the Administration of Justice,” makes clear that lawyers can and should ethically cooperate with each other in most situations. *Id.* Most of the guidelines are relevant to all areas of law, not merely family law. Similarly, judges from around the United States have issued the Sedona Conference Cooperation Proclamation, which states that “cooperation in discovery is consistent with zealous advocacy.” SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (2008), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf. See generally The Sedona Conference®, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (2009).

University of Wyoming Law School Dean Stephen Easton advocates an approach that many lawyers use:

When you encounter a potential dispute with one of your opponents, be it large or small, do not fight with your opponent over that issue until you first determine whether it is important to fight about it. If it is, fight hard, fight smart, fight with conviction, passion, and perseverance, and fight to win. If it is not worth fighting about, concede that issue to your opponent, or find a compromise that is acceptable to you, your client, your opponent, and your opponent's client.⁶

Even when lawyers fight passionately, they can do so respectfully and professionally.

Unfortunately, it is easy to start a cycle of escalating hostility and, once it gets started, it is hard to stop. Both sides may start by intending to cooperate, but a single event can trigger a chain reaction of hostilities. The triggering event can be as simple as a misunderstanding or perception of a disrespectful tone in an email. When lawyers believe that the other side has acted inappropriately, they often feel that they need to retaliate in a tit-for-tat strategy.⁷ Lawyers, understandably, may believe that failing to respond forcefully sends the wrong signal to the other side. They may worry that the other side would feel rewarded for bad behavior if it does not incur any cost for it, which could effectively encourage them to continue acting badly.⁸ In addition, clients often expect their lawyers to act as their champions and fight back. Lawyers may worry that they may lose their clients' confidence—and business—if they do not retaliate.

If lawyers do retaliate—even if they are justified and they do so in a professional manner—the other side is likely to feel justified in making a counter-response, leading to an escalating spiral of conflict. Such escalation is likely to prolong the dispute, substantially increase the costs, and seriously damage the interests of both parties. Even if they eventually reach a cease-fire, they will have suffered significant damage. The parties cannot recover the wasted time and money and it

6. Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 236–37 (2004).

7. Most lawyers intuitively understand the logic of the tit-for-tat strategy, which Robert Axelrod found to be most effective in a prisoner's dilemma game with repeated rounds. The strategy calls for starting with a cooperative move encouraging the other side to reciprocate positively by responding in kind to the counterpart's move. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 20–21 (1984). If both sides use the tit-for-tat strategy and one side perceives that the other side has acted uncooperatively, however, this can initiate a virtually endless loop of retaliation that is hard to escape.

8. *Id.*

is hard to restore the trust that is needed to work well together in litigation or negotiation.

This dynamic is caused, in significant part, by the fact that lawyers operate using what Professor Leonard Riskin calls the “lawyer’s standard philosophical map.”⁹ This map is based on two assumptions: “(1) that disputants are adversaries—i.e., if one wins, the others must lose, and (2) that disputes may be resolved through application, by a third party, of some general rule of law.”¹⁰ Given these assumptions, it is rational for lawyers to use legal rules and procedures to try to gain advantage over their adversaries. Although this approach has some virtues, strict and unconscious adherence to it can cause serious and unnecessary problems for clients, lawyers, courts, and society.

Sometimes lawyers use an interest-based approach, however, which relies on the opposite assumptions. This approach assumes that legal matters are not necessarily purely zero-sum, and so it is possible to find solutions that make both parties better off.¹¹ Under this approach, the law is not the only, or necessarily the most important, basis for making decisions.¹² In practice, lawyers use both of these approaches or some combination, depending on the circumstances.¹³

Some lawyers are afraid to develop good relationships with counterpart lawyers due to the adversarial assumptions of the lawyer’s standard philosophical map.¹⁴ They fear that developing a good relationship would create vulnerability and disadvantage their clients. They worry that if they develop a good relationship with their counterparts, it might raise the other side’s expectations or reduce their ability to resist the other side’s demands.¹⁵ This reflects a lack of self-

9. Leonard L. Riskin, *Mediators and Lawyers*, 43 OHIO ST. L.J. 29, 43–44 (1982).

10. *Id.* See also ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3–14 (2d. ed. 1991).

11. FISHER ET AL., *supra* note 10, at 15–94.

12. *Id.* at 3–14.

13. This mixed approach is somewhat similar to what Prof. Peter Robinson calls a “cautiously cooperative” approach. Peter Robinson, *Contending with Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 970–72 (1998). He writes, “[t]he cautiously cooperative approach balances an advocate’s cooperative behavior, designed to accomplish a mutually beneficial resolution of the dispute, with the necessity to guard against exploitation by a competitive opponent.” *Id.* at 971.

14. Riskin, *supra* note 9, at 43–44.

15. This is part of what I call the “prison of fear” that often keeps lawyers from engaging in early negotiation. See JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 4–8 (2011). One “brick” in this “prison” wall is the fear that lawyers will lose money if they are too cooperative and engage in early negotiation. In fact, savvy lawyers can actually make

confidence. When lawyers feel confident, they can readily respond to counterparts' unacceptable demands in many ways through negotiation and contested litigation procedures. Good lawyers can negotiate when appropriate, settle when reasonable, and litigate when necessary. Indeed, as this article shows, having good working relationships with counterpart lawyers can *increase* the likelihood of successfully managing difficult conflicts in a legal matter.

Part II describes general techniques for providing effective representation by building good working relationships. This analysis is based, in part, on interviews I conducted with lawyers who have extensive negotiation experience.¹⁶ The techniques include getting to know each other personally, initiating mutually helpful actions, and displaying appropriately respectful relationships in front of clients.¹⁷ Obviously, these techniques will not guarantee that counterpart lawyers will always develop good relationships or that the techniques will produce satisfying results for clients. But if lawyers conscientiously use these techniques, they should substantially increase the likelihood of doing so.

Part III argues that these techniques can be helpful even when counterparts take extreme positions or are rascals. The article concludes, in Part IV, that lawyers have little to lose and much to gain by trying to develop good working relationships with their counterparts.

II. TECHNIQUES TO BUILD GOOD WORKING RELATIONSHIPS WITH COUNTERPART LAWYERS

A. *Getting to Know Each Other Personally*

Normally, lawyers advance their clients' interests by maintaining good relationships with their counterparts rather than exacerbating the

money by using creative billing arrangements that provide premiums for lawyers if they achieve certain objectives as agreed with clients. *See id.* at 16–17, 35–45.

16. Excerpts of the interviews are reported in LANDE, *supra* note 15.

17. Professor Charles Craver makes similar recommendations. *See* Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271, 286–92 (2003). The scope of this article is limited to developing good relationships between counterparts and does not address numerous other aspects of handling legal matters. For discussion of techniques that cooperating counterpart lawyers can use, *see* LANDE, *supra* note 15; JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008); ROBERT H. MNOOKIN, SCOTT R. PEPPET, & ANDREW TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Robert D. Benjamin, *The Use of Mediative Strategies in Traditional Legal Practice*, 14 J. AM. ACAD. MATRIM. LAW. 203 (1997).

conflict by adding disputes between lawyers.¹⁸ Clients pay lawyers to resolve the clients' problems, not to have lawyers create new ones. Indeed, sometimes clients hire lawyers essentially to be "agents of cooperation" because the parties cannot resolve their conflicts on their own and they cannot tolerate an ongoing stalemate.¹⁹

Many lawyers I interviewed emphasized the importance of developing and maintaining good relationships with their counterparts. They find that doing so makes their work easier and more enjoyable, and, more importantly, it advances the clients' interest in satisfactorily resolving problems more efficiently.

Several lawyers said that if they do not know their counterparts when they begin a case, they normally try to develop personal relationships with them. Ideally, they go out to lunch and they might spend most of the time talking about themselves, their legal practices, hobbies, or other things that are not necessarily related to their case.²⁰ Although they might talk about the case, this need not be the major part of the conversation.²¹ Of course, it may not be possible to have a lunch in every case with a counterpart who they do not know, but they normally can at least have a phone call to get to know each other personally. The appendix provides a list of topics that lawyers sometimes talk about in these get-to-know-each-other conversations.

Seattle-area lawyer Holly Hohlbein says that she and her counterpart are, in effect, forming a partnership with each other in service of their clients, and they cannot do that by email. If they have not met before, she tries to meet in person if possible. She says they do

18. When lawyers represent clients with an overwhelming power advantage over the other side, they may gain some advantage by acting so aggressively that the other side capitulates and settles on very unfavorable terms, in part, to avoid the hostile relationship. This can be a risky strategy, however, if the other side reacts emotionally by resisting despite its weak position. Good lawyers exert their power in a professional manner and avoid aggravating their relationship with their counterparts. Even when one side has a strong legal position, it is normally in its interest to reach a satisfactory settlement rather than perpetuate a hostile conflict.

19. See *supra* note 1 and accompanying text.

20. Empirical research suggests that people are more likely to be cooperative with people with whom they share some affiliation. See Janice Nadler, *Rapport in Negotiation and Conflict Resolution*, 87 MARQ. L. REV. 875, 879-80 (2004).

21. Research suggests that engaging in preliminary "small talk" can promote cooperative negotiation and settlement. See *id.* at 880-82. For example, one experiment found that negotiators who engaged in preliminary small talk before negotiation were more likely to reach agreement than those who did not do so. Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 237 (2004). Moreover, negotiators who had preliminary small talk conversations shared more information, engaged in more reciprocity, made fewer threats, and developed more respect and trust during negotiation. *Id.* at 240-43.

not need to spend hours together, but they do need to talk.²² Lakeside Mediation Center's Eric Galton says that there is no substitute for meeting face-to-face for developing rapport with the counterpart.²³ "I can't tell you how much we value that personal relationship to build an atmosphere of trust."²⁴

The New Law Center's Doug Reynolds described a case where he represented two sisters against two other sisters in a fierce conflict.²⁵ He met with the other lawyer and they talked for an hour about their lives and legal practices and generally got to know each other. In this conversation, they barely talked about the case.²⁶ At the end of the conversation, they agreed that each would make an outline of the issues and then they would talk again.²⁷ He consciously tried to establish a relationship so that the first time they had an issue, the other lawyer did not just assume he was a jerk and take an adversarial position.²⁸ Reynolds credited building this good relationship as a factor in successfully negotiating the case.²⁹

Another lawyer (who I will call "Sanchez") described a case where her persistent efforts to develop a relationship with the other side produced surprisingly good results.³⁰ She represented the plaintiff in a sexual harassment case and suggested to her counterpart ("Lee") that they meet for coffee.³¹ It took about two weeks to convince Lee that this meeting would be a good use of her time.³² Sanchez started by asking Lee to tell her about her practice.³³ They talked about their respective legal practices, how they handled cases, and their general approaches to negotiation.³⁴

Then Sanchez provided material with general information about negotiation and offered to develop a negotiation process for that case.³⁵

22. LANDE, *supra* note 15, at 51.

23. *Id.*

24. *Id.* Empirical research suggests that meeting in person is beneficial as visual information about others promotes greater rapport. See Nadler, *supra* note 20, at 877-79. "In negotiation, the rapport that results from visual access facilitates cooperation and mutually beneficial negotiation outcomes." *Id.* at 882.

25. LANDE, *supra* note 15, at 51.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. LANDE, *supra* note 15, at 51.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

It took another three weeks of cajoling before they agreed to negotiate, and they ended up settling the case after an [unusually] candid discussion.³⁶ The harasser was the CEO of the company and had harassed other women in the past. The plaintiff, a twenty-two-year-old woman, wanted to make sure that the CEO would not harass other women. Sanchez was amazed to hear Lee say that she and her colleagues had warned the CEO (who was not present at the negotiation) about this issue until they were “blue in the face.”³⁷ This led to some brainstorming about what might be effective to get him to stop his harassing behavior. Lee was particularly intrigued by the idea of arranging for the CEO to meet with a psychologist who works with sexual harassment victims to talk about the emotional impact that a boss’s sexual overtures typically have on subordinate female employees.³⁸ This was a remarkable turn of events considering that Lee was initially reluctant to negotiate at all. It demonstrates the potential benefits of lawyers’ developing a good working relationship with their counterparts. Doing so can require initiative, good listening, openness, patience, and persistence.³⁹

David Hoffman, of the Boston Law Collaborative, described a case where he got off to a bad start with his counterpart.⁴⁰ At one point, they spent some time chatting and Hoffman mentioned how much he enjoyed working with his counterpart’s brother.⁴¹ She was in practice with her brother and was very proud of him. The fact that Hoffman had “hit it off” so well with her brother meant a lot to her and “melted a lot of ice” in their relationship.⁴²

Small talk can be helpful even when lawyers already have a good relationship. For example, David Hoffman described a lawyer with whom he works very well. The lawyer loves golf, which he plays every day. Whenever the two of them talk, they always talk about golf. This is one of the things that has fostered rapport between them, which has contributed to the fact they have settled every case they have had together.⁴³

Part of the initial conversations with counterparts can involve candid assessments of the dispute and the key issues. If the lawyers can

36. *Id.*

37. LANDE, *supra* note 15, at 52.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. LANDE, *supra* note 15, at 52

identify the key legal and factual issues in dispute, they can cooperate to take the steps needed to resolve the issues efficiently. One approach is to jointly develop “the third story”—how an outside observer might look at it—which can help both parties develop a realistic understanding of their case.

Conversations between counterparts may also address their respective clients’ interests and can help avoid unnecessary conflicts. For example, Sevilla Claydon, of Garvey Schubert Barer, tells her counterparts about things that will trigger her client to react badly.⁴⁴ She tells the other lawyers, “If you do this, it will send things backward instead of forward.”⁴⁵ Even if they initially proceed in litigation, coaching counterparts about possible “land mines” can lay the groundwork for eventual productive negotiation.⁴⁶

If lawyers do develop a personal relationship, when problems arise in a matter, it is harder for either of them to react hostilely, such as by immediately firing off angry emails. This can quickly lead to a counterproductive escalation of conflict. Indeed, it can be helpful to agree that if a problem arises in the case, the lawyers will call each other before taking adverse action, such as sending a threatening letter or filing a motion. They can agree that if they know of problems that are going to come up, they would normally inform the counterpart, who may be upset but is likely to appreciate hearing the news directly and promptly.⁴⁷ This can be an important element of building a relationship of trust between counterparts. Lawyers who have good relationships with each other can take this for granted. When lawyers work with counterparts who they do not know very well, it can be worthwhile to develop this understanding explicitly, possibly even in writing.

B. Initiating Mutually Helpful Actions

The norm of reciprocity is very powerful and lawyers can be very effective by initiating cooperative behavior.⁴⁸ When focusing on a case,

44. *Id.* at 53.

45. *Id.*

46. *Id.*

47. Lawyers can be tempted to mislead their counterparts in violation of their ethical duties. See Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 117–21 (2011) (responding to questions about a hypothetical scenario, 30% of lawyers said that they would withhold material facts in negotiation). When lawyers have a good professional relationship, they are probably more likely to comply with their duties to their counterparts, particularly disclosing sensitive information.

48. See ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 17–56 (Rev. Ed. 2007); Nadler, *supra* note 21, at 229–35; Richard H. Pildes, *The Destruction of*

lawyers can start out on the right track by noting the benefits of cooperation for both sides. Lawyers can tell their counterparts that they make a practice of being respectful and hope that everyone in the case would act that way. If appropriate, they can caution others not to mistake their being nice for being afraid to protect their client's interests. If the counterpart threatens to take an adversarial approach, they can offer to handle the case "the easy way or the hard way," stating that they would prefer the "easy way," but they are prepared to do it the "hard way" if necessary.

Being helpful to counterparts can help promote good relationships. When Jim McGuire, now of JAMS (Judicial Arbitration and Mediation Service), represented clients as a settlement counsel, he would send his counterpart a package of information with a cover letter saying that they would need the information to evaluate the case as part of the negotiation process.⁴⁹ The letter would offer to provide additional information upon request.⁵⁰ He would usually provide this information with "no strings attached" and without even asking for information that he needed.⁵¹ He says that under the norm of reciprocity, the other side 'owes you big time.' Sometimes this would prompt the other lawyer to make a 'nice guy macho' response by trying to outdo McGuire in making even more generous unilateral disclosures.⁵²

Similarly, when Eric Galton represents clients in negotiation, he tries to represent his clients' interests while helping his counterparts look good to their clients.⁵³ According to Galton, this is a slow, methodical educational process in which he tries to identify interests of the other side and help them satisfy their constituencies who have to sign off on (or at least acquiesce in) a settlement. He always starts by asking his counterparts, "How can we help you? What do you need to fully evaluate this matter?"⁵⁴ He offers to provide information and anything else he reasonably can.⁵⁵ For example, if a counterpart asks to talk with his consulting expert, he is happy to make the expert

Social Capital Through Law, 144 U. PA. L. REV. 2055, 2063-64 (1996); Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 108-12 (2003).

49. LANDE, *supra* note 15, at 82.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 50. See *infra* Part II.C, which particularly focuses on displaying appropriate respect for counterparts in front of their clients.

54. LANDE, *supra* note 15, at 50.

55. *Id.*

available.⁵⁶ Once he starts providing information, the other side usually reciprocates.⁵⁷

Obviously, lawyers should offer complete and unilateral sharing of information only after consultation with their clients and determination that this is an appropriate strategy. In some situations, lawyers exchange information in a series of stages, starting with the most obviously relevant (and legally discoverable) information. This protects both sides from worrying that the other side would take advantage and, in itself, can promote a more trusting and cooperative relationship.⁵⁸

*C. Displaying Appropriately Respectful Relationships
in Front of Clients*

It is usually helpful for lawyers to bolster their counterparts in front of their clients whenever it would be appropriate, as this is likely to stimulate cooperation. When lawyers have face-to-face meetings with their clients, the lawyers might praise their counterparts for their sincerity, competence, cooperation, and diligence as appropriate. If lawyers believe that their counterparts have made a mistake, it is often better to discuss this with them privately to avoid embarrassing them in front of their clients. Pointing out a mistake in front of the counterpart's client can prompt a defensive reaction. Moreover, if lawyers believe that a counterpart has made a mistake, discussing it privately may also be prudent because the lawyers themselves may be in error, which would not only irritate the counterpart but also possibly embarrass the lawyers in front of their own clients.

Lawyers should be aware of—and carefully manage—the risks in developing good relationships with their counterparts. Obviously, lawyers must diligently advocate their clients' interests, which should not be sacrificed because of friendship with the counterparts. Although lawyers probably do not sacrifice important client interests in this way very often, clients may worry about this when “opposing” counsel seem too chummy with each other. Thus lawyers should avoid too much or too friendly conversation with counterparts in the clients' presence, as this could signal that the relationship between counterparts is more important than their relationship with their clients. Lawyers normally should explain to their clients, in advance, the advantages to the clients of building a good negotiating relationship with their counterparts.

56. *Id.*

57. *Id.*

58. For discussion of procedures for exchanging information, see *id.* at 82–84.

Lawyers should also encourage their clients to share any concerns about this so that the lawyers can address them directly.

III. DEALING WITH DIFFICULT LAWYERS

Most readers would probably agree that the techniques described in this article are likely to be beneficial when counterpart lawyers are prone to be reasonable and do not take extreme positions. But would they work if the counterpart takes extreme positions or is a rascal? Maybe. A lot depends on the motivations and intentions of the “difficult” lawyer. Some lawyers are truly bad actors or represent clients who are. Some lawyers or clients are completely selfish, have no concern for others, are not open to evidence or reason, and may actually enjoy conflict and inflicting suffering on others. The techniques described in this article are not likely to work in these situations, but these situations are probably less common than many people think.

Most lawyers who are perceived as generally being “difficult” usually act that way for a reason. Often, it is because their clients have extreme, unrealistic expectations and the counterparts have problems managing the relationship with their clients. When a counterpart is acting difficult, sometimes Cleveland lawyer James Skirbunt asks, “What can I do to help you move this forward?”⁵⁹ Although this may be a surprising reaction to a perception that the other side is being particularly difficult, he usually gets a response describing what the other party needs.⁶⁰ In that situation, Skirbunt tries to help them if it would not harm his clients’ interests.⁶¹ He says that the toughest part is dealing with his instinctive reaction to become more aggressive.⁶² He says that it can be very hard for him to “suck it up” and ask the counterpart how he can help, but Skirbunt finds that it is one of the most effective things he can do.⁶³ On reflection, it should not be surprising that this technique would be effective when counterparts have difficulty working with their clients. Indeed, it is likely to induce great appreciation and even cooperation from the counterpart that may help satisfactorily resolve the matter.

In some cases, the two sides have substantial but sincere differences in their evaluations of a matter. Having a good working

59. LANDE, *supra* note 15, at 108.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 108-09.

relationship is much more likely to produce a better process and outcome than with a typical adversarial relationship. Without a good relationship, the opposing sides are likely to exchange recriminations of “bad faith” leading to an escalation of the conflict, slamming briefcases, and stormy exits from negotiation (assuming that they attempt to negotiate at all). With a good relationship, the lawyers are more likely to listen respectfully to each other and work together to resolve the differences. Los Angeles mediator and Collaborative lawyer Forrest Mosten suggests dealing with these problems through inquiry and collaboration with the other lawyer by asking, “How can we solve this together?”⁶⁴ In this situation, there are numerous ways to address the problems, including hiring a mediator, neutral evaluator, or arbitrator, among many others.⁶⁵

But what if the counterpart is a rascal or “S.O.B.”?⁶⁶ When counterparts have reputations of being generally difficult to work with, it is important to understand their perspectives and motivations. Some lawyers act tough to protect against being taken advantage of. Indeed, from their perspective, others may have taken hostile positions against them previously and thus acting tough may generally seem like a rational approach. “Difficult” lawyers may sincerely intend to be cooperative but they may lack self-awareness and/or do not realize that their behavior often stimulates negative reactions. Some have only a superficial interest in being cooperative and will do so only if it is in their partisan advantage.

Choosing an appropriate strategy depends on counterparts’ actual perspective and motivations. Lawyers are more likely to gain an accurate understanding of the counterparts’ perspective and develop an appropriate strategy by trying to develop a good relationship with them.⁶⁷ If a counterpart rebuffs an effort to develop a good working relationship, it provides important information about his or her motivations, which can lead to an appropriately vigilant posture. On the other hand, I have talked with numerous lawyers who reported successfully using cooperative techniques with lawyers generally considered to be “difficult.” Having good relationships between counterpart lawyers is usually the key to such success.

64. *Id.* at 108.

65. LANDE, *supra* note 15, at 97–103.

66. See Edlin & Dickman, *supra* note 2 and accompanying text.

67. For possible strategies in dealing with “difficult” counterparts, see FISHER & URY, *supra* note 10, at 95–143; LANDE, *supra* note 15, at 110–11; Edlin & Dickman, *supra* note 2, at 49, 64–66; Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 525–32 (2009).

IV. CONCLUSION

Confident and competent counsel have little to lose by developing good working relationships with their counterparts. Having a good professional relationship does not require lawyers to sacrifice their clients' interests. Lawyers should never do that regardless of how good or bad the relationship is between counterparts. Just because a relationship is cooperative, lawyers should not accede to demands that they believe to be unreasonable. If lawyers unsuccessfully try to develop and maintain a good working relationship with their counterparts, the experience should provide useful information helping them understand the other side's real motivations and respond accordingly. More likely, developing a good relationship would help both lawyers successfully and efficiently deal with difficult problems that would otherwise threaten their clients' interests. Indeed, building a good working relationship may help lawyers develop positive-sum outcomes that benefit both parties.

APPENDIX.

CHECKLIST FOR INITIAL CONVERSATION WITH COUNTERPART LAWYERS

Lawyers are likely to do a better job in a case—and enjoy it more—if they develop a good relationship with the other lawyer from the outset of the case. When working on a case with a lawyer one has never met or worked with before, it is very helpful to start by getting to know each other personally. If working on a case with a lawyer one already knows, the lawyers do not “start from scratch” but it still may be helpful to catch up with each other before focusing on the case. Ideally, lawyers should have this conversation face-to-face, perhaps over coffee or lunch.

The following is a list of topics lawyers might discuss in their first conversation. This should feel like a personal conversation rather than an interview. So both lawyers should address these topics as appropriate.

Personal Background

Information about their practice (e.g., how long they have practiced, types of cases they handle, types of processes they offer, description of their firm, their philosophy of practice):

- Where they went to law school and college.
- Mutual acquaintances.
- Where they grew up and have lived.
- Members of their family.
- Personal interests such as travel, hobbies, sports, etc.

Description of Their Client and the Case

- How their client sees the problem.
- What their client really wants in the matter.
- Ways that the lawyers might work together to make the case go as smoothly as possible.
- Problems that they anticipate might arise and how you might work together to avoid or deal with these problems.
- Any “hot buttons” of their client that you should try to avoid pushing.

Plans for Working Together

- Ask what you can do to help them in this case.
- Ask what information they will want. Offer to share information informally (if your client has authorized this) or to seek client's permission to provide the information.
- Ask them for information you will want and whether they would provide this information informally (with their client's permission).
- Ask what types of professionals would be helpful or needed, if any, and whether it would make sense to hire joint neutral professionals. Ask if there are professionals who they respect and would recommend.
- Ask what they see as the key legal issues in the case.
- Ask about their ideas for the best way to proceed in the case and when they think negotiation might be appropriate.
- Ask whether they think a face-to-face meeting with clients would be helpful early in the case.
- Ask if they would agree that you would both call each other before filing motions in court (other than in emergencies), initiating discovery requests, and doing anything the other side would consider as an unwelcome surprise.