



# Play Nice in the Sandbox

BY JANET C. PANCOAST, ESQ.

**Early in my career, I was sitting in then-Judge Michael Cherry's courtroom waiting for my case to be called. He made a statement that has stuck with me for decades, when he admonished the attorneys in the courtroom to: "Play nice in the sandbox." Over the years, whenever I ran into a rather cantankerous attorney as opposing counsel, it brought back memories of that courtroom and Justice Cherry's wise advice. The oath of office we take as attorneys states in part:**

I will conduct myself in a civil and professional manner, whether dealing with clients, opposing parties and counsel, judicial office or the general public ...

Unfortunately, it seems we are having troubles adhering to this oath these days.

## Disclaimer

If you are one who reads this and thinks of me as a hypocrite. My apologies. Over three decades of practicing law, I have tried many strategies, i.e., from zealous – or possibly in some opposing counsel's opinion, obnoxious – to cheerful and making diligent efforts to keep my ego in check and not allowing myself to react – as opposed to respond – when I get irritated by opposing counsel's strategy. I have some trepidation even having the audacity to write this article. However, after trying multiple approaches to the practice of law, I've concluded that it is better for me and my client if I avoid acrimony in the

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litigation process. Sometimes I fail, but I do try to keep interactions with opposing counsel amicable.

## Civility is Better for our Clients

If attorneys grow to hate each other over the course of litigation, and they then try to settle the case, the resolution is made more difficult by the inevitable mutual disdain. Before getting to the underlying client issues, the battling egos of the attorneys must be neutralized to get the parties to a point where settlement is even feasible.

Judges find acrimony among attorneys very frustrating. First rule of practicing law: “Don’t irritate the judge.” I have never heard a judge say, “the attorneys were at each other’s throats during the trial and the jury loved it.” Quite the contrary. In a case where one attorney is excessively combative, while the opposing counsel is more composed and not carried away by the heat of the argument, the jury may like the less-combative counsel, and therefore look more favorably on the claims of the party with the less-combative attorney.

## Civility is Better for Us

A less-acrimonious approach to representation can also benefit an attorney. The practice of law is stressful. American attorneys are the fifth-highest occupation in the incidence of suicide and they are 3.6 times more likely to suffer from depression.<sup>1</sup> It is always more stressful to litigate against someone who is, shall we say, less-than-cooperative and possibly purposefully petulant. I find that having a particularly cantankerous counsel opposing me raises my stress level. Stress is the response to any pressure or demand, either internal, i.e., perfectionism, competitiveness, etc., or external, i.e., employer’s demands, client’s demands, judge’s demands, kids’ demands, spouses’ demands, etc.

In “Full Catastrophe Living,” Dr. John Kabat-Zinn explains our modern-day stressors, which result in chronic hyper arousal:

Much of our stress comes from threats, real or imagined, to our social status, not to our lives. But the fight-or-flight reaction kicks in even when there is no life-threatening situation facing us. It is sufficient for us just to feel threatened. By causing us to react so quickly and so automatically, the fight-or-flight reaction often creates problems for us in the social domain rather than giving us additional energy for resolving our problems. Anything that threatens our sense of well-being can trigger it to some degree. If our social status is threatened, or our ego, or our strongly held beliefs, or our desire to control things or to have them be a certain way (“my” way, for instance), then the sympathetic nervous system lets loose. We can be catapulted into a state of hyperarousal and fight-or-flight whether we like it or not.<sup>2</sup>

Ironically, it is not necessarily the stress itself that can wreak havoc with our minds and bodies, it is rather how we perceive a situation, and how we handle it, that will determine whether the given situation will lead to high stress levels or whether that stressor, when combined with other stressful events, will turn into chronic stress.

According to Dr. Kabat-Zinn:

There is mounting evidence that chronic stimulation of the sympathetic nervous system can lead to long-term physiological dysregulation, resulting in problems such as increased blood pressure, cardiac arrhythmias, digestive problems, chronic headaches, backaches, and sleep disorders, as well as to psychological distress in the form of chronic anxiety. Of course, having any of these problems creates even more stress. They all become additional stressors that just feedback on us, compounding our problems. these symptoms of chronic hyperarousal back to the person.<sup>3</sup>

The reality is that long-term, the heightened stress caused by the unnecessarily acrimonious litigation is literally hazardous to attorneys’ mental and physical health. Perhaps then, the admonition of playing nice is not only sound professional advice, but sound health advice as well.

## How to Foster Civility

Psychologists Chartrand and Bargh found “that the act of perceiving another person’s behavior creates a tendency to behave similarly.”<sup>4</sup> They explained in their paper, “The Chameleon Effect: The Perception-Behavior Link & Social Interaction,” that:

Perceiving a hostile behavior in the environment . . . so that the mere act of act of interpreting the behavior as hostile would make the perceiver more likely to behave in a hostile manner.

*Id.* at 894.

So, if opposing counsel is being difficult, there is a higher likelihood that conduct will cause the attorney to likewise be more difficult.

I have certainly found this to be true in my own experience. Ironically, the opposite was also confirmed based upon using positive interactions of “smiling,” “friendliness,”





and “eye contact.” These actions resulted in study participants whose positive movements were mirrored reporting that the interaction went “more smoothly” and the participants liked the study participant they interacted with “significantly more.” So, if we are negative, then our behavior may be mirrored by opposing counsel, but also, if we are more professional and civil, based upon my personal experience, then the behavior of opposing counsel usually becomes more amicable.

Over the past few years, I have made significant efforts to be positive with opposing counsel. I discovered that if I was polite and cordial, that is what I would get back. There were times that I did not want to be cordial, but usually I wrangled in my outraged ego before it ran amok. What I found is that in the cases where, despite opposing counsel being rather grumpy, if I kept the interaction professional, we were able to work through the conflicts that inevitably arose in litigation. Even more interesting, the next case in which I had an attorney whose modus operandi was being difficult, we were able to avoid the acrimony and create a good working rapport.

Recently, I was chatting about civility challenges with a seasoned colleague who had successfully disarmed a cantankerous opposing counsel with kindness. She was assigned a case with an attorney she had dealt with before who was extremely difficult. The second time around, she decided to try an experiment and be cordial to him no matter how he behaved. Time and again, she repaid petulance with positive patience. Finally, one day the grump cracked. He wanted to know why she remained so nice the face of his crankiness. During this exchange, he admitted that his grumpiness was an act, and that her failure to respond in kind when he was being difficult was throwing him off his game.

Being irascible is not the same as being zealous. One can be zealous without being ill-tempered. The next time your opposing counsel is not playing nice in the sandbox, you may consider quelling your immediate reaction, but instead take some time to formulate a productive response to the dispute. You may need to file a motion and seek the court’s assistance. Or you may need to consider the source of the conflict to see if your conduct is the cause of opposing counsel’s anger. If you simply mirror the actions of the attorney who is angry and being overly aggressive, you will only make the entire situation worse. If, instead, you step back and figure out how to calmly respond regarding the conflict that has arisen, then you set the tone for the rest of the case ...and reduce your stress level. Responding instead of reacting is better for your client and for you. “Playing nice in the sandbox” is a good lesson for children and as adults, we should really try to do so as well.

#### ENDNOTES:

1. Webb, Michael S., “Dissenting from Death: Preventing Lawyer Suicide”, ABA Voice of Experience (11/24/21). [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2021/voice-of-experience-november-2021/dissenting-from-death-preventing-lawyer-suicide/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2021/voice-of-experience-november-2021/dissenting-from-death-preventing-lawyer-suicide/)
2. Kabat-Zinn, Jon. Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain, and Illness (Kindle Locations 4191-4192). Random House, Inc., Kindle Edition (2009)
3. *Id.* at 4516-4517.
4. Chartrand, T. & Bargh, J., “The Chameleon Effect: The Perception-Behavior Link & Social Interaction”, *Journal of Personality & Social Psychology*, Vol. 76, No. 6, 891-910 (1999).

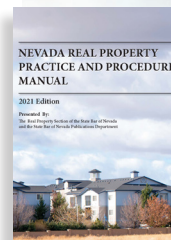
**JANET PANCOAST** serves as an arbitrator and short trial judge on cases assigned through the Eighth Judicial District Court. She also serves as judge pro tempore for the Clark County Justice Court and Las Vegas Justice Court.



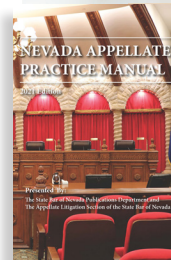
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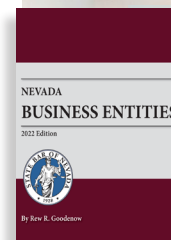
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