Party of One

By Lynn Duryee

If there is any truth to the adage that "tragedy plus time equals comedy," then those of us mired in litigation with the high-conflict, self-represented litigant can look forward to some huge belly laughs in our golden years. Admittedly, it seems like it could be funny when a party testifies she was abducted by aliens who implanted a remote-control device in her brain, or when another claims to have conclusive proof that the judge and opposing counsel are part of a vast conspiracy involving terrorist plots, oil futures and bananas. But if we happen to be involved in that case, it is the very opposite of funny — horribly expensive for the client, nerve-wracking for jurors and exasperating for judges and lawyers. Where legal professionals thrive on order, control and predictability, the high-conflict litigant ducks the rules and has a limitless ability to create chaos, surprise and a ton of extra work. How can we best manage lawsuits involving the difficult (and often disruptive and disrespectful) litigant? Hint: We will need that sense of humor now.

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The judge may first encounter the high-conflict litigant in an ex parte pretrial hearing. This party will typically have a dramatic and time-consuming tale to tell; she may have support people with her in the courtroom; she feels fully justified to cut to the head of the line; and the hearing will have a highly emotional tenor to it. The accommodating judge may respond to the emotional urgency and bend the rules slightly for her, permitting multiple ex parte motions while scrambling to master the facts and craft interim solutions.

A better option, however, is for the court to hold the self-represented litigant to the same standard as other litigants. Rather than trying to sort out a new and hastily briefed problem under the stress of an ex parte application, the judge should set the matter for hearing on a noticed motion, so that both the court and opposing counsel have adequate time to prepare. A second option is for the court to set the matter for an early settlement conference. It's sometimes effective to move this litigant off the ruinous litigation track and give her some "face time" with the judge so she can tell her story and perhaps resolve her matter.

A similar strategy for the difficult pro per is practiced by Judge Steve Austin of Contra Costa: "I try to figure out a way to get off the bench and have some interaction with him without my robe on. Most of these people are kind of worked up before they get in the courtroom and are geared up to fight with the guy in the black robe. I pass their case to the end of the calendar, then come off the bench. I take off my robe and introduce myself with a handshake and a smile. I talk to the parties for a few minutes about the court process. When I get back on the bench, the angry litigant sees me, not just the robe, and often behaves much better."

For the lawyer opposing the ex parte application, the temptation is to respond in kind, meeting the level of outrage and maybe even raising it. A more effective approach may be a simple response that does not address the merits, such as: "There is no urgency to this application. None of the requirements of Rule 3.1200 has been met. This should be set for a regularly noticed motion. If the court wishes to set an early settlement conference, we are pleased to participate."

The high-conflict litigant likes to communicate with the court frequently. Faxes, voicemails, and e-mails may be sent at all hours of the day and night, together with strongly worded letters, usually cc'd to newspapers, elected officials, regulatory agencies, the presiding judge and the Commission on Judicial Performance. Judges tend to ignore these letters or to have their clerk place them in the court file. The opposing lawyer, not knowing what the court has done with them, may feel duty-bound to respond, adding to the collection of inappropriate communications.

A better practice is for the court to have in place a procedure to manage uninvited communications. The courtroom clerk might return the faxes or letters with a form, also sent to opposing counsel, stating that the document is being returned unread, as it constitutes an inappropriate ex parte communication. If the litigant has acquired the judge's e-mail address, the judge can assign the sender's e-mail to its spam filter. Another option for prolific offenders is an order prohibiting telephonic, fax or e-mail communication with the court. The order might state that all communications must be through written motions and that violations of the order may be punishable by contempt.

At pretrial hearings, patience and preparation are absolutely essential. The judge must understand the issues before argument begins or the hearing will last forever and devolve into irrelevant matters. As Judge Jim Mize of Sacramento describes the problem, "The pro per needs to feel as if he has had time to present his story, and the court needs to get the case decided without wasting time on an inordinate amount of unhelpful story."

The approach used by Judge Jeffrey Bostwick of San Diego is to ask the litigant exactly what he wants the court to do and why. He does not allow litigants to interrupt or to address the other party when arguing. He lets counsel reserve objections until the self-represented litigant has finished his presentation. Bostwick says that hearing the whole story with minimal interruption "allows the court to focus on and understand what the litigant is trying to say, maintain order and control emotional reactions." Finally, this judge concludes with a pointed question, asking both sides if there is anything more they wish to say about a specific issue.

For lawyers, it is especially important to remain above the fray, not taking the bait — which is typically quite personal and offensive — offered up by the high-conflict litigant. Judge Alice Vilardi of Alameda suggests that lawyers avoid legalese in hearings. "It makes the hearing longer if I have to translate what you are saying to the self-represented litigant as well as communicate with him myself."

The trial of this matter — especially one before a jury — will require advance preparation so that a clear record is made of the issues to be tried, the rules to be followed and the consequences for violating the rules. For a disruptive party, the court may want to consider a conduct order prohibiting interruptions, eye rolls, speaking objections and other objectionable conduct. Although most judges prefer to let the lawyers try their case, they may find it necessary and appropriate in this situation to interpose objections and time limits, ask questions and terminate examinations and take appropriate steps to prevent a witness from harassment, all of which are permitted by various Evidence Code provisions and case law. The judge should allot sufficient time for the trial of the case, as it will undoubtedly take longer than the routine case.

Judge Paul Haakenson of Marin adds this piece of wisdom: "My clerk always makes sure the pro per in custody defendant has a pad of paper and pen. She helps with making copies and getting the defendant what he needs in court. It goes a long way."

Attorney Michael Hardiman of San Francisco says he prefers to try these cases to the court. "I don't want a jury feeling sorry for the party without a lawyer. I will try this case by the book — no favors, shortcuts, stipulations. I try to keep my sense of humor and avoid embroilment. I just put my case on."

The high-conflict litigant will strain the patience of the participants as well as judicial resources. Courts must not permit multiple drop-in appearances, nor allow these litigants to engage in inappropriate ex parte communications. Judges must employ effective management techniques to reduce the expense and hardship of the trial. Lawyers can help by maintaining professional distance and by requesting that the court follow established rules for notice, discovery compliance, evidence and procedures. If we can exercise superhuman restraint by avoiding embroilment and maintaining our sense of humor, we may yet live to laugh about these cases some day.

Lynn Duryee is a judge in Marin County. Her second book, "Trial & Error: Further Reflections on the Judging Life," is available through the California Judges Association.

Neutral Evaluation a Good Option When Cases Need Battle-Testing

By Robert D. "Bo" Links

A few years ago, I got an interesting assignment. A fellow with whom I shared office space — a partner in a separate law firm — asked me if I'd be willing to argue a motion against one of *his* colleagues.

"Why do you want to do that?" I asked. "Don't you have enough folks over there to do that?"

The response: "We want to battle-test the case."

It seems the law firm had a significant matter that was about to come before a law and motion judge and, as one might expect with a "significant" matter, the stakes were high. The firm involved wanted to conduct a real time oral argument, but they wanted some measure of privacy when doing so. They even hired *another* outsider to serve as the law and motion judge. We had the actual briefs from both sides and the argument was as real as any I have ever made in court. Nothing was pre-arranged, other than the exchange of briefs and notification of when and where the argument would be held. I did not know the "opposing" lawyer who was to argue the motion, nor did I know the "judge." We just showed up at the appointed hour, the "case" was called, and away we went.

I have served as a neutral arbitrator in well over 100 cases. In private arbitrations, I encourage the parties to spend the extra money to get a written opinion. Why? Because it produces a better result, and the parties receive an analysis that at least demonstrates that someone gave their problem a hard, thoughtful look.

When I serve as a volunteer arbitrator for the San Francisco County Superior Court, I automatically write a short opinion in each case without asking. There is no extra charge. While I realize in the Superior Court setting, the parties may well reject my analysis and ask for a trial de novo, I want them to know, at a minimum, that I heard them out and actually thought about what they had to say. And guess what? Several counsel have contacted me later to say that my written opinion helped them immeasurably: either to settle the case outright, or at least to narrow the focus as they approached trial.

These developments got me thinking. What I'm really doing as an arbitrator is an offshoot of early neutral evaluation, which is done frequently in the federal courts, but is something of a stranger to state court practice. But when you consider the process, why isn't early neutral evaluation used more often? And, to morph the concept a bit, why isn't "neutral evaluation" — conducted independently by one side — used more often? Indeed, why isn't one-party neutral evaluation used a *lot* more often?

Consider the economics. You take a deposition and it costs you what? Maybe $2,500 for preparation time, actual examination dime, and then there's the cost of the transcript. It could cost much more (and rarely costs less). And in any significant case, there are a good number of depositions.

Now step back a few paces. Suppose you could frame the case for both sides. You might prepare a brief for the plaintiff (assuming that's the side you represent). You might ask a colleague within your office to prepare a brief for the other side's point of view. You can select an outside lawyer — from an ADR provider, or simply a lawyer you know and respect — and pay that person for, say, 10 hours: two hours to review each side's position; one hour for oral argument; and then five hours to produce a short opinion analyzing the issues and coming to a conclusion. If the hourly rate is $400 an hour, you've spent $4,000, but you are much further down the road with your case analysis. In fact, you will have fantastic insight as to which arguments stick and which slide off. In the analysis that is developed, you may see an argument or two that you hadn't even thought of, or perhaps you will see a crucial piece of evidence that must be worked up differently (or avoided altogether).

You may be able to get this work done for a bit less money, perhaps a tad more. Whichever way the dollar sign swings, it makes some sense to consider the use of a neutral evaluator, especially in a significant case where the outcome is uncertain.

One aspect of the economics is attractive for smaller firms, where the talent pool may not be deep enough to provide an experienced evaluator (or an evaluative panel, if you desire more than one person analyzing the case at hand). The use of an outside neutral evaluator can be particularly effective in such settings as it fits a need that cannot otherwise be addressed. And even in larger firms, the use of a true outsider who has no intra-office agenda is a healthy exercise. It will provide a fresh perspective that you just can't get any other way.

One of the most important (and attractive) aspects of this process is that you can control it completely. If you structure things properly, no one needs to know you've done a one-party neutral evaluation. If you get a result you like, maybe you can use it to persuade a mediator — or opposing counsel — to heed the analysis of a neutral third party. And even if you don't use the work product that way, at least you will gain an insight and a focus that you could never obtain by conventional methods.

Think about it. While private neutral evaluation may not be for everyone, in the right case and in the right setting, it makes good sense.

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