

Adversarial Advocacy: Too Much Adversity Can Hurt You

Posted [Apr 7 2011](#) by [Hon. Jay Quam](#) in [Current Issue](#), [Feature Articles](#)

Handled well, the adversarial system distills the best that either side has to offer and offers the judge a clear and well-reasoned basis for decision. But pursuing adversity for its own sake clouds the issues, irritates the judge, and makes for bad decisions.

The adversarial system is the core and the pride of our legal system. When it works, it works really well. Here's why: When a case is well-presented, the lawyers have sifted through everything and picked out the best. The judge is given everything necessary for deciding the case: good reasons why one side's version of the facts should be believed and why the other side's version should be disbelieved; fair and reasoned comment on any disputes about the law that applies; and a reasonable suggestion for what the outcome should be.

Presiding over such a case, where the judge has only to choose between two reasonable versions, is a dream: the judge just looks at what has been presented and picks the parts that seem most persuasive. It is a little like a smorgasbord because the judge can choose among reasonable offerings and then tinker a little to reach the right outcome. From the judge's perspective, nothing could be easier or more satisfying.

GENGHIS KHAN LITIGATORS

But many lawyers increasingly seem to believe that if some adversity in the adversarial process is good, more must be better. Some appear to understand it as the legal equivalent of Genghis Khan's scorched-earth conquest of the Jin Dynasty.¹ These lawyers fight every request, ask every question, demand every document, concede nothing, and present every conceivable argument. This approach is usually accompanied by belligerence, hostility, and a complete lack of cooperation.

Unfortunately, those faced with this approach often conclude they must respond in kind. In other words, they believe that if the other side becomes extremely adversarial and hostile, the only way to effectively represent their client is to become equally adversarial and hostile. Balance the scale, if you will.

Resisting the pressure to be extremely adversarial is hard in today's highly competitive legal market. The pressure starts with the misconception among many clients that Genghis Khan would have made a great litigator. Clients with that mindset will scold you for being too compliant with your opponent's discovery requests; for not pounding the table enough; for not making every conceivable argument in every matter you bring to court; and for not responding to an angry diatribe from an opposing lawyer. As if negative incentives weren't enough, a number of lawyers have had amazing success marketing their Genghis Khan-like approach to litigation.² Simply put, there is tremendous pressure to behave badly.

NOT A WINNING WAY

You should resist the pressure to behave badly, at least if you want to win. The reason is that it doesn't work.

To understand why you shouldn't emulate Genghis Khan you have to understand what is behind the decision-making process. For starters, Genghis Khan-type lawyers act like bullies and jerks. Judges like bullies and jerks no more than the average person (and because we see so many of them, maybe even less). We don't like it when we see someone treating an adversary poorly, especially when the adversary is someone we like, admire, and respect.

To be sure, we try not to take our eye off our responsibility to make a decision based on the law and the relevant facts. We likewise try to remember that a lawyer's being an unreasonable jerk is not, technically speaking, relevant to what we are supposed to consider in deciding a case.

There may be some automatons on the bench who are unperturbed by bad behavior. But do you really think most judges can completely block out negative feelings toward a bully or a jerk when deciding a case? Before deciding to bet your case on it, think about how many people—including many judges—now want Tiger Woods to lose every tournament, now that his true character has been revealed through exposure of his sordid private life. It is simply human nature to want jerks and bullies to lose. Judges can't completely check their humanity at the door; if you act the part of a jerk or a bully, chances are the judge will notice and react to it.³

Jerks and bullies sometimes do win cases. However, in most cases where jerks or bullies win, one of two situations exists: either the *facts* are so strong that they lead to a favorable result despite the hostility of the lawyer involved; or *someone* has to win notwithstanding the hostile approaches of all the lawyers involved. In either situation, however, the win comes not because of, but *despite*, the bad behavior.

When there is a close case—and judges decide many close cases—a voice in the judge's head will be quietly rooting against the bully and for the reasonable lawyer. Only a fool would think that the voice rooting for the reasonable lawyer and against the bully has no influence in deciding those close cases.

GUIDING THE COURT

There is an even more compelling reason to resist the pressure to become too adversarial. It involves the practical limitations on the judge's time and the judge's need to rely on lawyers to help guide the court to the right result.

In a perfect world, judges and law clerks would have unlimited time to review the arguments, examine the record, and read the cases independent from what the lawyers present. As lawyers who put together cases know, that type of effort takes a long time.

Of course, judges and law clerks don't have anything close to the amount of time a perfect world requires to prepare for and decide cases. As a result, judges look for shortcuts to help them know the facts, the law, and the issues. The "shortcuts" available to judges for these purposes are better known as *lawyers*.

Lawyers are judges' shortcuts because they are the ones who know the facts in great detail, they have studied the law, and they are in a position to credibly present to the judge an accurate summary of the case. They can go through the mountain of information that surrounds every case and boil it down to its most relevant and compelling parts. It is no exaggeration to say that the lawyers can save days of a judge's time otherwise spent reviewing and analyzing a case.

To bring the point home to you and your client, how did you feel the last time someone did something to save you days of hard work, even when it was that person's job to do so? Really good and really grateful, right? The judge feels the same way when you save the judge days of hard work by providing accurate and reasonable information about a case. Suffice it to say, it is a good thing for you and your client.

Now turn around the situation and think about the last time someone did something that forced you to do days of hard work that shouldn't have been necessary. Pretty upset, weren't you? That is exactly what judges feel when lawyers fail to provide accurate and reasonable information about a case. Suffice it to say, it is a bad thing for you and your client.

MATTER OF TRUST

How does a Genghis Khan approach to litigation factor in to the judge's need for shortcuts in the decision-making process? The answer is simple: judges can't rely on those lawyers' shortcuts because they don't trust lawyers who act like Genghis Khan. If the judge does not trust a lawyer, the judge will not rely on what the lawyer says.

Trust matters so much to judges because judges have to make decisions based on actual facts and the correct application of law. If we make a finding of fact that is not supported by the evidence or wrongly apply the law, we get reversed. Judges don't like getting reversed. Even worse, if a lawyer has misled us into basing our decision on a completely unsupportable factual or legal proposition, we get reversed *and* we feel duped. Not wanting either of those outcomes and generally being cautious by nature, judges are careful to accept legal or factual propositions only from lawyers they trust.

Judges do not trust lawyers who act like Genghis Khan. Here are a few reasons why:

- **They take unsupportable positions.** Genghis Khan-type lawyers make every conceivable argument and are consistently contrarian in response. By doing so, they often make arguments and take positions that are unsupportable and, frankly, sometimes ridiculous.

Judges then wonder why the lawyer has done this: Because the other arguments aren't that strong? Because the lawyer doesn't recognize the weakness of those positions? Because the lawyer thinks the judge isn't astute enough to recognize bad arguments and unsupportable positions? Because the lawyer just wants to be difficult? Because the lawyer wants to run up the bill? Whatever the answer, the judge will be wary of any statement that lawyer makes and any position that lawyer takes.

- **They exaggerate the facts and the law.** As mentioned above, judges can't make a good decision without getting the facts and the law right. Genghis Khan-type lawyers frequently exaggerate the law and the facts. Once the judge knows a lawyer has exaggerated something, the judge will doubt the veracity of everything the lawyer says.

- **They don't tell you important parts of the case.** Judges need to know all the relevant facts and law to make an informed decision. The problem with Genghis Khan-type litigators is that they tend not to disclose important matters to the court, perhaps thinking it's the judge's job to figure it out.

For instance, a lawyer may attend a status conference and not inform the court that the lawyer is going to file a major motion the next day that will completely upend whatever strategy is devised at the status conference. Suffice it to say, the judge will not be pleased to realize that all the efforts at the status conference were for naught, especially when the lawyer's intentions could have been disclosed and discussed. The judge will always wonder what other information the lawyer is withholding.

- **They hide their endearing qualities.** Like most people, judges dislike jerks and bullies. In real life, as well as in the courtroom, disliking someone is about 90 percent of the way to not trusting them. When was the last time you leapt to credit something that a jerk or a bully claimed?

Even if the lawyer's behavior is good in court, judges are not blind to what goes on outside of court. If a lawyer is a jerk and a bully in the way he litigates his case, the judge will find out about it, whether through the nasty emails sent to the opponent, the deposition transcript provided to the judge, comments made in court, or otherwise. It only makes the lawyer look duplicitous if she appears all nice and friendly in court but has left an unflattering trail.

- **They create a fog that engulfs the case.** By litigating every point and being contentious about everything, Genghis Khan-type lawyers create a fog that makes it very difficult for the judge to cut through to the real issues in contention. Judges find it very frustrating to have to wade through countless sideshows to get to the heart of a case, the more so given the limited time and resources they have available. Not surprisingly, the judge is unlikely to trust the lawyer who has created that fog.

Some lawyers feel they have to fight fire with fire when facing a Genghis Khan-type litigator. For the sake of your client, you should resist that temptation.

The reason you should resist that temptation is that you will be giving up a huge opportunity to help shape the judge's understanding of the case. If you succumb to the temptation, the judge will be left rudderless. The judge will strive diligently to wade through all the fog and contention, but the outcome will be far more likely an ill-informed stab at what the judge guesses is right rather than a well-reasoned and supported decision. When you stoop to your opponent's level, the judge won't trust you either. You make the outcome far more of a toss-up.

PROFESSIONALISM PAYS

Here's the payoff for resisting the temptation to act like your opponent: You will earn the judge's trust; the judge will believe you; *and the judge will look to you for guidance as to the right result*. The judge will try to be fair and balanced, but if your opponent is Genghis Khan, the court will be left without a credible, compelling counterpoint to your reasonable point of view. By staying above the fray, you will put yourself in a position to win your case.

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