

Lawsuits over a job loss or a pay loss are never pleasant. That does not mean the civil lawsuit has to be uncivil. But the responsibility for keeping the animosity that exists between the lawsuit embroiled employee and employer out of the lawsuit belongs to their lawyers. Without such responsible lawyers, fighting the dispute can be as costly as resolving it.

I was compelled to publish this thought by an [article](#) I read today about a discovery fight in a New Jersey [case about lost overtime pay](#) .

The employer's attorney was questioning one of the employee-plaintiffs at deposition. The questions were about the employee's immigration status. The employee's immigration status obviously had nothing to do with the dispute about whether overtime pay was owed. So the lawyer for the employee sought a protective order from the judge to stop the questioning. The judge denied the request. The employee's lawyer appealed, and the appellate court said the trial judge should have stopped the questioning.

When interviewed about the decision, the employer's attorney gave this reason why the appellate decision was wrong and why he should have been allowed to ask his questions about the employee's immigration status: "he doesn't care about whether the plaintiffs are in the country legally or not. What does matter, he says, is whether they lied during their depositions. If it can be shown that they did, the jury should be allowed to hear that because it impacts on their credibility when it comes to their allegations that they were not paid the prevailing wage or worked overtime."

So the lawyer wanted to ask irrelevant questions about a sensitive matter to create issues of credibility. If the lawyer's reasoning is right, no embarrassing, or sensitive issue in a person's life is safe from the public after the person becomes part of a lawsuit. Of course, this would also be true regardless of whether the person was the plaintiff who chose to participate, or the defendant who was forced to participate, or a third party witness who has nothing at stake in the controversy. Asking questions for this purpose alone as admitted by the employer's attorney in this case does nothing more than send tensions between the parties soaring and reducing the likelihood of finding efficient resolution to the dispute.

Indeed, this is exactly the harm that the parties suffered in this overtime pay case. The appeal has dragged the litigation out. Now the fees and costs associated with the dispute are no doubt much higher. The employees will now want more money to compensate for the litigation. The employer will now find it harder to justify offering as much settlement money as they may have been willing to offer before the discovery appeal costs were incurred. Alternatively, the

employer's cost of successful defense has risen considerably or the exposure to paying the employees' attorney fees and costs has risen. So regardless of whether the employer wins or loses or wants to settle, this discovery battle was likely counter productive.

The economic pressures caused by the fight is only part of what makes resolution in this case less likely. A lawyer who represents her client without recognizing that most cases end in settlement does a disservice to her client. Thus, the lawyer must simultaneously keep the client well positioned to prevail at trial or arbitration while also keeping open the opportunities for amicable, compromised resolution. Asking embarrassing or intrusive or even excessive questions in the discovery process pushes the door more closed than open to settlement opportunities. That's why clients are poorly served by Rambo litigators like the one in this case.