

HOW TO COPE WITH THE DIFFICULT ADVERSARY

Introduction

Bury your head in the sand? Take the high road? Stoop to his level? Pound on the courthouse door?

These are the general options available to an attorney subjected to the antics of a difficult opposing counsel. Sometimes the opposing counsel's penchant for abusive tactics is apparent from the first telephone conference. Other times, opposing counsel saves her abusive tactics for formal discovery events. However, it is no mystery that the mere existence of this bad lot forces all of us to be on our guard. It is also no secret that the favorite target of the difficult opposing counsel is the younger or less experienced attorney.

These materials describe some of the more common behavior displayed by the difficult adversary and some suggestions on how to respond professionally and civilly.

The Hallmarks of a Difficult Lawyer

In litigation, the behavior of the difficult opposing counsel is typically referred to as "Rambo litigation tactics." Writing for the ABA Journal, one commentator described the six traits of a "Rambo litigator"¹:

- Acting as though litigation is war and describing trial practice in military terms.
- Believing that it is in his interest to make life miserable for his opponent.
- Dispensing with common courtesy and civility under the presumption that these traits are not becoming of a true warrior.
- Adept at manipulating facts and revising history.
- Quick to file unnecessary motions and use discovery as a means of intimidation rather than fact-finding.

¹ Robert N. Sayler, Rambo Litigation: Why Hardball Tactics Don't Work, A.B.A. J., Mar. 1, 1988, at 79. Other commentators provide a more colorful description: "tendency to foam at the mouth during depositions," "proudly displays tattoos featuring his favorite objections," and look[s] for the office building with the scorched earth in front." John G. Browning, Top 10 Ways to Spot a Rambo Litigator, 53 Tex. B.J. 1094, 1094 (1990).

- Predisposed to put himself on center stage while ignoring or diminishing his client or the client's cause.

Manifestations of the Rambo attorney's traits can be found in the following behavior:

- Refusing to extend normal courtesies, such as extensions of time and stipulations of facts;
- Failing to consult with others before scheduling depositions or hearings;
- Intentionally sending motions or messages at the end of the day or week;
- Sending letters "confirming" conversations that do not accurately represent the conversations;
- Intentionally delaying matters; and
- Obstructing the discovery of evidence, either by failing to produce documents, making frivolous objections to interrogatories, and/or interrupting depositions with speaking objections and inappropriate instructions not to answer.

Describing these tactics with anymore specificity is difficult because the context, tone and interpretation of the conduct or comments typically govern the level of inappropriateness or, worse, offensiveness. The results, however, are readily apparent. Those particularly adept at these tactics will frustrate the younger or less experienced attorney into submission; make her question her skills or even believe that she is in the wrong; increase the cost of litigation for clients; and generally stifle the pleasure of practicing law.

Examples of Rules at your Disposal

Professional Codes of Conduct

- Model Rule 3.2: Requires lawyers to act with reasonable diligence and promptness, to make reasonable efforts to expedite litigation, and to demonstrate respect for the legal system and the judges, lawyers and public officials who serve it.
- Model Rule 3.4(d): Prohibits lawyers from failing to make a reasonably diligent effort to comply with a legally proper discovery request and from making frivolous discovery requests.

- Model Rule 4.4: Prohibits lawyers from engaging in conduct the sole purpose of which is to embarrass, delay, or burden a third party.

Civility Codes

- Boston Bar Association's Civility Standards for Civil Litigation
- Denver Bar Association, Standards of Professionalism
- Los Angeles County Bar Association, Litigation Guidelines
- St. Petersburg Bar Association, Standards of Professional Courtesy
- Texas Lawyers' Creed
- Washington State Bar, Courtroom Decorum and Practice Guidelines Decorum Guide

Federal Rules

- Fed. R. Civ. P. 11: Requiring that all pleadings, motions and "other" papers be signed, certifying that the document "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."
- Fed. R. Civ. P. 16 and 26(f): Providing for pretrial orders that limit discovery.
- Fed. R. Civ. P. 26(c): Providing that a party may move for a protective order to protect the party "from annoyance, embarrassment, oppression, or undue burden or expense."
- Fed. R. Civ. P. 30(d): Requiring that objections and depositions be "stated concisely and in a non-argumentative and non-suggestive manner" and prohibiting instructions not to answer except when necessary to "preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion" for a protective order.
- Fed. R. Civ. P. 37: Providing remedies where a party fails to disclose information or documents required by Rule 26(a).
- 28 U.S.C. 1927: Providing that attorneys who multiply "the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs,

expenses, and attorneys' fees reasonably incurred because of such conduct."

Local Federal Court Rules and Standing Orders Regarding Discovery

- Middle District of Alabama Guidelines Civ. Discovery Prac. Guide
- Southern District of Alabama Pretrial Procedure Instructions
- District of Alaska – Local Rule 30.1(c)
- District of Colorado – Local Rule 30.1C
- Southern District of Florida -- Local Rule 30.1
- Southern District of Indiana – Local Rule 30.1
- District of Maryland Discovery Guidelines Guide
- Northern District of Ohio – Local Rule 30.1(a)
- District of South Carolina – Local Rule 30.04
- District of Wyoming – Local Rule 30

Local State Court Rules

- Arkansas R. Civ. P. 30
- Colo. R. Civ. P. 30
- Conn. Super. Ct. R. 247
- Del. Super. Ct. Civ. R. 30(d)
- Fla. R. Civ. P. 1.310
- Ky. R. Civ. P. 30.03 and 30.04
- Minn. R. Civ. P. 30
- N.J. Super. T. & Sur. Cts. R. 4:14-3(c)
- R.I. Super. Ct. R. Civ. P. 30

- Vt. R. Civ. P. 30
- Wyo. R. Civ. P. 30

Caselaw

- Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993) – In this seminal case, the Court issued eight guidelines for deposition conduct:
 - (1) Deposing counsel shall instruct the witness at the beginning of the deposition that the witness must ask deposing counsel (not the witness's own counsel) for clarifications, definitions, or explanations of any words, questions, or documents and the witness must abide by the instructions.
 - (2) Only those objections that would be waived if not made under Fed. R. Evid. 32(d)(3)(B) and those necessary to assert a privilege, enforce a limitation on evidence directed by the court or to present a motion for protective order may be made.
 - (3) A witness shall not be instructed not to answer a question except on the basis of privilege or a limitation on evidence directed by the court.
 - (4) No speaking objections – statements while making objections should be succinct and verbally economical, merely stating the basis of the objection.
 - (5) Witnesses may not engage in private, off-the-record conferences with their counsel during breaks or recesses, except to determine whether to assert a privilege.
 - (6) Conferences that occur in violation of guideline (5) are a proper subject for inquiry to determine whether witness coaching took place.
 - (7) Conferences that occur in violation of guideline (5) must be noted on the record by the counsel who participated in the conference.
 - (8) Deposing counsel must provide to the witness's counsel a copy of all documents shown to the witness during the deposition; however, the witness may not discuss documents with his counsel before answering questions regarding them.

- *In re Stratosphere Corporation Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998) – In this case, the Court established the following "deposition protocol":
 - (1) Depositions may be videotaped if the intention to do so is set forth in the deposition notice or otherwise agreed.
 - (2) Depositions must be conducted at the parties' counsel's office if possible. Otherwise, they must be conducted at "some other facility adequate to accommodate all those attending."
 - (3) Depositions must be conducted from 9:30 a.m. until 5:30 p.m., with a one-hour lunch break and 15-minute breaks during the morning and afternoon sessions, "unless transportation or health or other physical needs require reasonable modifications."
 - (4) Cellular phones must be turned off and pagers must be turned to silent signal modes.
 - (5) Smoking is prohibited in the deposition room.
 - (6) Firearms are prohibited.
 - (7) Strict adherence to Fed. R. Civ. P. 30(d)(1) and (3).
 - (8) Deponents and their counsel are prohibited from interrupting a deposition when a question is pending or a document is being reviewed except as permitted in Fed. R. Civ. P. 30(d)(1).
 - (9) When instructing the witness not to answer a question, counsel must "state on the record the specific reason for such an instruction, the specific question, part of a question, or manner of asking the question, upon which counsel is basing the instruction."
 - (10) The Magistrate Judge will try to make himself available by telephone to address disputes that arise during depositions if given proper notification of the time of the deposition.

Practical Pointers on how to Respond to the Difficult Opposing Counsel

Burying your head in the sand

This is typically the best first step. Many times opposing counsel will simply be "testing" you to determine if you are susceptible to her provocation. Once she determines that her conduct does not distract you, she may give up.

If the conduct persists and is interfering with your ability to represent your client, obtain discovery, or proceed with your case in a timely manner, then it is time to move on. Otherwise, opposing counsel's tactics will be achieving their desired affect.

Taking the high road

This option can be as simple as politely reminding counsel of the relevant rules or caselaw, or making informal attempts to resolve issues. Making a "paper trail" of these reminders and attempts is crucial in the event that court intervention becomes necessary.

Stooping to his level

This option may occur when all else fails and the attorney on the receiving end is not comfortable going to the next step – the courthouse door.

While some opposing counsel may change their tactics after being victimized in the same way, this is not the typical response. Instead, incivility tends to escalate as a result of the attorneys feeding off of each other's misconduct.

Pounding on the courthouse door

Requesting a conference with the judge or magistrate, or filing a succinct motion with the court, is usually viewed as a last resort. This is probably prudent unless you are certain that your judge is receptive. In any event, your position should be stated objectively, without resort to name-calling or embellishment of the objectionable conduct.

Conclusion

Dealing effectively with the difficult opposing counsel takes patience, common sense and confidence. Experience obviously helps. Most bar associations offer continuing legal education courses addressing this issue. Requesting assistance from temperate and more experienced attorneys in your office is also beneficial.

By James E. Davidson, Esq. and Denise L. Hanson, Esq. Mr. Davidson is a shareholder and Ms. Hanson is an associate in the labor and employment practice group at Schottenstein, Zox & Dunn Co., L.P.A. in Columbus, Ohio. Schottenstein, Zox & Dunn is 100 lawyer firm with offices in Columbus, Cincinnati and Cleveland, Ohio. There are eighteen lawyers in its labor and employment law practice section which represents some of the largest public corporations in the United States, as well as small and medium-sized companies in a diversified range of businesses.