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Litigation Unprofessionalism Revisited:
Leashing a Bulldog Adversary

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In May 2008 the Oregon State Bar Bulletin published my first article on how you as a litigator can maintain your professionalism even when confronted by an adversary's unprofessional conduct. This second article offers "nuts and bolts" strategies, all of them seeking to help litigators protect clients' interests in the face of unprofessional litigation tactics by an adversary. The good news is twofold: (1) there are effective strategies for responding to bulldog tactics, and (2) judges and juries are more likely to punish than to reward litigants who use sharp tactics. From document requests to trial, here are my top 18 problems and solutions to leash a bulldog, whichever side you are on:

1. **Problem:** A lawyer makes "speaking" or "coaching" objections in a deposition.
   Solution: A good practice is to go off the record and politely tell the offending lawyer that you expect compliance with ORCP 39 D(3) or FRCP 30(d)(1) as applicable, which prohibit argumentative and suggestive objections. *See* the Multnomah County Deposition Guidelines, www.mbabar.org/docs/depositionguide.pdf. If the non-compliance continues, make an objection on the record that includes reference to the rule and your off-the-record request. Your remedy for continued non-compliance is to call a judge and request an order directing compliance. Before calling the judge, work with the court reporter so the reporter is prepared to read examples of the non-compliant objections to the judge.

2. **Problem:** Opposing counsel stonewalls in discovery, such as refusal to cooperate in scheduling depositions.
   Solution: Conduct discovery early and move to compel as necessary; notice the deposition and seek court intervention if the deponent "no shows." For deponents who are not parties, keep in mind that you may have no meaningful remedy for non-appearance unless you have served a subpoena.

3. **Problem:** Counsel elects not to comply with a court order, such as orders compelling discovery.
   Solution: Immediately bring issue to attention of court; endeavor to have court put deadlines in orders to create bright lines for non-compliance.

4. **Problem:** Counsel advises that they will make certain non-party deponents (usually employees or former employees) available for deposition but then does not follow through.
   Solution: If your deposition schedule is tight, or in any situation where you cannot rely on your opposing counsel to make witnesses available, serve deposition subpoenas. They are relatively inexpensive.

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5. **Problem:** Counsel does not follow through with agreements.
   Solution: Confirm important agreements in writing. Anticipate that judges are likely to excuse initial lapses, and are more likely to take action when a pattern can be demonstrated. Talk with other lawyers who have litigated with your adversary to determine whether other lawyers' specific experiences may help you demonstrate a pattern of problems. Another lawyer may be able to provide an affidavit or attend a hearing to provide additional background to assist the court.

6. **Problem:** Counsel refuses to mediate or otherwise comply with mandatory ADR rules.
   Solution: Prepare for trial and seek court intervention to enforce the rules. Even if the other side is not cooperative it may help your client to put a realistic settlement offer on the table before trial. Even if a lawyer seems unreceptive to settlement, his or her client may be; and communication of the offer to the client may be productive. Also, in cases where the court may ultimately be making a discretionary award of attorney fees, keep in mind that the court will consider "[t]he objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute." ORS 20.075(1)(f).

7. **Problem:** Counsel drags feet on whether they will accept service of trial subpoenas.
   Solution: Whenever possible, avoid the problem by serving trial subpoenas on witnesses at their deposition. Put a short time limit on any request to accept service, and be prepared to serve the subpoenas. Confirm that counsel is actually accepting service.

8. **Problem:** Counsel drops numerous motions on opposing counsel on the eve of trial.
   Solution: Budget time immediately before trial to adequately respond to such motions, which often are make-work. Obtain a copy of opposing counsel's trial briefs from another case in advance, along with another firm's responses to those briefs. Maintain relationships with contract attorneys and law students, and let them know in advance that you may need their help on last-minute issues before trial.

9. **Problem:** Failing to submit an exhibit at the commencement of trial list as required by rules, *i.e.*, UTCR 6.080(3).
   Solution: Ask court to enforce the rule.

10. **Problem:** Misrepresentations in demonstrative aids.
    Solution: Ask court to compel opposing party to supply a legible copy of the demonstrative aid and/or allow sufficient time to confirm the accuracy of the information on the demonstrative aid before it is shown to the jury. Move court to exclude the demonstrative aid.

11. **Problem:** Counsel offering numerous experts on identical issues.
    Solution: Ask court to prohibit this practice under FRE 403 or OEC 403 re cumulative evidence. If the multiple experts are allowed, argue in response to the jury that the other party was not confident with just one expert so they had to pay additional experts to come and say the same thing. In any event, a party who calls multiple experts on the same issue runs a risk that their experts will disagree with one another on other issues at play. Plan to co-opt opposing experts on cross examination by asking questions that are relevant to your themes.

12. **Problem:** Offering evidence that was requested but not produced during discovery.

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Solution: Move for the sanction of exclusion of the evidence on account of discovery violation. If there are specific types of documents that you expect may be a problem, file motions in limine to exclude them so that you are not put in the difficult position of making objections in front of the jury that may come across as seeking to keep the jury from hearing the full story.

13. **Problem:** Unsubstantiated argument to the court at trial that certain documents were produced during discovery.
Solution: Require that all documents be produced with sequentially numbered bates labels, with number ranges referenced in a cover letter. If adequate cover letters are not forthcoming, respond with a letter confirming what bates ranges you received and requesting that future documents produced be accompanied by a cover letter referencing the bates range produced. If a party refuses to number documents, seek court intervention. In seeking such intervention, note that documents produced after January 1, 2008 must comply with the new ORCP 43 B(2)(a) requirement that documents be "organized and labeled to correspond with the categories in the [discovery] request." Production of voluminous unnumbered documents would seem not to comply with the labeling requirement. Have copies of your discovery requests, the other side's responses, and the cover letters (or a summary of the dates and page number ranges) showing what was produced in your trial notebook.

14. **Problem:** A party refuses to authenticate its own documents, or other documents in which authenticity is beyond dispute (*e.g.*, medical records obtained from providers).
Solution: Seek early stipulations on authentication issues. If stipulation is not prompt, serve requests for admission several months before trial. If authenticity is denied, *see* number 15, below.

15. **Problem:** A party denies requests for admission that should be admitted (for example, a defendant denies that medical bills were reasonable and necessarily incurred in a case where malingering or overtreatment is not at issue).
Solution: Make an appropriate challenge to the denial under the request for admission rule. *See*, *e.g.*, ORCP 45 C; FRCP 36(a)(6). Keep in mind that the challenge may not resolve the problem: some judges will allow denial of a request for admission, recognizing that the aggrieved party has a viable remedy if the denial ultimately is shown to be inappropriate. In that case, you will have to conduct the necessary discovery. In doing so, record your time/costs separately from other tasks, and with specificity so that recovery may be made against party who inappropriately denied requests for admissions. *See* ORCP 46 C (expenses on failure to admit).

16. **Problem:** Defense counsel asks permission to put on witnesses in plaintiff's case without agreeing not to call the witness again in defendant's case.
Solution: Do not agree. If the defendant agrees not to call the witness again in defendant's case, courtesy likely would favor accommodating a scheduling difficulty.

17. **Problem:** Counsel mischaracterizes witnesses testimony or what a trial exhibit says.
Solution: Object or, alternatively, point out the problem on cross examination or in closing arguments.

18. **Problem:** Counsel discloses or publishes documents to the jury that have not been admitted into evidence.
Solution: Move in limine citing OEC 103(3); side bar with the judge regarding the issue.

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Conclusion

Unprofessional or "bulldog" tactics may be employed by counsel for any party, plaintiff or defendant. As a profession, lawyers and judges should learn to identify and name conduct that is out of bounds. Naming the conduct not only helps you (and the judge) understand what is happening, but also often takes away much of the effectiveness of manipulative or unprofessional behavior. Early court intervention at a pre-trial conference (UTCR 6.010, SLR 6.014 (Multnomah); FRCP 16) can be beneficial.

If the unprofessional conduct goes to the merits of the case, another effective strategy is to present the conduct to the jury. Indeed, many litigators view an overly aggressive adversary as helpful: even if a lawyer tries to put on a fresh face for the jury, it is often possible to expose earlier inconsistencies and sharp practices. Many judges recognize that how a party conducted itself during litigation can be relevant to a jury's determination, and will exercise some discretion to allow a jury to receive relevant information about sharp practices.

When you are having problems with opposing counsel, it is often helpful to talk with other lawyers who can provide a cool-headed and neutral perspective on the situation and your options. I am always happy to offer my input, and encourage you to send me problems and solutions you have identified for inclusion in future discussions of these issues.

About the Author

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