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# 5 Dirty Litigation Moves And How Good Lawyers Foil Them

By **Sindhu Sundar**

Law360, New York (February 13, 2015, 6:47 PM ET) -- Destroying evidence and carting papers in for last-minute document dumps — where attorneys try to blindside adversaries with mammoth stacks of sheets before depositions — are mostly relics of decades past, but underhanded moves like lobbing personal attacks and sneaking a peek at opposing counsel's notes are still afoot, attorneys say.

As judges have become more conscious about reining in unnecessary conflict and implementing better courtroom decorum, some of the more outrageous attorney transgressions from the 1980s are now rare. But it is not unusual to see some attorneys using subtler tactics to gain an edge, such as needling a deposition witness with the same question repeatedly and dragging out discovery issues in order to stall the litigation or delay a settlement, attorneys say.

Here, attorneys share five less than noble litigation tactics, and suggestions for how to thwart them:

**Stretching Out the Case**

A lot of lawsuits, particularly class actions, involve complex issues that necessarily take time to work through, but attorneys sometimes also introduce artificial delays to litigation by breaking up resolution conversations into multiple fragments rather than working them out at one go — a tactic often aimed at racking up bills, attorneys say.

Attorneys are more likely to engage in such tactics if the corporate counsel or insurers who hired them have less oversight on how they spend their time, according to litigation veterans, who note that attorneys should try to be more accountable for how they spend their billable hours.

"I've had cases take three years to settle that could just as easily have been settled in year one," said Bill Marler of Marler Clark, a food safety attorney who's practiced for decades. "A lot of times we're representing a plaintiff who tests positive for E. coli, for example, and local, state and federal authorities have said that this person is part of the outbreak linked to a particular product by the defendants, but they'll still ask for excruciating detail about every thing that this person ate every hour for the weeks before the illness."

"When we know from neutral, scientific authorities what that particular illness is, you have to ask yourself: What's the efficiency of this?" he said.

**Harassing Deposition Witnesses**

The purpose of deposing the opposing party's witness is to draw testimony that can help

build your case, but the process can be fraught with tension as attorneys sometimes resort to harassing witnesses or manipulating them into giving responses that may seem damaging without context.

Attorneys say the key to dealing with this is to avoid passionate objections that betray emotion, and to instead carry out a redirect examination of the witness after the opposing attorney is done.

"This is something a lot of lawyers don't do, but you can ask follow-up questions to set the context for the testimony the opposing attorney got out," said Brendan Kenny of Blackwell Burke PA. "You can use that to explain testimony that may seem negative to your case, and it gives you an opportunity to show the other side was being unfair."

**Raising Frequent Objections**

When you are faced with deposing a difficult witness and the other side keeps interrupting your flow with repeated objections, the key again is to maintain composure, attorneys say, and your questions should be short and direct.

"That gives the witness less wiggle room and the other side's attorney less reason to object," Kenny said.

A frequent source of objections at trial is controversy over whether the opposing side is raising or alluding to evidence that was deemed inadmissible.

"They may sometimes pose questions that are out of bounds, but you don't want to look obstructionist," said David Biderman of Perkins Coie LLP. "If you want to object, you should do so in a quiet, understated way. You don't just get up and pound the table. And if things go far enough, you have to ask for a conference with the judge."

Attorneys should also strive to resolve these disputes earlier in the litigation, relying on tools in the Federal Rules of Civil Procedure.

Rule 26(f), for example, requires parties to confer about electronic discovery issues, while Rule 16 requires that a judge issues an order to guide how the discovery proceeds.

"The best way to counter these kinds of conflicts in advance is to have the discovery process as clear and unambiguous as possible as early as possible in the case," Kenny said.

**Judge-Shopping**

Some plaintiffs attorneys file a number of individual similar suits in a number of state courts, and once the cases are randomly assigned to judges, as is the case in some jurisdictions, they attempt to transfer all the suits to the judge they consider most favorably disposed to them, attorneys say.

The suits are sometimes filed on behalf of different proposed class members, but they are not served. Attorneys seeking to sniff out such forum shopping should look for similar complaints filed in other courts by the same attorney that were never served, attorneys said.

"Sometimes you do see people advocating for their client while also trying to circumvent the random assignment of judges that certain state courts have," Colin Kelly of Alston & Bird LLP said.

**Ambushing Experts at Trial**

One of the most contentious battlegrounds in litigation is the quest to exclude the other side's expert testimony, a pursuit that can sometimes slip into foul-play territory, attorneys say.

For example, attorneys might try to claim to the judge that the opposing side's expert is barred by an earlier court order from testifying, even if that's not the case, or they may create a combative environment that deters the expert from testifying at trial.

One of the ways to nip this problem in the bud is to ensure that issues surrounding experts are resolved well before a trial, through rigorous motion practice to address any objections to their testimony in an organized and methodical way, said Bill Curtis of the Curtis Law Group, a plaintiffs attorney.

"That way, by the time of the trial, neither side is trying to look behind the law to ambush the other side," he said.

--Editing by Jeremy Barker and Chris Yates.