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# Litigation Jujutsu: The Art of Combating Dirty Lawyer Tactics

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# Litigation Jujutsu: The Art of Combating Dirty Lawyer Tactics

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## 1. Who is the Rambo Litigator?

- A litigator that has one or more of the following traits:
  - A mindset that litigation is war and that describes trial Practice in military terms;
  - A conviction that it is invariably in your interest to make life miserable for your opponent;
  - A disdain for common courtesy and civility, assuming that they ill befit the true warrior;
  - A wondrous facility for manipulating the facts and engaging in revisionist history;
  - A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding;
  - An urge to put the trial lawyer on center stage rather than the client or his [or her] cause.

## 1. Who is the Rambo Litigator? (cont'd)

- Not returning your calls, but claiming by letter or email that you do not respond promptly to him or her;
- Sending letters or emails that demand immediate action (which is never reciprocated);
- Noticing depositions without contacting you in advance to pick a mutually convenient date;
- Threatening motions, sanctions, and screaming “frivolous” at the drop of a hat;
- Telling you one thing in person and then reneging later – the person you cannot trust on a handshake;

## 1. Who is the Rambo Litigator? (cont'd)

- Slinging insults/personal attacks;
- Making inappropriate and/or speaking objections at depositions;
- Conducting excessive discovery for the purpose of harassment;
- Arguing (orally and in briefs) outside of the record – making up facts to help his/her case;
- Blatantly misrepresenting the law;
- Interrupting during your argument;
- Exhibiting the general “weasel” factor, like faxing discovery requests over at 4:55 PM on a Friday.

## 2. Civility: The Hallmark of Professionalism

- Why do you do the right thing?
  - Doing the right thing and self-interest are not mutually exclusive; they should go hand in hand.
  - In short, if you act like a jerk, clients and potential clients will not like you. Neither will judges and juries.
- **People who are in control act politely.**
  - It is therefore *strategic* to act civil.
  - It projects the appearance of strength and control.

## 3. Documenting Bad Behavior and Dirty Tactics

- Jefferson on ethics: “Whenever you are to do a thing, though it can never be known but to yourself, ask yourself how you would act where all the world is looking at you, and act accordingly.”
- Create a paper trail of the improper tactics of a Rambo Litigator, but do not overexaggerate.
- Do not needlessly engage in letter writing campaigns; do not let the “little digs” bother you.

## 4. The Art of the Counter-Punch/Counter-Attack

- *Jiu jitsu*
  - *Jiu* means “gentle, supple, flexible, pliable, or yielding”
  - *Jitsu* means “art” or “technique.”
- *Jiu jitsu*: manipulating the opponent’s force against himself rather than confronting it with one’s own force.
- In litigation: allow your opponent to take an unreasonable position and document his doing so.
- Step 1: Exchange letters with the Rambo Litigator to establish a paper trail of the unreasonable position.
- Step 2: File a motion and attach the letters as exhibits.

## 5. Depositions

- Rambo litigators can do a great deal of damage during depositions using speaking objections.
- Three dangers:
  1. Speaking objections are used to throw the questioner off of his or her rhythm.
  2. Filibustering can be used to run out the clock on the questioner’s allotted time.
  3. Such objections can be used to educate the witness before the witness answers the question.

## 5. Depositions (cont'd)

- Solutions

- First, ignore the objection and ask the witness to answer.
- If the problem persists, go off the record and remind opposing counsel that speaking objections are not allowed.
- If there is still an issue, stay on the record and allow the court report to make a record of the speaking objection.
- Do not get greedy if you go on the record. Pick the most egregious examples of speaking objections so that when you file a motion for sanctions, it is as strong as possible.

## 5. Depositions (cont'd)

- The Rambo litigator may instruct the witness not to answer
  - Ask for the grounds for such an instruction.
  - Unless it is based on established privilege (such as attorney-client privilege), the question is permissible.
- Insist that the witness answer the question.
- If all else fails, ask the court reporter to mark the question in anticipation of a motion to compel.

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## 6. Hired-Gun Experts

- Find out everything about the opposing side's experts that you can and about the subject matters they will be testifying on.
- Once you do that, you will be in a good position to use the standard tools for discrediting experts



## 6. Hired-Gun Experts (cont'd)

- **Technique 1: Challenging Expert Credentials**

- Expert qualifications involve two things: education and classroom training, on the one hand; and actual hands-on experience relevant to the case, on the other.
- A common cross-examination technique is to show that the opposing expert lacks the highest degree or certification in the field at-issue.
- If the expert has impressive academic credentials, but lacks your expert's hands-on experience, cross-examination can often highlight this point as well.
- Another technique is to highlight the expert's unrelated area of interest, then point out that it doesn't apply to the case at hand.

## 6. Hired-Gun Experts (cont'd)

- **Technique 2: Exposing Bias**

- The most common (and obvious) bias arises when the expert testifies predominately, if not exclusively, for just plaintiffs or defendants.
- This information is discoverable under Federal Rule of Civil Procedure 26(a)(2).
- Another way to demonstrate bias is to use the expert's previous publications against him or her.

## 6. Hired-Gun Experts (cont'd)

- **Technique 3: Cast Doubts on Character or Truthfulness**
  - Experts, like any other witness, can be cross-examined on inconsistencies in their testimony.
- **Technique 4: Call Out Assumptions**
  - Expert testimony often requires the expert to make assumptions.
  - These are weak points to be exploited.
  - Ask the expert witness if changing an assumption would change his or her opinion.

## 6. Hired-Gun Experts (cont'd)

- **Technique 5: Questioning the Limitations of Evidence or Methodologies**
  - An expert's methodology must be established as proper before the expert can testify to it.
  - Methodologies can obviously be discredited for being improper.
  - More importantly, however, methodologies can be discredited for having *inherent limitations*.
    - For example: pointing out that to get the right result using his or her methodology, the expert basically had to assume away all the problems.

## 6. Hired-Gun Experts (cont'd)

### • Technique 6: Revealing Inconsistencies or Contrary Positions

- Properly research the expert to discover such inconsistencies.
- The information can be gleaned through discovery and internet searches.
- You can also use your own expert.
- Your deposition of the opposing side's expert is a further opportunity to gain knowledge about his or her theories and how s/he operates.
- Above all, be familiar with the opposing expert's report. Use your own expert to clarify any questions you have.

## 7. Other Practical Tips for Using *Jiu Jitsu* Against Rambo Litigators

1. Know Your Case
2. Stay Focused and Remain Calm
3. Do Not Use Rambo Tactics
4. Pick Your Battles
5. Know Your Judge

## 7. Other Practical Tips for Using *Jiu Jitsu* Against Rambo Litigators

6. Maintain a Rambo Litigation File
7. Involve the Court and Disciplinary Committee
8. Be Honest and Don't Exaggerate
9. Educate Your Client
10. Win Battles by Knowing the Procedural and Ethical Rules