Lawyers Behaving Badly: What Not to Do in Federal Court

By Hon. Karen L. Stevenson, Litigation News *Associate Editor*

Typically, I write about recent legal decisions of import to practitioners, but several recent incidents with lawyers left me perplexed, as in "What were they thinking?" So I share three "teachable moments" of what not to do in federal court: (1) Do not ask for a continuance in your opposing brief; (2) do not request substantive or procedural relief via telephone call to chambers; and (3) do not rely on state rules and case law when requesting relief governed by the federal rules. I offer these stories as a reminder to those who practice often in federal court and as an alert to those who may find themselves there less often.

REQUEST FOR CONTINUANCE IN OPPOSING BRIEF

In the first instance, the plaintiff lost a discovery motion and the defendant filed a motion seeking its reasonable costs under Federal Rule of Civil Procedure 37. When the court denies a motion to compel, Rule 37 provides that the court "must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." Because the court must allow the party or deponent who opposed the motion an opportunity to be heard, the date for oral argument was set weeks in advance.

The day before oral argument, my chambers received a call from the plaintiff saying, "Isn't the hearing continued? We put a request to continue the hearing in our opposition brief." Sure enough, the last paragraph of the opposition brief included a request to continue the hearing, and on the date of the hearing, the plaintiff did not appear. The defendant

appeared and said they knew nothing about a continuance. Neither did I. The parties never filed any formal request to continue the hearing with a showing of good cause to do so. Now the losing party faces not only possible monetary sanctions relating to the motion to compel but also an order to show cause on further sanctions for the nonappearance.

As a popular television commercial says, "That's not how it works. That's not how *any* of this works." Hearings in federal court are continued only when the court enters an order for continuance. *Always* check the local rules of the district and your judge's schedules and procedures to determine how to request a continuance. When in doubt, show up on the scheduled date. Further, if an emergency arises and a date needs to be changed, reach out to opposing counsel and try to reach a stipulation. Then file it with the court.

INFORMAL REQUEST NOT TO RULE AFTER ORAL ARGUMENT

The second situation involved a complex discovery motion about electronically stored information (ESI) and intricate details about the network systems of a large corporation. The parties' written submissions were extensive and included declarations and evidence from IT professionals on both sides. Oral argument was lengthy, nearly two hours, and because of the importance of the issues, I took the matter under submission for decision and told the parties that I would issue a written ruling within a few days.

I then hunkered down with the briefs, exhibits, case law, and my notes from oral argument and devoted most of the next two days to preparing the written ruling. Just as I was finalizing the order, my courtroom deputy got a call from the lawyers who said they did not want me to issue my order on the motion. They were not withdrawing the motion, but they just did not want a ruling right now. Asking the court not to rule on a motion, after it has devoted hours to reviewing the briefs, holding oral argument, and working through a complex ruling, does not build credibility with the court. Needless to say, the order went out on my schedule, not theirs.

Fortunately, both of these situations were anomalies. The majority of counsel appearing before me are well prepared, are familiar with the local rules, and make every effort to abide by my procedures. Indeed, when a new case is docketed in this district, the initial scheduling order requires all counsel (and pro se litigants) to be familiar with both the Federal Rules of Civil Procedure *and* the local rules of our district. Consequently, it is surprising (and rare) when lawyers do not, ostensibly, take the time to review the local rules or their judge's specific procedures. Even more surprising is an attempt to informally, through a call, make requests for which counsel believes that the court staff will accommodate them irrespective of the rules.

It is never a good idea to request substantive or procedural relief via telephone call to chambers.

As a refresher and an alert: It is never a good idea to request substantive or procedural relief via telephone call to chambers. If the relief is really needed, put it in writing. Seek a stipulation with the other side. If you suddenly have doubts about the merits of a motion, do not wait until after oral argument. Make a request to withdraw the motion. If it is an emergency, take advantage of the applicable ex parte procedures and file an application under the local rules that precisely outlines why ex parte relief is needed. Keep in mind that in federal court the standard for granting ex parte relief may be different than the standard in state court procedures. Which leads me to the third "teachable moment."

STATE RULES AND CASE LAW CITED IN BRIEF GOVERNED BY FEDERAL RULES

The final story involves a nonparty witness's failure to appear for deposition. Federal Rule of Civil Procedure 45 allows a party to issue a subpoena to compel testimony and the production of documents from third parties. If the nonparty believes the subpoena imposes undue burden or expense, the witness can move to quash the deposition or seek a protective order. The witness cannot, however, simply ignore the subpoena and fail to appear, which is what happened here. The party that served the subpoena filed a motion to sanction the witness for failing to appear and for an order compelling the witness's appearance at a later date.

The motion for sanctions and to compel the witness to appear should have been straightforward. There were no complex issues of law to analyze or nuanced case law to parse, making it an easy motion to consider granting. But after reviewing the brief, I noticed that the only rules cited were state rules of civil procedure and the only case law referenced was a state case. Clearly, no one took the time to proofread the brief before filing it, or surely they would have noticed this error. Or perhaps someone prepared the brief for federal court by cutting and pasting from a similar motion filed in state court. Either way, counsel left the unfortunate impression of, at best, carelessness or, at worst, a lack of knowledge.

Federal courts, like litigators, are busy. Take care when preparing any filing with the court, no matter how simple or straightforward: Cite to the appropriate authority and rules; read and reread the local rules and your judge's procedures; and never assume a motion is too simple to give it a close proofread. As the saying goes, "you only get one chance to make a first impression." L

RELATED RESOURCES

- Fed. R. Civ. P. 1, available at http://bit.ly/LN432-frcp1.
- Fed. R. Civ. P. 37, available at http://bit.ly/LN432-frcp37.
- Fed. R. Civ. P. 45, available at http://bit.ly/LN432-frcp45.