



WHEN
YOU
AREN'T
THE LEAD
DOG,
THE VIEW
NEVER
CHANGES

A DOG'S-EYE VIEW OF FEDERAL PRACTICE

Tips to Improve Your Perspective on Federal
practice,
and the Outcome for Your Clients

SWILL

March 1, 2019

TIPS TO IMPROVE YOUR PERSPECTIVE AND THE OUTCOME FOR YOUR CLIENTS

- 
- Know the Territory
 - Mark Your Territory
 - Are You Aggressive?
 - Are You Just a Little Too Laid Back?
 - Are You Easily Excitable?
 - Play Nice: Meet and Confer
 - Are You a Yowler or Plodder?
 - Can You Stay Focused?
 - Can You Deal With *Pro Se* Cases and Parties?
 - Know Your Audience

1. KNOW THE TERRITORY



- District Courts have broad discretion to enact and enforce Local Rules.
- This includes knowing who is allowed on the furniture (and whether you need to stand when you address the Court).



*“I AM ONLY
VAGUELY
FAMILIAR WITH
MY DISTRICT’S
LOCAL RULES.”*

HINT: LOOK THEM UP!
LEARN THEM!

Puppy-eyes won't cut it

1. KNOW THE TERRITORY

- District Court dismissed Complaint for failure to comply with Local Rules, where Complaint was photocopy of earlier dismissed version, just marked over with pen. *Braxton v. Bi-State Dev. Agency*, 728 F.2d 1105, 1107 (8th Cir. 1984)



***But my co-counsel said it was OK
to do it this way...***

1. KNOW THE TERRITORY: SUMMARY JUDGMENT



- Plaintiff’s response to Statement of Undisputed Facts stated “denied” without citations to the record.
- After two further failed responses, District Court deemed Statement of Undisputed Facts admitted.
- Appeals Court held this is not an abuse of discretion.

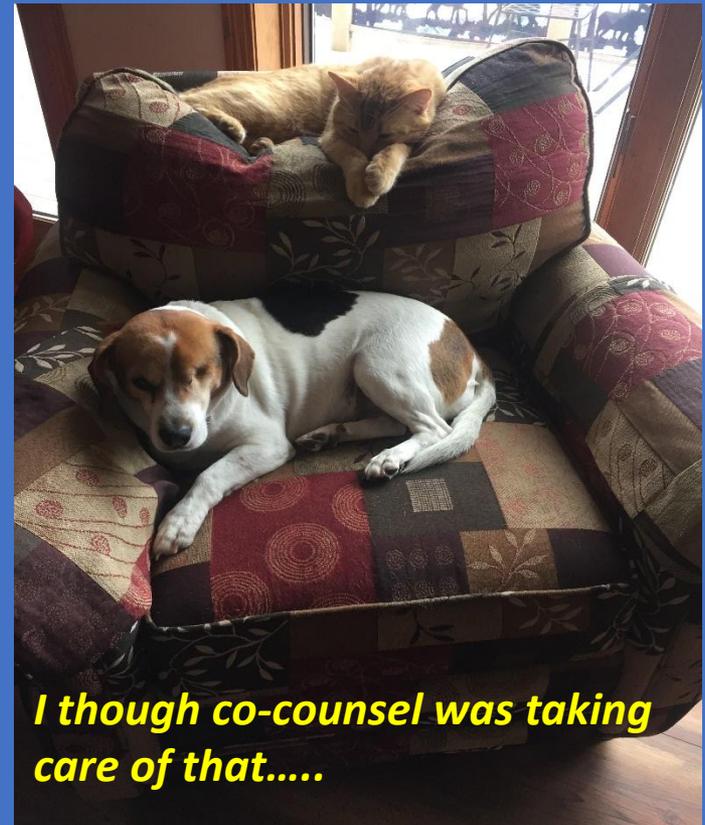
Libel v. Adventurelands of America Inc., 482 F.3d 1028, 1032 (8th. Cir. 2007).

You can trust me...

Why would I need a citation?

1. KNOW THE TERRITORY: SUMMARY JUDGMENT

- Plaintiff repeatedly failed to conform its Summary Judgment Resistance to Local Rules
- On Plaintiff's third failed attempt, the court deemed Defendant's Statement of Undisputed Facts admitted
- MSJ granted
- *Northwest Bank & Trust Co. v. First Illinois Nat. Bank*, 221 F.Supp. 2d 1000 (S.D. Iowa 2002), *rev'd in part on other grounds*, 354 F.3d 721 (8th Cir. 2003)



1. KNOW THE TERRITORY: SANCTIONS

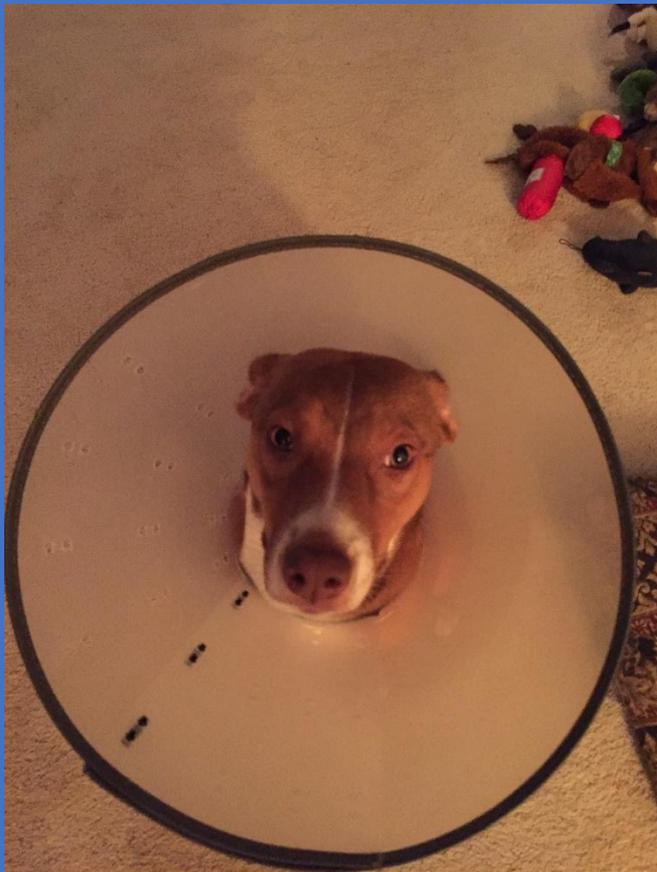
- Court sanctioned Defendant for failing to participate in good faith in court-ordered ADR.
- Defendant:
 - Did not submit required mediation statement.
 - Sent a representative with no knowledge of the case and only \$500 in settlement authority.

Nick v. Morgan's Foods, Inc., 270 F.3d 590 (8th Cir. 2001)



***I would definitely say
we're out in the weeds, and
up a creek without a paddle.***

1. KNOW THE TERRITORY: AVOID SANCTIONS



- Read the ORDER
- Read the Local Rules
- Believe them
- Ask if you don't understand
- Don't try to bluff your way through

2. MARK YOUR TERRITORY

- Showing up for court events with *all* necessary items and people can build a good reputation with the Bench, your colleagues, and avoids sanctions.



***You can always
count on me***

2. MARK YOUR TERRITORY: BE PREPARED

- Defense ordered to pay plaintiff's costs and attorney's fees for settlement conference
- Defense counsel failed to bring client representative with negotiating authority
- *Dvorak v. Shibata*, 123 F.R.D. 608, 608-11 (D. Neb. 1988).
- **HINT: READ THE ORDER!**



***"That's a lovely housedress
you're wearing, Your Honor."***

2. MARK YOUR TERRITORY: AT LEAST SHOW UP

- Defendant's answer is stricken for
 - Failure to appear at settlement conference
 - Failure to give any response to the court explaining the nonappearance
 - Failure to respond to two amended complaints

Tiger Team Technologies, Inc. v. Synesi Group, Inc., No. 06-1273, 2009 WL 1475516, at *1–*2 (D. Minn. May 27, 2009).



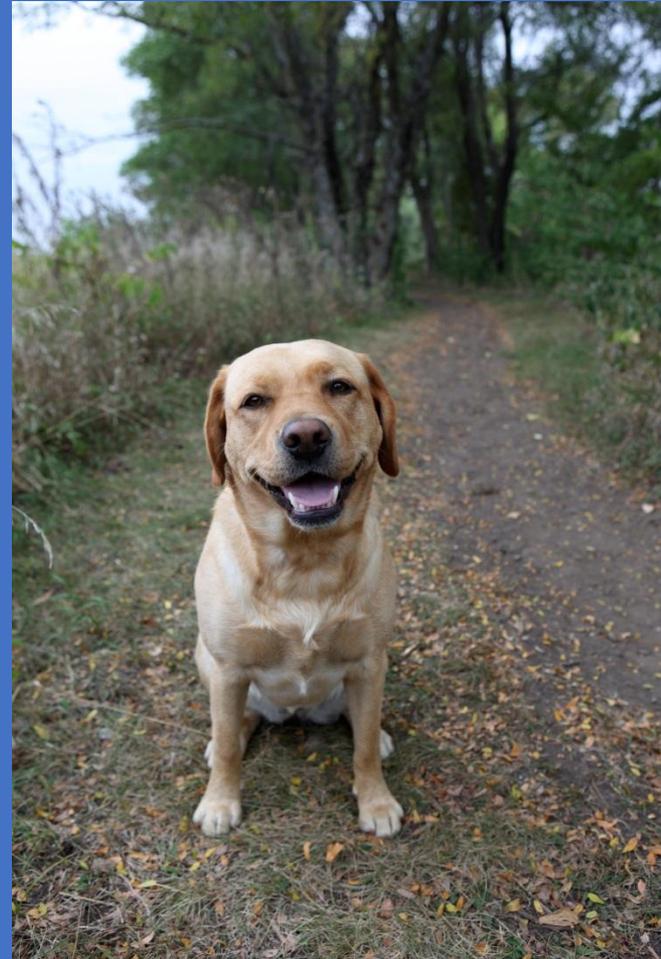
The press of other business (as noted in my new Facebook pix), prevented me from compliance; it's just excusable neglect, Your Honor...

2. MARK YOUR TERRITORY: LOCAL RULES

- The court struck a Motion to Compel
- Motion did not comply with the requirements of the district's General Rule 12(d)
- Motion failed to state items required by the Local Rule

IJR, Inc. v. Sodick, Inc., No. 87-C-6326, 1987 U.S. Dist. LEXIS 11087 (N.D. Ill. 1987).

- BE THE ONE WHO PLEADS CORRECTLY!



My claim to this path is well-pled

2. MARK YOUR TERRITORY

- Plaintiff failed to attach copies of the disputed requests and responses as required by Local Rule 37b
- Motion to compel was denied in its entirety for failure to comply with the LR.
- *Kayser v. Motors Liquidation Co. GUC Trust*, No. C11-2063, 2012 WL 6184908, at *3 (N.D. Iowa Dec. 11, 2012)



Seriously?!

2. MARK YOUR TERRITORY

- Court assessed opposing counsel's costs against attorney who failed to appear for argument.

- *In re Hunter*, 673 F.2d 211, 212 (8th Cir. 1982)



***But the Clerk usually calls
when I fail to appear...***

HINT: BE THE ONE WHO SHOWS UP!

2. MARK YOUR TERRITORY: PAY ATTENTION TO DEADLINES

- Case dismissed with prejudice
- Defendants awarded attorney fees and expenses
 - Plaintiff failed to appear at deposition
 - Plaintiff never responded to discovery requests
- *Ludovissy v. Deere & Co.*, No. C09-1023, WL 649462, at *3-*4 (N.D. Iowa Feb. 23, 2010).

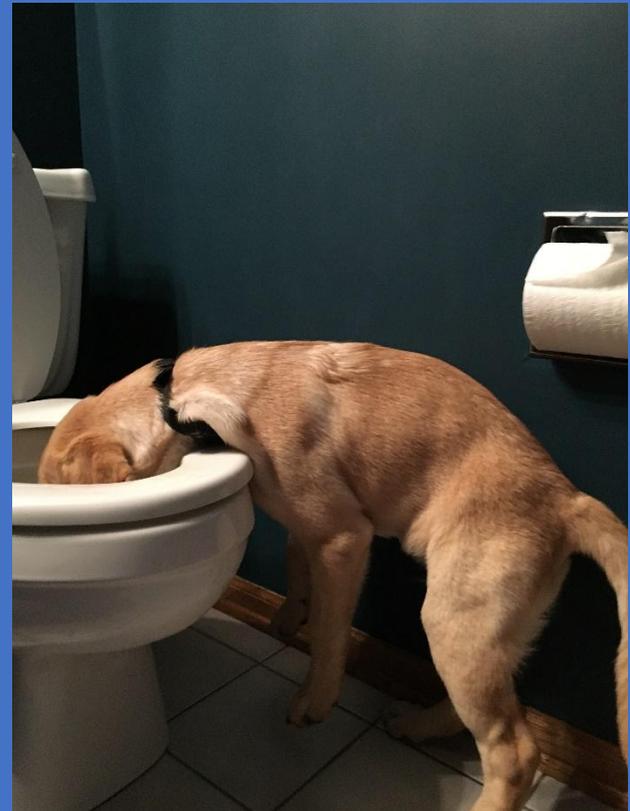


The press of other business caused a delay in providing discovery...

2. MARK YOUR TERRITORY

Award of sanctions against Plaintiff's counsel who:

- Failed to respond to discovery
- Failed to appear at deposition
- Served excessive eleventh-hour discovery requests
- Claimed he wasn't served with notices
- Filed amended complaint reasserting dismissed claims and adding a new claim
- Filed motion to compel after discovery closed
- Requested multiple extensions to resist summary judgment motion, missing one extended deadline along the way
- *Blakely v. Schlumberger Tech. Co.*, 648 F.3d 921 (8th Cir. 2011)



Why do people always pick on me?

2. Mark Your Territory: But in a Positive Way

- Affirmed the exclusion of expert medial witness testimony from treating physicians, for failure to make ANY timely expert witness disclosures.
- Plaintiff asserted, and Court found, information about treating physicians in the discovery material, just not these Doctor's opinions.
- Exclusion of experts led to summary judgment for opposing party.
- *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 702–707 (8th Cir. 2018).



We all agreed that treating physicians aren't FRCP 26(a)(2) experts; did you want us to actually READ the Rule?

3. ARE YOU AGGRESSIVE ? DO YOU NEED TO BE?



I bark a lot. Will I actually bite???
I dare you to file a Motion to Compel Civility

3. ARE YOU AGGRESSIVE? DO YOU NEED TO BE?

Attack the issues
without attacking your adversary,
and without Court intervention.



This is NOT a Meet-And-Confer

3. ARE YOU AGGRESSIVE? DO YOU NEED TO BE?



Having now realized that a combative approach might not win us any points, and is expensive for the clients, let's see if we can work this out....

“The Court encourages attorneys' strong advocacy for their clients, but Plaintiffs' accusatory and combative approach does not further this objective.”

IP Innovation L.L.C. v. Thomson, Inc.,
No. 1:03-cv-216-JDT-TAB, 2004 U.S.
Dist. LEXIS 6290, at *5 (S.D. Ind. 2004)

3. ARE YOU AGGRESSIVE? HOW'S THAT WORKING FOR YOU?

- Defense counsel made 115 form objections during deposition.
- As a sanction, district judge required defense counsel to write and produce a training video explaining why not to obstruct the deposition process.
- Sanction reversed on appeal for lack of notice to counsel.
- What did this cost the client?
- *Security Nat'l Bank of Sioux City, IA v. Day*, 800 F. 3d 936, 940 (8th Cir. 2015).



I don't have stress, I'm just a carrier...

3. ARE YOU AGGRESSIVE?



- Aggressive behavior includes “Liar’s Poker” (i.e., “I’ll meet your sanctions motion, and raise you one”).
- How is this drama helping the clients resolve their dispute?

*Well, we could attack each other,
or we could just hug it out.*

HINT:

Be the gracious one;
someday YOU may need a favor.

3. ARE YOU AGGRESSIVE?



***Ha! I've got you now!
Oh wait, am I supposed to be on
the furniture?
What were we fighting about?***

- Plaintiff moved for sanctions, asserting Defendant failed to mediate in good faith
- Defendant filed cross-motion for sanctions, asserting Pl.'s motion was frivolous
- The court denied both motions.

Stickney v. Pillsbury Co., No. 4:02CV3240, 2003 WL 26111555 (D. Neb. 2003)

3. ARE YOU AGGRESSIVE?

- Motion for sanctions is denied because there was no reasonable basis for Rule 9011 motion.
 - Prevailing party awarded fees

In Re Affiliated Foods Southwest Inc., 472 B.R. 538, 559 (E.D. Ark. 2012).



But Your Honor, I thought they looked identical....

3. ARE YOU AGGRESSIVE? JUST BARKING TO HEAR YOURSELF BARK?



I think you've brought a knife to a gun fight, just saying.

- First Things First:
 - Move to Compel *before* seeking sanctions

Affirmed denial of discovery sanctions where party moving for sanctions had not obtained an order compelling discovery

McGregor v. Mallinckrodt, Inc., 373 F.3d 923 (8th Cir. 2004)

3. ARE YOU AGGRESSIVE? OR, ONCE AGAIN: CRYING WOLF?

- Plaintiffs sought adverse inference for spoliation because Defendant destroyed pre-2006 emails
- Sanctions denied: Defendant produced over one million emails, and Plaintiff never requested litigation hold on emails; no showing of deliberate destruction to impede litigation
- *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010)



***Your Honor, he won't respond
to my emails!***

Oh, I guess I never sent him one...

3. ARE YOU AGGRESSIVE?

- Smokescreen objections can't save the day.
 - Defendant law firm objected to discovery requests and questions in 30(b)(6) deposition on grounds of privilege.
 - The court didn't buy it, and ordered production of discovery, and costs to Plaintiff.

Burke v. Messerli & Kramer, P.A.,
Civil No. 09-1630, 2010 WL
2520615 (D. Minn. 2010)



When you're all wet, you're all wet.

4. ARE YOU JUST A LITTLE TOO LAID BACK?

- Everything is late:
“I’ll get it filed
whenever.”
- “I only need one
more continuance,
Your Honor.”
- The only cardio I
get is running late.



*“I’ll meet an actual filing deadline
sometime before trial.”*

4. ARE YOU JUST A LITTLE TOO LAID BACK?

- Court denied attorney's fees for prevailing party for "time spent requesting continuances for the convenience of Plaintiff's counsel," and "excessive time preparing an amended notice of deposition."
- *Evans v. Ford Motor Co.*, 784 F.Supp. 621, 622 (D. Minn. 1991).



***But Your Honor...
I was trying to be collegial!***

DOES YOUR REQUEST PASS THE LAUGH TEST?

- Plaintiff requested \$40,957.13 in attorney fees.
 - Court granted only \$12,975. Judge reduced fees to make counsel “stop submitting such wildly excessive requests for attorney fees.”
 - Requests included 1.9 hours for “exercising billing judgment.”
- *Henderson v. Crimmins*, 147 F.Supp. 3d 780, 782, 792 (N.D. Iowa 2015).



Frankly, I'm offended that you think I did not exercise good judgment....

4. ARE YOU A LITTLE TOO LAID BACK?

- Plaintiff moved to compel three days after deadline passed;
- Motion denied;
- Plaintiff “provided no reason to justify missing the deadline.”

Firefighters’ Inst. for Racial Equality ex rel. Anderson v. City of St. Louis, 220 F.3d 898 (8th Cir. 2000).



We just didn't think that we had to meet deadlines in this case, because we haven't met them in our other cases...

4. ARE YOU A LITTLE TOO LAID BACK?

- Court denied Coker's motion to amend his original complaint as untimely.
- Coker failed to show good cause for why he missed the deadline.

Coker v. Arkansas State Police, 734 F.3d 838, 843 n.1 (8th Cir. 2013).



***I meant to get that filed...
Oh look! SQUIRREL!***

4. ARE YOU TOO LAID BACK?

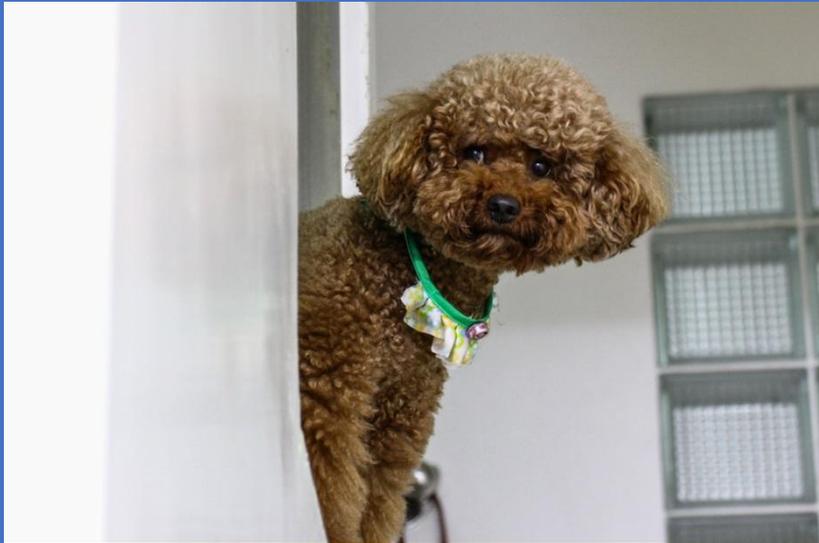
- Plaintiff and his accountant failed to appear for deposition.
- Defendant obtained order setting hearing on Motion to Show Cause, alleging contempt for non-appearance.
- Plaintiff and accountant missed response time, and were held in contempt; District Court dismissed action as sanction.
- Circuit Court reversed dismissal with prejudice as contempt remedy.

Hairston v. Alert Safety Light Prods., Inc., 307 F.3d 717 (8th Cir. 2002)



Sometimes doing nothing is the best I can do, and I just rely on the kindness of strangers (or the Court of Appeals).

4. ARE YOU TOO LAID BACK?



***Were you talking to me?
I thought you'd call....you can't
expect me to rely on snail mail!***

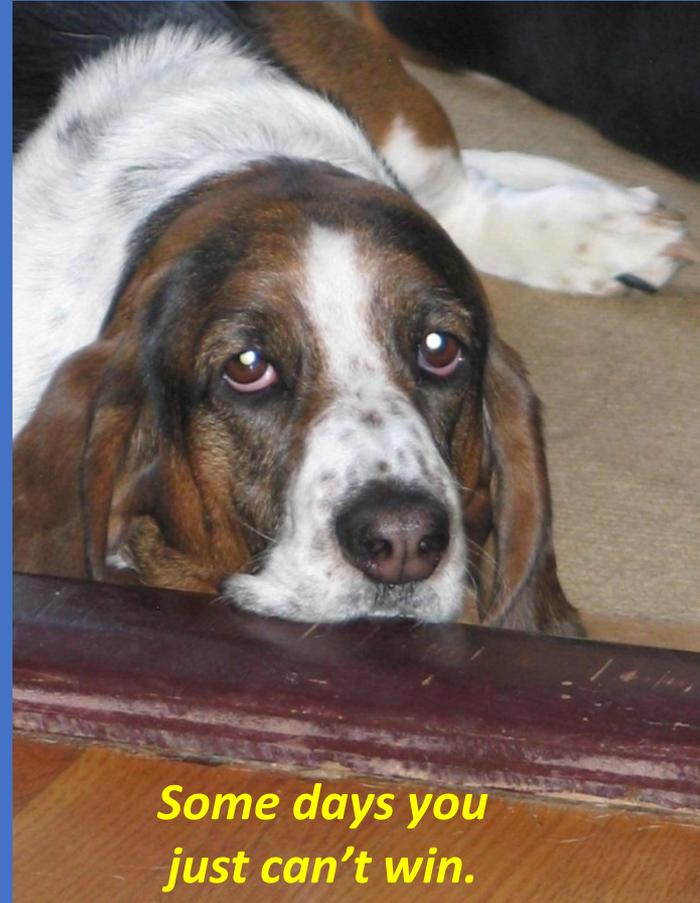
- Plaintiffs did not provide the court with a current email address, a completed fact sheet, or required signed medical disclosure form by required deadline.
- Counsel was notified three times that he had failed to comply with orders.
- Counsel was not even aware of the dismissal, because he inadvertently provided an erroneous email address to the court.

In re Guidant Corp. Implantable Defibrillators Products Liability Litigation, 496 F.3d 863, 866 (8th Cir. 2007).

4. ARE YOU A LITTLE TOO LAID BACK?

- Habeas petitioner sought relief based on ineffective assistance of counsel.
- On first day of underlying trial, petitioner's counsel sought a continuance based on "self-reported lack of preparation"; state court denied continuance.
- Post-conviction motion court denied habeas relief, finding all of petitioner's claims were "procedurally defaulted."

Robinson v. Wallace, No. 4:10cv0526, 2013 WL 1293817 (E.D. Mo. 2013)



4. ARE YOU A LITTLE TOO LAID BACK?

- Denied motion for additional time.
- Plaintiff “does not set forth a single reason under FRCP 60(b) why this court should relieve him from final judgment.”
- Plaintiff had been out of office for personal travel, and other legal matters had taken more time than he expected.

Giles v. Saint Luke's Northland-Smithville, No. 16-00647, 2017 WL 4582468, at *1 (W.D. Mo. July 4, 2017).



Yeah, I'm pretty jammed, we're gonna have to push back those depositions.

5. IS EVERYTHING A FEDERAL CASE?



***“Someone just filed a motion.
LET’S GET FRANTIC!
Is it mine? MINE? MINE!?!”***

Related to civility;
Not necessarily
aggressive behavior,
but relax and try to
figure out any
problems with
opposing counsel
before running to your
owner (the court).

5. ARE YOU EASILY EXCITABLE?



***Let's Check Those Deadlines!
I'm all over the Local Rules!
I LOVE the Local Rules!
Let's file a Motion to Strike!***

“Counsel should be wary of barging into the courthouse with trivialities in the future because this court will not hesitate to use the powers available to it to ensure that counsel treat each other with the level of respect expected from anyone admitted to the bar.”

See IJR, Inc., supra, 1987 U.S. Dist. LEXIS 11087

5. ARE YOU EASILY EXCITABLE?

- “Plaintiff is warned that further attempts to file frivolous pleadings will result in sanctions being imposed, including dismissal of his claim.”
 - Plaintiff filed frivolous motions including:
 - 5 motions for subpoenas
 - 1 supplement
 - 2 motions requesting appointment of counsel

Ford v. Wolcott, No. 4:18-cv-04153, WL 117812, at *1–*2 (W.D. Ark. Jan. 7, 2019).



5. IS YOUR EMERGENCY MY EMERGENCY?

- Plaintiff filed—and soon withdrew—an “Emergency Motion for Protective Order and Motion for Sanctions.”
- The court allowed the withdrawal without (public) comment.

Wills v. City of Mountain Home,
No. 3:12–cv–03090, 2013 WL 2634307
(W.D. Ark. 2013)

HINT: YOU MAY NOT HAVE A PROBLEM!
MIGHT WANT TO CHECK FIRST!
REMEMBER: MEET & CONFER



***Should we just TALK about
who gets the ball?
What ball? I thought it was
time for lunch!***

5. IS YOUR EMERGENCY MY EMERGENCY?

- Defendant moved to compel production of documents it already possessed, but were subject to protective order in another proceeding.
- Court ordered that Defendant could use the documents because Plaintiff waived its right to object to use.
- No document production necessary because **Defendant already held the documents it sought.**

Readlyn Telephone Co. v. Qwest Commc'ns Corp., No. 6:10-cv-2040-JEG-RAW, 2013 WL 3471163 (N.D. Iowa 2013)



Never mind, it turns out that the ball was here the entire time. My co-counsel must have moved it....

6. PLAY NICE: MEET AND CONFER



Face to Face does work better!

- “Civility between counsel, parties, and the court should be the norm, not the exception, in the adversarial process.
- Such civility includes conferring about disputes
- Had counsel for plaintiff made the effort to settle this matter face-to-face with defense counsel the apparent need for the motion for sanctions may have subsided.”

Sithon Maritime Co. v. Mansion, No. 96-2262-EEO, 1998 U.S. Dist. LEXIS 14724, at *14 (D. Kan. Sep. 14, 1998).

HINT: CHILL OUT

6. PLAY NICE: MEET AND CONFER

- Court denied motion to compel for failure to engage in meet and confer.
- Plaintiff's statement during deposition that he was going to get the court to get a ruling to strike or "come back with costs or sanctions" did not constitute good faith effort to meet and confer.



***Just because you can,
doesn't mean you should.***

Damgaard v. Avera Health,

No. 13-2192, WL 1608209, at *9 (D. Minn. 2015).

6. PLAY NICE: MEET AND CONFER



- Merely sending a letter to adversary stating motion to compel will be filed if discovery requests are not fulfilled is insufficient to satisfy “meet and confer” requirement.
- One party sent a blank disk in discovery, and party moving to compel failed to meet and confer to address whether disk was supposed to contain information.

Robinson v. Napolitano, No. CIV.08-4084, 2009 WL 1586959 (D.S.D. 2009)

Respect each other.

Be calm.

Model good behavior.

7. ARE YOU A YOWLER OR PLODDER?

If you are going to make a point, might want it to be the RIGHT one!

- District court properly sustained objection to, and gave curative instruction regarding counsel's reference in closing argument to certain jurors' statements in *voir dire* that they liked Defendant's manager.

Rodrick v. Wal-Mart Stores East, L.P., 666 F.3d 1093 (8th Cir. 2012)

HINT: THINK BEFORE YOU
SPEAK!
HAVE A PLAN!



I'm not sure where I'm going with this.

7. ARE YOU A YOWLER OR PLODDER?

Affirmed trial Court's grant of mistrial to State in the second trial.

Defense counsel mentioned in opening argument that Defendant was given a new trial, because the State withheld potentially exculpatory evidence at the first trial.

Case was set for third trial on remand.

Arizona v. Washington, 434 U.S. 497 (1978)



Well, now I just feel foolish.

8. MAYBE YOU NEED A LITTLE HELP: CLASS ACTION IS HARDER THAN IT LOOKS

- Putative class action involving pre-loaded store-value credit cards.
- Affirmed district court's order compelling arbitration on individual claim basis, as provided in card agreements.
- Plaintiffs (named and others similarly situated) effectively waived class action.

Pleasants v. Am. Express Co., 541 F.3d 853 (8th 2008)

**HINT:
READ SOME CASE LAW
BEFORE YOU FILE YOUR ACTION!**



“So you’re saying the standard is NOT just how sad we look together, and now we each have to look sad on our own???”

8. MAYBE YOU NEED A LITTLE HELP: CLASS ACTION IS HARDER THAN IT LOOKS



Who wouldn't want jurisdiction over us?

Class Plaintiffs filed Complaints in groups of less than 100 to avoid removal to federal court under Class Action Fairness Act (CAFA). Defendant removed nonetheless. District Court remanded actions of two groups of Plaintiffs back to State Court. Eighth Circuit vacated and allowed removal, because classes proposed their cases be tried jointly, creating a class of greater than 100 (a mass action)

Atwell v. Boston Sci. Corp., No. 13-8031 (8th Cir. Nov. 18, 2013).

9. OURS IS A NOBLE PROFESSION: THAT INCLUDES COPING WITH *PRO SE* LITIGANTS.



Plaintiff missed discovery deadline—already extended due to his heart surgery—asserting he had found counsel but would need more time.

- District court dismissed with prejudice on motion from Defendants.
- Court of Appeals reversed, holding District Court could have found less severe remedy for the delays.

Smith v. Gold Dust Casino, 526 F.3d 402 (8th Cir. 2008)

If you're the big dog, help out the little guy.

9. OURS IS A NOBLE PROFESSION: THAT INCLUDES COPING WITH *PRO SE* LITIGANTS.



I need a little help, here.

- District court **dismissed** action with prejudice following *pro se* Plaintiff's repeated failure to fully respond to discovery.
- Plaintiff: "I'm doing the best I can."
- Court of Appeals reversed, noting discovery requests served within three months of Complaint might be considered an *unreasonable* way to conduct discovery of a Plaintiff proceeding *pro se*.

Dockery v. Leonard, 46 F. App'x 868 (8th Cir. 2002)

9. OURS IS A NOBLE PROFESSION: THAT INCLUDES COPING WITH *PRO SE* LITIGANTS.

- Holding that the district court abused its discretion
- Dismissed *pro se* Complaint filed by mental hospital patient.
- The Complaint named numerous Defendants and was repetitive; Court needed to fine a solution.



Luh v. Fulton State Hosp., 636 Fed. Appx. 374, 375 (8th Cir. 2002).

While we may be duplicative, we are not duplicitous....

Can we get some pro bono help for the pro se litigants?

9. OURS IS A NOBLE PROFESSION: THAT INCLUDES COPING WITH *PRO SE* LITIGANTS.



**Perhaps if I ignore you you'll
just go away....**

Do you respond to *pro se* pleadings?
District Court entered Default against
Defendant

Defendant just ignored *pro se* Plaintiff's
repeated motions for Judgment and
Sanctions

Court of Appeals reversed the Default;
noted that Defendant's "conduct may
have been overly lax."

Tollefson v. Pladson, 508 F. App'x 593 (8th Cir. 2013)

**HINT: DON'T RELY ON THE COURT
RESCUING YOU!**

10. KNOW YOUR AUDIENCE:

**What kind of a dog
is a
U.S. Magistrate Judge?**



- Always Faithful
- Prepared
- Attentive to Detail
 - Willing to Work
 - Problem-Solvers
- Just Living the Dream!

10. KNOW YOUR AUDIENCE:

**What kind of a dog is
a U.S. District Judge?**



WITH ALL DUE RESPECT, YOUR HONOR:

**Use the worksheets
provided to help us make
practice in Federal Courts
*just, speedy, and inexpensive***

WITH ALL DUE RESPECT, YOUR HONOR...

It would improve practice in Federal District Court, and

- secure the just determination of every criminal proceeding,
- simplify procedure and fairness in administration and
- eliminate unjustifiable expense and delay

IF YOU WOULD:

- 1.
- 2.
- 3.
- 4.
- 5.