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Best practices in federal court

SIXTEEN THINGS PLAINTIFFS' ATTORNEYS NEED TO KNOW WHEN THEY FIND THEMSELVES IN FEDERAL COURT

If you practice primarily in California state courts, you might feel a little overwhelmed if you suddenly find yourself in federal court. Given the ability of the defense to remove cases from state court, the likelihood of a case ending up in federal court is not at all that uncommon. And there are circumstances where you are required by law to commence the case in federal court, such as when a valid forum-selection clause dictates that you do so. Whatever the reason is, you need to hit the ground running when you end up in federal court.

This article will provide you with valuable insights on best practices in federal court based on my experience working for the federal judiciary.

(1) Familiarize yourself with the Federal Rules of Civil Procedure and the Local Rules

Familiarizing yourself with the Federal Rules of Civil Procedure (FRCP) is of paramount importance. In some respects, federal procedural rules differ from California procedural rules, especially the deadlines governing discovery and motion practice. Failure to file a particular document in federal court within the prescribed period may adversely impact your case.

In addition, you should review the local rules of the particular district court where your case is pending. Civil local rules supplement the Federal Rules of Civil Procedure, and they should be

construed so as to be consistent with those rules. Having said that, local rules of each district may vary. You cannot assume that the local rules in the Southern District of California are similar to those of the Central District of California.

If you are looking for a user-friendly reference book for federal civil procedure, consider subscribing to the "California Practice Guide: Federal Civil Procedure Before Trial," written by Judge William W. Schwarzer, Judge A. Wallace Tashima, and James M. Wagstaffe. This desk set has practice pointers for both plaintiff and defense attorneys as well as forms that are commonly used in district courts.

See Gonong, Next Page

(2) Read carefully the district judge's procedures and schedules

In addition to the Federal Rules and the local rules, district judges have their own rules. Before filing any documents in federal court, visit the court website and access the procedures and schedules of the particular judge who is assigned to your case. In the U.S. District Court for the Central District of California, you may access a judge's specific requirements by going to the court website's "Judges' Requirements" page. (<https://www.cacd.uscourts.gov/judges-schedules-procedures>). In the U.S. District Court for the Southern District of California, you may find this information by going to the court website's "Chambers Rules" page. (<https://www.casd.uscourts.gov/Judges/chambers-rules.aspx>).

Each judge does things his or her own way, and the judges' specific requirements are in addition to their particular district's local rules. As such, it is important that you regularly visit the judge's webpage at the court website whenever you are working on a case pending before that particular judge. Once you have reviewed the judge's page, calendar all applicable dates and deadlines with reminders in advance of each critical date.

After calendaring all the critical events, scroll down that judge's webpage and make sure that you also review any attached general orders that apply to your case. For example, in the Central District of California, if you scroll down to the bottom of the "Judges' Requirements" page, you will find links to that particular judge's Initial Standing Order, Civil Trial Scheduling Order, and Order Setting Scheduling Conference. Make sure you read all these attachments because they contain critical information. For example, if you anticipate filing any motion, the attached general orders may contain specific instructions with respect to the scheduling or filing of that particular motion.

(3) Strictly comply with the district judge's Initial Standing Order

One of the biggest mistakes you could make as a federal practitioner is neglecting to read carefully the judge's Initial Standing Order. When practicing in federal court, having a good understanding of how a particular judge runs his or her courtroom is as critical as having a good grasp of the Federal Rules of Civil Procedure and the local rules for the particular district court where the case is filed. The judge's Initial Standing Order controls all cases pending before that particular judge, and its provisions may differ in some respects from the district court's local rules. Further, rules regarding certain issues may vary depending on the judge who issued the order. Below are some examples to illustrate the importance of reading the Initial Standing Order.

Presence of counsel

In some instances, reading carefully the judge's Initial Standing Order can make a huge difference in your case. For example, some judges expressly state in their Initial Standing Order that they are more likely to hear oral argument on a particular motion if any party files notice before a hearing stating that junior counsel will conduct the argument or at least the lion's share. This particular rule is designed to encourage lead counsel to permit junior counsel to fully participate in court proceedings, including to argue motions and to examine witnesses at trial. In contrast, some judges require that lead trial counsel appear in all proceedings before the court, including all status and settlement conferences; failure of lead counsel to appear at a hearing may be grounds for sanctions.

Briefing schedule

The Initial Standing Order can also provide a schedule for briefing motions that differ significantly from the briefing schedule set by the local rules. For example, in the Central District of California, the schedule for filing motion papers is generally governed by Local Rules 6-1 and 7. However, some judges provide a different briefing schedule

depending on the number of days between the hearing date and the date when the motion was filed. Therefore, it is important that you strictly comply with the Initial Standing Order that controls your case to ensure the acceptance of the documents that you are filing.

Length of motion papers

The Initial Standing Order can also provide limitations to the length of briefs filed with the court that differ significantly from format set by other judges sitting in the same court. For example, some judges require that reply briefs do not exceed 15 pages. However, there are also judges who limit the length of reply briefs to 12 pages or even 10 pages. It is important you are aware of each judge's requirements with respect to motion practice, including any page limitations, to ensure that your filing will not be rejected.

(4) Make sure to include all factual allegations establishing subject-matter jurisdiction in your complaint

Federal courts are courts of limited jurisdiction. This means that they can only hear cases authorized by the United States Constitution or federal statutes. Therefore, before filing a complaint in the federal court, be certain that subject-matter jurisdiction exists (federal question or diversity jurisdiction).

If you want your case to stay in federal court, make sure you state all facts necessary to establish jurisdiction. Remember that Rule 12(h)(3) of the FRCP makes it clear that federal courts can inquire into subject-matter jurisdiction sua sponte. If the court determines at any time that it lacks subject-matter jurisdiction over your case, the court must dismiss it on its own motion.

(5) Be prepared for everything at the scheduling conference

Once a case is assigned to a judge, the court will set a scheduling conference pursuant to Rule 16(b) of the Federal Rules of Civil Procedure. At the

See Gonong, Next Page

scheduling conference, the court may ask you about your settlement positions, discovery plan, factual details about your client (such as the number of employees that your client employs), whether dispositive motions should be anticipated, disputes about protective order, and the key legal issues and authorities. Make sure you are intimately familiar with the facts of your case as well as your legal theories before you show up at the scheduling conference. Moreover, make sure you review the judge's order regarding the setting of scheduling conference, which you may download from the court's website.

(6) Be on time for any court proceedings

District courts have the inherent power to dismiss a case for lack of prosecution. This power is governed not by rule or statute but by the power vested in courts to manage their docket and achieve orderly and expeditious disposition of cases. This power to dismiss a case may be exercised sua sponte without notice to parties. It is important for attorneys who are practicing in federal court to understand that federal judges are very strict when it comes to running court proceedings. Arriving late for a scheduling conference or any hearing may result in the dismissal of the action, or at a minimum, an issuance of an order to show cause why the action should not be dismissed for lack of prosecution.

(7) Take the pre-filing requirement seriously

Before seeking court intervention on a disputed issue, make sure that you strictly comply with Local Rule 7-3, which requires the moving counsel to first contact opposing counsel to meaningfully discuss the substance of the contemplated motion and any potential resolution. Some judges specifically provide that the pre-filing meet-and-confer requirement applies even to parties who appear pro se. Local Rule 7-3 requires that the meet and confer take place at least seven days prior to the filing of the motion, preferably

in person. Take note that the court may strike or outright deny a motion or other relief if counsel fails to meet and confer in good faith.

(8) Make life easier for the judges and law clerks

Briefs: Do not forget to proofread your brief several times before filing it. Take some time to organize your arguments instead of copying and pasting from your old briefs. Formulate case-specific, effective, and clear headings and sub-headings. Include a Table of Contents and Table of Authorities in any brief that is more than a few pages long. I know these steps could be time-consuming, but being able to communicate clearly, concisely, and coherently is a necessary ingredient to a winning brief. Typos, ramblings, wrong citations, and grammatical errors undermine the credibility of the author and tend to distract the reader.

Exhibits: When submitting voluminous exhibits for the court's review, use three-ring binders, not metal fasteners. Number the exhibits consecutively and use tabs to make it easy to locate the exhibits. When submitting excerpts of deposition transcripts as exhibits, make sure you highlight the relevant portions of the deposition transcripts. In the brief, when citing to deposition transcripts, make sure to include both the relevant page number(s) and the line number(s) of the transcript. When citing to a declaration, include the paragraph number(s), the page number(s) and/or line number(s).

Credibility is key: When possible, cite recent Ninth Circuit authority. Shepardize or KeyCite case citations to make sure that you are citing good law. Always use pinpoint citations to make it easy for the judge and the law clerks to locate the passage that you are citing or quoting.

Do not misrepresent or misinterpret the law. Judges and law clerks review the record and the cases you are citing, so make sure that your interpretation of law is accurate. Misrepresentations

undermine an attorneys' credibility, so be precise and avoid hyperbole.

(9) Prepare a hearing notebook for oral argument

Your hearing notebook should contain the motion, opposition, reply, relevant exhibits and key cases that were cited in the briefs. There are times when the judge might ask questions that require you to refer to a specific section of a document or a court opinion. The key documents and cases should be readily available to you in case you need to refer to them during oral argument. Highlight the relevant parts of a brief, a court opinion, or a deposition transcript. Nothing is more annoying than to represent to the court that you made a particular argument in your brief but you cannot cite to the specific page where that argument appears.

(10) Stick to logic and the law

Do not demonize the opposing party in your briefs. Avoid using too many adjectives to describe the opposing party or opposing counsel. Omit inflammatory words in your court filings and do not resort to emotional appeals. State your arguments clearly and appeal to logic instead.

Do not exaggerate. Do not say that opposing counsel's argument is "completely baseless," "frivolous," or something to that effect when both sides have good arguments and the issue is a close call. Nor should you accuse opposing counsel of lying or misrepresenting the law when there is a genuine dispute as to how the law should be construed.

(11) Provide proper citations

When submitting a brief, check the local rules and the judge's procedure regarding any formatting rules. For example, some Initial Standing Orders specifically require that attorneys use the Bluebook when citing statutes. If that is the case, you need to strictly adhere to Bluebook. An attorney's inability to comply with Bluebook's rules undermines his or her credibility.

See Gonong, Next Page

Further, statutory references should specifically identify the sections and subsections that you're citing as opposed to providing a general statute. For example, instead of writing that "Defendant violated the Fair Employment and Housing Act (FEHA), Government Code section 12940 et seq.," you should write, "Defendant violated the Fair Employment and Housing Act, Government Code section 12940(a)." Including the specific section or subsection makes the life of the law clerks and judge easier and ensures that everyone is on the same page with regards to the basis of your legal theory.

(12) Be courteous and professional

Be courteous and professional at all times when dealing with the judge, the court staff, your client, and opposing counsel.

Treat the Courtroom Deputy (CRD), Court Reporter, and chambers staff with respect. The court staff regularly communicates with the judge, so unfavorable interaction with any members of the court staff may likely reach the judge's attention.

Observe courtroom etiquette: stand up when you speak; speak at the lectern unless the court orders you to do otherwise; use the microphone so that the court reporter can hear you; request permission to approach the witness; do not walk into "the well." Do not interrupt opposing counsel during oral argument. You will get your turn to respond.

Wireless communication devices must be completely turned off in all courtrooms at all times, in any other room in which court proceedings are being held, in jury rooms during jury deliberations, and any area where relevant restrictions are posted. Some judges sanction attorneys for leaving their phones on.

Don't be a jerk to opposing counsel. When emailing and sending written communications to opposing counsel, always remember that your communications may be attached to a declaration and submitted to the

court as evidence to show that you met and conferred prior to the filing of the motion. So, be nice. Do not send communications where you are being overly hostile or aggressive. Civility in how you conduct yourself, how you speak, and how you communicate goes a long way towards establishing the court's impression of you. When in the courtroom, address your arguments to the court, not to opposing counsel. When submitting unanticipated documents to the court during a hearing, provide notice and/or copies to opposing counsel.

Don't bicker. Be reasonable and accommodating as much as possible. It aggravates the court to have to get involved in scheduling issues. Try to resolve issues with opposing counsel without court intervention. When filing papers with the court and in oral argument, do not come across as angry or bitter. This undermines your credibility and could annoy the clerks and the judge.

(13) Do not file a motion for reconsideration unless you genuinely believe that you can satisfy the requirements

District courts have very strict rules when it comes to the filing of motions for reconsiderations. In the U.S. District Court for Central District of California, such motion can be made "only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." (Local Rule 7-18.) Do not file a motion for reconsideration if you are merely repeating what you have already stated in your brief or oral argument. If you included a particular argument in your brief, trust that the judge and the law clerks have read it. Unless you truly

believe that you can satisfy Local Rule 7-18, do not seek reconsideration. Failure to make a showing that your motion was made in good faith will only undermine your credibility.

(14) Avoid ex parte applications absent exigent circumstances

Avoid filing ex parte applications unless there is a real emergency. The party who is seeking ex parte relief must show that he or she did not create the urgency that requires ex parte relief or that the crisis occurred as a result of excusable neglect. (*Mission Power Engineering Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995).) If the moving party's own conduct created the crisis, ex parte relief will likely be denied. Before filing an ex parte application, consult the local rules and the judge's Initial Standing Order regarding the procedure for ex parte applications.

(15) Before trial, coordinate with the CRD about the use of electronic equipment

Before the commencement of trial, make sure to ask the CRD for permission to test the courtroom's audio/visual equipment if you anticipate using it. This is important to make sure the equipment works and you know how to operate it. Most district courts now have document cameras and DVD/Blue Ray players that are available for use at trial. If you anticipate using any of the court's electronic equipment during trial, try scheduling an appointment with the CRD far in advance to do a practice run. On a related note, if you anticipate using electronic equipment not provided by the court, make sure to contact the CRD first to get instructions regarding your use of such equipment.

(16) Tips when practicing in the Ninth Circuit

In addition to the Federal Rules of Appellate Procedure ("FRAP"), the U.S. Court of Appeals for the Ninth Circuit has its own circuit rules, which is

See Gonong, Next Page

accessible by visiting this link: <http://cdn.ca9.uscourts.gov/datastore/uploads/rules/frap.pdf>. If you find yourself in the Ninth Circuit, make sure you review closely both the FRAP and the Ninth Circuit Rules. In addition, consider the following tips:

Coordinate with opposing counsel on the record. The court only needs one copy of each document. The court does not want to see duplicate documents, especially if the documents are voluminous.

Answer the judge's questions at oral argument. During oral argument, focus on the judge's question and make sure you give a straightforward answer. Judges will not ask a question unless they want to know the answer. If you do not know the answer, do not beat around the bush. Admit that you do not know the answer or, if necessary, offer to file a supplemental brief. Frequently, members of the three-judge panel use the oral argument to flesh out the issues that are critical to your case. Accordingly, you

should listen carefully to the questions and make sure you clearly address the judges' questions.

Do not recite the facts at oral argument. The judges are very familiar with the facts of each case. There is no need to recite the facts during oral argument. Listen carefully to the judges' questions, and make sure you leave yourself enough time to answer the questions.

Conclusion

When practicing in federal court, you need to make sure that you are adhering to the Federal Rules of Civil Procedure, the local rules, and the district judge's rules as laid out in that particular judge's orders. Complying with these rules requires time, effort, and meticulousness. Because you need to hit the ground running once your case ends up in federal court, it makes sense to have some idea on what to expect.

Christine J. Gonong heads the Law and Motion Department at Nguyen Lawyers, ALC. Ms. Gonong's areas of expertise include complex civil litigation, catastrophic personal injury, wrongful death, dog bite and premises-liability cases. She spent close to a decade working for the United States Courts. Christine was a former judicial law clerk to Circuit Judge Jacqueline H. Nguyen of the U.S. Court of Appeals for the Ninth Circuit, and clerked for District Judges S. James Otero, Otis D. Wright II, Dale S. Fischer, and Jacqueline H. Nguyen of the U.S. District Court for the Central District of California. In law school, she externed for U.S. District Judge Susan Y. Illston and U.S. Magistrate Judge James Larson of the U.S. District Court for the Northern District of California. She also teaches Legal Writing and Advocacy as an adjunct professor at USC Gould School of Law.

