Oh the Games We Play: Combating Abusive Litigation Tactics

By Charles R. Gallagher III

Thankfully the calls for professionalism and decorum long ago were heeded by lawyers far and wide, and generally speaking, the practice of law is far more civil than most outsiders would expect. However, once in a while we all seem to encounter litigation games. The existing professionalism guidelines, court rules, and case law provide the tools needed to combat such chicanery.

Unilateral Setting of Hearings and Depositions

No one enjoys the surprise of a Notice of Hearing or Notice of Deposition for a hearing or deposition that had not been discussed. The Standards for Professionalism, which apply to the Sixth Judicial Circuit, prohibit such notices and require that matters be set by mutual consent. The pertinent rule states as follows:

> B. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME
>
> 1. We will communicate with opposing counsel to schedule depositions, hearings, and other proceedings, at times mutually convenient for all interested persons.
>
> 2. We will provide opposing counsel and other affected persons reasonable notice of all proceedings except upon agreement of counsel when expedited scheduling is necessary. We will immediately notify opposing counsel of any hearing time reserved.[1]

Inadequate Time for Hearing

Equally surprising is reviewing a Notice of Hearing on a twenty page motion and noting that only five minutes are reserved for the hearing. The rules also require the scheduling of adequate time to present the matter before the court and allow response by opposing counsel. The pertinent rule states as follows:

> B. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME
>
> 3. We will request enough time for hearings and adjudicative proceedings to permit full and fair presentation of the matter and to permit response by opposing counsel. When scheduling depositions, we will schedule enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.[2]

Deference to Schedule Conflicts

One of the certainties of any litigation practice is a packed calendar with hearings, depositions, mediations, and trials. As a result, schedule conflicts are inevitable. The Standards of Professionalism require that counsel cooperate with one another in according deference to such conflicts and rescheduling in good faith. As to scheduling conflicts, the rule states as follows.

> We will cooperate with opposing counsel when conflicts and calendar changes are necessary and requested.
>
> We will grant reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice our client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.[3]

Uncleared Tack on Hearings

While it seems logical that only matters set for hearing under an agreed Notice of Hearing are appropriate for resolution by the Court, what happens when additional matters are "tacked on" without consent or worse yet, where matters not noticed for hearing are argued at the hearing?

Case law prohibits such a situation. "Florida law clearly holds that a trial court lacks jurisdiction to hear and to determine matters which are not the subject of proper pleading and notice,' and '[t]o allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights."[4]

So next time you find yourself the victim of litigation games, take comfort in the fact that the rules give you the tools you need to combat such abuses.

Charles R. Gallagher III is the founder and principal of Gallagher & Associates Law Firm, P.A. His practice includes foreclosure defense, consumer law, real estate and business litigation and insurance litigation. Mr. Gallagher is a graduate of Rollins College and Stetson University College of Law. He is a graduate of Leadership St. Pete and was selected as a Rising Star by Florida Super Lawyers and selected as an "Up and Comer" by the Tampa Bay Business Journal in 2011. He frequently lectures and serves as a media commentator on foreclosure topics.

1 See Administrative Order PA/PI-CIR-2007-006. (Emphasis supplied).

2 See Administrative Order PA/PI-CIR-2007-006.

3 See Administrative Order NO. 2007-006 PA/PI-CIR.

4 Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC, 968 So. 2d 1244, 1252 (Fla. 2008). See also: Epic Metals Corp. v. Samari Lake East Condominium Ass'n, Inc. 547 So. 2d 198 (Fla. 3d DCA 1989); Devaney v. Solitron Devices, Inc., 564 So. 2d 1229 (Fla. 4th DCA 1990) (due process rights violated when trial court expanded the scope of the hearing to address matter not noticed for hearing); McGilton v. Millman, 868 So. 2d 1259, 1262 (Fla. 4th DCA 2004).