

Pro Hac Vice, Ye Be Warned: A Cautionary Tale to Out-of-State Attorneys and Their Local Counsel

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On August 23, Judge Rebecca Beach Smith issued a notable decision that serves as a stern warning to out-of-state counsel seeking to practice in the Eastern District — and, perhaps more so, to the local counsel who choose to associate with them.

In *Joann Wright Haysbert v. Bloomin' Brands, Inc., et al.*, No. 4:20-cv-00121-RBS-RJK, 2023 U.S. Dist. LEXIS 148808 (E.D. Va. Aug. 23, 2023), Judge Smith admonished an out-of-state attorney through the severe measure of revoking his *pro hac vice* status and declaring a mistrial. According to the court, the “case ha[d] become completely infected by the cumulation of misrepresentations, rules violations, ‘red herrings,’ and other misconduct by [p]laintiff’s counsel.” *Id.* at *12.

During a two-week personal injury trial, the defendants brought an oral motion to quash a witness subpoena, a motion to revoke the plaintiff’s counsel’s *pro hac vice* status, and a motion for mistrial. Judge Smith swiftly granted all three motions, finding that the plaintiff’s counsel’s actions had tainted the case to the point where “a fair trial cannot proceed.” *Id.* at *19.

Motion to Quash a Witness Subpoena. At the outset, Judge Smith granted the defendants’ motion to quash a witness subpoena, finding the subpoena was untimely and that the plaintiff’s counsel had misrepresented to the court that it was timely served. The subpoena in question was served on the same day that the witness was required to appear; yet, records provided to the court demonstrated that the witness was not served until 5:25 p.m., after the court’s business hours. Judge Smith further held there was no good cause for the late-issued subpoena, particularly given that the parties had known about the revised trial date for several months prior, and the plaintiff considered this witness to be a “critical” witness.

Motion to Revoke Pro Hac Vice Status. The court granted the defendants’ motion to revoke the plaintiff’s counsel’s *pro hac vice* status based on “the cumulative effect of [counsel]’s unprofessional conduct, which included violations of federal rules, local rules, and court rulings, and his impact on the judicial economy.” *Id.* at *5. Judge Smith identified dozens of examples of unprofessional conduct displayed by the out-of-state attorney that warranted the revocation of his *pro hac vice* status. This unprofessional conduct included slamming papers and exhibiting multiple outbursts in front of the jury, badgering witnesses through repetitive and combative questions, issuing unenforceable subpoenas, misstating the Federal Rules of Evidence to the court, implying that the court was violating the Federal Rules of Evidence by not admitting the plaintiff’s exhibit based on the counsel’s

misstatement of the rules, purposely misleading the jury, and making conflicting misrepresentations to the court.

As examples of such misconduct, Judge Smith recounted instances where the attorney purposely sought to mislead the jury by implying that witness statements were inconsistent when they were not; suggesting that the slip-and-fall at issue in the case was captured by a camera when, in reality, the camera did not cover the area in question; and repeatedly referring to a document as “authentic” when its admissibility was still under advisement by the court. Further, the attorney made untrue statements directly to the court. These included claiming that he contacted his process server several hours earlier than as demonstrated by emails, and telling the court that he had served as a term law clerk to a district judge when, in reality, he had served as a judicial intern.

Judge Smith also emphasized the attorney’s multiple failures to abide by the Federal Rules of Evidence and local court rules. These violations included, among other things, intentionally eliciting hearsay testimony, failing to understand and follow the Federal Rules of Evidence and the court’s rulings on evidence, failing to issue witness subpoenas in advance of trial as required by the local rules, publishing prejudicial evidence to the jury that did not comply with the court’s redaction order, and improperly impeaching witnesses despite the court’s repeated rulings and instructions to the contrary.

Finally, Judge Smith noted the counsel’s negative impact on the judicial economy by failing to come to court prepared with paper copies of necessary documents, filing last-minute motions, and delivering the updated final trial exhibit binder to the office of the defendants’ counsel in Fairfax the morning the trial was to start in Norfolk. Judge Smith reasoned the combined effect of this misconduct was sufficient to revoke the counsel’s *pro hac vice* status.

Motion for Mistrial. Finally, Judge Smith declared a mistrial based on the misconduct described above. Judge Smith acknowledged that declaring a mistrial is an “extreme measure” but found it warranted where “the prejudice that presently exists” due to the misconduct “cannot be cured by a cautionary instruction.” *Id.* at *11.

In particular, Judge Smith pointed to prejudice that occurred through the plaintiff’s counsel repeated, deliberate injection of insurance and an improper standard of care into the case despite the defendant’s objections and the court’s admonishments warning him not to do so. Based on the cumulative effect of the identified misconduct, the court reasoned “the whole atmosphere of this trial ha[d] become infected.” *Id.* at *18.

Notably, Judge Smith directed some milder but firm admonishments to the plaintiff’s local counsel as well, which all members of the court’s bar would do well to consider. If a mistrial had not been declared, the plaintiff’s local counsel would have been required to try the rest of the case. Judge Smith contemplated this as a possible remedy, but concluded this would be “extremely prejudicial” to the plaintiff due to (1) local counsel’s demonstrated lack of preparedness for the trial, and (2) the fact that if the case was permitted to proceed before the same jury without the plaintiff’s out-of-state “lead counsel” present, his absence would cause speculation among the jury. *Id.* at *18-19. In a footnote, Judge Smith placed local counsel “on notice” that if a new trial went forward, he would be responsible for preparing “for all incidents of the proceeding as is required of a member of the bar of this court.” *Id.* at *20 n.20. Nonetheless, Judge Smith noted that other than a lack of preparedness in the case at hand, she “knew of no deficit in his ability to perform in cases as a member of this court’s bar.” *Id.*

While it is not uncommon for out-of-state attorneys to associate themselves with local counsel and seek *pro hac*

vice admission in Virginia, this case is a reminder to all out-of-state attorneys of the need to familiarize themselves with the local courts rules and to always conform their conduct to the rules.

This case also reminds local EDVA practitioners to be careful in their association with, and oversight of, *pro hac vice* attorneys. Local Rule 83.1(E) makes clear that local counsel are expected to be actively engaged in all matters in which they appear, and the judges of this district will enforce that obligation forcefully.

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