

TOP STORY

Individual Lawyers—Not Firms—Must Pay Discovery Sanctions

By Josephine M. Bahn – January 20, 2023

A federal appellate court has held that individual lawyers, and not their law firm, are jointly and severally liable for sanctions for misconduct during discovery. In [NPF Franchising, LLC v. SY Dawgs, LLC](#), the court reasoned that [Federal Rule of Civil Procedure 37](#), which “makes no mention of a party’s law firm, but explicitly lists a party and a party’s attorney,” does not allow for sanctions against the firm itself. The appellate court left the door open, however, for the trial court to use its inherent power upon remand to impose sanctions on the firm.

Lawyers Fail to Participate in Discovery

Following the termination of one of its franchisee teams in 2018, the National Pro Fastpitch League sued that franchisee alleging that it had solicited league suppliers, sponsors, and others for a separate and competing league in violation of its noncompete agreement. Thereafter, the parties began the discovery process. The franchisee filed numerous discovery motions alleging that the league’s lawyers failed to show up to multiple discovery conferences and depositions, provided insufficient discovery responses to written discovery, and failed to act in a cooperative manner to move the case through the discovery phase. The league later voluntarily withdrew the lawsuit.

The lower court determined, based on a recommendation from a magistrate judge, that the franchisee had been seriously prejudiced by the league’s failure to participate in the discovery process. The district court determined pursuant to Rule 37 that the four individual attorneys admitted pro hac vice in the case, as well as their law firm, were jointly and severally liable with their client for sanctions associated with their failure to actively participate in discovery.

The lawyers and the firm appealed to the [U.S. Court of Appeals for the Sixth Circuit](#). They argued that the franchisee and the lower court failed to outline the violations personally attributable to the attorneys. The court disagreed, holding that at multiple points during discovery the attorneys were notified of the alleged misconduct and the associated penalties for noncompliance. The court reasoned that it would be an impossible task, and something not required under the rules, to determine which of the league’s lawyers failed to attend a deposition or respond to written discovery. The appellate court agreed with the district court

that the four individual attorneys were jointly and severally liable for over \$280,000.00 pursuant to Rule 37.

However, the appellate court reversed with respect to the imposition of sanctions on the law firm itself, which it held could not be liable under the language of Rule 37. “Rule 37 makes no mention of a party’s law firm but explicitly lists a party and a party’s attorney,” the court explained.

Rule 37 Overhaul Needed

The court’s holding cuts against the meaning of and intent of Rule 37, requiring revision to better protect lawyers who may not be the decisionmaker on a case, explains [Alan R. Jampol](#), Los Angeles, CA, chair of the Attorney Liability Subcommittee of the [ABA Litigation Section’s Professional Liability Committee](#). “The court’s insistence that Rule 37 implies that only an individual lawyer can be liable is unsupported by the rule or by logic,” he argues. “It is too difficult and complicated to analyze which lawyers were directly responsible for the offending conduct and which were not. It is probable that several of the lawyers named in the opinion were associates or lower-level partners who were just doing what the team leaders in charge instructed them to do,” Jampol continues.

Additionally, if law firms are not responsible for sanctions payments, “there is little incentive for law firms to ensure their lawyers are conducting themselves appropriately and no incentive to develop and maintain a firm culture that promotes professionalism and ethical conduct,” cautions [Michael S. LeBoff](#), Newport Beach, CA, cochair of the Litigation Section’s Professional Liability Committee.

Decision Implicates Training and Oversight

Although the attorneys and not the firm were subject to sanctions in this case, firms may still be on the hook for Rule 37 sanctions awards, explains [Tiffany A. Rowe](#), cochair of the Professional Liability Committee. “Law firms are responsible for their partners, their associates, and their staff. There is no veil to protect the firm, which is part and parcel of the LLP, LLC, or member structure of a law firm. There is no freestanding corporate entity and one cannot be created for purposes of avoiding liability,” offers Rowe.

But law firms can help protect themselves from individual lawyer misconduct with better training and mentoring. “Firms have an ethical and professional responsibility to train and mentor their attorneys to act ethically and professionally throughout all facets of a case. Firms

should utilize this opinion to reignite the mentorship of their attorneys,” suggests [Naomi M. Berry](#), Miami, FL, cochair of the Section’s [Corporate Counsel Committee](#).

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Related Resources

- [Federal Rule of Civil Procedure 37](#): Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.
- Hon. Karen L. Stevenson, “[Want to Recover Attorney Fees under Rule 37? Be Reasonable!](#),” *Litigation News* (June 15, 2021).