

Judge's Rebuke Of Mass. AG Has Lessons For All Attorneys

By **Alison Eggers and Dallin Wilson** (May 12, 2021)

It's a situation every lawyer dreads: standing helplessly in open court as the judge reprimands you for making questionable arguments or failing to comply with a deadline. Often dubbed the "benchslap," these judicial rebukes feature prominently in daily legal industry social media updates, no doubt because there will always be a market for schadenfreude.

Lawyers from Massachusetts Attorney General Maura Healey's office found themselves on the receiving end of such a rebuke at a **recent hearing** before Judge Douglas P. Woodlock of the U.S. District Court for the District of Massachusetts because they refused to respond to a number of discovery requests in an auto industry suit, *Alliance for Automotive Innovation v. Healey*, challenging the state's updated Right to Repair law.

After breathing a sigh of relief that it wasn't you, it's worth pausing for a moment to look at the case and think about how you can avoid being the victim of the dreaded benchslap.

Background of the Massachusetts Right to Repair Case

To understand why Judge Woodlock was so frustrated, some background is necessary.

In November 2020, Massachusetts voters overwhelmingly approved a ballot initiative that expanded the state's existing Right to Repair law. Beginning with 2022 model year vehicles, motor vehicle manufacturers are required to equip vehicles sold in Massachusetts with a standardized, nonproprietary, open-access telematics platform across all of the manufacturer's makes and models, and to make telematics data available to independent repair shops and vehicle owners.

An industry trade association for manufacturers, the Alliance for Automotive Innovation, filed suit on Nov. 20, 2020, arguing that the new law was preempted by federal law. The alliance also sought a preliminary injunction to enjoin enforcement of the new law.

At a Dec. 3, 2020, hearing, Judge Woodlock expressed a strong desire to resolve the alliance's motion with a trial on the merits, rather than through competing affidavits, and ordered the parties to confer on a schedule that would allow for a prompt trial. Shortly thereafter, trial was set for June 14, 2021, and an expedited pretrial schedule was ordered.

On April 23, Judge Woodlock held a hearing on the alliance's motion to compel the attorney general to provide responses to certain requests for admission and interrogatories that the attorney general objected to on the grounds that they "seek admission of a proposition of pure law" or presented incomplete hypotheticals. Judge Woodlock excoriated counsel for the attorney general for their "inflexible approach with this chatter about differences between law and fact."

One of the allegedly unanswered questions is whether there exists an "open access platform across all of the manufacturer's makes and models ... capable of securely communicating all



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mechanical data."

Assistant Attorney General Eric Haskell began what presumably was going to be a lengthy answer, but was met with a sharp interruption from the judge.

"No, no, no, you're misreading it," he said. "Is there such a device? Are you aware of such a device?"

"We are aware of such a device," Haskell replied.

"Then you answer the question," Judge Woodlock said. "You don't get into these metaphysics or theology. Answer the question. If you're aware of it, answer the question!"

The court ordered the parties to work over the weekend and to produce substantive responses the following Monday.

Avoiding the Benchslap

The expedited schedule in this case has highlighted some important lessons for attorneys to avoid finding themselves on the receiving end of a judicial rebuke.

Timing is important.

Judge Woodlock was clearly irked that he was receiving motions to compel on the eve of trial, telling counsel that trial will take place according to the schedule he established with them at the outset.

"You bought into it," he added. "And to the degree you decided not to comply with timely requirements, decided to put off questions of motions to compel ... we are going to make up for lost time. Or, more accurately, you are."

Choosing when to file a discovery motion can be a balancing act.

On the one hand, courts are loath to resolve discovery disputes if the parties have not adequately met and conferred to try to resolve the dispute without involving the court. Many jurisdictions require counsel to confer before filing discovery motions, so it is important to review local rules to make sure a motion complies with any such requirements.

Rushing to court to file a motion to compel before trying to work it out first with opposing counsel is just as likely to draw ire as if counsel waits too long.

On the other hand, waiting too long can create problems if there is insufficient time to resolve the dispute in advance of other deadlines.

Often, dispositive motion and trial deadlines get delayed when discovery disputes arise, something that frustrates judges, many of whom closely monitor the length of time cases linger on their dockets. If deadlines are fast approaching, counsel would be wise to tee up any discovery disputes with the court before it is too late.

Use initial disclosures.

One way to ensure that discovery disputes are promptly raised with the court is to use initial disclosures to identify potential disputes at the outset of the case. Judge Woodlock pointed

out that many of the issues raised by the parties were known several months before the motions were filed.

Initial disclosures are often overlooked by counsel, viewed as more of a procedural annoyance rather than a critical tool for shaping discovery. Counsel should review initial disclosures and quickly request to confer with their opposing counsel to promptly resolve any potential disputes.

There is no need to wait until the eve of the discovery deadline or trial date to raise such issues, and judges will likely appreciate counsel's diligence in promptly addressing discovery disputes.

Know your judge.

Before making a discovery motion, or refusing to bend on discovery requested by your opponent, take a moment to consider the judge's reputation for resolving discovery disputes. If counsel lacks personal experience, reach out to colleagues or other attorneys who have experience with the judge and can provide feedback.

In addition to the judge's reputation for resolving discovery disputes, counsel should consider the history of the case and how a judge is likely to respond if he or she is asked to resolve a dispute.

In the Massachusetts Right to Repair case, Judge Woodlock made clear on multiple occasions his desire to resolve the case on a complete record and after a trial on the merits. It was no surprise that he reacted badly to a discovery dispute that threatened to slow the development of a complete record.

If a judge has expressed similar sentiments, counsel would be wise to take that into consideration when deciding how to respond to discovery.

Know your judge's schedule.

Counsel also often forget that discovery disputes not only take up their time, but judges must also devote significant time when disputes are raised with the court. That time is often time diverted from other, planned matters.

During the hearing, Judge Woodlock told the parties that he was preparing for the **district's first high-profile criminal jury trial** since the start of the COVID-19 pandemic, which was scheduled to start only a few days later.

While attorneys cannot control what is happening in other cases, if they know there are other, significant matters pending, they should try to minimize the number of disputes presented to the court and be prepared to make arguments as efficiently and directly as possible.

Think carefully before objecting to interrogatories and requests for admission.

Counsel should also carefully consider how a judge will respond to flat-out objections to interrogatories or requests for admission.

At a hearing just one week prior, Judge Woodlock heard the attorney general's motion to compel the alliance and certain of its members to produce sensitive vehicle source code

related to cybersecurity. The judge ordered the alliance and those members to produce only slightly more than they had previously agreed, and no voices were raised.

But when it came to the attorney general's objections to answering interrogatories and responding to requests for admission, Judge Woodlock ordered the attorney general to produce substantive responses within one business day, noting that the attorney general could supplement her answers if more information became available.

Given the increase in volume of electronically stored information, judges can sometimes be more sympathetic to parties faced with producing a costly and burdensome number of documents. Answering interrogatories or responding to requests for admission may not engender the same sympathy, and parties may appear to be obstructionist in refusing to provide any responses.

Remember Federal Rule of Civil Procedure 1.

Lastly, Judge Woodlock repeatedly invoked the often overlooked Rule 1 of the Federal Rules of Civil Procedure, which requires the "court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

It is inappropriate to use discovery to try to obtain leverage or to inflict delay. Thus, rule No. 1 for any lawyer who wants to avoid a benchslap might simply be to follow Rule 1: Comport oneself in a manner consistent with the goal of securing the just, speedy and inexpensive determination of their action.

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