Powerful Pleadings

Mike Adle found Angus in the First Federal Soup and Sandwich Shop last Friday and asked if he could sit down.

"The truth is I need help," he said. "I'm filing my first case in federal court, and I need someone to check the papers before I take them over to the court house. I'd hate to start out looking like a doofus."

Mike had the summons and complaint in his hand, so Angus said, "Let's see what you've got."

He went over everything, including the information on the title page and the check for the filing fee. Then he said, "Did you investigate what your client told you before you wrote this?"

"Absolutely," said Mike. "I don't want to get caught with Rule 11 sanctions for frivolous pleadings in my first case in federal court."

"Well, it looks like you've got everything right," said Angus.

Law is a second career for Mike, and he looked pleased when Angus approved of the technical details. But he didn't take the papers back. "Could you do me one more favor?" he said. "Would you read my pleadings?"

"Sure," Angus said.

Three or four minutes later he looked up again. "You graduated from law school last spring?" he said.

"Right," said Mike.

"It looks like you had Professor Winter for Civil Procedure."

"How can you tell?" he said.

"Because this is nearly a picture perfect job of what's called 'notice pleading' under the Federal Rules of Civil Procedure."

Mike smiled. He stood up and reached for the stack of papers, but Angus didn't give them back.

"Is that what you want to do?" he said.

"Why not?" said Mike. "I put a lot of work in on that complaint, trying to get it down to just a couple of pages. You know, just give the defendant basic notice of what the case is about and leave the details for discovery. Anything wrong with that?"

Angus looked at Mike. "Not in the usual sense," he said. "If you file this summons and complaint, you are definitely in court as far as the Federal Rules are concerned. If the defense makes a motion for a more definite statement, it will be denied. If they move to dismiss for failure to state a claim, they'll lose. Compared to most complaints, this is a superior job of legal drafting."

"But?" said Mike.

"But the rules are changing," said Angus.

"We had all the new rules. That's what we studied," said Mike. "And notice pleading is the law. You don't have to put your whole case in your answer or complaint. That business went out in 1938. Or at least in 1944 when the Supreme Court decided *Dioguardi v. Durning*."

Angus smiled. "You're right," he said. "Notice pleading is still the rule.

"But so is automatic discovery under new Rule 26 of the Federal Rules."

"What does that have to do with the way I wrote the complaint?" said Mike.

"Pleadings shape discovery," said Angus. "They always have, but now more than ever."

Mike Adle sat down again.

"The magic words in Rule 26 are 'pleaded with particularity,'" said Angus. "In their initial disclosures, the other side has to give you the names, addresses, and telephone numbers of people likely to have information about what you've 'pleaded with particularity.' They've got to give you copies or the description and location of documents, compilations, and things they've got that are relevant to what you've 'pleaded with particularity.'

"And they're supposed to do all that automatically—without you doing anything more than filing your summons and complaint. The way the rules have it set up, your complaint is not

just your pass into federal court, it's also your first discovery request."

"I guess I never hooked those two rules together," said Mike. "I just thought of them as separate problems. So should I do that? Should I redo my pleadings to give more of my case?"

"Good question," said Angus. "A lot of lawyers would say, 'No, leave them alone. The other side can learn a lot from your pleadings, and you shouldn't tell them any more than you have to. That's not your job. If they want something, let them ask for it in discovery.'

" 'Besides,' they say, 'the more particular you get in your pleadings, the more locked in you will be if the case starts to take on a new look during discovery.' "

"It sounds like a tough balancing act," said Mike. "Added discovery on one hand versus additional risks on the other. Right?"

"Not quite," said Angus. "It's not like you don't get any discovery if you stick to notice pleading. It just reduces what the other side has to give you in the initial disclosure stage, at the start of the case. You still have your full range of discovery requests available as the wheels start turning."

"Yeah, that's right," said Mike. "So I guess maybe pleading in particular isn't necessarily so important."

"And there's another factor," said Angus. "Whether the new rules even apply depends a lot on which judge you happen to get. You get Judge Gunn, and he will make both sides turn square corners under Rule 26. Judge Ransom won't care what you do so long as you don't involve her in any discovery disputes, and the word is Judge Riddick will let the parties stipulate out of Rule 26 if they want."

"Wow," said Mike "There's a lot to this."

"And there's a little more," said Angus. "This is a breach of contract case—right?"

"Right."

"No claim of fraud?"

"I thought about it, but decided intent might be pretty hard to prove," said Mike. "Still, everything the defendant did does smell a lot like fraud."

"Maybe you want to give that some more thought," said Angus. "Rule 9(c) of the Federal Rules says you've got to plead fraud or mistake with particularity—but it lets you plead malice or intent with just a general allegation.

"The reason for pleading fraud with particularity is pretty practical. Fraud is easy to charge but hard to prove. Courts aren't happy with claims like that unless it looks like you've got a pretty solid case going in.

"Since the defendant's conduct in your case has a fraud-like aroma, getting more specific about those facts won't hurt—even if you don't actually claim fraud at the start. It helps to be specific when you want to ward off possible judicial hostility. No sense making the judge be suspicious about your case from the start."

"Wow, I never knew there was that much to it. Thanks a lot," said Mike, reaching for her pleadings.

Angus didn't give them back. "You got a minute?" he said.

"Absolutely," said Mike. "There's more?"

"There is," said Angus. "I want you to be a Federal District Judge for a couple of minutes. A competent, conscientious judge who's been on the bench for five or six years. Okay?"

"Sure," said Mike.

"So tell me something. When you started your judicial career, did you read all of the pleadings in every case assigned to you?"

"Of course," said Mike.

"Because you wanted to know what was coming into your court?"

"Exactly," said Mike.

"Now be honest with me," said Angus. "Do you still do it? Do you still read all the pleadings, now that you've been on the bench for five or six years?"

"Yes, I think so," said Mike.

"Good," said Angus. "Not all of them do, but most judges get around to it by the pre-trial conference.

"Now how many really well-drafted pleadings do you get a month? I mean simple, clear, easy to follow answers and complaints?"

"Oh, there must be several," said Mike.

"Not many," said Angus. "One a month if you're lucky. Often none a month. Most of the pleadings you get are clogged with turgid language, that track the style of formal legal writing that goes back 50 years or more.

"As a judge you are still getting lots of answers that say, 'Now comes the defendant in the above styled and numbered cause, and for a defense would show this honorable court as follows . . .'

and complaints that have language like, 'Whereupon the defendant wholly failed, neglected, omitted, and refused to comply with the terms of said contract wherein it was required that delivery be made on or about the 14th of June.'

"So that's what most of the stuff you get is like. Now how do you think you're going to react to a simple, clear, easy to read pleading when it's put on your desk."

"Relief," said Mike. "Nope, better than that. Appreciation. Actual pleasure."

"Bingo," said Angus. "Now is that kind of reaction worth a lawyer's time? Never mind. That's a rhetorical question.

"Okay, next point. You're in your chambers, reading the pleadings in an important case. How do you digest what they say? How do you process the information you're getting from the answer and complaint?"

Mike was thoughtful. "I read the allegations in each one," she said. "I try to separate out the facts and apply them to the legal rules so I can appreciate what the case is all about."

"Wrong," said Angus. "Only in a law professor's dreams is that the way you actually think.

"You process information the way you learned when you were a child. You digest facts the way you have your entire life. You learn, you think, you process, you analyze through stories.

"The story is the basic mechanism people have for dealing with information—facts, ideas, principles.

"Since the beginning, humans have used stories to teach, to understand, to memorialize events, to pass on moral precepts, to make sense out of the world.

"Doubt it? Go back to law school and take contracts for the first time.

"Only this time we'll take out all the stories. You don't read any cases—they're stories. No examples, no hypotheticals from the teacher. They're stories. All you have are the black-letter principles in the Restatement of Contracts. Do you think you could get through the course?

"Sure. But it would take a long time—maybe years. And the way you would do it would be to make up your own examples—your own stories—to try to make sense out of the rules. And maybe they would fit the rules and maybe they wouldn't.

"One of the things we have learned is that when you give people raw information with no story line, they make up their

own stories to explain what happened. They invent characters who drive the story and even give them names. And these characters all have reasons—motives—for the things they do.

"One of the most interesting things is, when people fasten on a story like this, they don't even 'hear' the facts that don't fit their story."

"That is impressive," said Mike. "It sounds like I really ought to tell a story in all of my pleadings, so I can get the judge to start thinking along the right lines from the very start. Do you really think it makes that much difference?"

"Hard to say," said Angus. "Some of us think so. Some of us feel that every motion, pleading, brief, or memorandum ought to tell a trial-winning story. Not that the pleadings are the equivalent of a good opening statement. They can't be that well developed or complete. But if they get the judge taking your side from the beginning they can make a real difference."