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Federal Civil Procedure Litigation Manual

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Publication Information

1 Federal Civil Procedure Litigation Manual Author(s)

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Federal Civil Procedure 2010 Litigation Manual

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Federal Civil Procedure Litigation Manual Chapter 32(Matthew Bender 3d ed.) Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.



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1 Federal Civil Procedure Litigation Manual Dedication

Dedication

Dedication

The authors wish to dedicate this book to our teacher, friend, and colleague, Professor Ken Aplin, who has enjoyed a distinguished career teaching civil procedure to generations of students indebted to his service.

His commitment to teaching excellence reminds us all of the central purpose of legal education.



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1 Federal Civil Procedure Litigation Manual Preface

Preface

This manual is designed to provide a thorough, yet concise, analysis of the Federal Rules of Civil Procedure. It is intended to aid the practitioner, judge, and student alike in understanding the operation and application of the Rules in situations that recur throughout the course of litigation. Although this manual is not exhaustive of every procedural issue in federal court, it is anticipated that it will function both to identify other additional sources on federal civil procedure as well as to resolve problems frequently engendered by the application of the Rules.

Each Chapter in this manual contains the full text of each Rule in a format that lends itself to easier examination and dissection than any other currently available. Practical commentary on each Rule is also provided, as are hundreds of illustrations of possible applications. Each Chapter also includes a list of additional authorities and a carefully-selected list of leading cases. These cases are intended to serve as starting points for additional research; comprehensive annotations are beyond the scope of this manual.

This manual also contains a host of other useful features, including a note on judicial rulemaking in federal court and a table used to calculate the number of days between two dates, as well as the Supplemental Rules for Certain Admiralty and Maritime Claims, the Appendix of Official Forms accompanying the Federal Rules, and the full text of the Federal Rules of Appellate Procedure. A quick-reference index is located on the inside front cover; a section locator on the back cover will direct the user to the section of the book where the desired information is found.

Weissenberger's Federal Civil Procedure Litigation Manual is published annually and will inevitably benefit from refinement in future editions. Corrections, comments and suggestions are always welcome and may be directed to the authors at their e-mail addresses listed below.

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1 Federal Civil Procedure Litigation Manual Acknowledgments

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1 Federal Civil Procedure Litigation Manual Table of Authorities

Table of Authorities

Full citations of sources are presented below in the order they are listed in the Additional Authority section of each chapter.

James WM. Moore, *Moore's Federal Practice*, Vols. 1-23 (3d ed., Matthew Bender & Co.), *hereinafter* -- Moore's Federal Practice § --

Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure* (4th ed., Little, Brown & Co. 1992), *hereinafter* -- James & Hazard, *Civil Procedure* § --

Jack H. Friedenthal et al., *Civil Procedure* (2d ed., West Pub. Co. 1993), *hereinafter* -- Friedenthal, *Civil Procedure* § --

Larry L. Teply & Ralph U. Witten, *Civil Procedure* (The Foundation Press, Inc. 1994), *hereinafter* -- Teply & Whitten, *Civil Procedure* __

Glen Weissenberger, *Weissenberger's Federal Evidence* (4th ed., Anderson Pub. Co. 2001), *hereinafter* -- Weissenberger's Federal Evidence § --



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Publication Information

1 Federal Civil Procedure Litigation Manual Note on Judicial Rulemaking in the Federal Court

Note on Judicial Rulemaking in the Federal Court

Despite the fact that many states and other jurisdictions have modeled their rules of procedure after the Federal Rules of Civil Procedure, the Federal Rules enjoy a unique pedigree and authoritative posture. Unlike the authority of many state supreme courts to promulgate rules of practice and procedure for the efficient functioning of its junior courts, which is typically vested in their respective state constitutions or inherent in the nature of their respective judicial offices, the United States Supreme Court derives its authority to create rules of procedure in federal court from the Rules Enabling Act, 28 U.S.C. § 2072, a distinctively legislative enactment. Nonetheless, the Federal Rules of Civil Procedure, as with other rules adopted by the United States Supreme Court, should be interpreted differently than other legislatively-authorized rules. The Rules were designed primarily to facilitate and make uniform the passage and flow of civil actions through the federal courts—purposes in which the judicial branch has a unique interest in. Although Congress has retained for itself the authority to reject proposed Rules and even to enact new ones, it has wisely deferred to the Supreme Court in virtually every instance.

Rulemaking Authority

28 U.S.C. § 2072(a) provides that "[t]he supreme court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals." This grant of authority does not, however, confer upon the Supreme Court unfettered control over the promulgation of rules of procedure. 28 U.S.C. § 2074 subjects proposed rules of procedure to the possibility of veto by Congress. Proposed rules automatically take effect no earlier than December 1 in the year in which they are adopted absent Congressional action to the contrary.

Rules of procedure adopted by the United States Supreme Court supersede any existing conflicting statutory provision, a point made explicitly in 28 U.S.C. § 2072(b). Accordingly, federal courts have routinely held that conflicts between provisions in the Rules and those in the United States Code which cannot be harmoniously construed will be resolved in favor of the Rules. Statutory provisions that merely supplement or complement rules of procedure are, of course, still effective.

Rulemaking Procedure

28 U.S.C. § 331 creates the Judicial Conference of the United States, an office within the Administrative Office of the United States Courts. The Judicial Conference, through its Standing Committee and various advisory committees, makes recommendations from time to time to the United States Supreme Court concerning amendments to the Federal Rules of Civil Procedure and other rules adopted by the Supreme Court. After publication of proposed amendments and a rather extensive period of public comment on those amendments, the Judicial Conference submits its final recommendations to the Supreme Court, usually in the fall of the year prior to the year in which proposed amendments are to take effect.

Under 28 U.S.C. § 2074(a), proposed rules must be submitted by the Supreme Court to Congress no later than May 1 of the year in which they take effect. Unless Congress takes some kind of affirmative action, either by modifying or rejecting the proposed amendments, the amended Rules take effect on December 1.

Procedural Rules Must Be Nonsubstantive

The familiar proscription that rules of procedure may not "abridge, enlarge, or modify any substantive right" operates in federal courts as a function of congressional action: 28 U.S.C. § 2072(b) incorporates this proscription as a limitation on the delegation of authority by Congress under the Rules Enabling Act. Thus, a rule of procedure that amends or expands upon a substantive right is void, and any conflicting statutory provision controls. Such rules should be carefully distinguished from non-substantive procedural rules, which supersede contrary statutory provisions.

Local Rules

Procedural rules established by local courts for use within the jurisdiction of those courts are contemplated by Rule 83 and 28 U.S.C. § 2071. Local rules must be consistent with the Federal Rules of Civil Procedure and must not, of course, affect the substantive rights of parties. Additional information on the rulemaking procedure for local rules can be found in Chapter 83 of this manual.



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What's New

1 Federal Civil Procedure Litigation Manual Scope

Scope

HIGHLIGHTS

Release 2010 May 2010

New Federal Rules

New Federal Rule of Civil Procedure 62.1 codifies the "indicative rulings" practice used in most circuits. Civil Rule 62.1 is coordinated with new Federal Rule of Appellate Procedure 12.1, which prescribes the procedure in the circuit court when the district court makes an indicative ruling.

Amendments to Federal Rules

Many of the federal rules, both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, were amended effective December 1, 2009. Most of these changes consist of time-computation amendments.

New Federal Rule of Civil Procedure 62.1. The new Civil Rule 62.1 **prescribes the procedure in the district court** when a party moves for relief that the district court lacks authority to grant because an **appeal is pending**. Civil Rule 62.1 is coordinated with Appellate Rule 12.1, which governs the procedure in the court of appeals if the district court indicates that it would grant the motion or that the motion raises a substantial issue.

New Appellate Rule 12.1. If a party moves for relief in the district court while an appeal is pending, the district court generally lacks authority to grant the motion. But the **district court may make an "indicative ruling,"** stating that it would grant the motion or that a substantial issue is raised by the motion for relief. Appellate Rule 12.1 prescribes the procedure in the circuit court when the district court makes an indicative ruling. Appellate Rule 12.1 is coordinated with Civil Rule 62.1, which governs the procedure in the district court when a party makes a timely motion for relief that the district court lacks authority to grant because of a pending appeal.

The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure were amended effective December 1, 2009. The changes are important to all lawyers practicing in federal courts, and affect two related matters: the **method for calculating** or counting time periods set out in the rules, such as deadlines for actions; and the **specific time periods** set out in the various federal rules.

1 Federal Civil Procedure Litigation Manual Scope

Federal Rules of Civil Procedure. The following civil rules were amended, effective December 1, 2009: 6, 12, 13, 14, 15, 23, 27, 32, 38, 48, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81. New civil rule 62.1 was adopted, effective December 1, 2009. Admiralty Rules B, C, and G were also amended, effective December 1, 2009. Most of these changes consist of time-computation amendments.

Federal Rules of Appellate Procedure. The following appellate rules were amended, effective December 1, 2009: 4, 5, 6, 10, 12, 15, 19, 22, 25, 26, 27, 28.1, 30, 31, 39, 41. New appellate rule 12.1 was adopted, effective December 1, 2009. These changes include the time-computation amendments.



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TITLE I. SCOPE OF RULES; FORM OF ACTION

Chapter 1 Rule 1. Scope and Purpose

1-1 Federal Civil Procedure Litigation Manual 1.syn

§ 1.syn Synopsis to Chapter 1: Rule 1. Scope and Purpose

Scope Rule 1. Scope and Purpose

1.1 COMMENTARY

1.2 ADDITIONAL AUTHORITY

1.3 LEADING CASES



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TITLE I. SCOPE OF RULES; FORM OF ACTION

Chapter 1 Rule 1. Scope and Purpose

1-1 Federal Civil Procedure Litigation Manual Rule 1. Scope and Purpose

Rule 1. Scope and Purpose

Rule 1 reads as follows:

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

* * * * *



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TITLE I. SCOPE OF RULES; FORM OF ACTION

Chapter 1 Rule 1. Scope and Purpose

1-1 Federal Civil Procedure Litigation Manual 1.1

1.1 COMMENTARY

Rule 1 identifies the proceedings in which the Federal Rules of Civil Procedure apply. In promulgating the original Rules, the Supreme Court united the general rules of procedure prescribed for cases in equity with those prescribed for cases in law. Under a 1966 amendment to the Rule, separate rules of procedure prescribed for admiralty cases were abolished, and such cases are now governed by the Federal Rules of Civil Procedure.

Scope

The Rules apply to all civil proceedings in the United States district courts, single-judge or three-judge, and regardless of whether the case is tried to the court or to the jury. In certain instances, however, individual Rules draw distinctions between certain types of cases.

Illustration 1-1

Rule 55(b)(1) empowers the clerk of courts, under carefully prescribed conditions, to enter a default judgment in cases where only claims for monetary damages are presented. Cases in which other kinds of relief are requested are not subject to an entry of a default judgment by the clerk.

In addition, Rule 81 contains important limitations on the operation of Rule 1 with regard to the scope of the Rules, and Rule 81 should be consulted to determine the precise applicability of the Rules to a specific kind of proceeding.

Illustration 1-2

Rule 81 indicates that Rule 1, by its own terms, does not contemplate the Rules' applicability to bankruptcy proceedings, copyright proceedings, habeas corpus proceedings, or actions pursuant to specific statutes.

It is important to note, however, that nothing in either Rule 1 or Rule 81 precludes the Supreme Court or Congress from making the Rules applicable to such proceedings through a separate mechanism.

Illustration 1-3

Copyright Rule 1 indicates that copyright proceedings are to be governed by the Federal Rules of Civil Procedure.

By its own terms, Rule 1 renders the Rules applicable to any civil action in all district courts of the 50 states and to the United States District Court for the District of Columbia. However, the Rules are not generally applicable to administrative proceedings, disbarment proceedings, arbitration proceedings (absent a provision to the contrary in the pertinent arbitration agreement), proceedings before the Tax Court or before the United States Court of Federal Claims. Rule 1 does not operate to make the Rules applicable to district courts of United States territories or insular possessions. However, the Rules have statutorily been made applicable to several territorial district courts, including those in Guam, the Virgin Islands, and Puerto Rico. The Rules do not apply to original actions before the United States Supreme Court, though the Supreme Court's Rule 17.2 allows the Rules to be used as "guides" to procedure in original actions.

Purpose

The second sentence of Rule 1 directs courts to apply a construction of the Rules which will attain the stated goals of justice, speed, and the avoidance of unnecessary expense in the determination of every action. The word "administered" was added in 1993 to indicate the affirmative duty of courts to exercise the authority conferred upon them by the Rules in ensuring that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, the attorneys participating in the case share this responsibility with the judge to whom the case is assigned. The construction provided by the second sentence of Rule 1 applies to any proceeding in which the Rules operate, regardless of whether they are rendered applicable through the first sentence of Rule 1 or through some distinct mechanism, such as by statute.

In conjunction with Rule 83(b), the final sentence of Rule 1 provides trial court judges with a considerable amount of discretion to fashion practices that are consistent with the Rules, Acts of Congress, and the Constitution. In light of the vagaries and variabilities inevitably infusing the multiplicity of disputes faced by trial courts, the affirmative provision of such discretion is prudent as well as provident.

Note on the *Erie* Doctrine

The original Enabling Act, under which the Supreme Court derives its authority to promulgate the Federal Rules of Civil Procedure, explicitly provided that the Rules are to "neither abridge, enlarge nor modify the substantive rights of any litigant." Thus, to determine whether a particular Rule is a valid exercise of the power delegated to the Supreme Court, a distinction must be made between rules that are considered to be substantive in nature and those that are more accurately characterized as procedural. In 1965, the Supreme Court, in *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965), held that the proper test for making this determination is whether the challenged Rule violates the present Enabling Act, 28 U.S.C. § 2072, or the Constitution itself.

The traditional formulation of the distinction between "substantive" and "procedural" rights became more complex after the landmark case *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). So-called "*Erie*" problems are not concerned with the Enabling Act, but rather with the proper application of the Rules of Decision Act, 28 U.S.C. § 1652. Although both the Enabling Act and the *Erie* rule draw a distinction between laws that affect "substantive" and "procedural" rights, the *Hanna* case makes clear that the correct standards for drawing the distinction are different in each case. Thus, the *Erie* rule is not the correct test for determining the validity or applicability of a Federal Rule of Civil Procedure. Instead, *Erie* analysis has been applied to issues beyond the scope of the Rules, such as burdens of proof, statutes of limitations, conflicts of laws rules, and the sufficiency of the evidence for a case to go to the jury.

"Substantive"/"Substantial" Distinction

It should also be noted that the word "substantive" as it used both with respect to interpretive issues under the Rules Enabling Act and those arising in *Erie* cases should not be confused with the word "substantial" as it used in describing the nature of the rights affected under the doctrine of "harmless error" under Rule 61 or *Federal Rule of Evidence 103(a)*. In those contexts, the term "substantial" refers to a quantum of prejudice to a party justifying a new trial or modification of a judgment or order when an erroneous evidentiary or procedural ruling occurs. "Substantive" rights, on the other hand, are defined by reference to the "substantive"/"procedural" distinctions discussed above.



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1.2 ADDITIONAL AUTHORITY

1 *Moore's Federal Practice* §§ 1.01 -1.22

James & Hazard, *Civil Procedure* §§ 1.7, 2.34-2.35

Teply & Whitten, *Civil Procedure* 434-453



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1.3 LEADING CASES

"Abridge, Enlarge, or Modify" Substantive Right-Diversity Actions

Freund v. Nycomed Amersham, 326 F.3d 1070 (9th Cir. 2003) (Federal Rules of Civil Procedure must be applied by federal court sitting in diversity jurisdiction they do not abridge, enlarge or modify any substantive right in violation of Rules Enabling Act).

Applicability of Rules Without Regard to Substantive Law

Vess v. Ciba-Geigy Corp., 317 F.3d 1097 (9th Cir. 2003) (Federal Rules of Civil Procedure apply without regard to the source of subject matter jurisdiction or to whether the substantive law is based on state or federal law).

Counterclaims in Diversity Actions

Doelle v. Mountain States Tel. & Tel., 872 F.2d 942 (10th Cir. 1989) (where state and federal counterclaim rules differed in a diversity action, federal Rule 13 held to control the issue; counterclaim allowed).

Discretion of the Court

City of Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993) (consistent with the construction provided by the last sentence of Rule 1, court has considerable discretion to permit or exclude new evidence in a second trial).

Due Process Protections Reflected in Rules

Nelson v. Adams USA, Inc., 529 U.S. 460, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000) (Federal Rules of Civil Procedure incorporate the due process protections of the Constitution and are designed to further those protections).

Entry of Judgment Without Trial

Smith v. Navistar Int'l Transp. Corp., 957 F.2d 1439 (7th Cir. 1992) (entry of judgment without trial authorized by Rule 1 to ensure the quick and inexpensive determination of the action; maximum amount of damages already determined by the court).

Federal Circuit Applies Regional Circuit Interpretation of Rules

Anchor Wall Sys. v. Rockwood Retaining Walls, Inc., 340 F.3d 1298 (Fed. Cir. 2003) (Court of Appeals for the Federal Circuit should apply the law of the pertinent regional circuit when the precise issue to be addressed involves an interpretation of the Federal Rules of Civil Procedure).

Habeas Cases--Action Begins with Filing of Application

Woodford v. Garceau, 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003) (Federal Rules of Civil Procedure apply in habeas cases to the extent that they are not inconsistent with the rules governing those actions; accordingly, a habeas suit begins with the filing of a habeas application, the equivalent of a complaint in an ordinary civil case).

Habeas Cases--Forfeiture Rule for Defenses Not Necessarily Applicable

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (the rule that a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment does not necessarily apply in habeas corpus cases; instead, the trial court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition).

Habeas Cases--Rules Applicable

Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003) (habeas proceedings are civil in nature, and therefore, the Federal Rules of Civil Procedure apply).

In Rem Forfeiture Proceedings--Rules Applicable

United States v. \$8,221,877.16 in United States Currency, 330 F.3d 141 (3d Cir. 2003) (Federal Rules of Civil Procedure apply to in rem forfeiture proceedings, but only to the extent that they are not inconsistent with the Supplemental Rules).

Statutory Force

Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002) (Federal Rules of Civil Procedure have force of statutes).

Summary Proceedings in District Courts

SEC v. McCarthy, 322 F.3d 650 (9th Cir. 2003) (an explicit statutory provision may create an exception to the general rule that the Federal Rules of Civil Procedure govern all civil suits in district courts; summary proceedings may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even ex parte).

Supreme Court Original Actions

South Carolina v. North Carolina, -- U.S. --, 130 S. Ct. 854, 175 L. Ed. 2d 713 (2010) (although the Rules do not apply to original actions, the Supreme Court's Rule 17.2 allows the Federal Rules of Civil Procedure to be taken as

"guides" to procedure in original actions).

Validity of Rule

Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) (upholding service of process under the Rules even though service would not have been valid under state law; proper test of validity of Rule is whether it violates the Enabling Act or the Constitution, and not necessarily the *Erie* rule).



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Chapter 2 Rule 2. One Form of Action

1-2 Federal Civil Procedure Litigation Manual 2.syn

§ 2.syn Synopsis to Chapter 2: Rule 2. One Form of Action

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Chapter 2 Rule 2. One Form of Action

1-2 Federal Civil Procedure Litigation Manual Rule 2. One Form of Action

Rule 2. One Form of Action

Rule 2 reads as follows:

Rule 2. One Form of Action

There is one form of action--the civil action.

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1-2 Federal Civil Procedure Litigation Manual 2.1

2.1 COMMENTARY

Rule 2 provides for a single action and mode of procedure in federal civil cases. It represents the merger of law and equity in federal courts and accordingly abolishes the pre-Rules distinction between actions in law and suits in equity as well as any procedural differences between the two.

Nonetheless, the question whether an action would have been formerly characterized as "legal" or "equitable" is still significant for a number of reasons. For one, as with any other rule of procedure, Rule 2 can "neither abridge, enlarge nor modify the substantive rights of any litigant." One of the applications of this principle is to preserve the guarantee of a right to a jury trial under the *Seventh Amendment of the Constitution*. This right generally was accorded to actions or issues that were formerly "legal," as opposed to "equitable," in nature. Therefore, a party who has such a right, as determined by the historical distinction, may make a demand for a jury trial pursuant to Rule 38. The distinction between "legal" and "equitable" action is also significant for determining, among other issues, the appropriate statute of limitations, whether an action is properly brought within the admiralty jurisdiction, and whether equitable remedies are available to a party.



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1-2 Federal Civil Procedure Litigation Manual 2.2

2.2 ADDITIONAL AUTHORITY

1 *Moore's Federal Practice* §§ 2.01 -2.06

Teply & Whitten, Civil Procedure 44-47



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2.3 LEADING CASES

Actual Cause of Action

Hanson v. Aetna Life & Cas. Co., 625 F.2d 573 (5th Cir. 1980) (in a diversity case, plaintiff must still state an actual cause of action under state law even though Rule 2 provides for a single form of action).

All Actions Governed by Federal Rules of Civil Procedure

SEC v. McCarthy, 322 F.3d 650 (9th Cir. 2003) (an "action" is the formal and ordinary means by which parties seek legal and/or equitable relief before a court of law through the filing of a formal complaint; absent an express statutory provision to the contrary, the Federal Rules of Civil Procedure govern all "actions" before the district courts of the United States).

Second Filing of Complaint Constitutes New Action

H.R. Techs., Inc. v. Astechologies, Inc., 275 F.3d 1378 (Fed. Cir. 2002) (when a complaint is dismissed without prejudice, and a second complaint is filed, the second complaint initiates a separate civil action; all the requirements of service apply to the second complaint, and the filing of the first complaint does not establish the starting date for the second action).



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 3 Rule 3. Commencing an Action

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§ 3.syn Synopsis to Chapter 3: Rule 3. Commencing an Action

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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 3 Rule 3. Commencing an Action

1-3 Federal Civil Procedure Litigation Manual Rule 3. Commencing an Action

Rule 3. Commencing an Action

Rule 3 reads as follows:

Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the court.

* * * * *



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Federal Civil Procedure Litigation Manual

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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 3 Rule 3. Commencing an Action

1-3 Federal Civil Procedure Litigation Manual 3.1

3.1 COMMENTARY

Rule 3 simply declares that a civil action is "commenced" by filing a complaint with the court. Though such a declaration may seem patently manifest to some, other jurisdictions often treat the service of the summons on the defendant or some other phase of a civil action as the point at which the action is deemed to have been "commenced."

Rule 3 does not clarify the phrase "filing ... with the court"; instead, this is defined in *Rule 5(d)(2)*. Similarly, a list of allowable pleadings in a civil action is not the subject of Rule 3; instead, such a list is set forth in Rule 7. Rather, the purpose of Rule 3 is simply to denominate the point at which an action is deemed to have been commenced. In addition, Rule 3 implicitly anticipates that the pleadings and papers filed in a civil action shall be a matter of public record.

Determining When Statute of Limitations Has Tolloed

The determination as to when an action has commenced is necessary for, among other things, calculating when the applicable statute of limitations has run on a particular issue or action. This determination typically has two components: 1) ascertaining which statute of limitations is applicable; and 2) ascertaining when that statute of limitations has been tolloed. Although the former consideration is more properly regarded a choice of law issue, the latter becomes a straightforward mathematical calculation once the question of when the action is deemed to have been commenced has been resolved. The table located in the Appendix of this manual may be helpful with respect to this calculation.

Determining Applicable Statute of Limitations

As noted, an initial determination must be made regarding the appropriate source of law before the statute of limitations can be properly calculated. Although a complete exposition of this complex area of law is beyond the scope of this manual, a few brief words of introduction may aid the practitioner.

If the civil action arises from a federal statute, the statute of limitations prescribed by Congress for that action will apply. However, when the federal statute is silent with regard to an appropriate statute of limitations, federal courts have often looked to analogous statutes of limitations in the states in which the courts sit. In 1990, Congress enacted a "blanket" statute of limitations that states "Except as otherwise provided by law, a civil action arising under an Act of

Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues." *28 U.S.C. § 1658*. This provision, however, does not govern federal statutory causes of action arising before 1990. Federal precedent specific to the statute should be consulted in these instances. In any event, Rule 3 makes clear that the statute of limitations in any of these instances is tolled upon the filing of the complaint with the court.

When the civil action arises from a state source, either under a statute or the common law, and federal jurisdiction is predicated on diversity principles, the courts must apply the statute of limitations that would attach to that cause of action if the case were heard in a court of the state in which the federal court sits. In such cases, the applicable statute of limitations is sometimes tolled by service of the summons on the defending parties, not by the initial filing of the complaint. When this occurs, the significance of Rule 3 is greatly diminished, if not eradicated.



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 3 Rule 3. Commencing an Action

1-3 Federal Civil Procedure Litigation Manual 3.2

3.2 ADDITIONAL AUTHORITY

1 *Moore's Federal Practice* §§ 3.01 -3.07

James & Hazard, *Civil Procedure* §§ 1.15, 3.3-3.13

Friedenthal, *Civil Procedure* § 4.4

Teply & Whitten, *Civil Procedure* 498



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 3 Rule 3. Commencing an Action

1-3 Federal Civil Procedure Litigation Manual 3.3

3.3 LEADING CASES

Failure to File Complaint

Schlesinger v. Councilman, 420 U.S. 738, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975) (where there is a proper trial, failure to file a complaint under Rule 3 does not preclude a judgment from being issued).

Filing of Complaint Sufficient to Commence Action

Gilardi v. Schroeder, 833 F.2d 1226 (7th Cir. 1987) (filing of the complaint sufficient to commence action and toll the statute of limitations period even though in *forma pauperis* motion was granted and the action truly commenced after statute had run).

Habeas Cases--Action Begins With Filing of Application

Woodford v. Garceau, 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003) (the Federal Rules of Civil Procedure apply in habeas cases to the extent that they are not inconsistent with the rules governing those actions; accordingly, a habeas suit begins with the filing of a habeas application, the equivalent of a complaint in an ordinary civil case).

In Forma Pauperis Application

Minetti v. Port of Seattle, 152 F.3d 1113 (9th Cir. 1998) (application for leave to proceed in *forma pauperis* is only a request to file a proposed complaint, not a commencement of an action under Rule 3; accordingly, the Federal Rules of Civil Procedure are inapplicable to such applications).

Paper Needed to Commence Action

Kirkland v. Legion Ins. Co., 343 F.3d 1135 (9th Cir. 2003) (although the failure to file a "complaint" denominated as such is not necessarily fatal to the commencement of an action, a would-be party must file some paper adequate to inform the would-be defendant of the nature of the claim and relief sought to invoke jurisdiction of court).

Removal Not Commencement of Action

Pritchett v. Office Depot, Inc., 404 F.3d 1232 (10th Cir. 2005) (removal to federal court does not "commence" an action for purposes of the Class Action Fairness Act of 2005).

Right-to-Sue Letter

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) (plaintiff in a Title VII action filed complaint after 90-day statute of limitations, even though right-to-sue letter was filed within 90-day period; Court held that action was barred because the action was not commenced within 90-day period).

Statute of Limitations; Application of State Statute

Reed v. United Transp. Union, 488 U.S. 319, 109 S. Ct. 621, 102 L. Ed. 2d 665 (1989) (where Congress is silent with regard to a statute of limitations under an action of Congress enacted before 1990, court is to apply analogous state statute of limitations; exception where substantive policies of federal claim mandate analogizing to similar federal law held inapplicable).

Statute of Limitations; Diversity Actions

Walker v. Armco Steel Corp., 446 U.S. 740, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980) (in diversity action, *Erie* doctrine mandates that state law, which provides that statute of limitations tolls from service of process, not federal law, which provides that statute of limitations tolls from the filing of the complaint, controls).

Statute of Limitations; Federal Arbitration Act

National Iranian Oil Co. v. Mapco Int'l, Inc., 983 F.2d 485 (3d Cir. 1992) (as there is no need for national uniformity on appropriate statute of limitations for specific issue under the Federal Arbitration Act, state statute of limitations controls; Act silent on the matter).

Statute of Limitations; § 1983 Actions

Owens v. Okure, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) (in § 1983 action, 3-year state residual statute of limitations period held to control; § 1983 silent on matter).

Statute of Limitations; Personal Injury

Goodman v. Lukens Steel Co., 482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987) (2-year state statute of limitations period for personal injuries held applicable to § 1981 action; § 1981 silent on matter).

Statute of Limitations; RICO Actions

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) (in RICO action, national need for uniformity on statute of limitations dictated analogizing to Clayton Act for applicable period rather than analogous state provision).

Statute of Limitations Enacted After Filing of Complaint

Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) (new statute of limitations enacted after complaint had been filed

inapplicable to action because the action had already been commenced).



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS
Chapter 4 Rule 4. Summons

1-4 Federal Civil Procedure Litigation Manual 4.syn

§ 4.syn Synopsis to Chapter 4: Rule 4. Summons

Scope Rule 4. Summons

4.1 COMMENTARY

4.2 ADDITIONAL AUTHORITY

4.3 LEADING CASES



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS
Chapter 4 Rule 4. Summons

1-4 Federal Civil Procedure Litigation Manual Rule 4. Summons

Rule 4. Summons

Rule 4 reads as follows:

Rule 4. Summons

(a) Contents; Amendments.

(1) Contents. A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant

for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) **Amendments.** The court may permit a summons to be amended.

(b) **Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons--or a copy of a summons that is addressed to multiple defendants--must be issued for each defendant to be served.

(c) **Service.**

(1) **In General.** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) **By Whom.** Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) **By a Marshal or Someone Specially Appointed.** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 *U.S.C.* § 1915 or as a seaman under 28 *U.S.C.* § 1916.

(d) **Waiving Service.**

(1) **Requesting a Waiver.** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

1-4 Federal Civil Procedure Litigation Manual Rule 4. Summons

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent--or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:

1-4 Federal Civil Procedure Litigation Manual Rule 4. Summons

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

1-4 Federal Civil Procedure Litigation Manual Rule 4. Summons

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States. To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Extending Time. The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 *U.S.C.* § 1608.

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

1-4 Federal Civil Procedure Litigation Manual Rule 4. Summons

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(f) Proving Service.

(1) Affidavit Required. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States. Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law. The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law. On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 4 Rule 4. Summons

1-4 Federal Civil Procedure Litigation Manual 4.1

4.1 COMMENTARY

Rule 4 sets forth the specific requirements that must be satisfied when the defendant is served with a summons and copy of the complaint, a procedure commonly referred to as "service of process." A summons is the legal notification that a civil action has been commenced against the person or entity to whom the summons is addressed. Compliance with Rule 4 must be maintained whenever a person is joined as a party under Rules 14, 19, 20, and 22, and whenever a person is substituted as a party under Rule 25. Class actions have distinct summons and notice requirements, which are discussed in Chapter 23.

Service of subpoenas, which are directives from a court to appear in a particular place or take a particular action, is governed by Rule 45. Persons or entities who are not parties may be the subject of a subpoena. Service of any process other than a summons is governed by Rule 4.1.

Service of Summons and Service of Process Distinguished

As noted, Rule 4 regulates the issuance and service of a summons and copy of the complaint on the defendants, the modern form of original process in virtually all domestic courts. It has been well-settled that the service of a properly executed and issued summons and copy of the complaint will satisfy constitutional due process requirements, or "service of process" requirements. The terms "service of a summons" and "service of process" are thus often used interchangeably in this context, and the term "service," as is used in the Rules or in this manual, refers to either service of process generally or service of a summons accompanied by a copy of the complaint.

The distinction between service of process and service of the summons and copy of the complaint as a form of service of process is reflected in the almost now-archaic distinction between a motion under Rule 12(b)(4) to dismiss for insufficiency of process and a motion under Rule 12(b)(5) to dismiss for insufficiency of service of process. A motion under Rule 12(b)(4) attacks the summons or other process itself as insufficient in satisfying due process requirements. A motion under Rule 12(b)(5) attacks the manner in which the summons or other process was served upon the defendant or party raising the motion.

It should be noted that the service of a summons may not be the only form of process issued by federal courts. For example, persons who are subject to contempt orders or required to attend civil commitment hearings are not typically

notified of such orders or hearings through a summons. Service of process other than a summons is governed by Rule 4.1.

Contents of the Summons

Rule 4(a)(1) lists the information that must be included in every summons. Crucially, it must contain the time period within which the defendant must appear and defend the action, and it must also notify the defendant that failure to do so will result in a default judgment against the defendant. Omission of any of the mandatory information listed in subdivision (a)(1) is a ground for a Rule 12(b)(4) motion for insufficiency of process. Subdivision (a)(2), however, allows a summons to be amended, if the court allows.

Issuance of the Summons

In requiring the plaintiff to present a summons to the clerk, subdivision (b) makes clear that it is *not* the clerk's responsibility to see that a summons is issued. Instead, the plaintiff bears the primary responsibility for ensuring that a summons is issued. If the summons is presented in the correct form by a party, however, the clerk is required to sign, seal, copy (if needed), and issue it to the party for service on the person to whom it is addressed. The Rule requires that each defendant named in the complaint receive a separate summons or a copy of the same summons.

Service of Summons and Complaint by Plaintiff

A copy of the complaint must be included with the summons to each defendant, as required by Rule 4(c), and any mention of "service" in the Rules or in this manual refers both to the summons as well as a copy of the complaint. Although service of the complaint must always accompany service of the summons under subdivision (c), informal service of the complaint may sometimes entail distinct procedural consequences under applicable statutory provisions. In addition, confusion may arise because service of process in state court may not require that a copy of the complaint be included with the summons. For example, under 28 U.S.C. § 1446, the federal removal statute, the 30-day time period within which an action may be removed to federal court is triggered by the service of the complaint, not by service of the summons. Nonetheless, the Supreme Court has recently held that informal service of the complaint without a summons is insufficient to trigger the 30-day time period.

Amendments to Rule 4 in 1993 shifted the primary responsibility of serving the summons on each of the defendants from the United States marshal or other specially-appointed process server to the plaintiff. The plaintiff may, however, request the court to direct a marshal or similar person to serve the summons on each of the defendants, but plaintiffs are not required to effect service in this fashion except in special enumerated circumstances. Service of the summons can be effected by any person at least 18 years of age and who is not a party in the action.

Subdivision (m) provides that service on each defendant not located in a foreign country must be effected within 120 days of the filing of the complaint, or the action may be dismissed against that defendant. The court may also extend this period, and it must grant such an extension if the plaintiff shows "good cause" for the failure to effect the service.

Illustration 4-1

On April 1, Paul commences an action against Darren and Elizabeth, claiming damages for a broken fibula suffered in a waterskiing accident. On June 1, Paul serves Darren with a summons and complaint. However, Paul is unable to serve a summons and complaint upon Elizabeth until August 15, as the information obtained from Elizabeth at the accident scene was false. Elizabeth then files a motion to dismiss the action pursuant to *Rule 4(m)*. The court should deny Elizabeth's motion because the reason for Paul's failure to serve a summons and complaint upon Elizabeth within 120 days after filing the complaint constitutes "good cause" under Rule 4(m).

Waiver of Service

Rule 4(d) governs the waiver of service of process by most defendants. However, subdivision (d) does not apply to the United States or any of its agencies, corporations, or officers, state or local governments, foreign governments, or minors or incompetent adult individuals.

Under Rule 4(d), a plaintiff who wishes to request that the defendant waive service of process must comply with the seven requirements listed in subdivision (d)(1)(A). Although a failure to comply with all formalistic requirements will not render the waiver request invalid, the requirement that the waiver request actually be delivered to the defendant, or an agent appointed to receive service of process, has been strictly construed. Waiver requests addressed to defendants' attorneys will be invalid, and defendants will not be subsequently responsible for the costs of serving process incurred by the plaintiff.

Rule 4(d) is designed to encourage defendants to waive service of the summons to avoid the unnecessary expense sometimes inherent in the process. Accordingly, it contains both an incentive for defendants to waive service and a deterrent for defendants to not waive service. Defendants who waive service in a timely fashion have the time period within which they are required to file an answer increased from 21 days to 60 days under subdivision (d)(3)—a point reiterated in *Rule 12(a)(1)(A)(ii)*. This period is extended to 90 days in the event of a foreign defendant. On the other hand, defendants who refuse to waive service of the summons must pay the costs of the plaintiff in securing the service of the summons under Rule 4(d)(2), including the costs of making any necessary motion and attorneys' fees.

Illustration 4-2

Assume on the facts of Illustration 4-1 that Paul also wishes to commence a medical malpractice action against Frank, the doctor who treated Paul's broken fibula. On June 1, Paul mails a copy of the complaint and request for waiver to Frank. After consulting with his attorney, Frank promptly returns the form waiving service of a summons. The time period within which Frank is required to file an answer to Paul's complaint is now increased from 21 days to 60 days. Thus, Frank need not file an answer to Paul's complaint until July 31.

Rule 4 was amended in 1993 to replace the provisions dealing with service of the summons by first-class mail. Service by such a method is no longer allowed, unless authorized by some other provision in Rule 4 such as serving a United States attorney, Attorney General, or officer or agency of the United States as authorized by Rule 4(i)(1)(A)-(C). *Waiver* of service under Rule 4(d), however, is effected through means similar to those governing service by mail. Rule 4(d)(1)(A) lists the required information to be included in the waiver, and states that the waiver must be "sent by first-class mail or other reliable means." This includes transmission by facsimile or overnight delivery, an expansion of the prior "delivery by first-class mail only" rule.

A defendant must return the waiver within 30 days, or in the event of a foreign defendant, 60 days. An effective waiver may be obtained only by delivery of the waiver to the plaintiff, as waiver may not be implied by a refusal by the defendant to the waiver request. If the waiver is not secured during the requisite period, the plaintiff must still effect service of the summons on the defendant through other means prescribed by Rule 4. However, the costs of doing so are to be borne by the defendant, unless the defendant can show good cause for refusing to return the waiver in a timely fashion.

Illustration 4-3

Assume on the facts of Illustration 4-2 that Frank does not return the waiver until August 15. Because Paul did not secure a waiver of service within 30 days of the original request for waiver, Paul must effect

service of the summons and complaint on Frank through another method prescribed by Rule 4. However, absent evidence of good cause for Frank's failure to return the waiver in a timely fashion, the cost of effecting service on Frank must be borne by Frank.

The 120-day time period of Rule 4(m) within which the plaintiff is required to serve a summons on each defendant is not affected by the waiver provisions. Thus, if a defendant does not return the waiver within the 30-day period prescribed by Rule 4(d)(1)(F), the plaintiff still has 90 days within which to effect service of the summons through other means denominated in Rule 4. However, given the preference for waiver of service implied in the 1993 amendment, a plaintiff who unsuccessfully seeks a waiver from a defendant should be able to use that attempt to show "good cause" under Rule 4(m) and thereby extend the period within which service of the summons must be effected at least an additional 30 days, the time during which the plaintiff was presumably waiting for the waiver to be returned rather than seeking to serve the summons on the defendant through traditional means.

Illustration 4-4

Assume on the facts of Illustration 4-1 that Paul now wishes to commence a separate breach of contract action against Gloria, the person responsible for repairing Paul's waterskis. On August 1, Paul files a complaint in federal court. In an effort to comply with Rule 4, Paul mails a copy of the complaint, together with a request for waiver pursuant to Rule 4(d), to Gloria on November 1. As of November 29, the final day upon which Paul must serve process upon Gloria, Gloria has not returned the waiver form. Although Paul did not secure a waiver or effect actual service of process within 120 days of the filing of the complaint, the time period should be extended at least an additional 30 days, as the attempt to secure a waiver from Gloria should constitute good cause under Rule 4(m).

Subdivision (d)(5) explicitly states that a defendant who waives service does not thereby consent to personal jurisdiction. Defenses made by motion under Rule 12(b)(2) (lack of jurisdiction over the person) and Rule 12(b)(3) (improper venue) are retained by the defendant who waives service of the summons, although defenses under Rule 12(b)(4) (insufficiency of process) and Rule 12(b)(5) (insufficiency of service of process) are obviously unavailable to such a defendant. In view of the non-waiver of personal jurisdiction provided in subdivision (d)(5) and imposition of costs for refusing to waive in Rule 4(d)(2), defendants who believe that they are not subject to personal jurisdiction should nonetheless waive service of the summons and raise the defense of lack of personal jurisdiction at a later time.

Illustration 4-5

Assume on the facts of Illustration 4-4 that Gloria promptly waives service of process. Subsequently, Gloria makes a motion under Rule 12(b)(2) to dismiss the action for lack of personal jurisdiction. If the court, in fact, lacks personal jurisdiction over Gloria, her motion to dismiss should be granted, as the return of the waiver of service of a summons does not waive Gloria's objections to personal jurisdiction.

Methods of Service

Subdivisions (e) through (j) of Rule 4 prescribe the methods of service for entities who do not waive service of the summons or are not subject to the waiver provisions. The subdivisions are relatively self-explanatory.

Of these methods, the most important to understand, both for historical and practical reasons, is subdivision (e): service of the summons on competent, adult individuals within the United States. Essentially, service may be made on such persons in five different ways: 1) according to the law of the state where the court is held; 2) according to the law of the state where the service is actually made; 3) by delivering a copy of the summons and complaint to the individual personally; 4) by leaving a copy of the summons and complaint with a person of suitable age and discretion at the individual's home or usual place of abode; and 5) by delivering a copy of the summons and complaint to an agent

authorized to receive service of process.

Not all these methods may be available in a given circumstance, as there may be no agent authorized to receive service of process for an individual. Also, methods of service in many states are similar to the final three methods listed above, so overlap may result. However, some states authorize service by methods other than those listed in Rule 4, such as by first-class or certified mail. If service of the summons occurs in a state allowing such a method, or if the district court is located in such a state, then service by first-class or certified mail is permitted even though it was specifically omitted from Rule 4 in 1993.

Illustration 4-6

Theo, a defendant in a breach of contract action, resides in a state that authorizes plaintiffs to effect service of process through first-class mail. Thus, service of process by first-class mail is sufficient to satisfy the requirements of Rule 4 even though the method is not expressly authorized under Rule 4.

Service of the Summons Not Synonymous With Personal Jurisdiction

Sufficient service under subdivisions (e) through (j), however, does not guarantee that personal jurisdiction over the defendant has been established. Rather, subdivision (k) lists the methods pursuant to which personal jurisdiction is also established by service of the summons or waiver of service. Subdivision (k)(1) lists three such ways: 1) according to the general jurisdiction or long-arm statute of the state in which the district court is located; 2) if the defendant is within the "100-mile bulge" and joined under Rule 14 or Rule 19; or 4) if service of the summons on the defendant is authorized by any federal statute. The most important of these methods is the first, which allows federal courts to use often expansive state long-arm statutes to obtain personal jurisdiction over absent defendants.

Proof of Service

Subdivision (l) provides that proof of service shall be made by the person actually serving the copy of the summons and complaint. If service is not effected by a marshal or deputy marshal, the person must file an affidavit attesting to the service. If the service was effected according to an international treaty, the provisions of the treaty concerning proof will apply. Rule 4(l)(3) states that failure to make proof of service does not affect the validity of the service. This implies that the failure to make proof of service is not a ground for a defense to a motion under Rule 12(b)(4) or Rule 12(b)(5). Finally, if the defendant has waived service pursuant to Rule 4(d), no proof need be obtained; a copy of the waiver is filed with the court in the place of proof of service.

***In rem* Jurisdiction**

Rule 4(n)(1) authorizes the assertion of federal *in rem* jurisdiction if a statute so provides. When jurisdiction of this kind is exercised and property is involved in the action, the claimants must be notified according to the provisions of the statute authorizing the jurisdiction or by service under Rule 4. Rule 4(n)(2) authorizes *quasi in rem* jurisdiction when personal jurisdiction over a defendant cannot be obtained through "reasonable efforts." Although the literal language of subdivision (n)(2) suggests the exercise of a somewhat expansive use of *quasi in rem* jurisdiction, the advisory committee's note states that such use is to be confined to "exigent circumstances." This would appear to be an important limitation on a court's exercise of *quasi in rem* jurisdiction, in accordance with the due process concerns expressed in *Shaffer v. Heitner*, 433 U.S. 186 (1977) .

Service on a United States Officer or Employee

Rule 4(i) was amended in 2000 to clarify the procedure for serving an employee or officer of the United States in the various capacities in which they may be sued. The prior version of the Rule did not appear to require that the United

States be served with a summons and copy of the complaint when an officer or employee of the United States is sued in an individual capacity, and caselaw did not provide clear guidance on the issue. The amended version now explicitly requires service on the United States when a person is sued in an individual capacity in some situations. In these cases, service on the United States must be made in accordance with subdivision 4(i)(1), and service on the individual must be made in accordance with the ordinary provisions for service on an individual under subdivisions (e), (f), or (g). It should also be noted that the individual service provisions of subdivisions (e) and (f) are subject to the waiver provisions of subdivision (d). Actions against individuals who have had their relationship terminated with the United States are treated as actions against current officers or employees; process must still be served on the United States.

An action against a former officer or employee of the United States is covered by subdivision (i)(3) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States.

■ **Individuals Sued in Official Capacities**

Several features of the amended Rule should be noted. First, the Rule does not alter the method of service of process for officers or employees of the United States sued only in their official capacities, not their individual capacities. Under subdivision (i)(2), service is complete by serving the United States in the manner set forth in subdivision (i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer or employee.

■ **Service on Individual and United States Required**

Second, the Rule indicates that, when an individual is served in an individual capacity and service on the United States is required, service must be effected on *both* the individual (or a waiver obtained) and the United States to be deemed complete. The failure to serve either the United States or all named individuals in the pleading should rarely be fatal to the action, however, as subdivision (i)(4) includes a "saving" provision if a party is not served. This provision will be discussed in greater detail below.

■ **"In Connection with the Performance of Duties on Behalf of the United States"**

Third, subdivision (i) applies only when an officer or employee of the United States is sued in an individual capacity "for an act or omission occurring in connection with duties performed on the United States behalf." The advisory committee note indicates that this standard is intended to have practical application without the "distracting associations of such phrases as 'scope of employment,' 'color of office,' or 'arising out of the employment.'" Actions brought against individual federal officers or employees of the United States for acts or omissions that have no relationship or nexus with their governmental roles do not require service on the United States. As guidance on this issue, the advisory committee note suggests that service will be required if the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

Under the amended Rule, it is unclear who bears the responsibility of determining whether the "in connection with duties performed" standard has been met. On the one hand, the advisory committee note states that, "There is no reason to require service on the United States in ... [actions] brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever to their governmental roles," thus implying that the plaintiff should make the initial determination. The note to the companion amendments to Rule 12, however, indicate that the extended time period within which to respond to a complaint is necessary for the United States to determine whether to provide representation to the defendant officer or employee, thus implying that the United States should make the initial determination. Any doubt on the issue should be resolved in favor of service on the United States, as a failure to serve the United States may potentially result in a dismissal if the court determines that action has met the required standard and the United States has not been served.

■ Summary of Service of Process Provisions Against United States Officer or Employee

Under the current version of Rule 4(i), there are now three distinct capacities in which an officer or employee of the United States may be sued. Accordingly, when such an individual is sued in each of these capacities, service of process may be effected as follows:

Official Capacity: (1) service on the United States under subdivision (i)(1); and (2) copy by registered or certified mail to the individual.

Individual Capacity for Act in Connection with the Performance of Duties on Behalf of the United States: (1) service on the United States under subdivision (i)(1); and (2) service on the individual under subdivisions (e), (f), or (g) (or waiver under subdivision (d)).

Individual Capacity for Act Unrelated to the Performance of Duties on Behalf of the United States: service on the individual under subdivisions (e), (f), or (g) (or waiver under subdivision (d)).

Failure to Serve the United States or an Individual When Required

The 2000 amendment also clarified the "saving provision" in subdivision (i)(4) if a plaintiff fails to properly serve the required parties under the provisions set forth under subdivision (i)(2). Under the Rule, a party is allowed a "reasonable time" to serve process on all required parties if the United States attorney or the Attorney General of the United States has been served. The amendment also adds a reciprocal provision in subdivision (i)(4)(B) if the plaintiff fails to serve the United States if an officer or employee sued in an individual capacity has been served. Although the provision is not explicit on the issue, service on individuals who have had their relationship terminated with the United States should be subject to the savings provision with respect to the United States as well. The advisory committee note indicates that no cause need be demonstrated by the plaintiff who fails to serve either an individual required to be served or the United States.

Subdivision (i)(2) technically requires only that a copy of the summons and complaint be sent by registered or certified mail to the individual sued in an official capacity; formal "service" is not required. However, delivery of this notice on such persons should fall within the scope of the phrase "serve a person required to be served under Rule 4(i)(2)" such that the savings provision will be applicable.



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS
Chapter 4 Rule 4. Summons

1-4 Federal Civil Procedure Litigation Manual 4.2

4.2 ADDITIONAL AUTHORITY

1 *Moore's Federal Practice* §§ 4.01 -4.55

James & Hazard, *Civil Procedure* §§ 1.15, 2.21

Friedenthal, *Civil Procedure* §§ 3.18-3.22, 4.3-4.4, 5.27, 16.12

Teply & Whitten, *Civil Procedure* 340-353



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Chapter 4 Rule 4. Summons

1-4 Federal Civil Procedure Litigation Manual 4.3

4.3 LEADING CASES

Actual Notice Without Proper Service

Precision Etchings & Findings v. LGP Gem Ltd., 953 F.2d 21 (1st Cir. 1992) (actual notice without proper service of process held insufficient under Rule 4(e)(2)).

Admiralty Jurisdiction

Porina v. Marward Shipping Co., 521 F.3d 122 (2d Cir. 2008) (although plaintiffs' suit, which relied on general maritime law, was one that arose under federal law for purposes of Rule 4(k)(2), *Fifth Amendment's due process clause* barred exercise of personal jurisdiction; defendant ship owner could not constitutionally be subjected to personal jurisdiction with respect to unrelated suit merely because, as owner may have expected, ship had repeatedly visited forum's ports at sole direction of its charterers).

Amended Complaint Served Under Rule 5

Johnson v. Crown Enters., 398 F.3d 339 (5th Cir. 2005) (amended complaint need not be served under Rule 4, as Rule 5 governs service of every pleading subsequent to the original complaint).

Amended Complaint--Time Limit Not Extended

Bolden v. City of Topeka, 441 F.3d 1129 (10th Cir. 2006) (the 120-day period provided by Rule 4(m) is not restarted by the filing of amended complaint except as to defendants newly added in the amended complaint) (amended complaint need not be served under Rule 4, as Rule 5 governs service of every pleading subsequent to the original complaint).

Evasion of Service

Hibernia Nat'l Bank v. Carner, 758 F. Supp. 382 (M.D. La. 1991) (intentional evasion of service of process by

defendant constituted "good cause" for extending the 120-day time period).

Extension of Time Limit on Service Where Actual Service Occurs

Benjamin v. Grosnick, 999 F.2d 590 (1st Cir. 1993) (good cause shown and extension to effect service of process should have been granted to plaintiff where defendant had actual notice of the action, plaintiff reasonably believed that service of process had been effected, and a dismissal for failure to effect service of process would constitute a tolling of the statute of limitations, thus barring a re-filing of the action).

Failure to Effect Service

Peters v. United States, 9 F.3d 344 (5th Cir. 1993) (failure to effect service of process as required by Rule 4(i) justified dismissal of the action, even though the action would be subsequently barred by the statute of limitations).

Failure to Waive; Costs

Darulis v. Garate, 401 F.3d 1060 (9th Cir. 2005) (plaintiff is entitled to costs incurred in serving process on defendants where defendants fail to waive service regardless of entitlement to costs under Rule 54).

Foreign Service--Illegal Service Effective

Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002) (as long as service of process is court-directed and not prohibited by an international agreement, alternate service of process in a place not within a judicial district of the United States may be accomplished in contravention of the laws of the foreign country).

Jurisdiction in *In Rem* and *Quasi In Rem*

Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (extending the *International Shoe* "minimum contacts" test to *in rem* and *quasi in rem* actions).

Mandatory Versus Permissive Extensions of Time

Coleman v. Milwaukee Bd. of Sch. Dirs., 290 F.3d 932 (7th Cir. 2002) (in case of "good cause" for missing deadline for service after filing of complaint, extension of time is mandatory; in case of "excusable neglect," extension of time is permissive).

Marshal; Reliance on Service by

Olsen v. Mapes, 333 F.3d 1199 (10th Cir. 2003) (where lower court directed U.S. Marshal to serve summons and complaint, plaintiffs were entitled to rely on service by U.S. Marshal and action should not have been dismissed with prejudice as result of a failure to complete service).

Methods of Service of Process; Diversity Actions

Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) (in a diversity case, service of process under Rule 4 was valid even though state rule required different method of process).

Methods of Service on Corporations

McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957) (service of process on a

corporation valid if the corporation conducts a single transaction within the state).

Methods of Service; Domestic Agents

Silvious v. Pharaon, 54 F.3d 697 (11th Cir. 1995) (service of process on authorized domestic agent upheld even though defendant was abroad; method of service dependent upon where service is effected, not the location of the person to be served).

Methods of Service; Government Officers

Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995) (noting that Rule 4(i)(3) (now Rule 4(i)(4)) generously allows plaintiffs a great deal of latitude in serving multiple officers of the United States, providing that a plaintiff serves either the United States attorney or the Attorney General, which this plaintiff failed to do; under Rule 4(m), an extension of time to effect service of process is mandatory if good cause is shown and discretionary even if not).

Methods of Service; Place of Employment

Daly-Murphy v. Winston, 837 F.2d 348 (9th Cir. 1987) (service of process at the defendant's place of employment is insufficient).

"Minimum Contacts" and Long-Arm Statute Co-Extensive

Trinity Indus. v. Myers & Assocs., 41 F.3d 229 (5th Cir. 1995) (the standard determining whether action by defendant was contemplated by Texas long-arm statute is coextensive with the standard determining whether the action has sufficient "minimum contacts" so as not to constitute a violation of due process).

"Minimum Contacts" Not Established

Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) (Delaware trust company having no connection with the state of Florida did not have to give effect to Florida judgment ruling on an interest of an asset held in the Delaware trust; required "minimum contacts" not established).

"Minimum Contacts"; Out-of-State Franchisees

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (deliberately and willingly entering into franchise agreement, which stated that it was to be governed by Florida law, with Florida franchisor sufficient to render out-of-state franchisee amenable to process in Florida).

"Minimum Contacts" Within 100 Miles of Court

Quinones v. Pennsylvania General Ins. Co., 804 F.2d 1167 (10th Cir. 1986) (defendant amenable to process even though he had no contacts with the state in which the court was located because the defendant had sufficient "minimum contacts" with an area located within 100 miles of the district court).

Missing Complaint With Summons Insufficient

Albra v. Advan, Inc., 490 F.3d 826 (1st Cir. 2007) (because plaintiff employee had served defendant employer by mailing copy of summons without copy of complaint, employer was not properly served).

Municipal Governments Not Subject to Waiver

Lepone-Dempsey v. Carroll Co. Comm'rs, 476 F.3d 1277 (1st Cir. 2007) (where arrestees only attempt to serve city was by waiver of service procedure, they failed to properly serve city; waiver of service procedure set forth in Rule 4(d) did not apply to local governments).

National Minimum Contacts

Quick Techs., Inc. v. Sage Group PLC, 313 F.3d 338 (5th Cir. 2002) (Federal Rules of Civil Procedure provide for the exercise of personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole to justify the imposition of United States' law, but without sufficient contacts to satisfy the due process concerns of the long-arm statute of any particular state).

Nonintervention of United States

Eisenstein v. City of New York, 540 F.3d 94 (2d Cir. 2008), *aff'd*, 173 L. Ed. 2d 1255, 2009 U.S. LEXIS 4316 (2009) (where United States had declined to intervene in suit under False Claims Act, it did not have control over litigation, and it was not party to suit for purposes of appeal under *Fed. R. App. P. 4(a)(1)*, and thus, in order to be timely, notice of appeal had to be filed within 30 days of final judgment in case).

Personal Jurisdiction

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) ("continuous and systematic contacts" of a corporation with a state were required to support general in personam jurisdiction; isolated visits of corporation's CEO to state held insufficient).

Prior Dismissal

Cruz v. Louisiana, 528 F.3d 375 (5th Cir. 2008) (employee's sex discrimination and *Fourteenth Amendment* Equal Protection claims against her state employer under § 1983 and state civil rights laws were properly dismissed because, pursuant to state law, prior dismissal under Rule 4(m) prevented second complaint from interrupting one-year prescriptive period under law).

Receipt of Service Necessary for Completed Process

Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A., 347 F.3d 448 (2d Cir. 2003) (where court's docket sheet did not reflect receipt of service of process by court clerk and copy of receipt was not produced, there was no legal service of process under Rule 4(f)).

Service Failure May Not Warrant Dismissal

Olsen v. Mapes, 333 F.3d 1199 (10th Cir. 2003) (pro se litigant proceeding in forma pauperis was not sufficiently culpable with respect to failure to serve defendants to warrant dismissal of his action, where litigant was entitled to rely on service by the United States Marshall, there was no evidence that litigant failed to cooperate with Marshall, and litigant made sincere efforts to comply with court's orders).

Service of Complaint Triggers Removal Statute

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999) (detailing the various possibilities of serving a summons and copy of the complaint jointly or separately on the time periods within which an action may be removed to federal court under 28 U.S.C. § 1446 : (1) if the summons and

complaint are served together, the 30-day period for removal runs from the date the summons is received by the defendant; (2) if the defendant is served with the summons but the complaint is furnished to the defendant sometime after, the period for removal runs from the defendant's receipt of the complaint; (3) if the defendant is served with the summons and the complaint is filed in court, but local rules do not require that a copy of the complaint be served on the defendant, the removal period runs from the date the complaint is made available through filing with the court; and (4) if the complaint is filed in court prior to any service, the removal period runs from the date that the summons is served on the defendant).

Service of Crossclaim

Fluor Eng'rs & Constructors, Inc. v. Southern Pac. Transp. Co., 753 F.2d 444 (5th Cir. 1985) (service of crossclaim by codefendant was properly amended and then re-served where there was no indication that defendant would be prejudiced by such an amendment).

Subpoena Duces Tecum--Appearance in Response Waives Summons Requirement

Bollore S.A. v. Import Warehouse, 448 F.3d 317 (5th Cir. 2006) (although persons were not properly served with summons as required under Rule 4, having been instead served only with a subpoena duces tecum requiring that they produce documents, those persons waived their right to contest the issue by making an appearance and by failing to assign issue as error on appeal).

United States Marshals Service

Nagy v. Dwyer, 507 F.3d 161 (2d Cir. 2007) (party allowed to proceed in forma pauperis is entitled to service by United States Marshals; entitlement to service by Marshals, however, does not require automatic service).

Waiver; Service of Defendant Required

Flores v. School Bd. of Desoto Parish, No. 03-30967, 2004 U.S. App. LEXIS 23955, 116 Fed. Appx. 504 (5th Cir. Nov. 16, 2004) (a plaintiff is expressly required to serve a request for waiver of service of process with the defendant; filing with the defendant's attorney is insufficient).



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 4.1 Rule 4.1. Serving Other Process

1-4.1 Federal Civil Procedure Litigation Manual 4.1.syn

§ 4.1.syn Synopsis to Chapter 4.1: Rule 4.1. Serving Other Process

Scope Rule 4.1. Serving Other Process

4.1.1 COMMENTARY

4.1.2 ADDITIONAL AUTHORITY



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Chapter 4.1 Rule 4.1. Serving Other Process

1-4.1 Federal Civil Procedure Litigation Manual Rule 4.1. Serving Other Process

Rule 4.1. Serving Other Process

Rule 4.1 reads as follows:

Rule 4.1. Serving Other Process

(a) In General. Process--other than a summons under Rule 4 or a subpoena under Rule 45--must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

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1-4.1 Federal Civil Procedure Litigation Manual 4.1.1

4.1.1 COMMENTARY

Rule 4.1 was promulgated in 1993. According to the advisory committee's note, it was intended simply "to allow for greater textual clarity in Rule 4" and did not change existing practice, with one small exception noted below. Subdivision (a) applies to the service of process other than a summons, which is governed by Rule 4.

Applications under Rule 4.1 are rare, but typical examples include service of civil contempt orders, service of orders of execution, and service of civil commitment orders. Service under Rule 4.1(a) may only be carried out by someone specially appointed for that purpose, and proof of service must be obtained as required by Rule 4(l).

Service of Civil Contempt Orders

The first sentence of subdivision (b) alters pre-existing law. It provides that civil contempt orders to compel compliance with federal law may be served anywhere in the United States. This provision brings service of contempt orders in civil cases in line with the law governing criminal contempt orders, which already provide for nationwide service of process. The second sentence of subdivision (b) of the Rule made no change with respect to pre-existing law in civil contempt cases involving state law. It provides that service of such process can be made within the state or within 100 miles of the court issuing the order.



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1-4.1 Federal Civil Procedure Litigation Manual 4.1.2

4.1.2 ADDITIONAL AUTHORITY

1 *Moore's Federal Practice §§ 4.1.01 -4.1.04*

Teply & Whitten, Civil Procedure 341



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 5 Rule 5. Serving and Filing Pleadings and Other Papers

1-5 Federal Civil Procedure Litigation Manual 5.syn

§ 5.syn Synopsis to Chapter 5: Rule 5. Serving and Filing Pleadings and Other Papers

Scope Rule 5. Serving and Filing Pleadings and Other Papers

5.1 COMMENTARY

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5.3 LEADING CASES



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 5 Rule 5. Serving and Filing Pleadings and Other Papers

1-5 Federal Civil Procedure Litigation Manual Rule 5. Serving and Filing Pleadings and Other Papers

Rule 5. Serving and Filing Pleadings and Other Papers

Rule 5 reads as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard *ex parte*; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing--in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) Using Court Facilities. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Serving Numerous Defendants.

(1) In General. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying Parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) Required Filings; Certificate of Service. Any paper after the complaint that is required to be served--together with a certificate of service--must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) How Filing Is Made--In General. A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing, Signing, or Verification. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

* * * * *



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Federal Civil Procedure Litigation Manual

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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 5 Rule 5. Serving and Filing Pleadings and Other Papers

1-5 Federal Civil Procedure Litigation Manual 5.1

5.1 COMMENTARY

Rule 5 mandates that all documents in a civil action listed in subdivision (a) be served upon each of the parties in the action. Subdivision (d) of the Rule also requires that each of these papers be filed with the court, with exceptions for certain discovery documents that are discussed below. For some papers, it may be advantageous to file the document with the court before serving copies on the parties; for other papers, service of the copies on the parties followed by the filing of the originals, along with proof of service on the parties, may be more convenient. In each case, service of the copies or filing with the court should occur within a reasonable time after the other.

Service of the papers upon the parties themselves is regarded as more important than service with the court, as reflected in the requirement that the time limitations on responses to filed papers are generally measured from the date of service of the papers to the parties, not from the date that they were actually filed with the court.

Rule 5 Distinguished From Rule 4

Rule 5 should not be confused with Rule 4, which governs service of the summons. Most noticeably, service under Rule 5 may be made to the attorney representing the party to be served under Rule 5(b), whereas the service of the summons pursuant to Rule 4 is more restrictive. In addition, other rules, such as Rules 4.1, 45(b), and 71.1(d)(3), provide for their own method of service. Accordingly, the service provisions of subdivision (b) apply only to documents served under Rule 5(a) and Rule 77(d).

Illustration 5-1

Edgar sues Tom's Terrific Stadium Tours for \$25,000 on a claim arising under a state false advertising statute, and promptly serves a summons and copy of the complaint on Tom, who owns the business. Tom quickly retains the services of an attorney, Jerry, to advise him on the matter. Under Rule 5, service of any pleading and papers subsequent to the original complaint may be served upon Jerry.

How Service Is Made

Service of litigation documents under subdivision (b) is permitted in one of six different ways: (1) hand delivery; (2)

delivery at the person's office or home; (3) mailing; and (4) leaving a copy with the clerk of courts, if no address is known; and (5) delivery by electronic means, if the person has so consented in writing; and (6) any other means, providing that the person so served has consented in writing to the specific method of delivery. Under the Rule, delivery by e-mail and other electronic means, such as fax service, is obviously contemplated provided the party consents in writing. However, any other method is permitted under the Rule as well, as long as written consent is obtained.

The Rule authorizes the adoption of local rules that provide for service through the court, such as through electronic case filing systems. However, the rules must include provisions assuring that the consent of the parties has been obtained, as the authority for such local rules fall within subdivision (b)(2)(E), which requires written consent of the parties.

Service by E-Mail and Other Electronic Means

When litigation papers are served through e-mail or other electronic means, several steps should be taken by the party receiving service in that manner. As noted, written consent of each party is required, and the consent itself may be sent electronically. Accompanying the written consent should be a specification of the limitations on the consent, such as the scope and duration of the consent. The names, e-mail addresses, and/or fax numbers should be included in the consent, and the required format for e-mail attachments should be specified. Finally, parties who consent to receive litigation papers electronically should notify all parties of any change in the terms of the consent, such as an e-mail address change or software program upgrade.

Service by e-mail or other electronic means is complete on transmission. However, subdivision (b)(2)(E) clarifies that service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served, such as when an e-mail message or attachment is returned to the sender. Most modern e-mail programs have an option that requests receipt confirmation of messages, and this option should be used to resolve potential dispute on the issue.

Three-Day Extension Applicable to Electronic Service

When a response to a paper served through any means other than through hand delivery or home or office delivery under subdivision (b)(2), three days are added to the time period in which the party must respond under Rule 6(d). The three-day extension applies to e-mail service and other electronic means of service as well, but the Rule does not relieve a party who consents to service electronically of the responsibilities to check their e-mail or monitor the computer or other machine used to receive service.

Filing of Litigation Papers With the Court

Under subdivision (d), all papers after the complaint which are required to be served on a party, such as subsequent pleadings, written motions (other than ex parte motions), notices, appearances, demands, offers of judgment, designation of record on appeal, and the like, must be filed with the court within a reasonable time after service on the party. A certificate of service on all parties must also be filed along with the paper itself. The service requirement with the court will, of course, be rendered moot for many papers that are originally directed to the court, such as motions and notices of appearances. However, in these cases, a certificate of service of the paper on all parties should still be filed with the court.

Filing of Discovery Materials Not Permitted

Rule 5(d) was amended in 2000 as part of a substantial revision of the discovery rules. The amendment is intended to establish a uniform practice among federal courts with respect to the filing of discovery materials and disclosures. Under the prior version of the Rule, certain discovery materials were required to be filed with the court unless ordered

by the court on motion of a party or sua sponte. Many local rules had dispensed with the filing requirement altogether, and the current version of Rule 5 brings the national rule in conformity with these local rules. The advisory committee note indicates that the amendment is intended to replace local rules concerning the filing requirement, and existing local rules inconsistent with the provision are invalidated. However, local rules may still govern the filing of discovery materials and other documents once they are used in the proceeding and the filing requirement of subdivision (d) is triggered. Discovery materials and disclosures must still, of course, be served on all opposing parties in conjunction with subdivisions (a)-(c).

Exceptions to Non-Filing Requirement

Under the current version of the Rule, virtually all discovery materials, including disclosures under Rule 26(a)(1) and (2), are not permitted to be filed with the court until they are used in a proceeding or the court orders their filing. Disclosures under Rule 26(a)(3), however, must still be filed as provided in that Rule, and papers related to contested examinations under Rule 35 also remain subject to the filing requirement. Although the documents listed in subdivision (d) cover the great majority of discovery materials and disclosures used in an action, other documents not specifically listed, such as materials generated in conjunction with petitions to perpetuate testimony under Rule 27 and stipulations under Rule 29, should still be filed with the court unless otherwise ordered.

Illustration 5-2

Assume on the facts of Illustration 5-1 that Edgar and Tom exchange several crates of documents pursuant to the mandatory disclosure provisions of Rule 26(a). Interrogatories are also exchanged, and depositions of the parties and several witnesses are also taken. Rule 5(d) does not permit any of the materials generated in conjunction with these actions, including transcripts of deposition testimony, to be filed with the court until a particular document is "used in the proceeding."

Discovery Materials Used in the Proceeding

Under Rule 5(d)(1), discovery materials and certain disclosures are required to be filed with the court only if they are "used in the proceeding" or otherwise ordered by the court. Discovery materials and disclosures are used in the proceeding if they are relevant to any pending motion before the court (*e.g.*, a motion for summary judgment, a motion for a protective order, a motion to compel discovery), a pretrial conference under Rule 16, or any other proceeding requiring court involvement. Only those documents relevant to the proceeding should be initially filed, though other opposing parties are permitted to introduce other materials in accordance with applicable Rules, such as *Federal Rule of Evidence 106* and Rule 32(a)(6).

Filing With the Clerk or With the Court

Subdivision (d)(2) of the Rule plainly states that a paper is filed when it is delivered to the clerk of the court, although the judge may personally accept the papers to be filed and transmit those papers to the clerk of the court. Subdivision (d)(4) also states that the clerk of a court may not refuse to accept a paper for filing with the court because the clerk determines that the paper is not in the proper form. The clerk may, of course, point out the deficiencies of the papers filed to the person filing the papers.

The provisions of subdivision (d)(3) concerning electronic filing rules have been amended several times. Before 1996, a court that desired to institute an electronic filing system, such as filing by facsimile, had to conform its rules to technical standards established by the Judicial Conference of the United States and seek specific authorization from the Judicial Conference. In light of the rapid advances in electronic technology, the 1996 amendment abolished the latter requirement. Courts are now free to establish electronic filing rules without consulting the Judicial Conference directly. Courts that mandate electronic filing through standing orders, procedure manuals, or local rules must contain

"reasonable exceptions" when requiring electronic filing imposes a hardship on a party, but the Rule does not provide additional guidance on the kinds of exceptions envisioned.

Finally, the 1996 amendment makes it clear that filing by electronic means is equivalent to written filings. An electronic filing that complies with the local rule satisfies all the requirements for filing on paper, including signature and verification. Papers filed electronically are governed by the same rules of public access as those governing written filings.



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 5 Rule 5. Serving and Filing Pleadings and Other Papers

1-5 Federal Civil Procedure Litigation Manual 5.2

5.2 ADDITIONAL AUTHORITY

1 *Moore's Federal Practice* §§ 5.01 -5.34

James & Hazard, *Civil Procedure* § 2.12

Teply & Whitten, *Civil Procedure* 341, 512-513



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1-5 Federal Civil Procedure Litigation Manual 5.3

5.3 LEADING CASES

Amended Complaint Served Under Rule 5

Johnson v. Crown Enters., 398 F.3d 339 (5th Cir. 2005) (amended complaint need not be served under Rule 4, as Rule 5 governs service of every pleading subsequent to the original complaint).

Clerk's Refusal of Petitions Limited

Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005) (the role of the clerk in refusing petitions in most courts is quite limited, and Rule 5 prohibits such a refusal because of improper form).

Discovery Requests

Faile v. Upjohn Co., 988 F.2d 985 (9th Cir. 1993) (prisoner who gives discovery requests to prison official for forwarding effects proper service under Rule 5(b)).

E-Filing System Must Accept Documents

Farzana K. v. Indiana Dep't of Educ., 473 F.3d 703 (7th Cir. 2007) (complaint under Individuals with Disabilities Education Act challenging state administrative action was filed within time limit under state law even though complaint, which was submitted electronically on last day of 30-day period, was rejected by e-filing system for using docket number of dismissed suit; under Rule 5(e), court clerks could not refuse to accept documents for filing solely because they were not presented in proper form, and e-filing system could not reject any paper that clerk had to accept).

Electronic Filing of Appeal Timely

United States v. Harvey, 516 F.3d 553 (7th Cir. 2008) (appellate court had jurisdiction to hear defendant's appeal even though defendant's counsel did not file paper notice of appeal until nearly two months after deadline under *Fed. R. App. P. 4(b)(1)* because counsel had tendered to clerk's office timely electronic notice of appeal that satisfied

requirements of *Fed. R. App. P. 3*, and Rule 5(e) allowed notice of appeal to be filed despite counsel's failure to file notice conventionally on paper as required by local rule).

Filing With the Clerk

Torras Herreria y Construcciones, S.A. v. M/V Timur Star, 803 F.2d 215 (6th Cir. 1986) (filing of papers with court complete upon receipt by the clerk; motion mailed on last day of applicable time period held untimely where clerk actually received motion 5 days after deadline).

Mailing of Papers Does Not Constitute Filing

Raymond v. Ameritech Corp., 442 F.3d 600 (7th Cir. 2006) (placing papers into the mail addressed to the clerk's office does not constitute "filing" under Rule 5(e)).

Local Rule May Not Reject Electronic Filing

Contino v. United States, 535 F.3d 124 (2d Cir. 2008) (government's motion to dismiss inmate's appeal of denial of 28 U.S.C. § 2255 motion for lack of jurisdiction was denied under Rules 5 and 83(a)(2) where inmate had attempted to file timely notice of appeal electronically, it was rejected under local rule, and enforcing that rule would have denied him right to appeal).

Mail Room Practice Sufficient to Establish Mailing

United States v. Rivas, 493 F.3d 131 (3d Cir. 2007) (government sufficiently established that it had served copy of information on defendant's counsel by mail; assistant U.S. Attorney signed certificate of service stating that information was served by mail and stated that envelope containing information was left in mail room bin for service by U.S. mail; assistant attorney had sufficient personal knowledge of mail room's practices to establish mailing).

Method of Delivery; Business Address

J.D. Pharmaceutical Distributors, Inc. v. Save-On Drugs & Cosmetics Corp., 893 F.2d 1201 (11th Cir. 1990) (requests for admission mailed to individual defendant at her business address held inadequate where movant knew of defendant's home address).

Method of Delivery Generally

Rivera v. M/T Fossarina, 840 F.2d 152 (1st Cir. 1988) (party making motion has burden of demonstrating that the motion was mailed to the correct parties).

Service by Mail

Theede v. United States Dep't of Labor, 172 F.3d 1262 (10th Cir. 1999) (service by mail is accomplished when the documents are placed in the hands of the United States Post Office or in a Post Office Box).

Service Complete Upon Mailing

Fidelity Guarantee Mortg. Corp. v. Reben, 809 F.2d 931 (1st Cir. 1987) (local rule required service of claim for attorneys' fees within 45 days after entry of judgment; service of claim was timely, as it was mailed on the 45th day after judgment was entered).

Service of Rule 59 Motion

Russell v. Delco Remy, 51 F.3d 746 (7th Cir. 1995) (service of a motion under Rule 59 complete because it was mailed within 10 days of the judgment).

Service on Attorney

Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985) (service of an order to show cause may be effected by delivering notice of the order to the party's attorney).

Chagas v. United States, 369 F.2d 643 (5th Cir. 1966) (service of an injunction may be effected by delivering the injunction to the party's attorney).



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 5.1 Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

1-5.1 Federal Civil Procedure Litigation Manual 5.1.syn

§ 5.1.syn Synopsis to Chapter 5.1: Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

Scope Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

5.1.1 COMMENTARY

5.1.2 LEADING CASES



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Chapter 5.1 Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

1-5.1 Federal Civil Procedure Litigation Manual Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

Rule 5.1 reads as follows:

Rule 5.1 Constitutional Challenge to a Statute--Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

1-5.1 Federal Civil Procedure Litigation Manual Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

(b) Certification by the Court. The court must, under *28 U.S.C. § 2403*, certify to the appropriate attorney general that a statute has been questioned.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

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Chapter 5.1 Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

1-5.1 Federal Civil Procedure Litigation Manual 5.1.1

5.1.1 COMMENTARY

Purpose of the Rule

Rule 5.1 was added in 2006 to highlight the parties' and courts' duties with respect to constitutional questions. Previously, the provisions were located in Rule 24(c), and the drafters of Rule 5.1 believed that moving the rules governing constitutional questions to Title II of the Federal Rules of Civil Procedure, alongside the other rules governing notice and service of pleadings, would better alert litigants to their responsibilities in this regard. This helps to ensure that the United States Attorney or state attorney general has an opportunity to intervene, if permitted, at the earliest possible point in the litigation.

Rule 5.1 extends the scope of the requirements by including all constitutional questions to be noticed and served by the parties, and certified by the court. The prior provisions, and *28 U.S.C. § 2403*, were limited to constitutional challenges "affecting the public interest." This decision reflects the sensible perspective that it is better for the United States Attorney General and states' attorneys general to decide whether intervention in the case may be desirable than for the parties to assume that intervention is not warranted.

Notice and Service of Constitutional Question

Under subdivision (a), a party who files a pleading, written motion, or other paper drawing in question the constitutionality of a federal or state statute is required to file a notice of constitutional question with the court and serve the notice on the United States Attorney General or state attorney general. The notice is not required if the United States or particular state, or an agency, employee, or officer of the United States or particular state is a party in the action. The notice must be filed and served "promptly," but no specific deadline is required. Service by certified or registered mail is sufficient, as is electronic service to an electronic address so designated by the Attorney General or state attorney general.

Certification of Constitutional Question

A party's requirement to file and serve a notice of constitutional question is independent of the court's duty to certify a constitutional question. The certification requirements of the court are set forth in greater detail in *28 U.S.C. § 2403*, and

will be necessary in the event that a constitutional question arises in an action other than through a pleading, motion, or other paper filed by a party.

Intervention

Unless the court sets a later time, the 60-day period within which the United States Attorney General or state attorney general may intervene in the action runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. This period may be extended by the court or on motion of a party. Pretrial activities may continue without interruption during the intervention period, and the court retains authority to grant interlocutory relief. The court may reject any constitutional challenge before the 60-day period has expired, but a final judgment finding a statute unconstitutional may not be entered before the expiration of the period.



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Chapter 5.1 Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

1-5.1 Federal Civil Procedure Litigation Manual 5.1.2

5.1.2 LEADING CASES

Failure to Notify Attorney General

Edmondson v. Pope, 516 F.3d 1214 (1st Cir. 2008) (because individual and district court failed to notify U.S. Attorney General of constitutional challenge to federal statute, appellate court found it appropriate to vacate district court's judgment and remand to district court).



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 5.2 Rule 5.2. Privacy Protection For Filings Made with the Court

1-5.2 Federal Civil Procedure Litigation Manual 5.2.syn

§ 5.2.syn Synopsis to Chapter 5.2: Rule 5.2. Privacy Protection For Filings Made with the Court

Scope Rule 5.2. Privacy Protection For Filings Made with the Court

5.2 COMMENTARY



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 5.2 Rule 5.2. Privacy Protection For Filings Made with the Court

1-5.2 Federal Civil Procedure Litigation Manual Rule 5.2. Privacy Protection For Filings Made with the Court

Rule 5.2. Privacy Protection For Filings Made with the Court

Rule 5.2 reads as follows:

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

1-5.2 Federal Civil Procedure Litigation Manual Rule 5.2. Privacy Protection For Filings Made with the Court

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a pro se filing in an action brought under 28 *U.S.C.* §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
- (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
 - (A) the docket maintained by the court; and
 - (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may

later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) **Protective Orders.** For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) **Waiver of Protection of Identifiers.** A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

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Chapter 5.2 Rule 5.2. Privacy Protection For Filings Made with the Court

1-5.2 Federal Civil Procedure Litigation Manual 5.2

5.2 COMMENTARY

Purpose of the Rule

Rule 5.2 was added in 2007 to implement the privacy and security provisions of § 205(c)(3) of the E-Government Act of 2002. Although the E-Government Act applies only to electronically-filed documents, Rule 5.2 extends to all documents, whether filed by paper or electronically. Accordingly, litigators in federal court should become familiar with the technical requirements of and exceptions to the Rule immediately. The policy underlying Rule 5.2 is that litigation documents generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Rule 5.2 does not prevent the use of other Rules to protect potentially sensitive or private information, such as pretrial orders under Rule 16 and protective orders under Rule 26(c), though a simplified procedure for a protective order covering additional information is included in subdivision (e) of the Rule.

Scope of the Rule

Under subdivision (A), all filings containing any of the following information, whether filed by paper or electronically, must be redacted in the following manner:

- An individual's social-security number or taxpayer-identification number: the last four digits of the number only
- An individual's birth date: the year of the birth date only
- The name of an individual known to be a minor: the minor's initials only
- The number of any financial account, such as a brokerage account or checking account: the last four digits of the financial-account number.

The responsibility to review all filings and comply with the provisions of the Rule rests with counsel and the party or nonparty making the filing, and the court clerks will not review documents to determine if non-redacted private information remains. It is important to remember that all filings become public record and may ultimately be made

available over the internet. Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court

Exceptions to the Rule

Exceptions to the redaction requirement are listed in subdivision (b). Exceptions are included for financial account numbers identifying property allegedly subject to forfeiture in a forfeiture proceeding, records of state courts, administrative hearings, and other court records, and certain pro se proceedings.

Social Security Appeals and Immigration Cases

Subdivision (c) sets forth special provisions in social security appeals and immigration cases. In those cases, either the sheer volume of cases or the prevalence of sensitive information necessitates limited public access to those filings. Accordingly, remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. Nonparties may still obtain full access to those case files at the courthouse, including access through the court's public computer terminal, and parties and their attorneys may access the documents electronically through remote means.

Filings Under Seal, Protective Orders, and Options to Redaction

Subdivisions (d) and (f) recognize that parties may prefer to file certain documents under seal, and the provision preserves those rules and policies already developed to implement those practices. Subdivision (f) allows filing for both redacted documents and documents under seal, at the option of the party. The advisory committee note implies that the automatic redaction requirement may reduce the number of documents filed under seal. Subdivision (e) provides that the court may, for good cause, require more extensive redaction than otherwise required by the Rule. Subdivision (g) allows the option to file a "register" of redacted information--essentially, a filing containing abbreviated identifiers along with a separate filing under seal containing a description of the items or names identified. Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. The advisory committee note indicates that a person who files an unredacted documents by mistake may seek relief from the court by motion.



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 6 Rule 6. Computing and Extending Time; Time for Motion Papers

1-6 Federal Civil Procedure Litigation Manual 6.syn

§ 6.syn Synopsis to Chapter 6: Rule 6. Computing and Extending Time; Time for Motion Papers

Scope Rule 6. Computing and Extending Time; Time for Motion Papers

6 COMMENTARY

6.1 ADDITIONAL AUTHORITY

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Federal Civil Procedure Litigation Manual

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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 6 Rule 6. Computing and Extending Time; Time for Motion Papers

1-6 Federal Civil Procedure Litigation Manual Rule 6. Computing and Extending Time; Time for Motion Papers

Rule 6. Computing and Extending Time; Time for Motion Papers

Rule 6 reads as follows:

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(c) Motions, Notices of Hearing, and Affidavits.

(1) In General. A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

(2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

* * * * *



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Chapter 6 Rule 6. Computing and Extending Time; Time for Motion Papers

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6 COMMENTARY

Rule 6 covers various matters concerning the timing of certain actions taken under the Rules. The Rule is not intended to change any existing statute of limitations, but has served as a guideline for calculating whether the appropriate statute of limitations has been tolled. Other rules concerning time, such as *Rule 26 of the Federal Rules of Appellate Procedure*, should be consulted when appropriate.

Subdivision (a) was revised extensively in 2009 as part of a comprehensive time-computation project intended to bring all the Federal Rules within a simple, uniform framework. The organizing principle was a straightforward "days are days" approach to computing all time periods in each set of rules, counting intermediate weekend days and holidays. Under pre-2009 practice, intermediate weekends and holidays were sometimes counted and sometimes not. To further simplify time counting, most periods shorter than 30 days were changed to multiples of 7 days (7, 14, 21, or 28 days) so that deadlines will usually fall on weekdays. The amended rule also addresses "forward" and "backward" counting periods and addressed how concepts such as the "inaccessibility" of the clerk's office and when a day "ends" apply to electronic filing. These provisions are described in greater detail below.

Computation of Time Periods Measured in Days or Longer

Subdivision (a) specifies how time periods should be counted under the Rules. Deadlines are critical in litigation, and in addition to over 100 deadlines contained within the Federal Rules of Civil Procedure, local rules probably account for at least that many more in most jurisdictions. Accordingly, the time computation provisions in Rule 6 apply to all deadlines measured in periods of time, whether those deadlines arise under a statute (unless a contrary method is set out within the statute), Federal Rule, a local order, or court order. However, Rule 6 does not apply when a deadline is measured by a fixed date or time, such as a filing requirement that must be met on the "first of each month."

Under subdivision (a)(1), all time periods measured in days or any longer period (*e.g.*, weeks, months, or years) are measured in the same way. Under the former version of the Rule, intermediate Saturdays, Sundays, and legal holidays were excluded if the deadline was less than 10 days, but included if the deadline was 11 days or longer. Under the amended version, "days are days," and all days are included in all deadlines, with a single exception noted below. The day of the event triggering the deadline is not counted, but the deadline will begin to run on the following day, even if it happens to be a Saturday, Sunday, or legal holiday (now defined in subdivision (a)(6)).

The lone exception to the "days are days" principle is the concept of "final day relief," which is carried over from the prior version of the Rule. Accordingly, this relief remains available under subdivision (a)(1)(c)--if the period *ends* on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday.

A related carryover from the prior version of the rule is clerk office inaccessibility. Any day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. Accordingly, a deadline ending on that day would be extended to the next day the office is accessible.

Illustration 6-1

On Friday, December 12, a federal district court orders Snow Experts, Inc. to provide its shareholders with a copy of its tax returns for the past five years. The court directs Snow Experts, Inc. to complete this disclosure within 28 days. This 28-day period begins on December 13 and ends on January 10. However, if a monsoon occurred on January 10, Snow Experts, Inc. would not be required to provide the disclosure until the next day that the clerk's office was accessible.

The effect of these changes is that short time periods (*i.e.*, less than 11 days) will be shortened because intermediate Saturdays, Sundays, and legal holidays will be counted in the time period computation. Accordingly, many short time periods have been lengthened, typically from 5 to 7 days, or from 10 to 14 days. Almost all time periods under 30 days were changed to a multiple of 7 to allow those deadlines to end on the same day as the day in which the triggering act or event occurred. For example, if a party is given 14 days to file objections to a motion, and the motion is filed on a Thursday, the objections must be filed by the Thursday exactly two weeks later. Thirty day and longer periods, however, were generally retained without change.

Computation of Time Periods Measured in Hours

Subdivision (a)(2) was added in 2009 to address the computation of time periods that are stated in hours. Although deadlines measured in hours are uncommon, they appear in some statutes and court orders during expedited proceedings. Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour.

"Last Day"

Under subdivision (a)(4), the "last day" of a period ends when the clerk's office is scheduled to close, unless the deadline is for an electronic filing, in which case the last day ends at midnight. Different provisions for when the "last day" ends may be established by statute, local rule, or court order.

"Next Day"

Because time periods under the Rules contain both forward-looking deadlines (*i.e.*, requiring something to be done within a period of time after an event) and backward-looking deadlines (*i.e.*, requiring something to be done within a period of time before an event), the method of determining the "last day" under subdivisions (a)(1)(C) and (a)(2)(C) is not obvious. Accordingly, subdivision (a)(5) provides that one should continue counting in the same direction as the time period--that is, forward when computing a forward-looking period and backward when computing a backward-looking period. For forward-looking deadlines, the computation is intuitive: if a deadline falls on a Saturday,

the "next day" is the first day that is not a Saturday, Sunday, or legal holiday. For backward-looking deadlines, the practical effect is to make some deadlines slightly longer than they would appear, as the "next day" corresponding to a Saturday, Sunday, or legal holiday would be the day before the beginning of the time period.

Illustration 6-2

Assume on the facts of Illustration 6-1 that the court instead ordered Snow Experts, Inc. to provide its shareholders with a copy of its tax returns at least 14 days before the next pretrial conference scheduled for January 15. Because January 1 is a legal holiday, Snow Experts would be required to make the disclosures by December 31.

Enlargement of Time Periods

Subdivision (b) governs the procedure according to which the court may extend the applicable time period. The section distinguishes between the case where the request for extension occurs before the time period has expired and the case where the request occurs after the expiration of the time period. In the former case, under subdivision (b)(1)(A), the court may extend the time period for "good cause," whether or not the request was made by motion or the opposing party was notified. If the request occurs after the time period has expired, the court may, upon motion only under subdivision (b)(1)(B), extend the time period if the failure to act was "because of excusable neglect," a considerably more stringent standard.

Illustration 6-3

Assume on the facts of Illustration 6-1 that Snow Experts, Inc. desires additional time, because of business reasons, within which to comply with the court order. If Snow Experts, Inc. makes such a request before the deadline of January 12, the court should ordinarily grant the request. If, however, Snow Experts, Inc. makes the request after the deadline had passed, the court should deny the request. In the latter situation, if Snow Experts, Inc. was unable to comply with the court order because of the negligent misplacement of the returns by Unreliable Accounting Company, the court may extend the time period upon motion by Snow Experts, Inc. and notice to its shareholders.

The Rule excepts the time periods for taking actions under the indicated Rules from enlargement by the court. These Rules govern motions made by a party made after a judgment has been entered, such as a motion for a new trial under Rule 59(b) and a motion for post-judgment relief under Rule 60(b). Other Rules may also contain provisions relating to the enlargement or reduction of particular time periods. These specific provisions should take precedence over the more general provisions in this subdivision.

Illustration 6-4

Assume on the facts of Illustration 6-2 that Susan and Devyn fail to file a motion for a new trial within the requisite 28-day period of the court's entry of judgment. Rule 6 does not allow the court to grant the parties an extension of time to file a motion for new trial.

Notice of Hearing on a Motion; Reply Affidavits

Subdivision (c) requires that the notice of a hearing on a motion other than an *ex parte* motion be served on the parties no later than 14 days before the hearing date. The subdivision also requires that, when the motion is supported by an affidavit, the affidavits must also be filed with the motions. The opposing party may then serve opposing affidavits no later than 7 days before the hearing date, unless Rule 59(c) provides or the court permits otherwise.

Illustration 6-5

On April 1, Wanda files a complaint against Tim for personal injuries suffered in an automobile accident. After being served with a summons and copy of the complaint on April 5, Tim files a motion for summary judgment, accompanied by supporting affidavits, with the court on April 10. The court, in turn, orders a hearing on the motion for April 30. Wanda must be notified of the hearing no later than April 12, and any affidavits submitted by Tim in support of his motion must also be provided to Wanda by this date. Wanda must serve any affidavits in opposition to the motion on Tim by April 19, unless Rule 59(c) provides or the court permits otherwise.

Automatic 3-Day Extension if Service by Mail

Subdivision (d) should be read in conjunction with Rule 5(b)(2)(C)-(F), which permits the service of pleadings and other specific kinds of court documents by mail, deposit with the clerk of court, electronic means, or other means consented to by the party served. When service is made in this manner, and that service triggers a deadline within which the party being served is required or permitted to act in any way, Rule 6(d) provides that three days will be added to the time period. In effect, subdivision (d) originally embodied the assumption that documents placed in the mail will be received 3 days later--the assumption has since been applied to other methods of service as well. However, the automatic three-day extension does not apply to documents hand delivered under Rule 5(b)(2)(A) or delivered to a home or office under Rule 5(b)(2)(B).

Illustration 6-6

Assume on the facts on Illustration 6-5 that the court denies Tim's motion for summary judgment and that Tim thereafter mails an answer containing a counterclaim to Wanda on May 5. Under Rule 12(a)(1)(c), Wanda ordinarily has 21 days within which to file a reply to Tim's answer--May 26. Because Tim mailed the answer, however, Wanda's time period for serving a reply--is extended until May 29.

It is important to note that subdivision (d) applies only to time periods triggered by the "service" of a notice or other paper on another party. Time periods triggered in other ways, such as by court order, will not trigger the automatic 3-day extension.

Illustration 6-7

Assume on the facts of Illustration 6-6 that a local rule requires that all parties file a preliminary witness list with the court no later than 30 days after the initial scheduling conference under Rule 16(b). If the scheduling conference occurs on June 1, the parties would be required to file their preliminary witness lists by July 1, and the 3-day automatic extension would not apply.

Subdivision (d) has been amended several times to clarify its relationship to other time computational measurement changes made at the same time. The current version states clearly that the three-day extension of subdivision (d) is applied "after the period would otherwise expire under Rule 6(a)." In other words, the time period within which a party is required to permitted to act after the service of a pleading or other litigation document by mail, deposit with the court clerk, electronically, or other means consented to by the parties, should first be calculated under subdivision (a) and any other applicable time-counting rule. After this calculation is made, three days are then added to the deadline under subdivision (d).

Illustration 6-8

Assume on the facts of Illustration 6-6 that May 25 falls on a Saturday. Even though the "weekend day"

relief would be available to Wanda if her deadline ended on that day, the three-day extension makes the actual deadline Tuesday, May 28. Wanda's reply will be due on that day, and the "weekend day" relief does not apply.

E-Mail and Other Electronic Service

The three-day extension provided in subdivision (d) was extended to service through e-mail and other electronic means under *Rule 5(b)(2)(E)* and *(F)*. The extension is similarly provided for service on a person with no known address by leaving a copy with the clerk of the court.



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6.1 ADDITIONAL AUTHORITY

1 *Moore's Federal Practice* §§ 6.01 -6.25



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6.2 LEADING CASES

Applicability to Right-to-Sue Letters

Wilkes v. United States, 192 F.2d 128 (5th Cir. 1951) (Rule 6 held applicable to right-to-sue letter in Title VII action).

Christmas Eve Counted as Holiday

Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094 (D.C. Cir. 2003) (when President had directed that all executive branch departments and agencies of federal government would be closed on Christmas Eve Day, the day shall be regarded as a "any other day appointed as a holiday" under Rule 6 even though the word "holiday" was not used in Presidential Order).

Class Action Petition

Beck v. Boeing Co., 320 F.3d 1021 (9th Cir. 2003) (ten-day time limit for petition to appeal class certification order was subject to time computation rule of Rule 6, which excluded Saturdays, Sundays, and holidays, rather than time computation rule of Federal Rules of Appellate Procedure, which did not).

Class Certification Appeal; Holidays Excluded

In re Veneman, 309 F.3d 789 (D.C. Cir. 2002) (ten-day time limit for appealing denial of class certification was subject to Rule 6, which excludes Saturdays, Sundays, and holidays, rather than time-computation rule of Federal Rules of Appellate Procedure, which does not).

Clerk's Failure to File Motion

Green v. Administrators of the Tulane Educ. Fund, 284 F.3d 642 (5th Cir. 2002) (motion for judgment as a matter of law hand-delivered by defendant to clerk of court within ten days after entry of judgment was timely, so that commencement of period for filing notice of appeal was delayed until motion was disposed of, even though motion was

not stamped "filed" by clerk until after expiration of ten-day period).

Court Closed by Order

Latham v. Dominick's Finer Foods, 149 F.3d 673 (7th Cir. 1998) (when the 10-day time period for filing a motion for a new trial falls on a day that was not declared a holiday by executive order, Congress, or a State, but closed by order of the Chief Judge of the district court with no arrangements made for filings, the time period is extended to the next day).

Excusable Neglect Low Standard

Raymond v. IBM, 148 F.3d 63 (2d Cir. 1998) (although the court should not permit a party to demand a jury trial under Rule 39(b) absent an explanation beyond mere inadvertence for the original failure to serve jury demand in a timely fashion, mere inadvertence, without more, can, in some circumstances, be enough to constitute "excusable neglect" under Rule 6(b) for enlarging the time period under Rule 38 for demanding a jury trial).

Extension of Time Limit to Amend Complaint; Pro Se Plaintiff

Eldridge v. Block, 832 F.2d 1132 (9th Cir. 1987) (an extension of time to amend a complaint should be freely granted to a pro se plaintiff to avoid dismissal).

Federal Holidays

Parkus v. Delo, 985 F.2d 425 (8th Cir. 1993) (Rule 59(e) motion that was required to be filed within 10 days of the entry of judgment was timely even though it was received 16 days after the judgment because of two intervening weekends, a federal holiday, and a state holiday).

Filing of Affidavit on Day of Hearing Disallowed

Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515 (9th Cir. 1983) (where plaintiff submitted an affidavit on the day of a hearing on a motion to dismiss the action, court properly disallowed the affidavit).

Reyes-Cardona v. J. C. Penney Co., 690 F.2d 1 (1st Cir. 1982) (legal holiday in Puerto Rico not counted in calculating whether an appeal was timely even though it was not a federal holiday and clerk's office was open).

Final Day Relief

Cooper v. City of Ashland, 871 F.2d 104 (9th Cir. 1989) (return receipt indicated that a complaint was delivered to the clerk's office two days after the statute of limitations had apparently run; however, because final day of tolling period was a Saturday, filing was proper).

Guardian's Obligation to File Substitution Motion

Kaubisch v. Weber, 408 F.3d 540 (8th Cir. 2005) (district court did not abuse its discretion in failing to extend time for a guardian to file a motion to substitute parties after his ward died because guardian's misapplication or misreading of the plain language of Rule 25(a) did not establish excusable neglect under Rule 6 for failing to file a motion in a timely fashion).

Legal Holiday

Hart v. Sheahan, 396 F.3d 887 (7th Cir. 2005) (December 26, 2003, was excluded from the 10 days permitted for a motion under Rule 59 because the President had declared it a celebratory holiday for federal workers, thus making it a legal holiday under Rule 6).

Strategic Decision Not to File Not "Excusable Neglect"

Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990) (affidavits that were not filed by deadline properly rejected because they were the result of strategic decision by the party, not excusable neglect).

Statute of Limitations

Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998) (when a statute of limitations is measured in years, the last day for commencing the action is the anniversary date of the start of the limitations period).

Three-Day Extension by Delivery by Mail

CNPq-Conselho Nacional de Desenvolvimento Científico e Tecnológico v. Inter-Trade, Inc., 50 F.3d 56 (D.C. Cir. 1995) (3-day period to be automatically added to applicable time period if service was effected by mail are calendar days, not business days).

Time Extension Applicable Only for Court Filings

McCarty v. Astrue, 528 F.3d 541 (7th Cir. 2008) (attorney's unaccountable lapse in basic legal knowledge is not excusable neglect for purposes of granting extension of time for filing notice of appeal under *Fed. R. App. P. 4(a)(5)(A)(ii)*; attorney's error in applying former Rule 6(e) to documents served on opposing counsel and not to notices of appeal and other documents that must be filed in court was not a plausible misinterpretation of an ambiguous rule).

"Unique Circumstances" Doctrine; Late Motion for New Trial Accepted

Schneider v. Fried, 320 F.3d 396 (3d Cir. 2003) (doctrine of "unique circumstances" gives court of appeals jurisdiction to hear appeal where plaintiff reasonably relied on magistrate judge's order conferring him "the right" to file a second motion for new trial more than 10 days after case was dismissed in violation of Rule 59(b)).

Untimely Affidavit Subject to "Excusable Neglect" Standard

Schafer Bakeries, Inc. v. International Bhd. of Teamsters, Local 332, 650 F. Supp. 753 (E.D. Mich. 1986) (affidavit in opposition to a motion for summary judgment filed after deadline may be accepted only upon a showing of excusable neglect).

Weekends Not Included in 3-Day Extension

Treanor v. MCI Telecomms. Corp., 150 F.3d 916 (8th Cir. 1998) (when Rule 6(e) (now Rule 6(d)) operates to add three days to a time period if service is by mail, neither the day of mailing nor weekends and holidays should be included in the computation).



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TITLE III. PLEADINGS AND MOTIONS

Chapter 7 Rule 7. Pleadings Allowed; Form of Motions and Other Papers

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§ 7.syn Synopsis to Chapter 7: Rule 7. Pleadings Allowed; Form of Motions and Other Papers

Scope Rule 7. Pleadings Allowed; Form of Motions and Other Papers

7.1 COMMENTARY

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1-7 Federal Civil Procedure Litigation Manual Rule 7. Pleadings Allowed; Form of Motions and Other Papers

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

Rule 7 reads as follows:

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

- (1) a complaint;
- (2) an answer to a complaint;
- (3) an answer to a counterclaim designated as a counterclaim;
- (4) an answer to a crossclaim;
- (5) a third-party complaint;
- (6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

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7.1 COMMENTARY

Rule 7 governs the proper denomination of pleadings and sets forth the basic mechanics for motion practice in federal court. Additional provisions concerning motion practice, including specific rules governing the filing of motions, are located in Rule 5 and in local rules.

Pleadings Permitted

Subdivision (a) specifies the seven pleadings that may be filed in any action and, by implication, specifies those pleadings that must be filed. If claims are made by only a single party, namely the plaintiff, with no additional counterclaims, crossclaims, or third-party claims, the pleadings are limited to a complaint and an answer. The Rule also lists those pleadings that are required if such additional claims are made in the action. In this regard, it should be noted that the proper denomination of the responsive pleading to a pleading containing a counterclaim is a *reply*, though the proper denomination of the responsive pleading to a pleading containing a crossclaim is an *answer*. It is therefore possible for multiple answers or multiple replies to be filed in an action.

Significantly, the Rule does not permit a party to file additional pleadings other than those specified in the Rule without the permission of the court. Thus, a plaintiff is not even allowed to file a reply to the defendant's answer unless the defendant specifically includes a counterclaim in the answer, or unless the court orders a reply to the answer. All other pleadings, such as demurrers and pleas, which were common forms of pleadings before the Rules were promulgated in 1938, are not permitted.

Illustration 7-1

Alex sues Bob for personal injuries suffered in a boating accident. Upon receipt of Alex's complaint, Bob files an answer, alleging that Alex was actually the negligent party. Under Rule 7, Alex cannot file a pleading in response to the allegations made in Bob's answer unless the court orders a reply. If, however, Bob supplements his answer with a counterclaim, Alex must file a reply to respond to Bob's counterclaim.

Motions Generally

Any paper filed with the court other than the pleadings specified in subdivision (a) which can be viewed as a request for the court to act in some way is deemed a "motion" under subdivision (b). Under subdivision (b)(1), any such request must be made in writing other than a motion made at a hearing or trial, which may be made orally. The motion must state the relief or order desired by the party and must also state with particularity the grounds for the request--the two fundamental requirements of all motions set forth in subdivision (b)(1)(B)-(C).

Subdivision (b)(2) requires that all motions must comply with whatever caption, form, and Rule 11 signature requirements may be applicable to pleadings.



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7.2 ADDITIONAL AUTHORITY

2 Moore's Federal Practice §§ 7.01 -7.05

James & Hazard, Civil Procedure §§ 3.1-3.2, 3.12-3.13

Friedenthal, Civil Procedure §§ 5.1-5.3, 5.21-5.25



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7.3 LEADING CASES

Actual Notice Exception to Specification Requirement

Steinert v. Winn Group, Inc., 440 F.3d 1214 (10th Cir. 2006) (on a motion for attorneys' fee, attorney did not violate Rule 7(b)(1) (now Rule 7(b)(1)(B)) by not specifying judgment and basis for ultimate award because plaintiff's attorney had actual notice).

Amended Complaint to Be Attached to Motion to Amend

Wolgin v. Simon, 722 F.2d 389 (8th Cir. 1983) (denial of plaintiff's motion to amend a complaint was upheld where the motion did not indicate what the amended complaint would contain).

Court-Ordered Reply to Survive Dismissal

Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (under Rule 7(a), the court may order a reply to an answer or may grant a party's motion for a more definite statement under Rule 12(e) insisting that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing a cognizable injury for the purpose of surviving defendant's pre-discovery motion for dismissal or summary judgment).

Directed Verdict Motion Sufficient for Particularity Requirement

Hinz v. Neuroscience, Inc., 538 F.3d 979 (8th Cir. 2008) (in breach of contract case, Rule 50(b) motion for judgment as matter of law reversing damages award against product distributors satisfied particularity requirement under Rule 7(b), as district court was permitted to consider distributors' pre-verdict Rule 50(a) motion to determine whether Rule 50(b) motion was adequate).

Grounds for Relief Stated in Brief

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 957 F.2d 515 (7th Cir. 1992)

(requirement that grounds for relief be stated with particularity satisfied where the grounds were specified in a brief filed with the motion).

Habeas Corpus Motion to Dismiss Not Responsive Pleading

Morrison v. Mahoney, 399 F.3d 1042 (9th Cir. 2005) (an initial motion to dismiss on statute of limitations grounds in a habeas corpus proceeding is not a responsive pleading; an answer following remand was first responsive pleading requiring pleader to raise or waive all defenses).

Motion Defined

Campos v. Le Fevre, 825 F.2d 671 (2d Cir. 1987) (a motion is any request by a party for the judge to act, signed and filed with the court).

Relief Not Required to Be Stated With Particularity

St. Mary's Hosp. Med. Ctr. v. Heckler, 753 F.2d 1362 (7th Cir. 1985) (Rule 7(b)(1) does not require that the relief requested be stated with particularity, only the grounds for relief).



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TITLE III. PLEADINGS AND MOTIONS

Chapter 7.1 Rule 7.1. Disclosure Statement

1-7.1 Federal Civil Procedure Litigation Manual 7.1.syn

§ 7.1.syn Synopsis to Chapter 7.1: Rule 7.1. Disclosure Statement

Scope Rule 7.1. Disclosure Statement

7.1.1 COMMENTARY

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TITLE III. PLEADINGS AND MOTIONS

Chapter 7.1 Rule 7.1. Disclosure Statement

1-7.1 Federal Civil Procedure Litigation Manual Rule 7.1. Disclosure Statement

Rule 7.1. Disclosure Statement

Rule 7.1 reads as follows:

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents. A nongovernmental corporate party must file 2 copies of a disclosure statement that:

- (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
- (2) states that there is no such corporation.

(b) Time to File; Supplemental Filing. A party must:

- (1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and
- (2) promptly file a supplemental statement if any required information changes.

* * * * *



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7.1.1 COMMENTARY

Rule 7.1 was added in 2002 to inform judges and parties of those situations in which automatic disqualification of a judge in a case is required because of a financial interest in the matter. It requires all nongovernmental corporate parties to either: (1) disclose any parent corporation and any publicly held corporation that owns 10 percent of its stock under subdivision (a)(1); or (2) state that no such corporation exists under subdivision (a)(2).

Automatic Disqualification for Judges

Under the Code of Conduct for United States Judges, automatic disqualification of a judge is required when the judge, or a member of the judge's immediate family, has a financial interest in an individual or fiduciary capacity in the subject matter in controversy, is a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding. Rule 7.1 is designed to ensure that judges and parties are notified of the circumstances in which this occurs, and parties are required to file with the court a statement indicating whether or not these circumstances are present in a particular case.

The Rule does not cover all of the circumstances that may call for disqualification under the Code of Conduct "financial interest" standard, and does not deal at all with other non-financial circumstances that may call for disqualification. However, the Rule was designed to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Parties who are aware of additional information that may impact a judge's decision concerning disqualification should also include this information in the disclosure statement, but this additional information is not required.

Filing Disclosure Statements

Under subdivision (b), all nongovernmental corporate parties must file the statement in conjunction with the first appearance, pleading, petition, motion, response, or other request made by that party to the court. Corporate parties who have previously filed disclosure statements must also supplement those statements when changes in the information occur. Non-corporate parties are not subject to the requirements of the Rule, but all parties should be diligent in notifying the judge in a particular case of circumstances that may affect the judge's disqualification decision.



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7.1.2 ADDITIONAL AUTHORITY

2 Moore's Federal Practice §§ 7.1.01 -7.1.03



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TITLE III. PLEADINGS AND MOTIONS
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1-8 Federal Civil Procedure Litigation Manual Rule 8. General Rules of Pleading

Rule 8. General Rules of Pleading

Rule 8 reads as follows:

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) **In General.** In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials--Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading--including the jurisdictional grounds--may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation--other than one relating to the amount of damages--is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;

- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) **Mistaken Designation.** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) **In General.** Each allegation must be simple, concise, and direct. No technical form is required.

(2) **Alternative Statements of a Claim or Defense.** A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

* * * * *



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TITLE III. PLEADINGS AND MOTIONS
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8.1 COMMENTARY

Rule 8 sets forth the rules and principles generally applicable to the contents of pleadings. Special pleading rules are also found in Rule 9 and Rule 71.1. Rule 8(e), in conjunction with the liberal amendment procedures of Rule 15 and the construction to be supplied to the Rules contained in the second sentence of Rule 1, indicates that the merits of a case, rather than the technical rules governing code pleading, should dictate the tenor of a civil action.

Accordingly, Rule 8 provides that the pleadings should be concerned primarily with a general formulation of the issues in a case. The theory of the Rules is that specific factual information will be obtained through the liberal discovery provisions; such information thus need not be set forth in detail in the pleadings.

Jurisdictional Grounds Alleged

Rule 8(a)(1) requires a statement in the complaint setting forth the basis for the court's jurisdiction over the action. If jurisdiction is predicated upon diversity grounds, the citizenship of all the parties must be stated in the pleading. Whether a court properly has jurisdiction on diversity grounds, however, is a matter of statutory construction under 28 *U.S.C.* § 1332. The Rules simply mandate that diversity be sufficiently alleged in the pleadings.

If jurisdiction is predicated upon the fact that the action involves a question of federal law, a more detailed statement setting forth the specific federal provision under which the issues involved in the action arise is necessary.

Contents of Pleadings

In addition to alleging the court's jurisdictional predicate in the action, subdivision (a)(2) also requires a general statement of the claim and subdivision (a)(3) requires a demand for the kind of relief sought. Subdivision (b)(1) complements this provision by requiring a general statement of the party's defenses set forth in a responsive pleading to a complaint. General denials are permitted if made in good faith, and persons making such denials are subject to sanctions under Rule 11.

Claims and defenses must be supported by some kind of factual basis; mere legal conclusions are not sufficient. The particularity required will vary with the specific claim or defense. The official forms accompanying the Rules, however,

are indicative of the simplicity anticipated by Rule 8. Rule 8(d)(2) clearly contemplates pleading in the alternative, so that any number of hypothetical claims or defenses may be asserted in the pleadings.

As noted, subdivision (a)(2) implements the more relaxed standard of notice pleading under the Federal Rules of Civil Procedure compared to that which existed under code pleading. For over 50 years, this approach has been exemplified by the holding in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), in which the Supreme Court held that a complaint satisfies Rule 8's pleading requirements--and thus survives a motion to dismiss under Rule 12(b)(6)--unless it appears beyond doubt that the plaintiff can prove "no set of facts" in support of the claim that would entitle him or her to relief. This "no set of facts" language--occasionally referred to as the "conceivability" standard--has been instrumental to the operation of Rule 8 and the pleading requirements under modern litigation practice.

However, cracks in the *Conley* foundation appeared in the 2007 case *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In *Twombly*, the Supreme Court held that a complaint alleging an antitrust conspiracy under § 1 of the Sherman Act was required to allege sufficient facts to support a plausible, and not merely conceivable, claim for relief. Complaints must contain enough factual matter to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement to suggest that such an agreement was made. In other words, the *Twombly* Court substituted "plausibility" for *Conley's* standard of "conceivability" with respect to the allegation of facts on the face of the complaint. By "plausibility," the *Twombly* majority explained, it was requiring less than a probability yet more than mere possibility. Needless to say, the practical effect of *Twombly* would be a reduction in the discovery burden on antitrust defendants.

The principle of *Twombly* has since been jet-fueled with the Supreme Court's 2009 decision *Ashcroft v. Iqbal*, -- U.S. --, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In *Iqbal*, the Court continued its trend towards stricter pleading standards in civil cases, rejecting the idea that *Twombly* is simply a one-off antitrust case. The enhanced pleading requirements apply in all civil cases, as the holding was a function of Rule 8, rather than the vagaries of antitrust cases. Accordingly, when deciding a motion to dismiss a complaint, a court need not accept as true assertions that are no more than recitals of the elements of a cause of action, supported by mere conclusory statements. Instead, only well-pleaded factual allegations are entitled to an assumption of veracity, and a court should then determine whether such allegations are "plausible" and entitle the plaintiff to relief. Although the full effects of the twin decisions are not known (there are currently bills in Congress to restore the old, *Conley* standard), the decisions clearly point in the direction of increased pre-discovery dismissal of case through motions to dismiss.

Effect of Failure to Deny

Rule 8(b)(6) provides that any issues alleged in a pleading--other than an allegation relating to the amount of damages--are deemed to have been admitted by the opposing party if they are not denied in a mandatory responsive pleading. This treatment entails especially harsh consequences when the issues to which a denial has not been made are demonstrably false but nonetheless regarded as true for purposes of litigation. It is thus imperative that all issues in a pleading be addressed specifically by the opposing party. Careful separation of the allegations into different counts pursuant to Rule 10(b) diminishes possible confusion engendered by the provisions of Rule 8(d).

Illustration 8-1

Diane commences a breach of contract action against Annette. In her complaint, Diane alleges that Annette failed to complete the repairs to her garage prior to the deadline specified in the contract. In addition, Diane alleges that Annette failed to comply with local building ordinances. Although Annette's answer specifically denies that the repair failed to satisfy the requirements of the local building ordinances, Annette does not address whether the work was completed prior to the designated deadline. Because Annette did not deny the allegation regarding the contract deadline, the issue will be deemed to have been admitted by Annette, regardless of whether the allegation is actually true.

Affirmative Defenses

Rule 8(c) lists the affirmative defenses that must be alleged in the pleadings. Failure to allege one of these specified defenses constitutes a waiver of that defense, and a court should not thereafter dismiss a claim on the basis of that defense. Likewise, an allegation of an affirmative defense that contains no factual basis will not support a dismissal supported by that defense.

Illustration 8-2

Jeanette commences a tort action against Curt in connection with an accident that occurred at Curt's place of business. In his answer, Curt alleges that Jeanette assumed the risk of injury, but fails to allege that Jeanette was contributorily negligent. Under Rule 8, Curt's failure to allege contributory negligence in his answer constitutes a waiver of the defense. Therefore, the court cannot dismiss Jeanette's action on the basis that she was contributorily negligent.

Improper Denomination of a Counterclaim or Defense

Subdivision (c)(2) makes clear that a party's mistaken denomination of a defense or counterclaim as the other will not render a pleading insufficient on those grounds. The court must, "if justice requires, treat the pleading as though it were correctly designated," *i.e.*, as if a "counterclaim" specified by a defending party was actually denominated as an "affirmative defense" or vice versa. The court may also "impose terms" for treating a pleading or affirmative defense incorrectly denominated in its correct form, a reference to the consequences of filing a pleading or alleging an affirmative defense under the Rules. For example, the effect of treating an affirmative defense as a counterclaim will be to require the opposing to file a reply under Rule 7.



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8.2 ADDITIONAL AUTHORITY

2 Moore's Federal Practice §§ 8.01 -8.10

James & Hazard, Civil Procedure §§ 2.8, 3.10, 3.11, 3.16, 4.4, 4.5, 4.6

Friedenthal, Civil Procedure §§ 5.7-5.8

Teply & Whitten, Civil Procedure 498-504, 514-518



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8.3 LEADING CASES

Affirmative Defense; Estoppel

Great Southwest Life Ins. Co. v. Frazier, 860 F.2d 896 (9th Cir. 1988) (affirmative defense of estoppel cannot be raised for the first time on appeal).

Affirmative Defense; Factual Basis

DiMella v. Gray Lines of Boston, 836 F.2d 718 (1st Cir. 1988) (affirmative defense must be based upon a factual basis in the pleadings).

Affirmative Defense; Mitigation of Damages

Modern Leasing, Inc. v. Falcon Mfg. of California, Inc., 888 F.2d 59 (8th Cir. 1989) (mitigation of damages, although not listed in Rule 8 as an affirmative defense, is treated as such under circuit precedent and therefore must be alleged in a pleading).

Affirmative Defense; Privilege Against Self-Incrimination

North River Ins. Co. v. Stefanou, 831 F.2d 484 (4th Cir. 1987) (refusal to file an answer based upon a blanket assertion of *Fifth Amendment* privilege against self-incrimination not sufficient to prevent judgment on the pleadings; privilege must be invoked with particularity on the issues giving rise to the privilege).

Affirmative Defense Raised in Summary Judgment Motion

Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993) (affirmative defense not waived where first raised in a summary judgment motion and opposing party has timely notice of the defense).

Affirmative Defense; Res Judicata

Marcus v. Sullivan, 926 F.2d 604 (7th Cir. 1991) (res judicata is an affirmative defense that must be raised in the pleadings; therefore, it cannot serve as the basis for a judgment on the pleadings).

Affirmative Defenses in Diversity Actions

Carroll v. Acme-Cleveland Corp., 955 F.2d 1107 (7th Cir. 1992) (in diversity action, state law determines which defenses must be pleaded affirmatively in an answer; breach of contract defense is affirmative, and general denial insufficient to raise the defense).

Alternate Theories of Recovery

United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981) (plaintiff is not required to choose between alternate theories of recovery).

Antitrust Actions--Heightened Pleading

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (under § 1 of the Sherman Act, only restraints of trade caused by an agreement of some kind is prohibited--in many cases, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement; accordingly, a complaint alleging a Sherman Act violation must contain enough factual matter to raise a reasonable expectation that discovery will reveal evidence of illegal agreement to suggest that an agreement was made--an allegation of parallel conduct and a bare assertion of conspiracy will not be sufficient).

Conclusory Allegations Insufficient

Perkins v. Silverstein, 939 F.2d 463 (7th Cir. 1991) (Title VII complaint insufficient where it recited only the language of the statute and conclusory allegations of harassment without identifying specific facts that would give rise to a claim).

Condition Precedent to Suit; Statute of Limitations

Youren v. Tintic Sch. Dist., 343 F.3d 1296 (10th Cir. 2003) (where state law provides that a party's derivative right not to suffer adverse action for reporting a legal violation is not predicated on the commencement of an action within the applicable statute of limitations period, the statute of limitations defense is a classic affirmative defense which is waivable and not a "condition precedent" to suit).

Contributory Negligence Not Pleaded

Marino v. Otis Eng'g Corp., 839 F.2d 1404 (10th Cir. 1988) (contributory negligence may be raised to rebut a prima facie case of negligence at trial, even though it is not pleaded as an affirmative defense).

Counterclaim Denominated as Affirmative Defense

Reiter v. Cooper, 507 U.S. 258, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993) (counterclaim improperly denominated as an affirmative defense nevertheless treated as a counterclaim under Rule 8(c)).

Defamation Under State Law--No Special Pleading Required

Muzikowski v. Paramount Pictures Corp., 322 F.3d 918 (7th Cir. 2003) (because state law governing defamation

claims based on publications that do not literally name plaintiff do not apply in federal court, individual's claim for defamation per se did not fall under special pleading standards of Rule 9).

Determination of Citizenship for Diversity Jurisdiction

Kerney v. Fort Griffin Fandangle Ass'n, 624 F.2d 717 (5th Cir. 1980) (allegation of the residences of the parties insufficient to determine citizenship of parties for purposes of ascertaining diversity jurisdiction).

Employment Discrimination--No Heightened Pleading

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (complaints in employment discrimination actions are not subject to a heightened pleading standard).

Exhaustion of Administrative Remedies Affirmative Defense

Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007) (a failure to exhaust administrative remedies is an affirmative defense under the Prison Litigation Reform Act of 1995 (PLRA), and, as such, is not subject to pleading requirements beyond those required of other affirmative defenses; in other words, parties are not required to specially plead or demonstrate exhaustion of remedies in their complaints, and the dismissal of a complaint for failure to do so is inappropriate).

Failure to Plead Affirmative Defense Not Fatal

Williams v. Ashland Eng'g Co., 45 F.3d 588 (1st Cir. 1995) (affirmative defense not pleaded is not waived where the party learns of the defense outside the pleadings and the opposing party has timely notice of the defense).

Federal Question Jurisdiction

Oneida Indian Nation of N.Y. State v. County of Oneida, N.Y., 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) (allegation of federal question jurisdiction must be supported by well-pleaded claim).

General Denials

Stringfellow v. Perry, 869 F.2d 1140 (8th Cir. 1989) (general denial in an answer is sufficient to refute all the claims made by the plaintiff).

Habeas Corpus--Forfeiture Rule for Defenses Not Necessarily Applicable

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (the rule that a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment does not necessarily apply in habeas corpus cases; instead, the trial court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition).

Improper Form of Complaint Not Fatal

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981) (if a complaint states the facts upon which a claim can be founded, the form of the complaint should not preclude a plaintiff from having his claim heard at trial).

Insufficient Complaint

Northern States Power Co. v. Federal Transit Admin., 358 F.3d 1050 (8th Cir. 2004) (even the liberal pleading standard of Rule 8(a) was not met where there was nothing alleged in a complaint notifying defendants of the plaintiff's claim that state regulations were unreasonable under statutory law).

Likelihood of Recovery Not Considered for Pleading Sufficiency

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (Rule 8 establishes a pleading standard without regard to whether a claim will succeed on the merits, whether a recovery is very remote and unlikely is not the test in determining whether a complaint is sufficient).

Non-Fraudulent Conduct; Ordinary Notice Pleading

Vess v. Ciba-Geigy Corp., 317 F.3d 1097 (9th Cir. 2003) (allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a) in cases where fraud is not an essential element of a claim).

Notice Pleading Framework

Stokes v. Cross, 327 F.3d 1210 (D.C. Cir. 2003) (Federal Rules of Civil Procedure do not require a party to set out in detail the facts upon which the claims in complaint are based; rather, the simplified notice pleading framework created by the Rules relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims).

Notice Requirement

Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005) (because an "artificially inflated purchase price" is not itself a relevant economic loss, and the complaint provides the defendants with no notice of what the relevant economic loss might be, other than an "artificially inflated purchase price," the pleading fails even the basic rules of notice under Rule 8).

"Plausibility" Standard for Fact Pleading

Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (announcing a "plausibility" standard for facts pled in a complaint; a court need not accept as true assertions that are no more than recitals of the elements of a cause of action, supported by mere conclusory statements).

Pleading Requirements Not Governed by Common Law

Hill v. McDonough, 547 U.S. 573 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (the holding in *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004), did not change the traditional pleading requirements for § 1983 actions; pleading requirements in specific cases are governed by the Federal Rules of Civil Procedure and not through common law).

Prior Allegations in Pleadings Admissible in Subsequent Suit

W.V. Realty Inc. v. Northern Ins. Co., 334 F.3d 306 (3d Cir. 2003) (allegations in an earlier action may be introduced by opposing party adversary as evidence in a subsequent action notwithstanding the rule that permits pleadings containing inconsistent factual and legal allegations).

Pro Se Pleadings Construed Liberally

Lewis v. Attorney General of the United States, 878 F.2d 714 (3d Cir. 1989) (pro se prisoner stated a claim involving good-time credits in his supporting brief, not in the complaint itself; Rule 8(f) and liberal construction of pro se pleadings requires that the issue not be waived).

Res Judicata and Waiver

Weaver v. Florida Power & Light Co., 172 F.3d 771 (11th Cir. 1999) (res judicata and waiver are properly raised in a proceeding brought by a party as affirmative defenses, not as independent grounds for relief).

Res Judicata Distinct From Estoppel

Davignon v. Clemmey, 322 F.3d 1 (1st Cir. 2003) (an asserted defense of estoppel in an answer is insufficient to encompass the defenses of res judicata or release based on written settlement of prior action, as the defenses are separate and distinct as indicated by individualized enumeration of defenses in Rule 8(c)).

Res Judicata Must Be Raised as Affirmative Defense

Arizona v. California, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000) (res judicata is an affirmative defense that is ordinarily lost if not raised in a timely manner in the answer).

Right-to-Sue Not Complaint

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) (filing of right-to-sue letter in Title VII action does not constitute a complaint as it did not contain a short and plain statement of the claim as required by Rule 8(a)(2)).

Short and Plain Statement-Claim

United Steelworkers of Am. v. Oregon Steel Mills, Inc., 322 F.3d 1222 (10th Cir. 2003) (a properly stated civil claim under Federal Rules of Civil Procedure consists of a short and plain statement of a claim that provides the defendant with fair notice of what the claim is and the grounds upon which the claim rests).

Specificity Not Required Except Under Rule 9

Kolupa v. Roselle Park Dist., 438 F.3d 713 (7th Cir. 2006) (complaints do need to recite facts and narrate events that correspond to each aspect of the applicable legal rule; only Rule 9 provides grounds for a finding that a complaint is deficient because it lacks specificity).

Specific Content Instructions for Complaint Not Permitted

Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185 (2d Cir. 2008) (it was error for district court to issue specific instructions mandating content and format of pro se plaintiff's putative amended complaint because Rule 8(a)(2) required only short and plain statement of claim showing that pleader was entitled to relief and did not require detailed factual allegations).

Standing Alleged Generally

Alliant Energy Corp. v. Bie, 277 F.3d 916 (7th Cir. 2002) (an allegation of injury, and thus standing, may be alleged generally and is no different from any other matter that may be alleged generally).

Statutory Action Not Required to Be Named Specifically

Alvarez v. Hill, 518 F.3d 1152 (9th Cir. 2008) (because complaint contained factual allegations establishing plausible entitlement to relief under Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), inmate satisfied minimal notice pleading requirements of Rule 8 even though the Act was not specifically mentioned in the complaint).

Supplemental Jurisdiction

Lykins v. Pointer, Inc., 725 F.2d 645 (11th Cir. 1984) (where a district court already has jurisdiction over an action, plaintiff's failure to state reliance on supplemental jurisdiction in its complaint not fatal to exercise of such jurisdiction).

Theory of Case Not Necessary

Williams v. Seniff, 342 F.3d 774 (7th Cir. 2003) (a complaint does not need to identify legal theory, and specification of an incorrect theory is not fatal to the sufficiency of a complaint).

Time Bars Raised in Answer or Pleading

Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (Rules 12(h)(2) and (3) prolong the life of certain defenses, but time bars are not among those provisions; accordingly, those defenses must be raised in an answer or responsive pleading).



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1-9 Federal Civil Procedure Litigation Manual Rule 9. Pleading Special Matters

Rule 9. Pleading Special Matters

Rule 9 reads as follows:

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

* * * * *



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TITLE III. PLEADINGS AND MOTIONS

Chapter 9 Rule 9. Pleading Special Matters

1-9 Federal Civil Procedure Litigation Manual 9.1

9.1 COMMENTARY

Rule 9 contains rules relating to pleading in special circumstances. The circumstances indicated by subdivisions (a) through (g) are self-explanatory, and an exhaustive discussion of the applications of these provisions is beyond the scope of this manual. Practitioners desiring additional guidance on these specific issues or doctrines are advised to consult the relevant bodies of case law or the authorities cited below. In general, the circumstances listed in the Rule will be regarded as exclusive, carrying an implication that any other matter or circumstances not listed in the Rule is not subject to a heightened pleading requirement. For example, complaints brought under the Prison Litigation Reform Act of 1995 (PLRA) need not plead that all administrative remedies have been exhausted, even though the PLRA clearly requires exhaustion. Instead, exhaustion will be regarded as an affirmative defense and must be pleaded in an answer under Rule like all other affirmative defenses. *Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

However, it should be noted that subdivision (g) contemplates damages such as emotional distress and attorneys' fees; these must be requested specifically in the pleadings. In addition, admiralty actions have certain distinctive features that were intended to be preserved by the unification of civil actions and suits in admiralty in 1966. Subdivision (h) addresses some of these peculiar problems.

Interlocutory Appeals in Admiralty Cases

Subdivision (h)(2) was added in 1997 to resolve an ambiguity surrounding the proper interpretation of the phrase "admiralty case" with respect to interlocutory appeals in those cases under 28 U.S.C. § 1292(a)(3). Circuit courts had been split on the issue of whether an interlocutory appeal could be taken on all claims in an action comprising both admiralty claims and non-admiralty claims.

Under the amended version of the Rule, the disposition of any claim may be appealed as an interlocutory order so long as a single admiralty claim is presented in the case and the statutory requirements of Section 1292(a)(3) are satisfied. Such a position was selected by the framers of the amendment because the admiralty and non-admiralty claims will frequently be interdependent or dispositive of the other. If appeal was allowed as to only the admiralty claim, inconsistent obligations among the parties or within the action may result.

By making applicable the provisions of Section 1292(a)(3) to any action in which an admiralty claim is presented, no

inquiry need be made as to whether the admiralty claim independently "determin[es] the rights and liabilities of the parties to admiralty cases," the standard for interlocutory appeals under § 1292(a)(3). If any claim presented in the action, admiralty or not, satisfies this standard, an interlocutory appeal on that claim is permitted.



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TITLE III. PLEADINGS AND MOTIONS

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1-9 Federal Civil Procedure Litigation Manual 9.2

9.2 ADDITIONAL AUTHORITY

2 Moore's Federal Practice §§ 9.01 -9.11

James & Hazard, Civil Procedure §§ 3.14-3.20

Friedenthal, Civil Procedure §§ 5.9, 5.10, 5.16

Teply & Whitten, Civil Procedure 504-509



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9.3 LEADING CASES

Attorneys' Fees

Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983) (attorneys' fees cannot be recovered when they are not specifically requested in a pleading).

Capacity

Howerton v. Designer Homes by Georges, Inc., 950 F.2d 281 (5th Cir. 1992) (if defense of capacity to issue is not raised in the pleadings, it is waived).

Civil Conspiracy Pleaded With Particularity if Object Was Fraud

Wasco Prods. v. Southwall Techs., 435 F.3d 989 (9th Cir. 2006) (a plaintiff must plead, at a minimum, the basic elements of civil conspiracy if the object of conspiracy is fraudulent; heightened pleading requirements apply even if raised only in opposition to a motion for summary judgment).

Conditions Precedent

EEOC v. Klingler Elec. Corp., 636 F.2d 104 (5th Cir. 1981) (conditions precedent may be averred generally in a complaint).

Constitutional Tort Cases--No Heightened Pleading Standard

Miranda v. Clark Co., Nev., 319 F.3d 465 (9th Cir. 2003) (there is no heightened pleading standard in constitutional tort cases, as such a standard is not required under Rule 9).

Corporate Officer Not Adequately Identified

Barrie v. Intervoice-Brite, Inc., 397 F.3d 249 (5th Cir. 2005), vacated, remanded, 2008 U.S. App. LEXIS 286 (5th Cir. 2008) (claim of revenue recognition was properly dismissed because complaint did not adequately identify the corporate officer who improperly recognized revenue from specific transaction).

Court Requirement of Specificity

Boston & Maine Corp. v. Town of Hampton, 987 F.2d 855 (1st Cir. 1993) (court may require more specificity in pleading than does Rule 9).

Defamation Under State Law--No Special Pleading Required

Muzikowski v. Paramount Pictures Corp., 322 F.3d 918 (7th Cir. 2003) (because state law governing defamation claims based on publications that do not literally name plaintiff do not apply in federal court, individual's claim for defamation per se did not fall under special pleading standards of Rule 9).

Emotional Distress

Smith v. De Bartoli, 769 F.2d 451 (7th Cir. 1985) (damages for emotional distress cannot be recovered where they are not included in a pleading).

Evidence Beyond Pleadings

McKee-Berger-Mansueto, Inc. v. Board of Educ., 626 F.2d 559 (7th Cir. 1980) (evidence excluded because it went beyond the contents of the defendant's pleadings).

Exhaustion of Administrative Remedies Affirmative Defense

Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007) (a failure to exhaust administrative remedies is an affirmative defense under the Prison Litigation Reform Act of 1995 (PLRA), and, as such, is not subject to pleading requirements beyond those required of other affirmative defenses; in other words, parties are not required to specially plead or demonstrate exhaustion of remedies in their complaints, and the dismissal of a complaint for failure to do so is inappropriate).

Failure to Allege Fraud With Particularity

Midwest Grinding Co. v. Spitz, 976 F.2d 1016 (7th Cir. 1992) (motion by defendant for summary judgment and dismissal granted because plaintiff failed to state where and when the allegedly fraudulent acts occurred).

False Claims Act Allegation Pled With Particularity

United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375 (5th Cir. 2003) (qui tam relator's claim of fraudulent inducement in violation of False Claims Act (FCA) failed to comply with pleading requirements under Rule 9, as it contained only a one-sentence allegation, devoid of any factual information).

Fraud Stated With Particularity

Stevelman v. Alias Research Inc., 174 F.3d 79 (2d Cir. 1999) (to state a fraud claim with the required particularity under Rule 9, a complaint must: (1) specify the statements that the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent).

Negligence-Based Claims Not Subject to Specificity Requirement

In re Suprema Specialties, Inc. Secs. Litig., 438 F.3d 256 (3d Cir. 2006) (claims that were expressly negligence-based and pled in the complaint distinctly from fraud-based claims, it was error for district court to hold that they sounded in fraud and subject to the heightened pleading requirements of fraud claims).

Non-Fraudulent Conduct; Ordinary Notice Pleading

Vess v. Ciba-Geigy Corp., 317 F.3d 1097 (9th Cir. 2003) (allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a) in cases where fraud is not an essential element of a claim).

Particularity Requirement; Generally

In re Glenfed, Inc., 42 F.3d 1541 (9th Cir. 1994) (en banc) (intent need not be stated with particularity if it may be inferred from the specific facts set forth in the complaint).

Pleading and Proof Requirements Not Synonymous

Ackerman v. Northwestern Mutual Life Ins. Co., 172 F.3d 467 (7th Cir. 1999) (the purpose of the requirement that fraud be pleaded with particularity is simply to force the plaintiff to do more than the usual investigation before filing the complaint, not to give the defendant enough information to prepare his defense; heightened pleading and heightened proof requirements do not move in lockstep with each other, as the heightened pleading of fraud claims is required in all civil cases brought in the federal courts, whereas the applicable state or federal law determines the standard of proving fraud in a particular action).

Pleading Requirements Not Governed by Common Law

Hill v. McDonough, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (the holding in *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004) did not change the traditional pleading requirements for § 1983 actions; pleading requirements in specific cases are governed by the Federal Rules of Civil Procedure and not through common law).

PSLRA Particularity Requirement

Tellabs v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007) (a "strong" inference that the defendant acted with the required fraudulent state of mind--required by PSLRA must be more than merely a plausible or reasonable inference--it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent).

Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003) (Private Securities Litigation Reform Act's (PSLRA) particularity requirement incorporates, at a minimum, pleading standard for fraud actions under Federal Rules of Civil Procedure; accordingly, plaintiff must: (1) specify each statement alleged to have been misleading, *i.e.*, contended to be fraudulent; (2) identify speaker; (3) state when and where statement was made; (4) plead with particularity contents of false representations; (5) plead with particularity what person making the misrepresentation obtained thereby; and (6) explain reason or reasons why statement is misleading, *i.e.*, why statement is fraudulent).

Relationship With Rule 8

Old Time Enters. v. International Coffee Corp., 862 F.2d 1213 (5th Cir. 1989) (Rule 9(b), which provides for

pleading with specificity in certain situations, governs over the general rules of liberal pleading in Rule 8(a)).

Request Made in Pretrial Conference

Crosby v. Old Republic Ins. Co., 978 F.2d 210 (5th Cir. 1992) (failure to specifically request attorneys' fees in a pleading not fatal to award of fees where the request was made during a pretrial conference).

Specificity Not Required Except Under Rule 9

Kolupa v. Roselle Park Dist., 438 F.3d 713 (7th Cir. 2006) (complaints do need to recite facts and narrate events that correspond to each aspect of the applicable legal rule; only Rule 9 provides grounds for a finding that a complaint is deficient because it lacks specificity).

Retaliation Claims Under False Claims Act Not Subject to Fraud Pleading Requirement

Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097 (9th Cir. 2008) (unlike Federal False Claims Act (FCA) violation claim, FCA retaliation claim brought pursuant to 31 U.S.C. § 3730(h) does not require showing of fraud and therefore need not meet heightened pleading requirements of Rule 9(b)).

State-Based Fraud Actions Pled With Particularity

Vess v. Ciba-Geigy Corp., 317 F.3d 1097 (9th Cir. 2003) (the particularity requirement in fraud cases applies to causes of action arising under state law; although the elements of the cause of action will be determined by state law, those elements must be pled with particularity under Rule 9).

Unfair Surprise

Bowles v. Osmose Utils. Servs., 443 F.3d 671 (8th Cir. 2006) (Rule 9(g)'s objective is to guard against unfair surprise).



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TITLE III. PLEADINGS AND MOTIONS

Chapter 10 Rule 10. Form of Pleadings

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§ 10.syn Synopsis to Chapter 10: Rule 10. Form of Pleadings

Scope Rule 10. Form of Pleadings

10.1 COMMENTARY

10.2 ADDITIONAL AUTHORITY

10.3 LEADING CASES



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TITLE III. PLEADINGS AND MOTIONS

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1-10 Federal Civil Procedure Litigation Manual Rule 10. Form of Pleadings

Rule 10. Form of Pleadings

Rule 10 reads as follows:

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence--and each defense other than a denial--must be stated in a separate count or defense.

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

* * * * *



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1-10 Federal Civil Procedure Litigation Manual 10.1

10.1 COMMENTARY

Rule 10 is largely a technical provision that governs the form, as opposed to the content, of the pleadings. Rules 7-9 address various principles applicable to the contents of pleading; these Rules should also be consulted whenever pleadings are being drafted.

Parties Named in Captions

Subdivision (a) mandates that all the parties to an action be named in the complaint, but subsequent pleadings and motions can be titled by reference to the first party on each side. All persons and entities named in the caption are parties to the action, even though additional references to the parties in the pleading may omit one or more of the names included in the caption. However, several courts have held that the failure to name a specific individual in the caption of a pleading does not necessarily render that individual a non-party, as long as the party is sufficiently described in the pleading.

Rule 10(a) does not provide for anonymous plaintiffs or defendants; however, specific exceptions have been allowed where, for example, the plaintiffs' need for privacy outweighs the concerns of disclosure in Rule 10.

Separate Counts

Rule 10(b) anticipates separate counts in the pleadings in two circumstances. First, the Rule requires that claims arising from a single set of circumstances be separated into different counts. Second, the Rule mandates separate counts whenever overlapping claims may arise from distinct transactions or occurrences, if the separation will facilitate the presentation of the claims.

Illustration 10-1

Linda files an action against Williams Construction, the general contractor who supervised the construction of Linda's home. Linda alleges that her gas furnace was installed improperly, and claims that Williams Construction is liable for the cost of repair, either on a breach of warranty theory or a negligence theory. In her complaint, Linda should set forth the breach of warranty and negligence

theories in separate counts.

Illustration 10-2

Assume on the facts of Illustration 10-1 that two of Linda's neighbors join in her action against Williams Construction, each claiming that their furnace was installed improperly. The complaint should list each allegation of improper installation separately, as well as setting forth distinct theories of liability. Thus, the complaint should contain a minimum of six counts (three transactions times two theories of liability).

Exhibits

Finally, subdivision (c) allows for the adoption and incorporation of statements made in any pleading into any part of the same pleading, any other pleading, or any motion. Exhibits to a pleading are considered part of that pleading for all purposes and may also be incorporated by reference into other pleadings and motions.



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10.2 ADDITIONAL AUTHORITY

2 Moore's Federal Practice §§ 10.01 -10.05

Friedenthal, Civil Procedure § 5.13

Teply & Whitten, Civil Procedure 499-500



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10.3 LEADING CASES

Anonymous Plaintiffs

James v. Jacobson, 6 F.3d 233 (4th Cir. 1993) (plaintiffs were allowed to proceed under anonymous names where the need for privacy outweighed the interests of Rule 10(a)).

Anonymous Prosecution

Doe v. United Servs. Life Ins. Co., 123 F.R.D. 437 (S.D.N.Y. 1988) (plaintiff alleging homosexual discrimination was allowed to prosecute the action under a fictitious name).

Broad Description of Numerous Defendants Insufficient

National Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs, 886 F.2d 1240 (10th Cir. 1989) (complaint naming as plaintiffs "all members and subscribers" of the organization insufficient to confer party status on those individuals because they were not named individually in the caption; narrow exception to Rule 10 not applicable).

Defendants Named Individually

Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992) (pro se prisoner's failure to name each defendant individually, per court order, resulted in dismissal of case).

Description of Defendant Sufficient

Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992) (where pro se prisoner provided sufficient description of defendant chief deputy but failed to state his name, it was reversible error to deny a motion to join that defendant).

Exhibits

Venture Assoc. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429 (7th Cir. 1993) (an exhibit to a pleading is considered part of the pleading for all purposes under Rule 10(c)).

Exhibits Not Accepted as Truth

Jones v. City of Cincinnati, 521 F.3d 555 (6th Cir. 2008) (where exhibits were attached to complaint under § 1983 alleging excessive force by police officers, and exhibits contained unilateral statements made by officers that conflicted with allegations in complaint, Rule 10(c) did not require plaintiff to adopt every word within exhibits as true for purposes of pleading; instead, court could treat exhibits as allegation that officers made statements in transcripts).

Fictitious Names Disfavored

Stratton v. City of Boston, 731 F. Supp. 42 (D. Mass. 1989) (the use of fictitious names in a caption is disfavored, though expressly prohibited by Rule 10, because service of process may be difficult to effect).

Opinions of Expert in Attached Affidavit Not Part of Pleading

Financial Acquisition Partners v. Blackwell, 440 F.3d 278 (5th Cir. 2006) (only those of an expert's affidavit attached to a pleading that do not constitute opinions of the expert will be considered part of the pleading under Rule 10).

Legislative Record Incorporated Into Pleading

Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291 (6th Cir. 2008) (district court did not convert Rule 12(c) motion into Rule 56 motion by accepting as evidence of secondary effects listed in legislative record of sexually oriented business ordinance, which defendants attached to their motion for judgment on pleadings because Rule 10(c) provided that as exhibit to pleading, legislative record was part of pleading for all purposes; furthermore, legislative record did not constitute external document because city had incorporated legislative record into its ordinance).

Party Identified in Body of Pleading

Yeseta v. Baima, 837 F.2d 380 (9th Cir. 1988) (party's failure to name a defendant in the caption of the pleading not fatal if the defendant is adequately identified in the body of the pleading).

Party Omitted in Body of Pleading

Jones v. Louisiana, 764 F.2d 1183 (5th Cir. 1985) (if a defendant is named in the caption of the complaint but omitted from a list of all the other defendants in the pleading, the defendant is still a party to the action).

Pseudonyms

Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185 (2d Cir. 2008) (interests of both public and opposing party should be considered when determining whether to grant application to proceed under pseudonym; accordingly, when determining whether plaintiff should be allowed to maintain action under pseudonym, plaintiff's interest in anonymity must be balanced against both public interest in disclosure and any prejudice to defendant).

Qualified Immunity Determination; Exhibits Part of Complaint

Bradford v. Huckabee, 394 F.3d 1012 (8th Cir. 2005) (exhibits are attached to complaint are part of complaint for the purpose of determining qualified immunity on face of complaint).

Separation of Claims

Stone Mountain Game Ranch, Inc. v. Hunt, 746 F.2d 761 (11th Cir. 1984) (dismissal of action upheld where the plaintiff did not separate the legal claims into different counts and confused its allegations of damages in the complaint).



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Chapter 11 Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

1-11 Federal Civil Procedure Litigation Manual 11.syn

§ 11.syn Synopsis to Chapter 11: Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Scope Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

11.1 COMMENTARY

11.2 ADDITIONAL AUTHORITY

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1-11 Federal Civil Procedure Litigation Manual Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Rule 11 reads as follows:

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

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Representations to the Court; Sanctions

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of

1-11 Federal Civil Procedure Litigation Manual Rule 11. Signing Pleadings, Motions, and Other Papers;
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the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

* * * * *



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TITLE III. PLEADINGS AND MOTIONS

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11.1 COMMENTARY

Rule 11 is one of the more controversial Rules of Civil Procedure. It establishes the signature requirements for all pleadings and motions filed in an action and describes the conditions under which the court may impose sanctions on an attorney or a party for certain kinds of abuses of the litigation process, as well as the kinds of sanctions that may be imposed. The Rule has had substantive amendments twice: once in 1983, and 10 years later in 1993. Before 1983, sanctions could be imposed under Rule 11 only upon a showing of bad faith on the part of an attorney or party. The 1983 amendments greatly expanded the Rule and made it much easier and more desirable for attorneys and parties to make motions for Rule 11 sanctions. Due to the overwhelming amount of litigation that flowed from the 1983 amendments, the Rule was modified again in 1993. The 1993 amendments clarify some parts of the Rule and make it less advantageous, at least monetarily, for attorneys to seek Rule 11 sanctions against an opposing party.

Signatures Required

Rule 11 is broken into six parts. Subdivision (a) requires that all documents in a litigation, not just the pleadings, must be signed by an attorney or the parties themselves, if acting *pro se*. Unsigned papers will not be accepted by the clerk, unless the attorney or party corrects the omission promptly. All litigation documents must contain the signing party's address, e-mail address, and telephone number.

When Sanctions May Be Imposed

Subdivision (b) lists the consequences of "presenting" any litigation document to the court. The word "presenting" is intended to include signing, filing, submitting, or later advocating a document before a court. This last application of the term "presenting" was necessary to allow for the imposition of sanctions on parties and attorneys in actions removed to federal court, as the initial pleadings and motions in those actions were originally signed and filed in state court.

Illustration 11-1

Julie, a resident of Ohio, commences a breach of contract action in an Ohio state court against Frances, a resident of North Dakota, for \$90,000 in conjunction with Frances's failure to deliver goods as required by a written contract. After Julie files the complaint, Frances removes the action to federal court. If Julie

continues to advance the claims made in her complaint to the federal court, she is subject to Rule 11 sanctions with regard to those claims.

Effect of Signing

In presenting a pleading or motion before the court, Rule 11(b) provides that the attorney or party implicitly makes four certifications with regard to the pleading or motion. First, the presentation of the pleading or motion certifies that the document is not intended to harass, to cause unnecessary delay or expense, or for any other improper purpose. Second, the attorney or party certifies that the claims, defenses, and other legal issues presented in the paper are supported by existing law, by a "nonfrivolous" extension or reversal of existing law, or by the establishment of new law. This second certification includes any discrete legal issue presented in a litigation paper, so the entire paper need not be frivolous for sanctions to be imposed.

Illustration 11-2

Assume on the facts of Illustration 11-1 that Frances argues that, contrary to case law, a recorded oral agreement should supersede any written contract language in conflict with the oral agreement. Although Frances's argument rests on principles contrary to existing law, Frances should probably not be subject to a Rule 11 sanction because her defense will almost certainly constitute a plea for a "nonfrivolous" reversal of existing law.

Third, the attorney or party certifies that the factual allegations in a paper presented to the court be supported by factual evidence or that further discovery and investigation is likely to uncover such evidence. It is thus imperative that an attorney or party without evidentiary support of all factual allegations or contentions specifically state so in all litigation papers. Finally, an attorney or party who denies factual allegations must have some kind of supporting evidence for the denial or aver that the denial is based upon lack of information concerning the matter. Again, it is imperative that denials without evidentiary support be specifically so stated in all papers presented to the court.

However, it should be noted that subdivisions (b)(3) and (b)(4), which comprise the third and fourth certifications implied in the presentation of a pleading or motion, are not entirely parallel. There is no duty incumbent upon an attorney or party who *denies* a factual allegation to undertake discovery or investigative steps toward supporting that denial as there is upon an attorney or party who *makes* factual allegations without existing supporting evidence.

Illustration 11-3

Aaron sues Betsy for damages caused to his crops when Betsy treated her apple orchard with pesticides and other chemicals, thereby permanently damaging Aaron's adjoining crop fields. In her answer, Betsy claims that she secured Aaron's permission before she treated her orchard with the chemicals. Under Rule 11(b)(3), Betsy must have some factual basis supporting her claim or state that additional investigation will uncover supporting evidence. If, however, Aaron denies Betsy's claim in an admission, claiming that he lacks information on the matter, Aaron is not subject to a duty to investigate additional facts to support his denial.

Sanctions Generally

Subdivision (c) identifies the processes through which the imposition of sanctions may be initiated, and it also contains important limitations on those processes. Rule 11(c)(1) makes clear that sanctions are discretionary with the court, even if the underlying conduct is undisputed. Additionally, the Rule expressly provides that sanctions may be imposed upon the law firm employing a sanctionable attorney. Also, an attorney or party accused of violating Rule 11 must be given notice of the allegation and an opportunity to be heard concerning the alleged infraction. A hearing is not required under

the Rule, and a written explanation by the alleged violator is sufficient.

Illustration 11-4

Attorney Kate represents Michael in a toxic tort action initiated by Sam. An interrogatory served by Sam inquires as to whether Michael has ever been aware of any chemical disposal on Sam's land. Although both Kate and Michael were aware of a pattern of chemical disposal, Kate advises Michael to deny that he had such knowledge. Two months later, Sam discovers documents proving both Kate's and Michael's knowledge of the chemical disposal. After 21 days have elapsed from Sam's service of a motion on Michael and Kate, Rule 11 authorizes the court to impose sanctions. The court may also sanction Kate's law firm if it finds that the conduct was particularly egregious and that sanctions are appropriate. However, the court is not obligated to impose sanctions on anyone.

"Safe Harbor" Provision

Subdivision (c)(2), Rule 11's "safe harbor" provision, is possibly the most controversial product of the 1993 amendments. It provides that the attorney or party has 21 days from the receipt of a Rule 11 motion within which to withdraw the statement or correct the action giving rise to the motion for sanctions. This "waiting period" must elapse before the court is authorized to impose sanctions. The subdivision also provides that a motion for sanctions must be made separately from other motions and must specifically describe the conduct giving rise to the allegation.

Subdivision (c)(3) allows the court to initiate sanctions against an attorney or party *sua sponte*, but the court must allow the alleged violator an opportunity to respond to the allegations, the so-called "show-cause" order. This subdivision contains no analogous "safe harbor" provision, so even a prompt withdrawal of the statement giving rise to the allegation will not prevent the court from imposing sanctions.

Illustration 11-5

Assume on the facts of Illustration 11-4 that the court becomes aware of Kate's misconduct and imposes sanctions upon Kate despite the fact that no motion was made. Under Rule 11, the court must provide Kate with an opportunity to explain her conduct but need not wait for 21 days before imposing sanctions.

Kinds of Sanctions Allowed

Subdivision (c)(4) lists the kinds of sanctions that may be imposed by the court, with the careful limitation that the sanction should be sufficient to deter the violator from future improper conduct and should not be imposed as a penalty. One of the major changes of the 1993 amendments was that monetary sanctions are now to be ordinarily paid to the court, rather than to the party making the motion for sanctions. The moving party may, however, be awarded attorneys' fees and other associated expenses incurred in making the motion. This provision is thus in accord with the deterrence philosophy advocated by the 1993 amendments. Two limitations on the court's monetary sanction power are detailed in subdivision (c)(5).

Finally, if the court decides to impose sanctions on an attorney or party, subdivision (c)(6) requires the court to issue an order that both details the sanctioned conduct and explains the reasons for the particular sanction chosen. The absence of a similar provision requiring the court to issue an order when it refuses to impose sanctions on an attorney or party was a deliberate policy choice by the advisory committee.

Illustration 11-6

Assume on the facts of Illustration 11-4 that the court imposes a monetary sanction upon attorney Kate in

the amount of \$5,000. In its order imposing sanctions, the court must explain its reasons for imposing the sanction as well as specifying the conduct that serves as the predicate for the sanction. However, if the court decides not to impose sanctions for any reason, the order need not contain information other than the denial of the original motion for sanctions. No explanation is necessary.

Discovery Excepted from Rule

Subdivision (d) excepts discovery materials from the operation of Rule 11. The discovery rules contain their own provision for sanctions, Rule 37.

Appeal of Sanctions

Sanctions imposed under Rule 11 are considered interlocutory orders not subject to appeal except through the unusual applicability of 28 *U.S.C.* § 1292(b) to such orders. Even where the sanction has the effect of disqualifying an attorney from the action, the order will not be considered a "final decision" and will be unreviewable until a judgment is entered in the case.



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TITLE III. PLEADINGS AND MOTIONS

Chapter 11 Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

1-11 Federal Civil Procedure Litigation Manual 11.2

11.2 ADDITIONAL AUTHORITY

2 Moore's Federal Practice §§ 11.01 -11.42

James & Hazard, Civil Procedure § 3.11

Friedenthal, Civil Procedure § 5.11

Teply & Whitten, Civil Procedure 538-558



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11.3 LEADING CASES

Attorney's Ability to Pay Not Required to Be Considered Under Rule

Christian v. Mattel, Inc., 286 F.3d 1118 (9th Cir. 2002) (Rule 11 does not mandate that an attorney's ability to pay a monetary sanction be considered in awarding sanctions under that rule).

Delay and Increase Costs; Sanction Awarded

FDIC v. MAXXAM, Inc., 523 F.3d 566 (5th Cir. 2008) (Rule 11(b)(1) sanctions for costs of case were appropriate on grounds that plaintiff Federal Deposit Insurance Corporation (FDIC) improperly pursued case to delay case and increase costs of litigation; there was evidence that FDIC saw litigation and related administrative forum both as discharge of statutory duty and as opportunity to pressure settlement by increasing costs and harassing defendant CEO).

Discovery Violations Not Sanctionable Under Rule 11

Christian v. Mattel, Inc., 286 F.3d 1118 (9th Cir. 2002) (conduct in depositions, discovery meetings of counsel, oral representations at hearings, and behavior in prior proceedings do not fall within the ambit of Rule 11; the Rule is limited to papers signed in violation of the rule).

Education in Civil Procedure Proper Sanction

U.S. Bank Nat'l Ass'n, N.D. v. Sullivan-Moore, 406 F.3d 465 (7th Cir. 2005) (where attorney misconduct resulted in the eviction of an elderly woman without proper service of process, there was nothing excessive or overly burdensome in a court order that the attorneys in the firm attend a 16-hour course in civil procedure).

Excessive Damages Request

Hudson v. Moore Bus. Forms, Inc., 836 F.2d 1156 (9th Cir. 1987) (excessive request for damages is sanctionable under Rule 11).

Failure to Investigate

Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018 (5th Cir. 1994) (attorney could be sanctioned for failing to investigate the legal basis of the suit when the attorney simply asked the party if he had committed fraud).

Frivolous Arguments Not Sanctionable

Hadges v. Yonkers Racing Corp., 48 F.3d 1320 (2d Cir. 1995) (party cannot be sanctioned monetarily for frivolous legal arguments).

Jurisdictional Ruling to Be Made After Sanction Ruling

Gary v. Braddock Cemetery, 517 F.3d 195 (3d Cir. 2008) (district court erred in failing to rule on defense motion for sanctions under Rule 11 prior to dismissing suit for lack of subject-matter jurisdiction; district court should have determined before dismissal whether action was frivolous and whether sanctions were warranted so that single appeal could have been brought).

Lack of Subject-Matter Jurisdiction No Bar to Sanctions

Tropf v. Fidelity Nat'l Title Ins. Co., 289 F.3d 929 (6th Cir. 2002) (a district court may impose Rule 11 sanctions in cases where it is later determined that court lacked subject-matter jurisdiction without impermissibly expanding its Article III judicial authority).

Negligence Alone Not Sanctionable

Maynard v. Nygren, 332 F.3d 462 (7th Cir. 2003) (there is no authority under the Federal Rules of Civil Procedure or under the inherent powers of the district court to sanction attorneys for mere negligence).

Non-Party Motions for Sanctions

Nyer v. Winterthur Int'l, 290 F.3d 456 (1st Cir. 2002) (in general, non-parties may not bring a motion for sanctions pursuant to Rule 11; in limited circumstances, however, a non-party may have standing to move for sanctions).

Notification of Opposing Party of Intent to Seek Sanctions

Hunter v. Earthgrains Co. Bakery, 281 F.3d 144 (4th Cir. 2002) (a party has an obligation to notify its opponent and the court at the earliest possible date of its intention to pursue sanctions against an attorney for failing to conduct an adequate pre-filing inquiry).

Objective "Reasonableness" Standard

Community Elec. Serv., Inc. v. National Elec. Contractors, 869 F.2d 1235 (9th Cir. 1989) (Rule 11's objective standard of reasonableness means that if reasonable practitioners could have disagreed on the legal basis of the argument, sanctions are not appropriate).

Objective Standard for Sanctions

Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991) (Rule 11 sanctions are to be determined under an objective standard of reasonableness against corporate

counsel; Rule 11 did not violate Rules Enabling Act because it acted to preserve the integrity of the judicial system and it did not abridge, enlarge, or modify any substantive right).

Opportunity to Be Heard

Didie v. Howes, 988 F.2d 1097 (11th Cir. 1993) (court may not impose Rule 11 sanctions without providing the party or attorney with an opportunity to be heard).

Post-Trial Motion Not Required for Sanctions Motion

De La Fuente v. DCI Telecomms., Inc., 259 F. Supp. 2d 250 (S.D.N.Y. 2003), *aff'd in part and remanded in part*, 82 Fed. Appx. 723 (2d Cir. 2003) (party not required to make Motion under Rule 59 or any other procedural rule to request sanctions under Rule 11 at conclusion of litigation).

Prerequisites of Sanction Order

Nuwesra v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87 (2d Cir. 1999) (an attorney sanctioned under Rule 11 must first receive: (1) specific notice of the conduct alleged to be sanctionable; (2) the standard by which that conduct will be assessed; (3) and an opportunity to be heard on the matter).

Pre-Sanction Attorneys' Fees Not Includable in Sanction Award

Divane v. Krull Elec. Co., 319 F.3d 307 (7th Cir. 2003) (it was erroneous for district court to include as a sanction attorneys' fees generated before the filing of the sanctionable answer and counterclaim).

PSLRA Costs Issue Distinct From Rules' Costs Issue

Morris v. Wachovia Secs., 448 F.3d 268 (4th Cir. 2006) (even though a Rule 11 violation was present, a factually unsupported allegation in a complaint did not trigger presumption for imposition of fees and costs under Private Securities Litigation Reform Act of 1995 (PSLRA), 15 USC § 78u-4(c)(3)(A)(ii), as the determination under that statute is different from that under Rule 11).

Reasonable Inquiry Into the Facts

Lichtenstein v. Consolidated Servs. Group, Inc., 173 F.3d 17 (1st Cir. 1999) (factors to be considered in determining whether a party breached the duty to conduct reasonable inquiry into the facts and law of the case include: (1) the complexity of the subject matter; (2) the party's familiarity with the subject matter; (3) the time available for the inquiry; and (4) the ease or difficulty of access to the requisite information; when the motion for sanctions is based on the impropriety of the case itself, the court should defer consideration of the motion until the end of the trial to gain a full sense of the case and to avoid unnecessary delay of disposition of the case on the merits).

Relationship to Malicious Prosecution

Cohen v. Lupo, 927 F.2d 363 (8th Cir. 1991) (imposition of Rule 11 sanctions does not operate as res judicata on an action for malicious prosecution on the same action).

Review of Sanctions

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (imposition of sanctions under Rule 11 to be reviewed under an abuse of discretion standard).

Sanctions by Other Courts

Woodard v. STP Corp., 170 F.3d 1043 (11th Cir. 1999) (the use of sanctions as a punishment for bringing a subsequent lawsuit in another court is not appropriate, as the propriety of sanctions is the job of the court hearing the lawsuit).

Sanctions Discretionary

Knipe v. Skinner, 19 F.3d 72 (2d Cir. 1994) (district court is not required to impose Rule 11 sanctions, but has the discretion to do so).

Sanctions on Pro Se Litigants

Segarra v. Messina, 158 F.R.D. 230 (N.D.N.Y. 1994) (pro se plaintiff may be sanctioned for frivolous legal arguments).

Separate Motion Required

Hedges v. Yonkers Racing Corp., 48 F.3d 1320 (2d Cir. 1995) (Rule 11 motion must be separate from any other motion filed).

Signature; Lack of, Cure

De Aza-Paez v. United States, 343 F.3d 552 (1st Cir. 2003) (although a habeas petition was not signed by an inmate or his attorney, there was no question concerning who was filing or what judgment was attacked; accordingly, later copy of same petition cured signature defect of initial petition and should have been considered as having been timely made).

Signature Requirement

Kale v. Obuchowski, 985 F.2d 360 (7th Cir. 1993) (attorney whose name was typewritten on papers filed with the court could not be sanctioned because the papers had not been signed).

Signature Requirement Nonjurisdictional

Wash v. Johnson, 343 F.3d 685 (5th Cir. 2003) (signature requirement under Rule 11 is nonjurisdictional, and violation was cured when non-signing parties submitted signed copies of notice of appeal following notification by court clerk).

Subjective Standard When No Safe Harbor Provided

In re Pennie & Edmonds LLP, 323 F.3d 86 (2d Cir. 2003) (where a court makes a Rule 11 sanction motion sua sponte and denies the lawyer an opportunity to withdraw the challenged document under the "safe harbor" provision, the appropriate mens rea standard is subjective bad faith rather than objective unreasonableness).

Substituted Counsel

Bakker v. Grutman, 942 F.2d 236 (4th Cir. 1991) (after plaintiff's counsel withdrew from the case following removal to federal court, substituted counsel could not be sanctioned under Rule 11 because they had not signed any of the sanctionable papers).

Typed Names Not Sufficient as Signature

Becker v. Montgomery, 532 U.S. 757, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001) (the "signature" requirement in Rule 11 does not permit typed names, but instead indicates a handwritten name or a mark handplaced).

Unopposed Motions

Geller v. Randi, 40 F.3d 1300 (D.C. Cir. 1994) (local rule that provided that any unopposed motion would be deemed to have been conceded applicable to Rule 11 motions).

Withdrawal of Filing Within 21-Day Safe Harbor

Truesdell v. Southern California Permanente Medical Group, 293 F.3d 1146 (9th Cir. 2002) (if a party has not withdrawn the allegedly offending filing after 21 days, the moving party may file a Rule 11 motion with the court).



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TITLE III. PLEADINGS AND MOTIONS

Chapter 12 Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

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§ 12.syn Synopsis to Chapter 12: Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

Scope Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

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Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

Rule 12 reads as follows:

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

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(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

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(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

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(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

* * * * *



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12.1 COMMENTARY

Rule 12 is one of the most important Rules and also one of the most complicated. Much of the confusion and interpretive difficulty surrounding the Rule stems from the fact that the framers of Rule 12 condensed the procedures of several different functions into a single Rule. Unlike Rule 4, which, although perhaps more detailed and unwieldy than Rule 12, nevertheless addresses the singular issue of service of the summons, Rule 12 is best conceptualized as performing no fewer than five distinct functions. The compression of these discrete functions into one Rule accounts for many of the issues discussed in this Chapter.

Overview of Functions of Rule 12

Subdivision (a) is primarily a timing provision; it specifies the time periods and their exceptions within which a party must respond to a pleading.

Subdivision (b), the most familiar part of Rule 12, should be read in conjunction with subdivisions (g) and (h), which together govern how various defenses to an action may be presented, and how they may also be waived.

Subdivision (c) provides for a judgment on the pleadings--a mechanism for resolving an action before trial. Subdivision (d) specifies that a motion ordinarily brought under subdivision (b)(6) or a motion for judgment on the pleadings will be converted to a motion for summary judgment under Rule 56.

Finally, subdivisions (e) and (f) govern the motions that may be brought by a party to correct perceived defects in a pleading. These separate aspects of Rule 12, each delineating a discrete function, are explained in more detail below.

Time Periods Within Which Responsive Pleadings Must Be Made

Rule 12(a) specifies the time periods within which an answer or other mandatory responsive pleading must be served. Subdivision (a)(1)(A)(i) establishes a default time period of 21 days from the receipt of a summons within which a party must answer the original complaint. If a party waives service of the summons under Rule 4(d) within the time periods set forth in that Rule, the period to respond to the complaint with an answer is extended to 60 days from the date that the

request for waiver was sent by the party initiating the suit. If the request for waiver is delivered by first-class mail, as will be the case in most situations, this period will also be extended by 3 days under the provisions of Rule 6(d).

Illustration 12-1

Paula commences a tort action against Dan for personal injuries resulting from an automobile accident. On March 10, Paula mails a copy of the complaint to Dan along with a request for waiver of service of process. If Dan chooses to waive service of process, Dan has until May 12 to answer the original complaint. If, however, Dan refuses to waive service of process and Paula subsequently serves Dan with the summons on March 20, Dan must answer the original complaint no later than April 10.

Similarly, a party has 21 days after being served with a pleading stating a crossclaim within which to respond. In addition, a party has 21 days after being served with an answer stating a counterclaim within which to respond. This period may be extended if the court orders a reply to the counterclaim. An extension of time for a crossclaim or counterclaim pursuant to a timely waiver under Rule 4(d) is inapplicable.

Illustration 12-2

Assume on the facts of Illustration 12-1 that Dan files an answer to Paula's original complaint on April 1. In addition to denying the allegations contained in Paula's complaint, Dan's answer includes a counterclaim for the injuries he suffered in the automobile accident. Paula has until April 22 to file a responsive pleading to Dan's counterclaim. Because no additional process is required in this situation, this period is not subject to the time extension provisions governing responsive pleadings to original complaints.

Response Periods for Officers or Employees of the United States

Rule 12(a) was amended in 2000, and the changes in the Rule should be interpreted in conjunction with contemporaneous amendments to Rule 4(i). Rule 12(a) now differentiates between actions filed against officers or employees of the United States in their official capacities, actions filed against those individuals in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, and actions filed against those individuals not having such a connection.

• Individuals Sued in an Official Capacity

Under subdivision (a)(2), as under former practice, individuals sued in an official capacity have 60 days within which to respond to a complaint. Note that the time period begins to run from the date that the United States attorney is served with the pleading, and not from the date on which the officer received notice of the action by registered or certified mail as required under Rule 4(i)(1)(B).

• Individuals Sued in an Individual Capacity for Acts in Connection with the Performance of Duties

The current version of Rule 12(a) extends the time period to 60 days for responding to a complaint by an individual sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. The advisory committee note indicates that the additional time is needed for the United States to determine whether to provide representation to the defendant officer or employee. Note that the 60 day time period runs from the date the officer or employee is served with the summons and copy of the complaint or the date on which the United States attorney is so served, whichever is later.

Although the advisory committee note is silent on the issue, a determination by the United States that the action does

not meet the "in connection with duties performed on the United States' behalf" and thus refuses to provide representation to the defendant officer or employee, should not shorten the time period within which the individual must respond to the complaint to 21 days under subdivision (a). Because the additional 39 days are provided for the benefit of the United States, the individual officer or employee should not bear the adverse consequences of a delay by the United States in making such a determination.

■ **Individuals Sued in an Individual Capacity for Acts Not in Connection with the Performance of Duties**

Defendant officers or employees of the United States in actions not meeting the "in connection with duties performed on the United States' behalf" standard are subject to the ordinary response time periods of subdivision (a). Accordingly, those defendants have 21 days within which to respond to a complaint, or 60 days if service has been waived.

Alteration of Time Periods

The service of a Rule 12 motion alters, and in most cases extends, the time periods explained above in three circumstances, as set forth in subdivision (a)(4): 1) if the court denies or postpones the Rule 12 motion, the pleading shall be served within 14 days of notice of the court's denial or postponement; and 2) if the court grants a Rule 12(e) motion for a more definite statement, the pleading shall be served within 14 days after the service of the statement ordered by the court. These alterations are inapplicable for motions made outside the ambit of Rule 12; *e.g.*, to respond to a pleading.

Illustration 12-3

Assume on the facts of Illustration 12-1 that Dan, in fact, refuses to waive process and is served with a summons on March 20. On March 24, prior to filing an answer to Paula's original complaint, Dan files a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. If the court schedules a hearing for Monday, June 2 and then denies Dan's motion at the hearing, Dan is required to file an answer to Paula's complaint no later than Monday, June 16. Similarly, if the court notifies the parties at the hearing that Dan's motion will not be ruled upon until trial, Dan must still file an answer to Paula's complaint by June 16. If Dan's motion had been for a more definite statement under Rule 12(e) and the motion had been granted, Dan must await the service of the more definite statement from Paula and file an answer within 14 days after the date of service. Thus, if Paula re-serves her complaint on Monday, July 7, Dan must file an answer by Monday, July 21.

In most cases, alteration of the time period under subdivision (a)(4) will extend the period within which to respond to a pleading, as the party making a Rule 12 motion will not willingly decrease the time within which she is to respond, *i.e.*, she will want to serve the Rule 12 motion as close as possible to the expiration of the time period within which she was originally required to respond. However, in the unusual event that a court denies a Rule 12 motion more than 14 days before the expiration of the original time period, it is uncertain whether the party should be allowed the additional time to respond between the end of the 14-day period under subdivision (a)(4)(A) and the end of the original time period under subdivision (a)(1)-(3). In any event, the court is given discretion in the first clause of subdivision (a)(4) to order a different time period in that rare circumstance.

Illustration 12-4

Assume on the facts of Illustration 12-3 that, instead of scheduling a hearing on the motion, the court immediately denies Dan's Rule 12(b)(6) motion and so notifies the parties on the same day, Monday, March 24. Under Rule 12(a), Dan would have 14 days after notice of the denial of his motion within which to file an answer--April 7. However, Dan's original deadline for filing an answer was 21 days after the date of the service of the summons--April 10. In this instance, the court should grant to Dan the

additional time within which to file an answer.

Defenses in an Action Generally

The second function of Rule 12 is to set forth the manner in which all defenses to an action may be presented. Of course, the familiar litany of defenses in Rule 12(b) is the most salient part of the Rule. This list includes: 1) lack of subject-matter jurisdiction; 2) lack of personal jurisdiction; 3) improper venue; 4) insufficient process; 5) insufficient service of process; 6) failure to state a claim upon which relief can be granted; and 7) failure to join an indispensable party under Rule 19.

Often overlooked, however, is the crucial first part of the sentence listing these defenses. It states, simply, that "*Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.*" (emphases added). The severe consequences of the failure to heed this directive are softened in some instances by the liberal amendment provisions in Rule 15, but the importance of explicitly setting forth all defenses should be evident. In addition, as discussed below, the failure to bring a defense listed in Rule 12(b) within the appropriate time period will sometimes also effect a waiver of those defenses. When a party fails to bring an enumerated defense under Rule 12, this may, at times, be unamendable by Rule 15.

Defenses; How Raised

Subdivision (b) contains several other important provisions. First, the Rule makes clear that the listed defenses are not required to be made by motion; they may, at the option of a party, be raised in a responsive pleading. Second, the Rule states that, if a party chooses to raise any of the defenses by motion, the motion must be made before the next pleading is to be served. If a party fails to raise an enumerated defense by motion or in the responsive pleading to a claim, the defect can be cured only by amending the pleading as a matter of course pursuant to Rule 15(a). However, if the pleading is not amended as a matter of course pursuant to Rule 15(a), *i.e.*, if the court's permission is required to amend the pleading, the pleading may not be amended to include one of the enumerated defenses in Rule 12(b). It is thus crucial to raise the defenses listed in Rule 12(b) either by a motion before responding to the pleading or by raising the defense in the pleading itself.

Illustration 12-5

Eve sues Tim on a claim arising under a Florida statute and serves a summons and copy of the complaint on Tim on July 22. Tim promptly serves an answer, which contains a general denial of all charges, on July 30. Although Eve's service of process upon Tim is insufficient because the summons was left with one of Tim's housekeepers, Tim fails to raise the defense by motion or in his answer to Eve's complaint. To raise the defense, Tim must amend his complaint before August 20. As the court's permission is required to amend Tim's answer after that date, the defense of insufficiency of service of process under Rule 12(b) will no longer be available to Tim in defending the action.

It should be noted that if a party is not required to make a responsive pleading and that party chooses not to make a motion under subdivision (b), the party may still raise any defense at trial, including the ones listed in subdivision (b). This provision ensures that a party cannot waive a defense simply by doing nothing before trial, if that party is, in fact, not required by the Rules to do anything. In essence, subdivisions (b), (g), and (h), read together, require a "triggering" mechanism, either a required pleading or permissive Rule 12 motion, in order for the waiver provisions of those subdivisions to take effect.

Illustration 12-6

If defendant Mark crossclaims against co-defendant Roger, and Roger's answer to Mark's crossclaim

contains a counterclaim, Mark is not technically required to file a responsive pleading. In this situation, Mark should be free to assert any of the defenses listed in Rule 12 at trial.

Joinder of Defenses

Subdivision (b) also specifies that a defense is not waived by being joined with another defense in the same motion or pleading. This point is repeated in subdivision (g)(1) and made apparent by the severe consequences of failing to join together the specified defenses. Although perceived by some scholars as redundant of subdivision (b), the consolidation provision of subdivision (g) actually includes within its scope all the various motions described in Rule 12, whereas the consolidation provision of subdivision (b) includes within its scope only those motions that can be brought under that subdivision. Thus, subdivision (g) indicates that, for example, a motion to strike under Rule 12(f) *can*, and as the waiver provision of subdivision (g) makes clear, must be joined with any other motion brought under Rule 12.

Motions "Then Available to the Party"

Under subdivision (g)(2), a party that makes a Rule 12 motion is not allowed to make another Rule 12 motion "that was available to the party" but omitted from the first motion. In other words, if a party makes a Rule 12(e) motion for a more definite statement and the motion is granted, that party should still be allowed to bring another Rule 12 motion if the failure to bring the second motion was caused by the indefiniteness and lack of clarity in the pleading challenged in the first Rule 12(e) motion. The defense or objection that is the subject of the second motion would not have been "available to the party" at the time that the first motion was made. Notice that a Rule 12(e) motion does not automatically confer permission on the moving party to file another Rule 12 motion; whether a defense or objection is "available to a party" must be determined on a case-by-case basis.

Illustration 12-7

Rebecca commences an action against Andrea, but Andrea is unable to determine the nature of the lawsuit from Rebecca's complaint. Therefore, Andrea makes a Rule 12(e) motion for a more definite statement. The court grants Andrea's motion and orders Rebecca to issue a more definite statement within 14 days of the court's order. After Rebecca provides Andrea with a more definite statement of the nature of the lawsuit, Andrea may believe that Rebecca has now failed to state a claim upon which relief can be granted. Andrea should be allowed to make a second motion under 12(b), as Rebecca's lack of clarity in her original complaint prevented Andrea from consolidating both Rule 12(b) motions.

Consolidation and Waiver of Defenses Generally

The consolidation provisions of subdivision (g) should be read in conjunction with subdivision (h), which makes the waiver implications of failing to consolidate a motion under subdivision (g) explicit. Subdivision (h)(1) specifies that the defenses enumerated in subdivisions (b)(2)-(5) are waived if they are neither included in a Rule 12 motion nor raised in a responsive pleading or an amendment to that pleading under Rule 15(a)(1) as a matter of course. As these defenses involve primarily the personal convenience of the party raising the motion, it is appropriate to require parties to raise those defenses at an early stage of the trial process.

Illustration 12-8

Cindy sues Roger for trespassing on her property, but fails to effect sufficient service of process upon Roger in accordance with Rule 4. Roger makes a Rule 12(b)(3) motion for improper venue, but fails to join with it a Rule 12(b)(5) motion for insufficiency of service of process. Because Roger has not joined

all his Rule 12 defenses available to him at that time in a single motion, he may not thereafter raise the Rule 12(b)(5) defense. If, alternatively, Roger serves an answer to Cindy's complaint and does not include the Rule 12(b)(5) defense in his answer, the defense is lost unless Roger amends his answer within 21 days of its service on Cindy.

Because of the severe repercussions of omitting a defense or objection listed in Rule 12 from another Rule 12 motion or responsive pleading, the list of objections and defenses upon which the waiver and consolidation provisions of Rule 12 will operate should be strictly limited to those enumerated in the Rule. For example, the defense of improper venue must be brought in the same motion as any other Rule 12 defense or objection, but a motion to transfer venue for the convenience of the parties under 28 U.S.C. § 1404 may be the subject of an independent motion. Similarly, a motion for summary judgment under Rule 56 triggers neither the time period alterations of Rule 12(a) nor the waiver and consolidation provisions of subdivisions (g) and (h), though scholars have suggested a contrary result.

Exceptions to Waiver of Defenses

Subdivision (h)(2) specifies that the defenses enumerated in subdivisions (b)(6)-(7), as well as the objection of failure to state a legal defense to a claim (the opposing party's counterpart to a Rule 12(b)(6) motion), are not waived under the circumstances set forth above. Although these defenses may not be raised by an additional motion before responding to the pleading, they may be raised in the responsive pleading itself, in a motion for judgment on the pleadings, or at trial. Because subdivision (h)(2) does not expressly authorize a party to raise one of these defenses in a Rule 56 motion for summary judgment, the careful litigant wishing to raise such a motion should move for judgment on the pleadings under Rule 12(c) and have that motion converted to a summary judgment motion under the provisions of that subdivision. These defenses are waived after the conclusion of the trial, and consequently, a party failing to raise these defenses during the trial stage of an action may not raise them for the first time on appeal. Because these defenses involve interests other than the personal convenience of the parties (*e.g.*, a motion for failure to join a party under Rule 19 involves the interest of the non-joined party) it is appropriate to allow these defenses to be raised at later stages of an action.

Illustration 12-9

Robert commences an action against Hilary, a subcontractor employed to install the electrical system at the warehouse, for damages resulting from a fire at Robert's warehouse. During the course of discovery, Hilary arrives at the conclusion that Sally, an unrelated subcontractor employed to install the heating system at the warehouse, is actually the party responsible for the fire. Although Hilary had not raised a Rule 12(b) motion for failure to join a party under Rule 19 by motion or in a responsive pleading, Hilary may still raise the defense at trial. If, however, Hilary fails to raise the defense prior to the conclusion of the trial, Hilary has effectively waived the defense and cannot raise it for the first time on appeal.

Defense of Lack of Subject-Matter Jurisdiction

Subdivision (h)(3) distinguishes the defense of lack of subject-matter jurisdiction under Rule 12(b)(1) from the other enumerated defenses. First, the issue may be raised at any time, including for the first time on appeal. Second, it is well-established that the issue need not be raised by a motion; the court may raise the issue *sua sponte*. Fourth, if the court finds that it does in fact lack subject-matter jurisdiction, the court is divested of its usual discretion to fashion an appropriate remedy when granting a party's motion. Instead, the Rule states simply that "the court *must* dismiss the action" (emphasis added). As this defense involves interests that are fundamental to the integrity of our federal judicial institutions, a concern echoed in *Federal Rule of Appellate Procedure 1(b)* ("[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law"), it is appropriate that the defense is always available to the court, even if the parties' desires are to the contrary.

The Relationship Between Rule 12 and Rule 56 Generally

The third function of Rule 12 is derived from an analysis of the interplay among subdivision (c) and Rule 56, which governs summary judgment. In order to properly understand this relationship, however, it is first necessary to examine the nature of the motions made pursuant to those Rules.

Nature of a Rule 12(b)(6) Motion

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) is the Rule's analog to the general demurrer under code pleading. A party making a Rule 12(b)(6) motion denies that the allegations in the nonmoving party's pleading are legally sufficient to sustain an actionable claim. In making the determination of legal sufficiency under such a motion, a court will treat the factual allegations, in addition to all reasonable inferences therefrom, of the nonmoving party's pleading as having been admitted.

Illustration 12-10

Nathan commences an action against Kelly, alleging facts A, B, and C in his complaint. Kelly files a 12(b)(6) motion for failure to state a claim upon which relief may be granted, claiming that facts A, B, and C do not support a legally cognizable claim. The court will accept facts A, B, and C as true for purposes of ruling on Kelly's motion. If the court finds that fact D is a necessary element of the cause of action, it should grant Kelly's motion and dismiss the action. Alternatively, the court may grant Nathan leave to amend his pleading to correct the omission.

Nature of a Rule 12(c) Motion

A motion for judgment on the pleadings under Rule 12(c) is similar to one under Rule 12(b)(6), except that a Rule 12(c) motion may be made only after the pleadings have been closed "but early enough not to delay trial." A Rule 12(c) motion also allows a party to deny that the allegations of a party's defensive pleading are legally sufficient to defeat the moving party's claim, the logical converse of a Rule 12(b)(6) motion. In making a determination of legal sufficiency under a Rule 12(c) motion, a court will treat all the nonmoving party's factual allegations as true except for those facts which the nonmoving party has admitted in a pleading. A court may grant a judgment on the pleadings under Rule 12(c) to the nonmoving party when it appears that the nonmoving party is entitled to judgment as a matter of law.

Illustration 12-11

Pedro commences an action against Greg, alleging facts A, B, and C. In his answer, Greg admits facts A, B, and C, but raises an affirmative defense by claiming facts D and E. Pedro files a Rule 12(c) motion for judgment on the pleadings, claiming that facts D and E do not support a legally cognizable affirmative defense. The court will accept facts D and E as true for purposes of ruling on Pedro's motion. As Greg has admitted facts A, B, and C in his answer, the court should grant Pedro's motion for judgment on the pleadings if additional fact F is a necessary element of Greg's affirmative defense. Alternatively, the court may grant Greg leave to amend his pleading to correct the omission.

Although there is little authority that the court can grant a judgment on the pleadings under Rule 12(c) *sua sponte*, it has been fairly well-settled that a court can grant summary judgment for a party *sua sponte* on the appropriate notice.

In addition, a motion for judgment on the pleadings "searches the record." This means that a court will examine the pleadings for their legal sufficiency in the order in which they were made and rule against the first pleading lacking the requisite elemental sufficiency, regardless of who brought the original motion.

Illustration 12-12

Assume on the facts of Illustration 12-11 that fact G is necessary to support Pedro's cause of action, but this fact is omitted in Pedro's original complaint. If Pedro now makes a Rule 12(c) motion for judgment on the pleadings, the court should nonetheless grant judgment for Greg because Pedro's original complaint is legally deficient.

Conversion of Motions Under Rule 12 Into Motions Under Rule 56

As subdivision (d) makes clear, motions made pursuant to Rule 12(c) and Rule 12(b)(6) are automatically converted into motions for summary judgment under Rule 56 if materials outside of the pleadings are used by the court to determine the motion. Under Rule 56, both parties are allowed to present additional materials, such as affidavits or depositions, to support their claims, a prerogative not permitted with Rule 12 motions. In situations where summary judgment is a more appropriate method of disposing of an action than are judgments on the pleadings and Rule 12(b)(6) dismissals, Rule 12(b) and (c) provide for an easy transformation from those motions to one for summary judgment.

Illustration 12-13

Allan commences a breach of contract action against Deborah. After receiving the summons and copy of the complaint from Allan, Deborah makes a Rule 12(b)(6) motion for failure to state a claim upon which relief may be granted and submits a transcript of prior testimony from Allan to support her position. The court should convert Deborah's motion into a motion for summary judgment and allow Allan to present additional materials that he feels would assist the court in ruling on the motion. The court should also make explicit whether the time within which Deborah is required to file a responsive pleading has been tolled by the conversion of the Rule 12 motion into a Rule 56 motion.

Ordinarily, Rule 12(e) motions for a more definite statement and Rule 12(f) motions to strike are ruled upon by the court without a preliminary hearing on the issue. By omitting these motions from those specifically mentioned in subdivision (d), the Rule appears to require this result. Although Rule 12(d) does not specifically authorize a summary judgment on a motion for failure to state a legal defense to a claim (the converse of Rule 12(b)(6) described above), its preservation from waiver in subdivision (h)(2) and categorical inclusion with the 12(b) defenses in that subdivision lend support to the argument that a preliminary hearing on such an issue would be defensible under a liberal construction of the Rules. Additionally, a court may derive the inherent discretion to hold a preliminary hearing on such an issue from the construction of the Rules provided in the final sentence of Rule 1, the authority to order oral argument under Rule 43(c), and the express authorization to regulate practice consistent with the Rules located in Rule 83(b).

Motions for a More Definite Statement and Motions to Strike

Rules 12(e) and (f) specify motions to correct alleged defects in a party's pleading. A Rule 12(e) motion for a more definite statement rarely has application today. As originally drafted, the Rule also permitted bills of particulars. Because of the vast amount of criticism and unnecessary litigation surrounding this provision, it was eliminated in 1948. A pleading that survives a Rule 12(b)(6) objection for failure to state a claim upon which relief can be granted will rarely be so vague or ambiguous such that a Rule 12(e) motion should be granted. Still, a Rule 12(e) motion is appropriate for vague or ambiguous answers, as those pleadings are not subject to Rule 12(b)(6) motions.

Rule 12(f) is the Rules' analog to the motion to expunge in code pleading. It should be used when there is redundant, immaterial, impertinent, or scandalous matter in a pleading. Although a party waives a Rule 12(f) motion in the same manner as the party waives other Rule 12 defenses or objections, the court may strike the material on its own initiative.



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TITLE III. PLEADINGS AND MOTIONS

Chapter 12 Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings;
Consolidating Motions; Waiving Defenses; Pretrial Hearing

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12.2 ADDITIONAL AUTHORITY

2 Moore's Federal Practice §§ 12.01 -12.51

James & Hazard, Civil Procedure §§ 4.2, 4.3

Friedenthal, Civil Procedure §§ 5.20, 5.22-5.24, 14.7

Teply & Whitten, Civil Procedure 509-514, 518-522



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12.3 LEADING CASES

Amendment of Pleading Preferable to Dismissal

Trentacosta v. Frontier Pac. Aircraft Indus., Inc., 813 F.2d 1553 (9th Cir. 1987) (if subject-matter jurisdiction can be plausibly demonstrated under a well-pleaded complaint, the party should be granted leave to amend the complaint rather than an outright dismissal).

Consideration of Documents Not Incorporated Within Pleadings

Watterson v. Page, 987 F.2d 1 (1st Cir. 1993) (although documents that are not incorporated into the pleadings cannot usually be considered in Rule 12 motion without converting the motion to one under Rule 56, if the parties do not dispute the authenticity of the documents, the court may treat them as part of the pleadings and dispose of the matter under Rule 12).

Converted Summary Judgment Motion Made Explicit by Court

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003) (a Rule 12(b)(6) motion to dismiss supported by extraneous materials cannot be regarded as one for summary judgment until the district court acts to convert it by indicating, preferably by explicit ruling, that it will not exclude those materials from its consideration; accordingly, until the district court converts the motion to dismiss into a summary judgment motion, a plaintiff is free to file proper notice of dismissal under Rule 41(a)(1)).

Defense Not Advanced in Timely Fashion

Continental Bank, N.A. v. Meyer, 10 F.3d 1293 (7th Cir. 1993) (defense of lack of personal jurisdiction was deemed to be waived where the defendant, though raising the defense in the answer, took no steps toward advocating the defense until after a trial on the merits).

Diversity Jurisdiction Determined at Commencement of Action

Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004) (where there has been no change in a party in an action, subject-matter jurisdiction based on diversity of citizenship is governed by the citizenship of the parties at the commencement of the action, regardless of when the jurisdictional challenge is brought).

Habeas Corpus--Forfeiture Rule for Defenses Not Necessarily Applicable

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (the rule that a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment does not necessarily apply in habeas corpus cases; instead, the trial court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition)

In Forma Pauperis Dismissal Reviewed De Novo

Farese v. Scherer, 42 F.3d 1223 (11th Cir. 2003) appeal after remand, remanded, 2008 U.S. App. LEXIS 23622 (11th Cir. 2008) (the Court of Appeals reviews a district court's sua sponte dismissal of a prisoner's in forma pauperis action suit for failure to state a claim under a de novo standard and must apply the Rule 12 standard).

Matters Outside Pleading

Salehpoor v. Shahinpoor, 358 F.3d 782 (10th Cir. 2004) (the district court properly treated defendants' separate motions to dismiss on basis of qualified immunity as motions for summary judgment and granted summary judgment based on materials outside pleadings, as neither party argued on appeal that they were not given opportunity to respond to materials).

Carter v. Stanton, 405 U.S. 669, 92 S. Ct. 1232, 31 L. Ed. 2d 569 (1972) (if matters outside the pleadings are presented in support of a Rule 12 motion and they are not excluded by the court, the motion shall be treated as one brought under Rule 56).

More Definite Statement to Avoid Dismissal

Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (under Rule 7(a), the court may order a reply to an answer or may grant a party's motion for a more definite statement under Rule 12(e) insisting that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing a cognizable injury for the purpose of surviving defendant's precovery motion for dismissal or summary judgment).

Motion Determined With Hearing; Standard

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981) (if court holds hearing on Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, plaintiff must establish personal jurisdiction by a preponderance of the evidence).

Motion Determined Without Hearing; Standard

Michigan Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462 (6th Cir. 1989) (if no hearing on Rule 12(b)(2) motion is held, plaintiff need only make a prima facie showing of personal jurisdiction).

Motion Forum Non Conveniens Not a Rule 12 Motion

Catalano v. BRI, Inc., 724 F. Supp. 1580 (E.D. Mich. 1989) (a motion to transfer venue for the convenience of the parties is not one listed in Rule 12(b), and thus it is not waived if not brought at the same time other Rule 12 motions are made).

Motion Not to Be Raised Sua Sponte

Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (Rule 12(b)(6) motion should not be raised sua sponte).

Motion to Dismiss Raised Before End of Trial

Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226 (10th Cir. 1987) (under certain circumstances, a Rule 12 motion to dismiss may be asserted at any time before the end of a trial).

Motion to Strike

Williams v. Jader Fuel Co., 944 F.2d 1388 (7th Cir. 1991) (Rule 12(f) allows the court to consider a motion to strike made after it has been deemed to have been waived; court can consider a motion to strike on its own initiative).

Objection; Improper Venue

Whittington v. Milby, 928 F.2d 188 (6th Cir. 1991) (if defense of improper venue is not raised in a responsive pleading or by motion, it is deemed to have been waived).

Objections to Service of Process

Resolution Trust Corp. v. Starkey, 41 F.3d 1018 (5th Cir. 1995) (Rule 4(m)'s requirement that process be served within 120 days is a defect in service of process, raised by a motion under Rule 12; hence, it is waived if not raised by motion or in a responsive pleading).

Res Judicata Effect

Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976) (a dismissal under Rule 12(b)(6) is a judgment on the merits of the case and has *res judicata* effect).

Rule 12 Motions Waived by Summary Judgment Motion

Misch v. Zee Enters., Inc., 879 F.2d 628 (9th Cir. 1989) (party waives a right to contest the venue of the action by filing a motion for summary judgment).

Special Appearance Not Necessary

County Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477 (6th Cir. 2002) (a special appearance is no longer necessary under Rule 12 to object to a court's exercise of personal jurisdiction; a motion for invalid service of process is the correct form for such a defense).

Time Bars Raised in Answer

Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (Rule 12(h)(2) and (3) prolong the life of

certain defenses, but time bars are not among those provisions; accordingly, those defenses must be raised in an answer or responsive pleading).



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TITLE III. PLEADINGS AND MOTIONS

Chapter 13 Rule 13. Counterclaim and Crossclaim

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§ 13.syn Synopsis to Chapter 13: Rule 13. Counterclaim and Crossclaim

Scope Rule 13. Counterclaim and Crossclaim

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TITLE III. PLEADINGS AND MOTIONS
Chapter 13 Rule 13. Counterclaim and Crossclaim

1-13 Federal Civil Procedure Litigation Manual Rule 13. Counterclaim and Crossclaim

Rule 13. Counterclaim and Crossclaim

Rule 13 reads as follows:

Rule 13. Counterclaim and Crossclaim

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that--at the time of its service--the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim--or to claim a credit--against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated.]

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

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13.1 COMMENTARY

The labyrinth encompassing the joinder of claims and the joinder of parties begins with Rule 13. Rules 13 and 18, relating to the joinder of claims, Rules 19 and 20, relating to the joinder of parties, and Rule 14, governing the joinder of parties and claims through third-party practice, are all interrelated, and a discussion of the complexities of any of these Rules necessarily entails reference to the others.

Briefly, the issue of whether the parties have been properly joined must be analyzed before deciding whether claim-joinder has been proper. In other words, parties must be properly joined under Rule 19 or Rule 20 before counterclaims and crossclaims under Rule 13, third-party claims under Rule 14, and "conditional" claims under Rule 18 may be considered. Subdivision (h) thus links Rule 13 with Rules 19 and 20. Additionally, issues of claim-joinder and party-joinder should not be confused with supplemental jurisdiction, a statutory subject beyond the scope of this manual.

Definition of Counterclaims and crossclaims

Rule 13 governs counterclaims and crossclaims. Briefly, a counterclaim is a claim asserted by a party against an opposing party. Parties may be said to be "opposing" when they are situated in an adversarial posture in an action. A crossclaim, on the other hand, is a claim asserted by a party against a coparty. A coparty is a party with whom the relationship in an action cannot be said to be "opposing." Although it is possible for two parties to be both coparties with respect to one claim in an action and opposing parties with respect to another, it makes sense to refer to the parties only as opposing parties for purposes of determining their rights and options under the Rules, as the rules governing counterclaims are more liberal than those governing crossclaims.

Compulsory Counterclaims Generally

Subdivision (a)(1) states that, if a party files a pleading in an action, all "compulsory" counterclaims a party may have against an opposing party must be asserted against that party. The Rule embodies the principle that all claims that are closely related should be resolved in a single action, avoiding the ineconomies of multiple litigation on the same issues. The Rule goes on to state two exceptions to this rule.

Illustration 13-1

Scott commences a tort action against David for personal injuries suffered in a rollerblading accident. Scott serves upon David a summons and copy of a complaint. David serves a timely answer on Scott. In his answer, David must assert all "compulsory" counterclaims that he may have against Scott at this time or the claims will be lost.

To properly understand the operation of Rule 13, it is helpful to analogize the structure of the Rule with the structure of the hearsay rules under the Federal Rules of Evidence. As with the hearsay rules, Rule 13 presents a definition of the pertinent term, an exception (or, in the case of the hearsay rules, exceptions) to the definition of the term, a mandatory rule employing the term, and exceptions to the rule. Rule 13 also sets forth a precondition for the operation of the rule.

First, a counterclaim does need not to be asserted by a party unless the party files a pleading in the action. Thus, a party who files a Rule 12 motion or motion for summary judgment and files no other paper should not lose the ability to bring an otherwise "compulsory" counterclaim subject to the rule of mandatory assertion as an independent action. In the same way, a party that is the subject of a default judgment is not subject to the rule of mandatory assertion of counterclaims.

Illustration 13-2

Assume on the facts of Illustration 13-1 that, instead of serving an answer, David makes a Rule 12 motion to dismiss for lack of personal jurisdiction. If the court grants David's motion, David is then free to assert any claim he may have against Scott in a different forum.

Second, a "compulsory" counterclaim is defined by the Rule as a claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." This language appears in numerous procedural contexts and has been the subject of many cases. No one test has prevailed as the dominant standard. Some courts hold that a claim and counterclaim arise out of the same transaction or occurrence when they raise the same essential issues of fact and law, while other courts have stated that the appropriate test is whether *res judicata* would bar an independent action if the "compulsory" counterclaim rule did not exist. Still other courts have held that, if the same evidence would be used to either prove or refute the claim or counterclaim, the claim can be said to be "compulsory." Finally, many courts have stated that a counterclaim is "compulsory" if it is logically related to the original claim.

Illustration 13-3

Assume on the facts of Illustration 13-1 that David was also injured in the accident. Any claim for damages because of these injuries must be asserted in David's answer, as they clearly have arisen out of the occurrence that is the subject matter of Scott's claim.

Compulsory and Permissive Counterclaims Distinguished

The term "compulsory" has been placed in quotes because it is crucial to understand that the terms "compulsory" and "permissive," as they are used in the Rule, are legal terms of art that are not *defined* under the Rule according to their ordinary meanings. A "compulsory" counterclaim, despite the ordinary meaning of the word "compulsory," is not defined as a counterclaim that must be asserted by a party. Rather, counterclaims that are deemed as "compulsory" under one of the tests enumerated above are subject to the rule of mandatory assertion in Rule 13.

In the same way, "permissive" counterclaims are those counterclaims that are not "compulsory." "Permissive" counterclaims are, of course, permissive in the sense that a party is not required to assert them, but this fact arises from the word "may" in subdivision (b) and not the ordinary meaning of the word "permissive". This distinction becomes

consequential in the context of crossclaims. Only crossclaims that are "compulsory" may be asserted. Paradoxically, however, crossclaims are always permissive in the sense that they are not required to be asserted.

Illustration 13-4

Under the facts of Illustration 13-3, a counterclaim by David is deemed "compulsory" because of its relationship to the subject matter of the action. Under Rule 13(a), this claim must be asserted. If David has a breach of contract claim against Scott which is unrelated to the accident, the lack of a logical relationship between the claims will cause the breach of contract claim to be regarded as "permissive." Under Rule 13(b), such claims may, but need not be, asserted in the same action.

Counterclaims That Require Indispensable Parties

Rule 13(a)(1)(B) also requires that "compulsory" counterclaims do not "require adding another party over whom the court cannot acquire jurisdiction." The effect of this provision is that counterclaims that require indispensable parties under Rule 19 are not "compulsory" when jurisdiction over these parties cannot be obtained. Notice that Rule 13(a)(1)(B) does not say that "compulsory" counterclaims need not be asserted when jurisdiction over indispensable parties cannot be obtained; it simply says that such counterclaims are not "compulsory."

Illustration 13-5

Under the residuary clause of a will, Frank's Foundation, a struggling charity serving the needs of the poor, stands to receive \$750,000. The Foundation sues Mary, the executrix of the will, to compel her to carry out the terms of the will with all due speed. Mary would like to counterclaim against the Foundation seeking to have the residuary clause declared invalid. James, a beneficiary under the will over whom the court does not have personal jurisdiction and who will not consent to such jurisdiction, stands to gain \$50,000 if the residuary clause is declared invalid. Under these circumstances, Mary's counterclaim against Frank's Foundation is not "compulsory" under Rule 13 and is thus not subject to the rule of mandatory assertion of such claims.

Rule of Mandatory Assertion for Compulsory Counterclaims

Subdivision (a)(1) also sets forth the rule of mandatory assertion. It expressly provides that all "compulsory" counterclaims at the time the claim is served must be asserted by a party, providing that the pleading requirement has been met. A failure to assert a "compulsory" counterclaim will constitute a waiver of those claims, curable only through the amendment provisions in Rule 15.

Illustration 13-6

Larry, a renowned trumpet player, commences a breach of contract action against Max, an equally-renowned trombone player, alleging that Max intentionally sabotaged Larry's trumpet immediately prior to a performance. After receiving a summons and copy of the complaint from Larry, Max files an answer but fails to assert a "compulsory" counterclaim for assault and battery that Larry inflicted on Max upon discovering the sabotage to his trumpet. Max's failure to assert a "compulsory" counterclaim constitutes a waiver of any claim he may have arising from his injuries, unless he amends his pleading as a matter of course under Rule 15 or with the permission of the court under Rule 13(f).

Exceptions to the Rule of Mandatory Assertion

Subdivision (a)(2) goes on to state two exceptions to the rule that all "compulsory" counterclaims must be asserted. The

second exception, which will be addressed here first, applies when jurisdiction in the action is *in rem* or *quasi in rem*, and the defendant chooses not to assert any other counterclaim. In such an instance, a defendant may defend the action without having to assert a "compulsory" counterclaim, and may bring the counterclaim as a subject of an independent action.

Illustration 13-7

Assume on the facts of Illustration 13-6 that Larry alleges that Max stole his trumpet and shipped it to another jurisdiction. If Larry brings an *in rem* action solely to recover his trumpet in the jurisdiction in which the trumpet is located and in which the court cannot assert personal jurisdiction over Max, Max may bring a claim for his injuries in a different forum.

The other exception to the general rule that "compulsory" counterclaims must be asserted is the circumstance in which the "compulsory" counterclaim is the subject of an independent action at the time the claim was filed. Of course, if the counterclaim in the latter action is asserted as a claim in an earlier independent action, the "compulsory" nature of the counterclaim in the latter action would seem to necessitate a finding that the original claim in the latter action was a "compulsory" counterclaim in the earlier action, and as such, subject to the rule of mandatory assertion. However, the fact that it was not asserted as a "compulsory" counterclaim in the earlier action should imply that it was waived, and the latter action should be dismissed.

Illustration 13-8

Lisa sues Heidi for personal injuries suffered in an automobile accident in a Colorado state court. Heidi also suffers personal injuries in the accident. Rather than asserting her "compulsory" counterclaim against Lisa in her answer, Heidi commences an independent action against Lisa in the same court. Under these circumstances, Heidi's failure to assert her "compulsory" counterclaim against Lisa in Lisa's action implies that Heidi has waived any claim stemming from the accident. Accordingly, the court should dismiss Heidi's action against Lisa but may allow Heidi to amend her answer to include the claim.

Nonetheless, there are at least six circumstances in which "compulsory" counterclaims may legally be the subject of an independent action at the time an action is brought, thus excepting such "compulsory" claims from the rule of mandatory assertion. First, if the actions were initiated in district courts in circuits using different "same transaction or occurrence" standards, it is possible that a counterclaim could be deemed "compulsory" within one circuit, and thus subject to the rule of mandatory assertion, while being deemed not "compulsory" in another.

Second, if the earlier action were initiated in a state court that did not have counterclaim rules identical to those in the Federal Rules, the original claim in the latter action may not have been subject to the rule of mandatory assertion.

Third, the court in the earlier action may have been unable to obtain jurisdiction over an indispensable party, whereas the court in the latter action may be able to do so.

Fourth, the party in the earlier action may not have filed a pleading in the action, so that the plaintiff is in the process of securing a default judgment.

Fifth, if jurisdiction in the earlier action was *in rem* or *quasi in rem*, the party defending the action is not required to assert the "compulsory" counterclaim.

Finally, and most obscurely, the original claim in the latter action may not have been subject to the rule of mandatory assertion because it itself was the subject of an independent action pending at the time of the earlier action, perhaps in a state court. A claim will rarely be brought as the subject of two independent actions at the same time in different courts,

but it is possible, though extremely unlikely, that the original claim in the latter action that was also the subject of the pending independent action that prevented it from being asserted as a counterclaim in the earlier action would have terminated between the filings of the earlier action and the latter.

Illustration 13-9

Abel, a resident of Minnesota, files on January 1 a negligence action against Blaine, a resident of North Dakota, in Minnesota court, alleging that Blaine hit him with an ice cream truck (assume that Minnesota's counterclaim rules are identical to those in federal court). Blaine does not answer, but files on January 10 a federal action predicated upon diversity jurisdiction alleging that Abel negligently caused damage to Blaine's ice cream truck by sleeping in the middle of the road. Abel then voluntarily dismisses his Minnesota state court action on January 20 and files the identical action in federal court on January 21. Blaine is not required to assert his compulsory counterclaim against Abel in Minnesota court because he has not filed a pleading in that action. Abel is not required to assert his compulsory counterclaim against Blaine in federal court because it is the subject of an independent action pending at the time Blaine's federal action was filed. Blaine is not required to assert his counterclaim against Abel in federal court because it is also the subject of an independent action pending at the time Abel's federal action was filed. To resolve the situation, the federal court may then order a consolidation of the trials under Rule 42(a).

Permissive Counterclaims Generally

Subdivision (b) covers "permissive" counterclaims, those claims by parties against opposing parties that are not "compulsory" counterclaims. "Permissive" counterclaims are not required to be asserted and cannot be asserted if doing so would destroy the jurisdictional basis of the action. The failure to assert a "permissive" counterclaim does not preclude the possibility of bringing an independent action on that claim. Subdivision (i) permits the court to order separate trials on both "compulsory" and "permissive" counterclaims pursuant to Rule 42(b). Separate judgments must be entered by the court if separate trials are ordered.

Illustration 13-10

Tabitha commences a breach of contract action against Lauren, alleging that Lauren failed to comply with specific lease provisions regarding the maintenance of a building leased to Tabitha. In her answer to Tabitha's claim, Lauren alleges that Tabitha withheld rent in response to Lauren's alleged failure to maintain the property. Lauren is also considering suing Tabitha for unrelated damage to the building which occurred several months earlier. Under these circumstances, Lauren's counterclaim for the unpaid rent, a "compulsory" counterclaim, must be asserted in the same action. However, Lauren's counterclaim for the unrelated damage, a "permissive" counterclaim, may be brought as a separate action. If Lauren chooses to assert the "permissive" counterclaim in the same action and the court feels that a jury may be confused by the discrete issues involved, it may order separate trials. If this occurs, the court must enter separate judgments on each of Lauren's counterclaims.

Crossclaims Generally

Crossclaims are governed by subdivision (g), which is fortunately less complicated than subdivision (a). As stated previously, crossclaims are claims filed by coparties against one another. Coparties are parties who are not in an adversarial posture in the action until, of course, the filing of a crossclaim. Crossclaims differ from counterclaims in several important respects. First, the assertion of all crossclaims is at the discretion of the parties. No party is required to assert a crossclaim, but a party may be required to assert a compulsory counterclaim against a party that asserts a crossclaim against that party.

Illustration 13-11

Aramis, Athos, and Porthos are all injured in a 3-way paintball accident. Porthos files an action against Aramis and Athos for personal injuries suffered in and dry cleaning expenses resulting from the accident. Aramis and Athos must assert their "compulsory" counterclaims against Porthos. However, neither Aramis nor Athos is required to assert a crossclaim against the other even though all the injuries occurred as part of the same occurrence. However, if Aramis chooses to do so, Athos will then be required to assert all claims arising out of the same transaction against Aramis.

Definition of Crossclaim

All crossclaims under Rule 13(g) must "aris[e] out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action." This language replicates in part the language defining a "compulsory" counterclaim in subdivision (a)(1)(A). In this sense, the term "permissive" cannot be used to accurately describe crossclaims, as "permissive" counterclaims are defined in subdivision (b) as those counterclaims "not arising out of the transaction or occurrence that is the subject of the opposing party's claim" (emphasis added). Crossclaims must always satisfy the test used to determine whether a counterclaim is "compulsory." This discrepancy is resolved by recalling the description of the structure of subdivision (a) as analogous to the hearsay rules in the Federal Rules of Evidence. Crossclaims are always "compulsory," as that term is defined in the Rule, but they are not subject to the rule of mandatory assertion in subdivision (a).

Illustration 13-12

Assume on the facts of Illustration 13-11 that Aramis and Athos reach an oral agreement not to pursue crossclaims arising from the accident against one another, opting instead to consolidate their resources defending the action by Porthos. However, Aramis is considering bringing an unrelated breach of contract claim against Athos. Under Rule 13(g), the breach of contract claim cannot be joined as a crossclaim in the action because it is not related to the occurrence giving rise to the original action.

As noted, subdivision (g) indicates that crossclaims are available when the jurisdiction in the action is *in rem* or *quasi in rem*. The second sentence of subdivision (g) is designed to make clear that a party may "join" a third-party pleading under Rule 14 with a crossclaim under Rule 13.

Assertion of Crossclaim Triggers Counterclaim Rules

As noted, a party that is the subject of a crossclaim is subject to the rule of mandatory assertion of "compulsory" counterclaims in subdivision (a). Although coparties are not required to make any claims against one another, even "compulsory" ones, once a crossclaim has been asserted, all "compulsory" counterclaims between the former coparties in the action are then subject to the rule of mandatory assertion.

Furthermore, although a party is not permitted to bring a non-"compulsory" crossclaim against a coparty, the party may nevertheless bring it as a "conditional" claim under Rule 18 if the party also asserts a "compulsory" crossclaim. In other words, an unrelated crossclaim is not allowed unless it can be "joined" with a proper crossclaim.

Illustration 13-13

Assume on the facts of Illustration 13-12 that Aramis breaks his oral agreement with Athos and files a crossclaim claiming damages arising from the accident in question. Aramis may now join in the action his unrelated breach of contract claim against Athos under Rule 18. If this occurs, Athos must join as a "compulsory" counterclaim any claim he may have against Aramis arising out of the contract allegedly

breached.

Recoupment and Set-Off With Counterclaims and Crossclaims

Subdivision (c) incorporates the procedures of recoupment and set-off used by the former courts at common law and courts in equity. Although subdivision (c), by its terms, applies only to counterclaims, there is little reason to suspect that it should not apply to crossclaims as well.

Counterclaims Against the United States

The scope of counterclaims against the United States is delineated by statute. Subdivision (d) reiterates and preserves this fact.

Immature Counterclaims

Subdivision (e) provides that a "permissive" or "compulsory" counterclaim that is immature at the time the pleading giving rise to the counterclaim was filed may be presented as a counterclaim by a supplemental pleading. However, courts have typically required that immature claims be presented in independent actions.

Omitted Counterclaims

Subdivision (f) formerly provided for the amendment of pleadings to assert counterclaims in certain instances. This provision was deleted in 2009 as largely redundant and potentially misleading. Amendments to add counterclaims have always been governed by Rule 15 and the standards set out in that Rule. There is no need for a complementary amendment provision within the text of the counterclaim rule itself.



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TITLE III. PLEADINGS AND MOTIONS

Chapter 13 Rule 13. Counterclaim and Crossclaim

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13.2 ADDITIONAL AUTHORITY

3 Moore's Federal Practice §§ 13.01 -13.124

James & Hazard, Civil Procedure §§ 4.8, 9.9-9.13

Friedenthal, Civil Procedure §§ 2.12, 6.7-6.8, 14.6

Teply & Whitten, Civil Procedure 592-612



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13.3 LEADING CASES

Class Actions; Failure to Raise Set-Off Not Fatal

Allapattah Servs. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003) (in class actions, the appropriate time for defendant to raise affirmative defenses and set-off claims is during the damages phase of action, and a failure to raise claims in its answer did not preclude claims as untimely).

Coparties Defined

Earle M. Jorgenson Co. v. T.I. United States, Ltd., 133 F.R.D. 472 (E.D. Pa. 1991) (a coparty is any party that is not an opposing party; thus, a co-defendant of a third-party plaintiff could assert a crossclaim against a third-party defendant).

Counterclaims Subject to Independent Action

St. Paul Fire & Marine Ins. Co. v. Seafare Corp., 831 F.2d 57 (4th Cir. 1987) (a counterclaim on issues is unnecessary if those issues are the subject of an independent state court action and the defendant refers to that action in its answer).

Crossclaims Not Required

Peterson v. Watt, 666 F.2d 361 (9th Cir. 1982) (where neither of co-defendants asserts a crossclaim, it was error for the court to decide a common issue between them).

Declaratory Judgment Action Not Subject to Counterclaim Rule

Allan Block Corp. v. County Materials Corp., 512 F.3d 912 (7th Cir. 2008) (judgment in favor of patentee in its breach of contract case was not barred based on patentee's failure to bring its claim as counterclaim in declaratory judgment action filed by opposing party because neither doctrine of res judicata nor Rule 13(a) required that claim be

filed in declaratory judgment action).

Delay in Filing Counterclaim

Carroll v. Acme-Cleveland Corp., 955 F.2d 1107 (7th Cir. 1992) (three-year delay in filing a counterclaim not excusable; therefore, the court was within its discretion in refusing to allow a party to assert the counterclaim).

Foreign Action Destroys Compulsory Counterclaim

Canon Latin Am., Inc. v. Lantech (CR), S.A., 508 F.3d 597 (1st Cir. 2007) , cert. denied, -- U.S. --, 171 L. Ed. 2d 889 (2008) (defendant's claim was subject of Costa Rican suit pending at time that plaintiff brought its claims in district court; as such, it was not a compulsory counterclaim).

"Logical Relationship" Between Claims Defined

Transamerica Occidental Life Ins. Co. v. Aviation Office of America, Inc., 292 F.3d 384 (3d Cir. 2002) (a logical relationship between claims exists, for purposes of compulsory counterclaim rule, when separate trials on each of the claims would involve a substantial duplication of effort and time by the parties and the courts; such duplication is likely to occur when claims involve the same factual issues, the same factual and legal issues, or are offshoots of the same basic controversy between the parties).

"Opposing Parties" Defined

Transamerica Occidental Life Ins. Co. v. Aviation Office of America, Inc., 292 F.3d 384 (3d Cir. 2002) (parties are treated as "opposing parties" within the meaning of compulsory counterclaim rule when they are functionally equivalent, an unnamed party has controlled the litigation, or an unnamed party was the alter ego of the named party).

Rule 12 Motion Interposed

Mellon Bank, N.A. v. Ternisky, 999 F.2d 791 (4th Cir. 1993) (a defendant need not assert compulsory counterclaims if a Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted is made before answering the complaint and the motion is granted).

"Same Transaction or Occurrence"

FDIC v. Hulsey, 22 F.3d 1472 (10th Cir. 1994) (because defendant's counterclaims arose from the same transaction or occurrence as the plaintiff's claim, it was error for the court to dismiss those claims).

State Counterclaim Rules Inapplicable

Doelle v. Mountain States Tel. & Tel., 872 F.2d 942 (10th Cir. 1989) (Rule 13 takes precedence over state counterclaim rules where both sets of rules are applicable).



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TITLE III. PLEADINGS AND MOTIONS

Chapter 14 Rule 14. Third-Party Practice

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§ 14.syn Synopsis to Chapter 14: Rule 14. Third-Party Practice

Scope Rule 14. Third-Party Practice

14.1 COMMENTARY

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TITLE III. PLEADINGS AND MOTIONS

Chapter 14 Rule 14. Third-Party Practice

1-14 Federal Civil Procedure Litigation Manual Rule 14. Third-Party Practice

Rule 14. Third-Party Practice

Rule 14 reads as follows:

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) Third-Party Defendant's Claims and Defenses. The person served with the summons and third-party complaint--the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) Plaintiff's Claims Against a Third-Party Defendant. The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) Motion to Strike, Sever, or Try Separately. Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) Third-Party Defendant's Claim Against a Nonparty. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) Third-Party Complaint In Rem. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) Scope of Impleader. If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable--either to the plaintiff or to the third-party plaintiff--for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) Defending Against a Demand for Judgment for the Plaintiff. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule

12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

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TITLE III. PLEADINGS AND MOTIONS

Chapter 14 Rule 14. Third-Party Practice

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14.1 COMMENTARY

The labyrinth encompassing the joinder of claims and the joinder of parties continues with Rule 14. As noted previously, Rules 13 and 18, relating to the joinder of claims, Rules 19 and 20, relating to the joinder of parties, and Rule 14, governing the joinder of parties and claims through third-party practice, are all interrelated, and a discussion of the complexities of any of these Rules necessarily entails reference to the others.

Impleader Generally

Rule 14 covers third-party practice, and is sometimes referred to as "impleader." The Rule allows a party defending an action to join other entities that may be liable to that party for the claim or claims asserted against them. Although this license is initially afforded only to defendants, subdivision (b) makes it clear that plaintiffs are also allowed to implead additional parties, *e.g.*, when a counterclaim has been asserted against them, if a defendant would have been allowed to do so. Defendants who are the subject of crossclaims by other defendants are also allowed to implead third parties.

Illustration 14-1

John and Jake commence a tort action against Wereckum Bus Company for injuries they sustained in an accident with a bus operated by that company. In addition to seeking relief from Wereckum Bus Company, Jake crossclaims against John, alleging that John is responsible for a portion of his injuries as well. John asserts that any liability apportioned to him should be paid by Brakes 'R Us, alleging that the accident was due in part to the negligent repair of his brakes by that Company. John may join Brakes 'R Us as a party to the action by impleading it under Rule 14. If Wereckum Bus Company happens to have had the brakes on its bus repaired by Brakes 'R Us as well, it should also file a claim against that company under Rule 14(a).

Policy of Rule

The policy of Rule 14 is that a party defending a claim to whom an additional party is liable for that claim should not suffer the possibility of inconsistent results if that party is forced to litigate the action against the third party in a separate action.

The Rule also allows a party defending a claim to avoid the inconvenience and expense of litigating the same issue twice. A defendant, of course, cannot force the plaintiff to join the third party as a defendant. Rule 14 provides a defendant with the means to effect substantially the same result. The provisions of Rule 14 are never mandatory, and although the language of the Rule suggests that a party has an absolute right to implead a third party at any time not more than 14 days after serving the answer on the original plaintiff, case law has generally dictated that the ability to join a third party is always within the discretion of the court.

Operation of Rule 14

A party who initiates proceedings under Rule 14 is called a "third-party plaintiff," and the party defending a claim under Rule 14 is called a "third-party defendant." The Rule also allows parties who have been impleaded to further implead an additional party, the "fourth-party defendant," but on its face severs the extension of the Rule there.

Rule 14 states that any person "who is or may be liable to [the third-party plaintiff] for all or part of [the plaintiff's claim] against [the third-party plaintiff]" may be impleaded. This language restricts the scope of Rule 14 to situations involving "domino liability" among parties, and not to those situations involving mistaken defendants. Rule 14 is thus well-suited to indemnification actions, where an insurer is liable to an insured for actions arising under the terms of the insurance policy.

Illustration 14-2

Frederick sues Angelica for injuries suffered during an automobile collision. Angelica cannot implead a third party on the grounds that the third party was actually the person operating the vehicle. However, Angelica may implead the automobile maker on the grounds that, if she is found to be negligent, the brakes negligently manufactured by the automobile maker were actually the cause of the collision.

Process and Pleading Requirements for Impleaded Parties

Impleaded parties are subject to the same service and pleading requirements as defendants, as indicated in subdivision (a)(1). Motions under Rule 12 are available to impleaded parties under subdivision (a)(2)(A), and the time periods for responding to pleadings in Rule 12(a) apply to impleaded parties as well. Impleaded parties are also subject to the rule of mandatory assertion for "compulsory" counterclaims in Rule 13 against third-party plaintiffs, and are allowed to bring "compulsory" crossclaims against other impleaded parties. Impleaded parties may also assert defenses against the original plaintiff for the claim asserted against the original defendant and may also bring "compulsory" claims against the original plaintiff. If this latter event occurs, the plaintiff and the impleaded party are subject to the rule of mandatory assertion for "compulsory" counterclaims in Rule 13 and the provisions for "conditional" claims in Rule 18. However, the Rules do not appear to provide impleaded parties the ability to join additional parties with parties already involved in the action, unless an impleaded "third-party" wishes to implead a "fourth-party."

Admiralty and Maritime Impleader

Subdivision (c) specifies the procedure to be used when a defendant that is the subject of an admiralty or maritime claim desires to implead a third-party on that claim and provide for specific provisions for use when those claims are brought. The provisions of the subdivision contemplate a procedure that is substantially similar to that contemplated in subdivisions (a) and (b).



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14.2 ADDITIONAL AUTHORITY

3 Moore's Federal Practice §§ 14.01 -14.54

James & Hazard, Civil Procedure § 10.18

Friedenthal, Civil Procedure §§ 2.12-2.13, 6.9

Teply & Whitten, Civil Procedure 645-653, 846-848



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14.3 LEADING CASES

Dependent Action Not Subject to Third-Party Complaint

American Zurich Ins. Co. v. Cooper Tire & Rubber Co., 512 F.3d 800 (6th Cir. 2008) (district court did not abuse its discretion in dismissing insured's third-party complaint, as the complaint was derivative of the original action and dependent on its outcome).

Diversity Jurisdiction Not Created With Impleader

Adkins v. Illinois Cent. R.R., 326 F.3d 828 (7th Cir. 2003) (federal party joined as third-party defendant will not preserve federal court jurisdiction because the party was not an originally named defendant).

Government Immunity Precludes Impleader in Tort Action

Hillier v. Southern Towing Co., 714 F.2d 714 (7th Cir. 1983) (tort indemnity can be found only among joint tortfeasors; as the United States was immune from tort liability under the facts of the action, it could not be impleaded by a defendant under a tort indemnity theory).

Independent Jurisdictional Basis in Diversity Actions

Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978) (in a diversity case, an independent jurisdictional basis must exist for a plaintiff who wishes to assert a claim against an already-joined third party under Rule 14).

No Independent Jurisdictional Basis in Federal Question Action

King Fisher Marine Serv. v. 21st Phoenix Corp., 893 F.2d 1155 (10th Cir. 1990) (in a federal question case, if a proper Rule 14 action is brought, then the court does not need an independent basis for jurisdiction for hearing the

impleaded claim).

Theory of Liability Determined by State Law

Tate v. Frey, 735 F.2d 986 (6th Cir. 1984) (the theory of liability that supports the application of Rule 14 is to be determined by state law, even if jurisdiction is predicated upon a federal question).

Time Limitations

First Nat'l Bank v. Duncan Sav. & Loan Ass'n, 957 F.2d 775 (10th Cir. 1992) (defendant was allowed to implead third party seven months after the filing of the complaint).



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1-15 Federal Civil Procedure Litigation Manual Rule 15. Amended and Supplemental Pleadings

Rule 15. Amended and Supplemental Pleadings

Rule 15 reads as follows:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

* * * * *



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TITLE III. PLEADINGS AND MOTIONS
Chapter 15 Rule 15. Amended and Supplemental Pleadings

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15.1 COMMENTARY

Before the Rules were promulgated in 1937, the procedures governing amendments of pleadings were severely restricted. The general rule was that an amendment could not change the cause of action specified in the original pleading, and parties were bound to the legal or factual theories articulated therein. *Rule 15* reflects the liberal policies of the Federal Rules by allowing amendments "when justice so requires." Rule 15 also provides for amendments of pleadings to conform to the evidence presented, another sharp contrast to the practice that existed before the Rules. The most controversial aspect of Rule 15, subdivision (c), sets forth the circumstances under which the date of an amendment of a pleading is treated as if it were made on the date of the original pleading, or the "relation back of amendments."

Amendment as of Right

Subdivision (a)(1) provides all parties with a right to amend their pleadings one time without the permission of the opposing party or the court. The circumstances under which a party may do so changed under a 2009 amendment to the Rule, and the language of the Rule must be parsed carefully to discern how the operation of the Rule will change. First, a party may amend her pleading within 21 days (extended from 20 days under the pre-2009 version of the Rule) after that pleading was served on all the parties. There is no longer a requirement that a trial date not have been fixed on the court's calendar, as this practice is largely anachronistic under modern litigation scheduling. Second, if the pleading is one to which a responsive pleading is required, a party may amend the pleading within 21 days after service of the responsive pleading or within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The pre-2009 version of the Rule distinguished between pleadings to which responsive pleadings were filed and pleadings to which Rule 12 motions were filed; in other words, serving a responsive pleading terminated a party's right to amend her own pleading, but serving a Rule 12 motion did not terminate the right. That distinction no longer exists, so that either the filing of a responsive pleading or a Rule 12 motion will trigger the 21-day period.

Illustration 15-1

On May 1, Beth serves Jeff with a summons and copy of a complaint alleging that Jeff negligently caused property damage to her house while painting the exterior. Jeff files a motion to dismiss under Rule 12(b)(6) on May 10, , arguing that Beth has not alleged facts sufficient to warrant an inference of

causation, a necessary element of the cause of action. Beth may amend her complaint at any time prior to May 31 to include the necessary allegation of facts. If Jeff had instead filed an answer on May 10, Beth would also be permitted to amend her complaint at any time prior to May 31.

A party may not amend the same pleading twice without the permission of the court or the opposing parties, but a party can amend two different pleadings one time each as of right.

Illustration 15-2

Assume on the facts of Illustration 15-1 that Beth now wishes to amend her complaint a second time to include a demand for punitive damages. Absent express permission from the court or the opposing parties, Beth cannot amend her complaint a second time.

When a pleading is amended, the opposing party is required to respond to the amended pleading within 14 days after being served with the amended pleading, unless a longer period remains in the time period within which the opposing party was required to respond to the original pleading.

Illustration 15-3

Assume on the facts of Illustration 15-1 that Beth served the original summons and copy of the complaint upon Jeff on Monday, May 5, but served the amended complaint on Monday, May 19. Jeff must file an answer no later than Monday, June 2.

When Leave to Amend Is Required

If a party has already amended a pleading and wishes to do so again, or if one of the conditions for amendment as of right is not met, then that party must obtain permission of the court or the opposing party under subdivision (a)(2). Typically, permission of the court is sought through a motion under Rule 7(b) with a copy of the amended pleading attached. Although judges have the discretion to deny an amendment when it would prejudice the opposing party, Rule 15 clearly contemplates that motions to amend a pleading should be granted in most circumstances.

Amendments to Conform to the Evidence

Subdivision (b) allows amendments to pleadings to conform to the evidence presented at trial, and leave to make such amendments is freely and routinely given. This provision is applicable at any time during the course of an action, even on appeal. Although courts frequently exclude evidence at trial because it bears upon collateral matters not raised by the pleadings, these exclusions are compelled by the Federal Rules of Evidence, not the Federal Rules of Civil Procedure.

Relation Back of Amendments Generally

Subdivision (c) provides for the relation back of the date of an amended pleading to the date of the original pleading. This provision is applicable primarily when a statute of limitations or the defense of laches is raised by the opposing party. The Rule distinguishes between amendments that alter the claim or defense in a pleading and those that change the parties to an action.

Relation Back of Amendments Changing a Claim or Defense

Subdivision (c)(1) provides that an amendment that changes a claim or defense relates back to the date of the original pleading when the applicable state law provides for relation back of that claim or defense. Additionally, relation back results when the claim or defense sought to be added "arose out of the conduct, transaction, or occurrence set out--or

attempted to be set out--in the original pleading." This test is essentially the same test used to determine the "compulsory" nature of counterclaims in Rule 13. The alternative character of subdivision (c)(1) relating to amendment of claims or defense suggests a two-part test for courts. First, a court should inquire into the applicable state statute of limitations to determine whether relation back would be permitted under state law, as indicated in subdivision (c)(1)(A). If not, the court should examine the claim or defense asserted in the amended pleading to determine if it satisfies the test articulated in subdivision (c)(1)(B).

Relation Back of Amendments Changing a Party

The relation back of amendments that change a party involved in an action is slightly more complicated to ascertain. Because of the controversy and subsequent amendment of what is now set out as subdivision (c)(1)(C), many courts have jumped directly to that subdivision to determine whether such an amendment relates back. However, it is crucial to note that subdivision (c)(1) applies to *all* amendments, not just those that change a claim or defense. Thus, when determining whether an amendment changing a party relates back, courts should employ an analogous two-part test to that described above. First, it should be ascertained whether the applicable state law provides for relation back in such a circumstance. If state law does not provide for relation back, only then should a court look to the test in subdivision (c)(1)(C).

Subdivision (c)(1)(C) provides for relation back of an amendment changing a party in an action if four conditions are satisfied. First, the "same transaction" test of subdivision (c)(1)(B) must be met with regard to the changed parties. Second, the party sought to be added must have been notified of the institution of the action within the 120-day time period specified in Rule 4(m). This provision was added in 1991 to overrule the decision in *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), which held that relation back of an amendment changing a party did not result if the party changed in the pleading is not notified through service of the summons within the applicable statute of limitations period. The Rule now expressly allows for relation back whenever "notice" is received by the party to be brought in by amendment within the 120-day period, not by the date on which the applicable statute of limitations is tolled. Furthermore, the language of the Rule implies that actual service of the summons within the 120-day time period is not required to allow for relation back, and the advisory committee's note confirms that "the notice need not be formal." It is sufficient that the party to be brought in by the amendment receive notice of a possible action against them that will allow them to prepare an adequate defense.

Illustration 15-4

Peter, Paul, and Mary are involved in a collision involving three speed boats. Three days before the statute of limitations expires, Peter commences an action against Mary for personal injuries stemming from the accident, and he promptly serves upon her a summons and copy of the complaint. However, Peter forgets to join Paul as a defendant. One month later, Peter discovers his mistake and makes a motion to add Paul as a defendant, and he notifies Paul of his intention by telephone. Although the statute of limitations has run with regard to Paul, he was notified of the impending action against him within the 120-day period, and the amendment will relate back to the date on which the complaint was originally filed.

The kind of notice that is required under the Rule is closely tied to the third condition, set out in subdivision (c)(1)(C)(i), the requirement that the party to be added will not be prejudiced in maintaining a defense on the merits of the case. Finally, under subdivision (C)(1)(C)(ii), the party to be added must have known or should have known that the action should have been brought against it if it had not been for a mistake in the identity of the parties. These final two conditions are designed to ensure that a party who knows that the plaintiff made a mistake in naming the correct party in the pleading, and stands silently by, cannot take advantage of that mistake through a statute of limitations or laches defense.

Supplemental Pleadings

Subdivision (d) allows for supplemental pleadings. These pleadings are different from amended pleadings in that supplemental pleadings are appropriate only in situations where pertinent occurrences or events have happened after the filing of the original pleading sought to be supplemented.

Illustration 15-5

Situations in which supplemental pleadings would be appropriate include new damages resulting after the filing of the pleading, res judicata stemming from the resolution of an action after the filing of the pleading, and the assertion of a claim previously immature at the time of the original pleading.

Matters of which a party is mistaken or ignorant, however, are properly added through amendment. Supplemental pleadings are within the discretion of the court and must be requested by motion under Rule 7(b) with a copy of the supplemental pleading attached to the motion. Responsive pleadings to supplemental pleadings are not required, but they may be ordered by the court. Opposing parties wishing to respond to supplemental pleadings should make a motion to that effect with the court.

Illustration 15-6

Randy sues Dave for personal injuries resulting from a skydiving accident. In his original complaint, Randy requests compensation for injuries to his neck. Two months later, Randy develops back problems and now wishes to recover damages for injuries to his back. In order to claim damages for his back injury, Randy must make a motion under Rule 7(b), seeking permission to file supplemental pleadings. If the court exercises its discretion and grants Randy's motion, Dave does not need to file a pleading in response to Randy's supplemental papers unless the court directs otherwise.



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15.2 ADDITIONAL AUTHORITY

3 Moore's Federal Practice §§ 15.01 -15.30

James & Hazard, Civil Procedure §§ 3.12, 4.11-4.17

Friedenthal, Civil Procedure §§ 5.26-5.28

Teply & Whitten, Civil Procedure 523-537



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15.3 LEADING CASES

Affirmative Defense Treated as Supplemental Pleading

Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990) (assertion of affirmative defenses that arose after the date of the filing of the pleading should be treated as a motion to file a supplemental pleading under Rule 15(d)).

Amendment After Final Judgment

Penteco Corp. Ltd. Partnership v. Union Gas Sys., Inc., 929 F.2d 1519 (10th Cir. 1991) (amendment of complaint allowed after a final judgment was rendered).

Amendment of Pleading Denied

Carruthers v. BSA Adver., Inc., 357 F.3d 1213 (11th Cir. 2004) (there was no abuse of discretion by the district court in denying a motion to amend an complaint where the motion was filed six months after deadline for amendments to pleadings and two months after deadline for completing discovery, no explanation as to why such amendment was not sought earlier or why the claim was not included in original or first amended complaint, and where granting motion would have further delayed proceedings and prejudiced defendant).

Amendments to Conform With Evidence

Brandon v. Holt, 469 U.S. 464, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985) (Supreme Court ordered district court to allow the plaintiffs to amend their complaint to conform with the evidence).

Delay in Amending Complaint

Executive Leasing Corp. v. Banco Popular de P.R., 48 F.3d 66 (1st Cir. 1995) (motion to amend a complaint properly denied where the delay was inexcusable).

Determination of Consent to Trial on Issue

In re Rivinius, Inc., 977 F.2d 1171 (7th Cir. 1992) (consent to trial of an issue determined by examining whether the opposing party had an opportunity to oppose the issue by presenting additional evidence).

Equitable Considerations Not Relevant to "Relation Back" Issue

Arthur v. Maersk, Inc., 434 F.3d 196 (3d Cir. 2006) (although equitable considerations, such as "undue delay", are relevant to the question under Rule 15(a) whether leave to amend a pleading should be granted, they are not relevant to the question of whether the pleading relates back to the date of the original pleading; the question in the latter case is circumscribed by a determination of the three conditions listed in subdivision (c) (now subdivision (c)(1))).

Failure to Object to Evidence

United States v. SCI, Inc., 828 F.2d 671 (11th Cir. 1987) (a party's failure to object to evidence not raised in the pleadings constitutes implied consent to the evidence, thus requiring an amendment of the pleadings to conform to the evidence).

Fee Applications; Relation-Back Doctrine Applies

Scarborough v. Principi, 541 U.S. 401, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) (the relation-back doctrine in Rule 15(c) applies not only to "pleadings," but to other documents that may commence an action, such as a fee application; accordingly, a timely fee application under statutory law may be amended after the 30-day filing period has run to cure an allegation error).

Habeas Corpus--Forfeiture Rule for Defenses Not Necessarily Applicable

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (the rule that a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment does not necessarily apply in habeas corpus cases; instead, the trial court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition).

Habeas Corpus Petition Does Not Relate Back When New Ground for Relief Asserted

Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) (an amended habeas corpus petition does not relate back to the date of the original petition when it asserts a new ground for relief supported by facts that differ in both time and type from those in the original pleading).

Habeas Petition Amendments Permitted

Grier v. Hood, 46 Fed. Appx. 433 (9th Cir. 2002) (a party may amend a habeas petition to conform to the evidence where new rules are adopted by opposing party since filing of original petition).

Implied Consent to Issues at Trial

Moncrief v. Williston Basin Interstate Pipeline Co., 174 F.3d 1150 (10th Cir. 1999) (there are two prerequisites to amending the pleadings where there is no implied consent to try a new issue: (1) the opposing party must object; and (2) party seeking amendment must move for amendment; court may not sua sponte invoke rule allowing amendment of pleadings where there is no implied consent to try a new issue).

Motion to Amend Denied; Prejudice Shown

Johnson v. Methodist Med. Ctr., 10 F.3d 1300 (7th Cir. 1993) (motion to amend complaint properly denied because an amendment would have prejudiced the opposing party).

No Relation Back; No Notice of Impending Action

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) (filing of complaint in a Title VII action did not relate back to the date of the filing of the right-to-sue letter because it did not provide the defendant with fair notice of the impending action).

Opportunity to Be Heard Required for Added Party

Nelson v. Adams USA, Inc., 529 U.S. 460, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000) (when an amended pleading that adds a party relates back to the date of the original pleading, it is reversible error to deny the added party an opportunity to be heard under the provisions in Rule 15 in response to the amendment).

Prejudice to Party Required to Deny a Motion to Amend

Harrison v. Rubin, 174 F.3d 249 (D.C. Cir. 1999) (a delay in time alone cannot justify a denial of a motion to amend a complaint to clarify its legal basis; prejudice to opposing party must also be shown).

PSLRA Amendments

ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46 (1st Cir. 2008) (Private Securities Litigation Reform Act of 1995 (PSLRA), does not alter liberal amendment policy of Rule 15; text of Act neither purports to affect Rule 15(a), nor does it require that all dismissals be with prejudice).

Relation Back of Amendment Changing a Party; Pre-Amendment

Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986) (relation back of an amendment changing a party does not result if the party changed in the pleading is not notified through service of process within the applicable statute of limitations period; overturned by amendment to Rule 15).

Relation Back of Amendment; Basis for Subject-Matter Jurisdiction

Berkshire Fashions, Inc. v. M.V. Hakusan II, 954 F.2d 874 (3d Cir. 1992) (amendment that sets forth a new basis for subject-matter jurisdiction relates back to the date of the original pleading).

Relation Back of Amendment; Notice Provided

In re Dominguez, 51 F.3d 1502 (9th Cir. 1995) (memo filed in bankruptcy proceeding gave notice of subject of amended declaratory judgment, and therefore related back).

"Same Transaction" Test

Gleason v. McBride, 869 F.2d 688 (2d Cir. 1989) (a claim not satisfying the "same transaction" test of subdivision (c)(2) (now subdivision (c)(1)(B)) did not relate back to the date of original pleading).

Scheduling Order; Amendment of Pleadings Governed by

S&W Enters. v. Southtrust Bank of Ala., 315 F.3d 533 (5th Cir. 2003) (Rule 16(b), not the more liberal provisions of Rule 15(a), governs the amendment of pleadings after a scheduling order deadline has expired, a good cause is required to modify the scheduling order).

Similarity to Rule 41

Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683 (9th Cir. 2005) (Rule 15(a), like Rule 41(a)(2), requires judicial approval after a responsive pleading is filed absent stipulation by opposing party).

State Action Filing Date Not Related to Federal Action

Johnston v. Young, 57 Fed. Appx. 392 (10th Cir. 2003) (complaint in federal court did not relate back to filing date separate state court action against different parties; such an application of the relation back doctrine would have offended accepted principles of federal-state comity).

Supplemental Pleadings; Generally

Gillihan v. Shillinger, 872 F.2d 935 (10th Cir. 1989) (supplemental pleading should have been allowed because it was made seven days after the original complaint, did not prejudice the defendant, stated events occurring after the filing of the complaint).

Undue Delay in Litigation

Otis Clapp & Son v. Filmore Vitamin Co., 754 F.2d 738 (7th Cir. 1985) (denial of motion to file supplemental pleading upheld because it would have unduly delayed the litigation).



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Chapter 16 Rule 16. Pretrial Conferences; Scheduling; Management

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§ 16.syn Synopsis to Chapter 16: Rule 16. Pretrial Conferences; Scheduling; Management

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1-16 Federal Civil Procedure Litigation Manual Rule 16. Pretrial Conferences; Scheduling; Management

Rule 16. Pretrial Conferences; Scheduling; Management

Rule 16 reads as follows:

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

(b) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and (vi) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under *Federal Rule of Evidence 702*;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is

reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

* * * * *



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TITLE III. PLEADINGS AND MOTIONS

Chapter 16 Rule 16. Pretrial Conferences; Scheduling; Management

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16.1 COMMENTARY

Rule 16 sets forth a framework for the mechanics of pretrial practice. It was revised in 1983 to accommodate the complexities of modern litigation and to shift the emphasis of pretrial conferences from trial preparation to overall case management. The 1983 amendments also provide for a greater degree of judicial involvement in pretrial conferences in an effort to keep the focus of cases on settlement or trial rather than becoming weighted down in discovery proceedings or collateral matters.

The Rule is closely tied to the mandatory discovery disclosure provisions of Rule 26, and was amended in 1993 to reflect the changes in that Rule. Rule 16 is sufficiently flexible to allow for a simple pretrial process in ordinary cases, and yet it envisions a series of consecutive pretrial conferences and orders in complex ones.

Objectives of Pretrial Conferences

Subdivision (a) lists the objectives of pretrial conferences, and provides the court with the authority to order such a conference if it feels that a pretrial conference would effectively accomplish some of the goals listed in that subdivision. Settlement of an action was added in 1983 as a proper objective of pretrial conferences. Pretrial conferences are not mandatory under the Rule, but the advisory committee's note recommends a conference for the drafting of the pretrial order under subdivision (b).

Scheduling Orders

Unless exempted by local rule, all cases must have a scheduling order entered by the district judge or, if authorized by local rule, by a magistrate judge. The order must be entered as soon as practicable within 120 days after the complaint has been served on the defendant or within 90 days after the appearance of the defendant, whichever period is shorter (defendants are assured of receiving a copy of the complaint whether or not they waive service of the summons). Subdivision (b)(3)(A) lists the required contents of every scheduling order: the time periods within which the parties may join parties, amend their pleadings, file motions, and complete discovery proceedings. The order may also include items listed in subdivision (b)(3)(B). An amendment to the Rule in 2006 included the inclusion of time limits in the scheduling order relating to the discovery of electronically stored information, if any. Such matters are best handled early in the litigation if such discovery is expected to occur. An additional amendment added to the scheduling order

any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work product protection. The Rule itself does not suggest any particular agreement, and the advisory committee note anticipates flexibility by the parties with many different arrangements agreed to by the parties.

The scheduling order is binding on the parties with respect to the issues mentioned in the order, and, under subdivision (b)(4), the order cannot be changed unless good cause is shown. This standard is not very stringent, however, and modification of scheduling orders should be granted upon a showing of due diligence by the party seeking the modification. Scheduling orders are primarily temporal in nature and should be distinguished from pretrial orders of the kind contemplated in subdivision (e), which address primarily the substantive matters of any pretrial conferences that are held.

Illustration 16-1

Stephon commences a claim for negligent infliction of emotional distress against Jose. Stephon serves the summons and copy of the complaint on Jose on August 10 and Jose serves an answer on August 20. Under these circumstances, a scheduling order must be entered by the trial judge no later than November 8.

Pretrial Conferences

Subdivision (c)(1) insures adequate preconference preparation so that the meeting is more than a ceremonial or ritualistic event. It requires every party to authorize someone attending every pretrial conference to make final decisions concerning all matters that may reasonably be anticipated for discussion at the conference. If ordered by the court, this may include the possibility of settlement, and the Rule allows the court to require that someone be present or "reasonably available by other means" to consider the possibility of settlement. This language is intended to provide for flexibility in ensuring that attorneys authorized to discuss settlement are available, and includes PDA availability as well as more traditional means of communication. Subdivision (c)(2) lists proper subjects for discussion at pretrial conferences. This list of subjects has been expanded significantly since its original promulgation, reflecting the Rule's emphasis on total case management.

Pretrial Orders

Rule 16(d) contemplates formalized minutes of every pretrial conference in the form of a pretrial order. These orders should incorporate the matters discussed and agreed upon at the pretrial conference, and an order that follows the sequence of matters in subdivision (c)(2) is recommended. Unlike scheduling orders under subdivision (b)(3), pretrial orders do not require a showing of good cause to be modified. The Rule contemplates that the pretrial orders will be binding on the course of the action until they are modified at the next pretrial conference. However, the order issuing from a final pretrial conference can be modified "only to prevent manifest injustice," a stringent standard intended by the framers of the Rule to describe the restraint the trial judge should exercise.

Pretrial orders should be interpreted in light of the objectives of pretrial conferences generally. Rule 16 is designed to control the pretrial scheduling and planning process, and to effectively and efficiently allow the parties and their attorneys to conduct fair settlement negotiations and to prepare the parties for trial and frame the issues to be presented there. Parties that violate the terms of a pretrial order are sanctionable under subdivision (f), but pretrial orders should never be used to work prejudice on a party or affect a party's substantive rights.

Final Pretrial Conference

Subdivision (e) states that a final pretrial conference, which in many cases will be the only pretrial conference, should be held as close as possible to the beginning of the trial. The advisory committee's note recommends a time period of 10

days to 2 weeks before trial. A final pretrial conference is not required under the Rule, but may be ordered by the judge.

Sanctions Under Rule 16

Finally, subdivision (f) provides for sanctions on disobedient or recalcitrant parties or their attorneys in the three situations described in the Rule: failure to appear at a scheduling or pretrial conference; substantially unprepared to participate in a conference, or participating in a conference in bad faith; and failing to obey a scheduling or pretrial order. The nonexhaustive list of sanctions available to a judge in Rule 37, which provides for sanctions for violation of discovery proceedings or orders, is cross-referenced in Rule 16(f)(1). This somewhat backward method of listing the kinds of sanctions available was chosen because subdivision (f) was added in 1983, and the advisory committee's note mentions that courts and practitioners should be familiar with the kinds of sanctions available to a judge under Rule 37. Sanctions may be sought by motion of a party or may be imposed by the court sua sponte.



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16.2 ADDITIONAL AUTHORITY

3 Moore's Federal Practice §§ 16.01 -16.94

James & Hazard, Civil Procedure §§ 5.16-5.17

Friedenthal, Civil Procedure §§ 8.1-8.3

Teply & Whitten, Civil Procedure 767-775



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16.3 LEADING CASES

Amendment of Pleadings Governed by Scheduling Order

S&W Enters. v. Southtrust Bank of Ala., 315 F.3d 533 (5th Cir. 2003) (Rule 16(b) (now Rule 16(b)(4)), not the more liberal provisions of Rule 15(a), governs the amendment of pleadings after a scheduling order deadline has expired, a good cause is required to modify the scheduling order).

Arguments Not Included in Pretrial Order

Lurch v. United States, 719 F.2d 333 (10th Cir. 1983) (arguments not included in pretrial order that framed the issues could nonetheless be raised and considered on appeal because the party had previously raised those issues in a brief in opposition to opposing party's summary judgment motion and the one of the matters on appeal was whether the summary judgment motion was properly granted).

Decisionmaker With Authority to Settle Must Be Present

FTC v. Freecom Comms., Inc., 401 F.3d 1192 (10th Cir. 2005) (if the district court believes that a party acts in bad faith in failing to make proper decisionmakers present in settlement discussion, it may impose attorneys' fees as sanctions under Rule 16).

Dismissal for Failure to Attend Pretrial Conferences

Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686 (1st Cir. 1993) (dismissal of action with prejudice for repeated absences from pretrial conferences and excessive disobedience with court's pretrial orders upheld).

Court Modification of Pretrial Order at Trial

Manley v. AmBase Corp., 337 F.3d 237 (2d Cir. 2003) (Rule 16(e) does not prevent a district court from modifying a

pretrial order governing the uses of documentary evidence at trial; although the parties did not reserve any objections to the admissibility of the documents in the pretrial order, the trial court properly gave a limiting instruction).

Dismissal of Action Improper Where Attorney Is at Fault

John v. Louisiana, 828 F.2d 1129 (5th Cir. 1987) (dismissal of prejudice of an action too severe a sanction on a party where the fault lies with the party's attorney, not the party).

Failure to Comply With Scheduling Order

Geiserman v. MacDonald, 893 F.2d 787 (5th Cir. 1990) (plaintiff's untimely designation of an expert witness not allowed because the designation did not comply with pretrial order).

Good Cause Required to Amend Pleadings After Scheduling Deadline Passes

Nourison Rug Corp. v. Parvizian, 535 F.3d 295 (4th Cir. 2008) (given their heavy case loads, district courts require effective case management tools provided by Rule 16; therefore, after deadlines provided by scheduling order have passed, good cause standard must be satisfied to justify leave to amend pleadings).

Modification of Pretrial Orders

In re El Paso Refinery, 171 F.3d 249 (5th Cir. 1999) (trial judge has broad discretion in determining whether or not a pretrial order should be modified or amended).

Pretrial Conference and Order Vital

SNA Nut Co. v. Haagen-Dazs Co., 302 F.3d 725 (7th Cir. 2002) (pretrial conference and pretrial order are vital parts of the procedural scheme created by Rule 16).

Pretrial Order Constitutes Amended Complaint

Syrie v. Knoll Int'l, 748 F.2d 304 (5th Cir. 1984) (error for the district court to exclude evidence on a negligence claim that was not included in the complaint but incorporated into a pretrial order; pretrial order effectively constituted an amended pleading).

Sanctions for Failure to Appear at Mediation Permitted

Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762 (9th Cir. 2001) (sanctions against a party for failure to appear at mediation session were warranted; although the party asserted that the failure to appear was not intentional, the party did not notify other parties beforehand of expected nonappearance).

Sanctions for Violation of Pretrial Order

Ford v. Alfaro, 785 F.2d 835 (9th Cir. 1986) (imposition of sanctions for violation of pretrial order without a hearing was error, but harmless in the absence of prejudice).

Sanctions on Attorneys

In re Baker, 744 F.2d 1438 (10th Cir. 1984) (monetary sanctions on attorneys upheld where they delayed the beginning of a scheduled trial to take a deposition; violation of pretrial order not necessary for the imposition of

sanctions).

Scheduling Order Modification--Factors

Inge v. Rock Fin. Corp., 281 F.3d 613 (6th Cir. 2002) (the primary measure of the good cause standard for modifying the scheduling order is the moving party's diligence in attempting to meet the case management order's requirements; possible prejudice to the party opposing the modification should also be considered).

Scheduling Order Strictly Enforced

Book v. Nordrill, Inc., 826 F.2d 1457 (5th Cir. 1987) (terms of a scheduling order may be strictly enforced against a party).

Settlement Does Not Affect Attorneys' Fees Award

Fleming & Assocs. v. Newby & Tittle, 529 F.3d 631 (5th Cir. 2008) (while district court order under Rule 16(f) awarding compensatory attorneys' fees should be vacated as moot after settlement of underlying litigation, but where district court has reviewed case of misconduct and issued well reasoned sanctions order, appellate court should not allow subsequent settlement to erase that language).

Special Pretrial Procedures Permitted

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989) (Rule 16 provides courts with the authority to adopt special procedures during pretrial conferences for managing complex cases involving multiple defendants).

Stipulations in Pretrial Orders

Canal Ins. Co. v. First Gen. Ins. Co., 889 F.2d 604 (5th Cir. 1989) (defendant could not assert fraud in an insurance policy at a trial where it had stipulated in a pretrial order that the policy was effective at the time of the automobile accident).

Summary Jury Trial Not Mandatory

Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987) (district court cannot require parties to participate in a nonbinding summary jury trial).

Trial of Issue Not Permitted When Not Included in Pretrial Order

Youren v. Tintic Sch. Dist., 343 F.3d 1296 (10th Cir. 2003) (issue omitted from a pretrial order was not preserved for presentation at trial or subject to review on appeal).

Violation of Court Order--Dismissal

Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43 (1st Cir. 2002) (although dismissal without prejudice ordinarily should be employed as a sanction only in the case of extreme misconduct, disobedience of a district court's orders meets such a standard).



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TITLE IV. PARTIES

Chapter 17 Rule 17. Plaintiff and Defendant; Capacity; Public Officers

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§ 17.syn Synopsis to Chapter 17: Rule 17. Plaintiff and Defendant; Capacity; Public Officers

Scope Rule 17. Plaintiff and Defendant; Capacity; Public Officers

17.1 COMMENTARY

17.2 ADDITIONAL AUTHORITY

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1-17 Federal Civil Procedure Litigation Manual Rule 17. Plaintiff and Defendant; Capacity; Public Officers

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

Rule 17 reads as follows:

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) Action in the Name of the United States for Another's Use or Benefit. When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

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17.1 COMMENTARY

The proper litigation of an action depends upon the allegation of a viable claim by the appropriate party against the appropriate party. Rule 12(b)(6) protects against complaints that do not state a sufficient claim upon which relief can be granted; Rule 17 sets forth the rules protecting against the allegation of viable claims brought by or against the incorrect parties.

Real Party in Interest Rule

Subdivision (a) sets forth the real party in interest rule. This rule applies only to plaintiffs and provides that every action must be prosecuted in the name of the person who has an enforceable right under the applicable law. Subdivision (a)(1) clarifies that the following persons may sue in their own names without having to join the person benefitting from the action: an executor; and administrator; a guardian; a bailee; a trustee of an express (but not implied or constructive) trust; a party named in a contract that benefits another person; and a party authorized by statute. It should be noted that Rule 17 does not, by itself, confer any substantive right to sue or be sued; these rights are derived from the law of the state in which the district is located or by federal statute. If the substantive law provides an enforceable right to a party, that party is the real party in interest under Rule 17 and can maintain an action in federal court.

Illustration 17-1

Charles is the sole trustee of the Winthrop Family Trust, and he manages several income-producing assets held in that trust, including shares of stock in the Whiteglove Corporation. Under the terms of the trust, the present beneficiary of any trust income, as well as any distributions of the corpus of the trust, is the oldest surviving member of the Winthrop family, who at present is Hank Winthrop. Charles may commence a shareholder derivative action against Whiteglove Corporation in his name as trustee for the trust, and Hank need not be joined as a plaintiff.

Capacity or Standing Distinguished

The real party in interest rule should be distinguished from rules relating to capacity or standing. Capacity to sue or to be sued is governed by subdivision (b), whereas standing is an element of the case or controversy requirement in Article

III of the Constitution which limits the federal courts' subject-matter jurisdiction. Nonetheless, doctrinal distinctions between the real party in interest rule and the standing requirement are virtually nonexistent, as courts often interpret the two requirements synonymously.

Motions Under Subdivision (a)

Although subdivision (a)(1) appears to list the exceptions to the real party in interest rule, these instances are simply illustrations of the rule, rather than exceptions to them. Thus, as noted above, a party may bring an action for the use or benefit of a person who is not a party if one of the enumerated relationships is present. Although the Rule does not specify the mechanics for a motion under the Rule, a motion made by a defendant under Rule 17(a) is appropriate for challenging the basis of the plaintiff to bring an action in federal court, although a motion under Rule 12(b)(6) should also be regarded as sufficient to raise the issue of whether the plaintiff is the real party in interest. The mandatory language of the Rule also provides the court with the inherent discretion to raise the issue *sua sponte*.

Illustration 17-2

Assume on the facts of Illustration 17-1 that Charles mistakenly files an action against Whiteglove Corporation in Hank's name. Whiteglove may make a motion under Rule 17(a) to challenge Hank's interest in the action and his right to maintain the action. Alternatively, Whiteglove may make a Rule 12(b)(6) motion to challenge Hank's right to bring the action.

When Plaintiff Is Not Real Party in Interest

If it is discovered that the plaintiff is not the real party in interest, subdivision (a)(3) suggests three options for the plaintiff. The plaintiff may join the person or entity in whose name an enforceable right may be maintained. The plaintiff may also withdraw and substitute the appropriate person or entity in the action. The plaintiff may also seek to have the action ratified by the person or entity in whose name the action may have been brought. Ratification may take the form of an affidavit attesting to the prosecution of the action with the knowledge and consent of the person or entity possessing the enforceable right, or by some other means that the court deems proper. The court must allow the plaintiff a reasonable time within which to join, substitute, or seek ratification of the real party in interest. Dismissal of the action is proper only after this opportunity is provided and the plaintiff fails to take any action to rectify the error.

Illustration 17-3

Assume on the facts of Illustration 17-1 that Charles, as trustee of the trust, distributes all stock from Whiteglove Corporation to Hank. Nevertheless, Charles commences a shareholder derivative action against Whiteglove in his name as trustee for the trust. In response, Whiteglove makes a motion under Rule 17(a) and challenges the Charles's right to bring the action. At this point, Charles may proceed in three ways under subdivision (a)(3). First, Charles may join Hank as a party to the action. Charles may also withdraw from the suit and substitute Hank as the appropriate party to bring the action. Finally, Charles may seek to have the action ratified by Hank.

Plaintiffs desiring to join other persons for the purpose of satisfying the real party in interest rule should ensure that the joinder does not destroy complete diversity between the parties. It should also be noted that collusive action to create diversity jurisdiction is prohibited by 28 U.S.C. §§ 1359, 1332(c)(2). However, there is no analogous provision preventing collusive action to destroy diversity jurisdiction.

Capacity to Sue or to Be Sued Generally

Subdivision (b) sets forth the procedure for deciding which rules are to be used in determining whether a party has the

capacity to sue or to be sued. Unlike the real party in interest rule, both plaintiffs and defendants must have the capacity to sue or to be sued.

Capacity is distinct from the real party in interest rule. Although a person or entity may have an enforceable right under the applicable substantive law, that person or entity may be prevented from being a party in federal court because of age, mental defect, or because of some other restriction.

Illustration 17-4

Marty, a five-year old child, was riding in the back seat of his mother's car when the car was struck by a truck driven by Amy. Marty suffered numerous injuries as a result of this accident. Although Marty has an enforceable right against Amy, Marty cannot commence an action against Amy in most jurisdictions because of his age. The action must ordinarily be prosecuted in the name of Marty's guardian or in the name of a court-appointed guardian.

How Capacity Is to Be Determined

Subdivision (b) sets forth five choice of law provisions. Under subdivision (b)(1), the capacity for individuals not acting as a representative for another person determined by the state law in which that individual resides. For corporate entities, under subdivision (b)(2), capacity is determined by the state law in which the entity was incorporated. Subdivision (b)(3)(A) provides that an unincorporated association, such as a partnership or limited liability company, may sue or be sued whenever the law of the state in which the district court is located so provides, or whenever a Constitutional or federal statutory right is the subject of the action. Subdivision (b)(3)(B) states that federal receivers may sue or be sued according to the applicable federal law, 28 U.S.C. §§ 754 and 959(a), governing receivers. In all other cases, the residual choice of law provision in subdivision (b)(3) provides that the capacity to sue or to be sued is determined by the law of the state in which the district court is located.

It should be noted that, in certain rare circumstances, the laws of different states may be applicable for determining whether a plaintiff is a real party in interest and whether the plaintiff has the capacity to sue. For example, if an individual resident of state X brings a diversity action in federal district court located in state Y, the law of state Y will be used to determine whether that individual is the real party in interest, but the law of state X will be used to determine that individual's capacity to sue.

Infant or Incompetent Persons

Subdivision (c) contains special provisions relating to the capacity of infants or incompetent persons to sue or to be sued. The applicable law, as determined under subdivision (b), may render such persons incapacitated to sue or to be sued, and subdivision (c) is triggered only when this occurs. If an infant or incompetent person has one of the legal representatives listed in subdivisions (c)(1)(A)-(D), the representative has the authority both to sue or to be sued on behalf of the infant or incompetent person. If no such representative exists, subdivision (c)(2) provides that an infant or incompetent person may bring an action through a next friend or guardian *ad litem*. If an infant or incompetent person that has no legal representative is sued in federal court, the court may appoint a guardian *ad litem* to defend the person in the action and make other orders to properly protect the interests of the infant or incompetent person.

Actions Against Public Officers

Subdivision (d) provides that a public officer who sues or is sued in an official capacity may be named in the pleadings by their official titles rather than the personal name of the individual holding the office. Although substitution of a newly-elected official or successor to an office is automatic under Rule 25(d), prosecuting or defending the action in an official title may eliminate needless confusion. The court, however, may order that the name of the individual be added

to the pleading.



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17.2 ADDITIONAL AUTHORITY

4 *Moore's Federal Practice* §§ 17.01 -17.28

James & Hazard, Civil Procedure §§ 10.2-10.10

Friedenthal, Civil Procedure § 6.3

Teply & Whitten, Civil Procedure 619-624



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17.3 LEADING CASES

Capacity Determination Under Federal Rules

Gibbs v. Carnival Cruise Lines, 314 F.3d 125 (3d Cir. 2002) (the issue of "capacity" is determined by standards contained within Rule 17, not by state rules governing the appointment of guardians *ad litem*, as the rules are procedural in nature and thus governed by the Federal Rules of Civil Procedure).

Diversity Jurisdiction Not Destroyed by Person Not Named in Action

Lincoln Prop. Co. v. Roche, 546 U.S. 81 (2005) (an entity not named or joined as a defendant cannot be deemed a real party in interest whose presence would destroy diversity; Rule 17 and Rule 19 address the joinder of parties, not federal subject-matter jurisdiction, a point made explicitly in Rule 82).

Guardian Ad Litem; Fee Arrangement

Hoffert v. General Motors Corp., 656 F.2d 161 (5th Cir. 1981) (court that appointed a guardian *ad litem* could make inquiries into the fee arrangement between the guardian and the guardian's attorney).

Guardian ad Litem Not Required to Be Appointed

Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196 (2d Cir. 2003) (district court's failure to sua sponte appoint a guardian ad litem to a pro se plaintiff under Rule 17(c) (now Rule 17(c)(2)) was not improper, as the court is not required to sua sponte conduct an inquiry into an employee's competency).

Habeas Corpus Proceedings

Allen v. Calderon, 408 F.3d 1150 (9th Cir. 2005) (Rule 17 applies in habeas corpus proceedings).

Insureds Real Party in Interest

Allstate Ins. Co. v. Hughes, 346 F.3d 952 (9th Cir. 2003) (under Rule 17, the insureds, not insurer, are the real parties in interest in an insurer's subrogation action for negligence and breach of contract; judgment overturned because diversity jurisdiction did not exist).

Parents of Litigant Acting as Attorney

Osei-Afryie v. Medical College of Pa., 937 F.2d 876 (3d Cir. 1991) (a parent acting as a representative of his children may not proceed *pro se* unless the parent is also an attorney).

Parents Do Not Have Right to Act as Counsel for Children

Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005) (for purposes of Individuals with Disabilities in Education Act (IDEA), parents are not "parties aggrieved" who have a right to bring civil action and represent themselves under the Act; although they may bring an action on their child's behalf, they may not serve as legal counsel for their minor's cause of action).

Partial Insured Claim; Both Insured and Insurer are Parties in Interest

St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73 (2d Cir. 2005) (if part of an insured claim has been paid, both insurer and insured are real parties in interest whose citizenship must be considered in diversity jurisdiction analysis).

Prudential and Jurisdictional Requirements Distinguished

Ensley v. Cody Resources, Inc., 171 F.3d 315 (5th Cir. 1999) (defendant's objection to plaintiff's standing on the basis that the claim belonged to plaintiff's corporation and not to plaintiff personally, was a prudential, and not a jurisdictional, limitation constituting an objection to the real party in interest rule, and was therefore governed by Rule 17).

Ratification

Integon Life Ins. Co. v. Browning, 989 F.2d 1143 (11th Cir. 1993) (real party's in interest affidavit that the plaintiff was acting on its behalf was sufficient to constitute ratification of the action).

"Real Party in Interest" Rule Defined

United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc., 335 U.S. App. D.C. 331, 173 F.3d 870 (D.C. Cir. 1999) (the "real party in interest" rule requires that the action be brought by the person who, according to the governing substantive law, is entitled to enforce the right being asserted).

Reasonable Time Required for Substitution

Jaramillo v. Burkhart, 999 F.2d 1241 (8th Cir. 1993) (court of appeals vacated the dismissal of an action because it could not determine if the district court had provided the plaintiff with a reasonable time within which to join or substitute the real party in interest).

Shareholder Action Barred Because No Personal Injury

Rawoof v. Texor Petroleum Co., 521 F.3d 750 (7th Cir. 2008) (gas station owner was barred by shareholder-standing

rule from pursuing a claim because he lacked direct, personal injury independent of derivative injury of shareholder generally, and had otherwise failed to bring himself within one of recognized exceptions to shareholder-standing rule).

Standing Defined

Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274 (5th Cir. 1999) (to establish standing, a litigant must demonstrate: (1) that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant (2) that the injury fairly can be traced to the challenged action and (3) that the injury is likely to be redressed by a favorable decision).

Standing Generally

Swanson v. Bixler, 750 F.2d 810 (10th Cir. 1984) (a stepson that sued for deprivation of his stepfather's testamentary wishes could not maintain an action in his own name because he had no legally enforceable right in the action).



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TITLE IV. PARTIES

Chapter 18 Rule 18. Joinder of Claims

1-18 Federal Civil Procedure Litigation Manual 18.syn

§ 18.syn Synopsis to Chapter 18: Rule 18. Joinder of Claims

Scope Rule 18. Joinder of Claims

18.1 COMMENTARY

18.2 ADDITIONAL AUTHORITY

18.3 LEADING CASES



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TITLE IV. PARTIES

Chapter 18 Rule 18. Joinder of Claims

1-18 Federal Civil Procedure Litigation Manual Rule 18. Joinder of Claims

Rule 18. Joinder of Claims

Rule 18 reads as follows:

Rule 18. Joinder of Claims

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

* * * * *



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TITLE IV. PARTIES

Chapter 18 Rule 18. Joinder of Claims

1-18 Federal Civil Procedure Litigation Manual 18.1

18.1 COMMENTARY

The labyrinth encompassing the joinder of claims and the joinder of parties continues with Rule 18. As noted previously, Rules 13 and 18, relating to the joinder of claims, Rules 19 and 20, relating to the joinder of parties, and Rule 14, governing the joinder of parties and claims through third-party practice, are all interrelated, and a discussion of the complexities of any of these Rules necessarily entails reference to the others.

Despite the fact that Rule 18 is included within Title IV of the Rules, labeled "Parties," the Rule does not provide for the joinder of additional parties. Instead, parties must be properly joined under Rule 19 or Rule 20 before claims under Rule 18 may be added. Furthermore, a claim must be properly asserted under Rule 3, Rule 13, or Rule 14 before a claim under Rule 18 can be joined. This latter requirement is discussed in more detail below.

It should be noted that Rule 18 is, of course, a rule of procedure only. The federal jurisdictional and venue requirements must still be satisfied. In some circumstances, a federal court may lack an adequate basis for supplemental jurisdiction over a claim even though the claim may be authorized by Rule 18.

"Conditional" Claims Under Rule 18 Generally

Rule 18(a) furthers the liberal joinder philosophy of the Rules by allowing any party already asserting a valid claim to join as many claims as that party has against an opposing party. Although the far-reaching language of the Rule may appear to imply that the other Rules governing joinder of claims, such as Rules 13 and 14, are rendered inconsequential by Rule 18, these other Rules are still necessary for determining whether an initial claim is cognizable. Thus, claims joined under subdivision (a) may be best characterized as "conditional" claims, although this terminology is not employed by the Rule. In other words, Rule 18 is triggered only when a claim is properly asserted under some other Rule. Once an original claim, counterclaim, crossclaim, or third-party claim is properly brought, Rule 18(a) may be used to assert any other claim against an opposing party.

Illustration 18-1

Cynthia commences an action against her neighbor Rose for property damage when Rose's terrier Perky tore up Cynthia's flower garden. Cynthia also has an unrelated breach of contract against Rose involving

a joint business venture. Cynthia wishes to commence one suit against Rose for both of these claims. Under Rule 18, Cynthia may join her breach of contract claim with her property damage claim once the court recognizes that the property claim is cognizable, even though the two claims are unrelated to one another.

"Conditional" claims under Rule 18(a) are optional, and they need not relate to the subject matter of any of the other claims. To avoid needless complication and unnecessary confusion in the action, the court may order a separate trial for "conditional" claims under Rule 42.

Illustration 18-2

Assume on the facts of Illustration 18-1 that the court determines the jury will be confused if both of Cynthia's claims are presented at the same trial. The court may thus order separate trials on the property damage claim and breach of contract claim.

Contingent Claims Allowed

Subdivision (b) expressly allows a party to join contingent claims, or claims that mature upon the successful prosecution of other claims. The second sentence of this subdivision is illustrative only; it provides an example of a claim that is cognizable only upon obtaining a judgment on another claim.



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TITLE IV. PARTIES

Chapter 18 Rule 18. Joinder of Claims

1-18 Federal Civil Procedure Litigation Manual 18.2

18.2 ADDITIONAL AUTHORITY

4 *Moore's Federal Practice* §§ 18.01 -18.23

James & Hazard, Civil Procedure § 9.8

Friedenthal, Civil Procedure § 6.6

Teply & Whitten, Civil Procedure 583-587



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TITLE IV. PARTIES

Chapter 18 Rule 18. Joinder of Claims

1-18 Federal Civil Procedure Litigation Manual 18.3

18.3 LEADING CASES

Separate Claims Required

George v. Smith, 507 F.3d 605 (7th Cir. 2007) (district court erred in failing to separate out prisoner's approximately 50 civil rights claims against 24 different defendants pursuant to Rule 18(a), 20, and to thereafter assess validity of each separate suit).



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TITLE IV. PARTIES

Chapter 19 Rule 19. Required Joinder of Parties

1-19 Federal Civil Procedure Litigation Manual 19.syn

§ 19.syn Synopsis to Chapter 19: Rule 19. Required Joinder of Parties

Scope Rule 19. Required Joinder of Parties

19.1 COMMENTARY

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TITLE IV. PARTIES

Chapter 19 Rule 19. Required Joinder of Parties

1-19 Federal Civil Procedure Litigation Manual Rule 19. Required Joinder of Parties

Rule 19. Required Joinder of Parties

Rule 19 reads as follows:

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) **Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) **Venue.** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

* * * * *



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TITLE IV. PARTIES

Chapter 19 Rule 19. Required Joinder of Parties

1-19 Federal Civil Procedure Litigation Manual 19.1

19.1 COMMENTARY

Rule 19 governs the joinder of persons needed for just adjudication, commonly referred to as "compulsory" joinder. As noted previously, Rules 13 and 18, relating to the joinder of claims, Rules 19 and 20, relating to the joinder of parties, and Rule 14, governing the joinder of parties and claims through third-party practice, are all interrelated, and a discussion of the complexities of any of these Rules necessarily entails reference to the others.

Briefly, the issue of whether the parties have been properly joined must be analyzed before deciding whether claim-joinder has been proper. In other words, parties must be properly joined under Rule 19 or Rule 20 before counterclaims and crossclaims under Rule 13, third-party claims under Rule 14, and "conditional" claims under Rule 18 may be considered. As Rule 19 significantly impacts the operation of class actions, subdivision (d) explicitly provides that the Rule is subject to the provisions of Rule 23. This proviso should be interpreted as subjecting Rule 19 to Rules 23.1 and 23.2 as well.

Relationship of Rule 19 with Supplemental Jurisdiction Statute

The interrelationship between Rule 19, Rule 20, which governs the permissive joinder of parties, and the power of federal courts to exercise supplemental jurisdiction is the source of frequent confusion for students, practitioners, and courts alike. Some of the confusion results from the unusual analysis implied by the supplemental jurisdiction statute, *28 U.S.C. § 1367*.

Ordinarily, constitutional and statutory requirements of a civil action are analyzed according to standards derived independently of those in the Rules. For example, venue is properly laid according to *28 U.S.C. § 1391* and the case law interpreting that provision without regard for any Rule that may relate to the laying of venue. However, in diversity cases, the supplemental jurisdiction provision is keyed to the proper joinder of parties under specific Rules, including Rule 19. Thus, inquiry must first be made concerning compliance with the Rules before determining whether the court has the power to exercise supplemental jurisdiction over a claim.

This peculiar drafting suggests the following four-step analysis. First, it should be determined whether the party is a necessary or indispensable party under Rule 19. Persons that fall into one of the three categories listed in Rule 19(a)(1) must be joined as parties unless personal jurisdiction cannot be obtained or the joinder will destroy subject-matter

jurisdiction. Second, if a person does not fit into one of the Rule 19(a)(1) categories, the party may still be joined under Rule 20 if the liberal requirements of that Rule are satisfied. Third, after ascertaining whether joinder is proper under the Rules, it must be determined whether the court is authorized to exercise supplemental jurisdiction over the claim. Finally, the court should consider the factors listed in 28 U.S.C. § 1367 in deciding whether to use its discretion to decline to exercise supplemental jurisdiction.

Operation of Rule 19

The operation of Rule 19 itself is fairly straightforward. It distinguishes between so-called "necessary" parties under subdivision (a)(1), or those parties who are required to be joined in an action if it is feasible to do so, and so-called "indispensable" parties, or those parties whose nonjoinder must result in a dismissal of the action, as indicated in subdivision (b). These denominations should not be confused with one another, as "indispensable" parties are always "necessary," but "necessary" parties may not be "indispensable."

Illustration 19-1

If Linda is determined to be a "necessary" party because her absence would prevent complete relief from being afforded among the existing parties, a further determination must then be made as to whether the action should continue. Only then, if it is determined that Linda is "indispensable" under subdivision (b), will the action be dismissed.

"Necessary" Parties

Subdivision (a) specifies three categories of persons that must be joined in an action: (1) persons whose absence would prevent complete relief among existing parties; (2) persons claiming an interest in the action that are situated such that a disposition of the action in their absence may, as a practical matter, impair or impede their ability to protect their interest; and (3) persons claiming an interest in the action that are situated such that a disposition of the action in their absence may render an existing party subject to a substantial risk of incurring multiple or inconsistent obligations. Persons that fall into one of these three categories may be referred to as "necessary" parties; these persons must be joined in the action if the court can secure personal jurisdiction over them, and their inclusion in the action would not destroy the subject-matter jurisdictional basis of the action.

Illustration 19-2

Tracy commences an action against Eddy's Repair Shop to recover for personal injuries suffered in a fire at the repair shop. Rather than naming Eddy's Repair Shop as a defendant in the action, Tracy sues Corporate Insurance, the insurer of Eddy's Repair Shop. However, the insurance policy covers only losses in excess of \$500,000. Under Rule 19(a)(1)(A), Eddy's Repair Shop is considered a "necessary" party, as Tracy cannot obtain complete relief in the absence of Eddy's Repair Shop as a party to the action.

Illustration 19-3

Donna owns a life estate in a parcel of land, the remainder interest of which is owned by Rich. Donna commences an action against a tenant, Lee, for ejectment, and Lee defends on the basis that he owns the property through adverse possession. Under subdivision (a)(1)(B)(i), Rich should be joined in the action, as the disposition of the action may impede his ability to protect or even retain his remainder interest.

Illustration 19-4

Steel Laborers United, a union comprised of steel workers, represents the interests of the workers at

Associated Steel. Under the terms of a collective bargaining agreement with Steel Laborers United, Associated Steel must run three shifts a day around the clock. A community association commences an action against Associated Steel, seeking an injunction to limit the hours in which smoke caused by the production process is placed into the environment to no more than 10 hours a day. Under Rule 19(a)(1)(B)(ii), Steel Laborers United should be joined in the action, as the grant of an injunction will expose Associated Steel to inconsistent obligations with regard to the hours of production.

If the court determines that a person is a "necessary" party, it must issue an order directing the person to be joined as a party. This order poses no particular problem if the person should be joined as a defendant in the action. However, when a "necessary" party should be aligned with the plaintiff and the party refuses to join the action, the court may order that the person be joined as a defendant and treated in the same manner as any other defendant. In the event that the alignment of the "necessary" party on the defendants' side would destroy the diversity jurisdictional basis of the action, the doctrine of "realignment of the parties" provides relief. This doctrine allows the court to look beyond the formal alignment of the parties in the pleadings and arrange the parties according to their actual interests in the action.

"Indispensable" Parties

As the Court stated in *Republic of Philippines v. Pimental*, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008), nonjoinder even of a "necessary" person does not always result in dismissal. If a person falls into one of the three categories listed in subdivision (a) but whose presence in the action would destroy the jurisdictional basis for the action or over whom personal jurisdiction cannot be obtained, subdivision (b) requires the court to determine whether the party is "indispensable." An "indispensable" party is a person without whom the court cannot in equity and good conscience allow the action to continue. Such a ruling would result in a dismissal of the action and compel the plaintiff to bring the action in another forum. The determination of whether a party is "indispensable" is not made until an initial determination is made regarding whether the party is "necessary" under subdivision (a)(1).

Subdivision (b) lists the factors that the court should consider in making this determination: (1) the extent to which a judgment rendered in the person's absence might be prejudicial to the existing parties; (2) the degree to which the prejudice to the absent person or existing parties can be lessened or avoided through protective orders or narrowly-drawn judgments; (3) the adequacy of a judgment rendered in the person's absence; and (4) whether the existing plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Notably, the use of protective orders and judgments has proved particularly helpful in allowing courts to avoid the harsh action of dismissal. This list is not exclusive, and the court may consider other factors in determining whether an action should be dismissed because an "indispensable" person cannot be joined in the action.

Pleading Requirements of Rule 19

Subdivision (c) supplements the pleading rules in Rules 8 and 9 by requiring all parties to state the known identities of all necessary and indispensable persons that are not joined in the action in their pleadings. The reasons for the nonjoinder of such persons should also be stated with particularity in the pleadings. This explication will assist the court in ruling on a motion under Rule 12(b)(7) to dismiss the action for failure to join a necessary or indispensable person.



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TITLE IV. PARTIES

Chapter 19 Rule 19. Required Joinder of Parties

1-19 Federal Civil Procedure Litigation Manual 19.2

19.2 ADDITIONAL AUTHORITY

4 Moore's Federal Practice §§ 19.01 -19.09

James & Hazard, Civil Procedure §§ 10.11-10.15

Friedenthal, Civil Procedure § 6.5

Teply & Whitten, Civil Procedure 624-639



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Chapter 19 Rule 19. Required Joinder of Parties

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19.3 LEADING CASES

Abuse of Discretion Standard Applicable

Picciotto v. Cont'l Cas. Co., 512 F.3d 9 (1st Cir. 2008) (abuse of discretion standard applies in both former Rule 19(a) and 19(b) contexts).

Admission of Party Establishes Indispensability

Mattel, Inc. v. Bryant, 446 F.3d 1011 (9th Cir. 2006) (the declaration of the intervening party that it was not indispensable party was sufficient to establish that the intervening party would not have been prejudiced by non-joinder and was thus not an indispensable party).

Complete Diversity Requirement Applicable

Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984) (the requirement of complete diversity as a predicate for diversity jurisdiction applies to Rule 19 and Rule 20).

Dismissal Proper Where Indispensable Party Could Not Be Joined

Yashenko v. Harrah's N.C. Casino Co., 446 F.3d 541 (4th Cir. 2006) (district court properly granted summary judgment to defendant on the basis that an Indian tribe was both necessary and indispensable party to employee's cause of action, but that its sovereign status prohibited its joinder).

Diversity Jurisdiction Destroyed by Indispensable Party

McCulloch v. Velez Malave, 260 F. Supp. 2d 358 (D.P.R. 2003), appeal dismissed in part, affirmed in part, and vacated in part, remanded, 364 F.3d 1 (1st Cir. 2004) (when sole shareholder failed to establish that damages he sought to recover were those he personally suffered and not his corporations, his companies were indispensable parties to breach of

contract suit, and companies' joinder destroyed diversity jurisdiction).

Diversity Jurisdiction Not Destroyed by Person Not Named in Action

Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005) (an entity not named or joined as a defendant cannot be deemed a real party in interest whose presence would destroy diversity; Rule 17 and Rule 19 address the joinder of parties, not federal subject-matter jurisdiction, a point made explicitly in Rule 82).

Failure to Join Indispensable Party Raised on Appeal

Gonzalez v. Cruz, 926 F.2d 1 (1st Cir. 1991) (the failure to join an indispensable party is so fundamental that it may be raised after the trial has concluded or for the first time on appeal).

Indispensability Higher Standard Than Necessary

Merrill Lynch, Pierce, Fenner & Smith v. ENC Corp., 446 F.3d 1019 (9th Cir. 2006) (in that Rule 19 distinguishes between necessary and indispensable parties, indispensability has to meet higher standard than necessity, and it must be determined in context of particular litigation).

"Indispensable" Parties

Schlumberger Indus. v. National Sur. Corp., 36 F.3d 1274 (4th Cir. 1994) (all the insurers of the parties were indispensable parties, and because they could not be joined without destroying the jurisdictional basis of the action, the action must be dismissed).

Indispensable Party--Factors

PaineWebber, Inc. v. Cohen, 276 F.3d 197 (6th Cir. 2001) (determination of whether case should proceed in absence of particular party involves three-step process in which court: (1) determines whether person is necessary to action and should be joined if possible; (2) considers whether it has personal jurisdiction over party and party can be joined without eliminating basis for subject-matter jurisdiction; and (3) analyzes whether action should proceed or, based on party's indispensability, be dismissed).

Joint Tortfeasors Not Automatically "Necessary" Parties

Temple v. Synthes Corp., 498 U.S. 5, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990) (potentially joint tortfeasors are not automatically "necessary" parties under Rule 19(a) and therefore do not need to be joined in the action).

"Necessary" Parties Generally

United States v. County of Arlington, 669 F.2d 925 (4th Cir. 1982) (if the parties can obtain complete relief without the joinder of a particular person, the person is not a "necessary" party and the factors in Rule 19(b) (now Rule 19(b)(1)-(4)) do not need to be considered).

Necessary Party Determination Not Jurisdictional

Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016 (9th Cir. 1999) (whether a party is necessary and indispensable is a pragmatic and equitable judgment, not a jurisdictional one).

"Necessary" Party Under Former Version of Rule

Orff v. United States, 545 U.S. 596, 125 S. Ct. 2606, 162 L. Ed. 2d 544 (2005) (the phrase "join ... as a necessary party defendant" in the Reclamation Reform Act, 43 U.S.C. § 390uu, parallels the former construction of "necessary" parties in Rule 19, defined as those persons who must be joined in an action because complete relief cannot be given to those already parties without their joinder).

Prejudice and Dismissal Factors Weighed

Republic of Philippines v. Pimental, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008) (an application of the factors set forth in subdivision (b) compel the conclusion that the action must be dismissed; any prejudice to the party bringing the action for interpleader is outweighed by the prejudice to the absent entities invoking sovereign immunity).

Public Rights Exception to Joinder

South Utah Wilderness Alliance v. Kempthorne, 525 F.3d 966 (1st Cir. 2008) (where land management bureau's decision to issue oil and gas leases was reversed and remanded, private lessees were not indispensable parties because action against bureau fell within public rights exception to joinder rules, most notably Rule 19).

Supplemental Jurisdiction Inapplicable to Rule 19 Plaintiffs

Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (28 U.S.C. § 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under FRCP 19, claims against defendants joined under Rule 20, or plaintiffs who seek to intervene pursuant to Rule 24; however, § 1367(b) does not prevent the exercise of supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 or certified as class action members under Rule 23).

Tortfeasors; Joint and Several Liability

Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686 (1st Cir. 1993) (a tortfeasor with joint and several liability is not an indispensable party in an action).

Two-Step Inquiry

Teamsters Local Union No. 171 v. Keal Driveaway Co., 173 F.3d 915 (4th Cir. 1999) (under Rule 19, a two-step inquiry is appropriate: first, the court should determine whether a party is necessary to a proceeding because of its relationship to the matter under consideration, and second, if a necessary party is unavailable, whether the proceeding can continue in that party's absence; if it cannot, the party is indispensable and the action should be dismissed).



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TITLE IV. PARTIES

Chapter 20 Rule 20. Permissive Joinder of Parties

1-20 Federal Civil Procedure Litigation Manual 20.syn

§ 20.syn Synopsis to Chapter 20: Rule 20. Permissive Joinder of Parties

Scope Rule 20. Permissive Joinder of Parties

20.1 COMMENTARY

20.2 ADDITIONAL AUTHORITY

20.3 LEADING CASES



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TITLE IV. PARTIES

Chapter 20 Rule 20. Permissive Joinder of Parties

1-20 Federal Civil Procedure Litigation Manual Rule 20. Permissive Joinder of Parties

Rule 20. Permissive Joinder of Parties

Rule 20 reads as follows:

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons--as well as a vessel, cargo, or other property subject to admiralty process in rem--may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders--including an order for separate trials--to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

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TITLE IV. PARTIES

Chapter 20 Rule 20. Permissive Joinder of Parties

1-20 Federal Civil Procedure Litigation Manual 20.1

20.1 COMMENTARY

Rule 20 governs permissive joinder, or joinder of persons that do not fall into one of the three categories of persons needed for just adjudication under Rule 19. As noted previously, Rules 13 and 18, relating to the joinder of claims, Rules 19 and 20, relating to the joinder of parties, and Rule 14, governing the joinder of parties and claims through third-party practice, are all interrelated, and a discussion of the complexities of any of these Rules necessarily entails reference to the others.

Briefly, the issue of whether the parties have been properly joined must be analyzed before deciding whether claim-joinder has been proper. In other words, parties must be properly joined under Rule 19 or Rule 20 before counterclaims and crossclaims under Rule 13, third-party claims under Rule 14, and "conditional" claims under Rule 18 may be considered.

Permissive Joinder Generally

Rule 20 implements the liberal joinder philosophy of the Rules by permitting joinder of parties in a broad range of cases. Although subdivision (a) distinguishes between joinder of plaintiffs and joinder of defendants, an examination of the respective provisions reveals that the requirements are identical. Unlike compulsory joinder under Rule 19, Rule 20 contains only two restrictions on the ability of a party to be joined in an action. Subdivisions (a)(1) and (a)(2) set out these requirements: (1) an alleged right must arise out of the same transaction, occurrence, or series of transactions or occurrences; and (2) a common question of law or fact with respect to the defendants must be present in the action. Joinder under Rule 20 is always at the discretion of the parties. Property subject to admiralty *in rem* process may also be joined under the same provisions.

It should also be noted that joinder of the parties must be proper before joinder of claims against the parties can be considered. However, once the requirements of Rule 20 are satisfied and joinder of the parties is proper, a party may use the more liberal claim-joinder provisions of Rule 18 to assert unrelated claims against the joined parties.

Illustration 20-1

Peter suffers serious injuries when he is involved in an automobile collision with Doris. At the

emergency room where Peter is taken after the accident, Dr. Steinberg negligently treats him, thus aggravating his injuries. Peter wishes to commence an action against both Doris and Dr. Steinberg. Under Rule 20(a)(2), Peter may join both parties as defendants in one action. Peter's claims against each defendant arise out of the same series of occurrences, namely the automobile accident and subsequent medical treatment. Peter's claims against each defendant also consist of common questions of fact, namely the extent of Peter's injuries. Once the parties are properly joined, Peter may assert any unrelated claim he may have against the parties in the same action.

Jurisdiction and Venue Distinguished

Jurisdiction and venue over the joined parties are distinct from proper joinder under Rule 20, and the requirement of complete diversity in diversity jurisdiction cases will sometimes prevent the parties from being joined in the action. However, the harsh consequences of failing to join a permissive party under Rule 20 will rarely occur when the jurisdictional predicate is not present. Because joinder of parties under Rule 20 necessarily implies that the parties are not "necessary" parties under Rule 19, the plaintiff will simply have to bring separate actions against the defendants or bring an action against the joint defendants in a different forum.

Illustration 20-2

Alexis, a resident of Indiana, has been allegedly defrauded by Tom LeBeau's Get Rich Now!, Inc.'s money-making program. The corporation is incorporated in Delaware and has its principal place of business in Arizona. Barbara, a resident of Arizona, purchased the program through the same television offer that induced Alexis, and she would like to join in the action as a co-plaintiff. However, Barbara's presence would destroy complete diversity, and Barbara must simply bring the action in another forum, such as state court.

Separate Trials and Protective Orders Allowed

Subdivision (b) provides that the court may order separate trials or make protective orders where multiple parties have been joined under Rule 20. Separate trials may prevent a party from being embarrassed, delayed, or otherwise prejudiced in an action.



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Chapter 20 Rule 20. Permissive Joinder of Parties

1-20 Federal Civil Procedure Litigation Manual 20.2

20.2 ADDITIONAL AUTHORITY

4 *Moore's Federal Practice* §§ 20.01 -20.09

James & Hazard, *Civil Procedure* §§ 9.5-9.7

Friedenthal, *Civil Procedure* § 6.4

Teply & Whitten, *Civil Procedure* 639-645



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20.3 LEADING CASES

Abuse of Discretion Standard on Appeal

Avitia v. Metropolitan Club of Chicago, 49 F.3d 1219 (7th Cir. 1995) (district court's denial of a motion requesting severance of an action against defendants joined under Rule 20 reversible only for an abuse of discretion).

Aggregation of Claims Not Permitted

In re Corestates Trust Fee Litig., 39 F.3d 61 (3d Cir. 1994) (parties cannot aggregate their claims against the defendants to satisfy the jurisdictional minimum amount unless the claims are joint).

Alignment of Joined Party

Fenton v. Freedman, 748 F.2d 1358 (9th Cir. 1984) (corporation was correctly aligned with the plaintiff when it was joined as a party because of a community of interest between the parties).

Dismissal Without Prejudice Proper

Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674 (6th Cir. 1988) (dismissal of a party from an action without prejudice because the party was improperly joined under Rule 20 was upheld).

Prior Case Consent to File Inapplicable to Current Case

Albritton v. Cagle's Inc., 508 F.3d 1012 (1st Cir. 2007) (consents filed by plaintiff employees in prior Fair Labor Standards Act class action were limited to that case and did not carry over to two new suits filed three years later by same attorneys against same defendant employers, nor could earlier consents authorize filing of later lawsuits as joint action under Rule 20).

Supplemental Jurisdiction Applicable to Rule 20 Plaintiffs

Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (28 U.S.C. § 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under *Federal Rule of Civil Procedure 19*, claims against defendants joined under Rule 20, or plaintiffs who seek to intervene pursuant to Rule 24; however, § 1367(b) does not prevent the exercise of supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 or certified as class action members under Rule 23).



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Chapter 21 Rule 21. Misjoinder and Nonjoinder of Parties

1-21 Federal Civil Procedure Litigation Manual Rule 21. Misjoinder and Nonjoinder of Parties

Rule 21. Misjoinder and Nonjoinder of Parties

Rule 21 reads as follows:

Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

* * * * *



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21.1 COMMENTARY

Rule 21 specifies the effect of misjoinder on existing parties and provides the mechanism for the implementation of Rules 18-20. A party may seek to add or drop a party under Rules 19 and 20 by making a motion to the court, or the court may so order on its own initiative. A party may also raise the issue in a responsive pleading. Objections for failure to join an indispensable party under Rule 19 may be made at any time during the course of the litigation, and may be raised for the first time on appeal.

The first sentence of Rule 21 states that misjoinder of parties is not a proper ground for dismissal of the action in its entirety. However, dismissal of parties from the action or severance of claims against parties are appropriate actions for the court.



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4 *Moore's Federal Practice §§ 21.01 -21.06*



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21.3 LEADING CASES

Dismissal of Defendants Not Required

Sentry Select Ins. Co. v. LBL Skysystems (U.S.A.), Inc., 486 F. Supp 2d 496 (E.D. Pa. 2007) , *aff'd, remanded*, 2008 U.S. App. LEXIS 11996 (3d Cir. 2008) (in interpleader action, there was no need to strike under Rule 21 defendants who had waived any claim to funds at issue; interpleader order had sufficiently narrowed controversy to parties that had interest in interpleaded funds, and no further action in that regard was warranted).

Dismissal of Non-Diverse Parties

Newman-Green, Inc. v. Alfonso-Larrain, 490 U.S. 826, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989) (the court of appeals may dismiss a nondiverse party that is not indispensable).

Diversity Jurisdiction Perfected by Court

Kirkland v. Legion Ins. Co., 343 F.3d 1135 (9th Cir. 2003) (Rule 21 may be used by federal courts to perfect diversity jurisdiction by dropping non-diverse parties, provided that non-diverse parties are not indispensable to action under Rule 19).

Failure to Dismiss Erroneous

Samaha v. Presbyterian Hosp., 757 F.2d 529 (2d Cir. 1985) (district court's failure to dismiss parties that were not indispensable and were not diverse was error).

Fraudulent Joinder of Parties Not Shown

McKee v. Kansas City S. Ry. Co., 358 F.3d 329 (5th Cir. 2004) (where defendant failed to show that non-diverse parties were fraudulently joined under Rule 21 due to absence of any potentially viable claims against those parties,

district court erred in denying passenger's remand motion under 28 U.S.C. § 1447(c), as district court lacked subject-matter jurisdiction because there was no federal question and no complete diversity).

Insured Not Indispensable When Partial Claim Is Made

St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73 (2d Cir. 2005) (if part of an insured claim has been paid and the insured person continues to have a potential right of recovery against the third-party tortfeasor, the insured person is not an indispensable party in a subrogation claim between the insurer and the third-party tortfeasor).

Issue Raised for First Time on Appeal

Vild v. Visconsi, 956 F.2d 560 (6th Cir. 1992) (in ruling on a dismissal of an action by the district court, the court of appeals did not permit the plaintiff to argue for the first time that the district court should have severed the parties under Rule 21 and allowed the action to proceed against the individual defendants).

Motion to Sever Claims or Remove Parties

Reinholdson v. State, 346 F.3d 847 (8th Cir. 2003) (a district court's grant of a motion to sever claims so that individual issues could be tried separately, but retain jurisdiction over common claims, was considered interlocutory and non-appealable, as the motion would be construed as having been made under Rule 42(b) rather than Rule 21).



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TITLE IV. PARTIES

Chapter 22 Rule 22. Interpleader

1-22 Federal Civil Procedure Litigation Manual Rule 22. Interpleader

Rule 22. Interpleader

Rule 22 reads as follows:

Rule 22. Interpleader

(a) Grounds.

(1) By a Plaintiff. Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) By a Defendant. A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements--and does not limit--the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to--and does not supersede or limit--the remedy provided by 28

1-22 Federal Civil Procedure Litigation Manual Rule 22. Interpleader

U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

* * * * *



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22.1 COMMENTARY

Rule 22 governs "rule interpleader," a special party-joinder device. Interpleader allows a person possessing money or property that is the subject of inconsistent claims, referred to as the "stakeholder," to force all persons presenting a claim for the money or property, referred to as the "claimants," to go before a single federal court to resolve the dispute. The Rule allows a stakeholder to thus avoid separate actions over the same subject matter and possibly multiple liability to different claimants.

Rule 22 and Statutory Interpleader Generally

Rule interpleader under Rule 22 should be distinguished from statutory interpleader under 28 U.S.C. § 1335. This section grants special subject-matter jurisdiction to federal courts in interpleader actions when the statutory requirements have been satisfied. In addition, 28 U.S.C. §§ 1397 and 2361 are special provisions relating to venue and service of process in statutory interpleader actions.

In contrast, interpleader actions brought under Rule 22 have no special grant of subject-matter jurisdiction: jurisdiction must either be predicated upon 28 U.S.C. § 1331, thus involving a federal question, or upon 28 U.S.C. § 1332, thus satisfying the requirements for diversity jurisdiction. Rule interpleader actions are also subject to the usual venue provisions accompanying most civil actions and the service requirements of Rule 4.

Subdivision (b) makes clear that statutory interpleader and Rule 22 are independent provisions, and both actions remain available to parties in appropriate circumstances. Although the basic nature of the actions is the same, the distinctions between rule and statutory interpleader indicated above suggest significant differences in the circumstances in which the actions may be available.

Diversity Requirements Distinguished

Like rule interpleader, statutory interpleader contains a diversity requirement for federal jurisdiction to attach. However, this requirement differs from the ordinary diversity requirement in 28 U.S.C. § 1332 in two ways. In statutory interpleader actions, the diversity required involves that between the claimants only. The citizenship of the stakeholder is irrelevant. Under Rule 22, diversity must exist between the stakeholder and the claimants. Furthermore, statutory

interpleader requires only minimal diversity between the claimants--at least two of the claimants must be citizens of different states. Complete diversity among the claimants is not required. Actions brought under Rule 22 retain the complete diversity requirement, so that the stakeholder must not be a resident of the state of any claimant. However, diversity among the claimants is not required for rule interpleader actions.

Illustration 22-1

Statutory interpleader, and not rule interpleader, will be available when the stakeholder and one of the claimants are residents of State X and another claimant is a resident of State Y. On the other hand, rule interpleader, and not statutory interpleader, will be available when the stakeholder is a resident of State X and all of the claimants are residents of State Y. Both statutory and rule interpleader will be available when the stakeholder is a resident of State X, and the only two claimants are residents of States Y and Z, respectively.

Amount in Controversy Requirements Distinguished

28 U.S.C. § 1335 provides that jurisdiction exists for statutory interpleader if the amount in controversy is \$500 or more. In rule interpleader actions based upon diversity jurisdiction, the amount in controversy must exceed \$50,000.

Venue Provisions Distinguished

Under *28 U.S.C. § 1397*, venue in statutory interpleader actions is proper only when the action is brought in any district in which one or more of the claimants reside. Venue in rule interpleader actions is governed by *28 U.S.C. § 1391*. This section states that venue is proper only in: (1) a judicial district where any claimant resides, if all the claimants reside in the same state; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) a judicial district in which the claimants are subject to personal jurisdiction, or if jurisdiction is based upon the existence of a federal question, a judicial district in which any defendant may be found, if, in both circumstances, there is no district in which the action may otherwise be brought. Although venue under *28 U.S.C. § 1391* is generally narrower than that under *28 U.S.C. § 1397*, a stakeholder wishing to bring an action in a district in which the property is located but in which no claimant resides is limited to actions under Rule 22.

Service of Process Provisions Distinguished

28 U.S.C. § 2361 provides that a summons may be served on the claimants in statutory interpleader actions only in the districts in which the claimants reside or may be found. A summons in rule interpleader actions may be served in any method authorized by Rule 4, which allows for service on individuals in foreign countries and, if allowed by the applicable state law, by certified mail.

Comparison of Rule 22 With Historical Interpleader

To properly understand the language and operation of Rule 22, it is helpful to differentiate the Rule from its historical analog. Under the common law, strict bills of interpleader had very rigid restrictions that prevented the use of the bills in many situations in which the suit may have been useful. These strict requirements included: (1) the same thing or debt must be claimed by all the parties against whom relief is demanded; (2) the adverse claims must be derived from a common source; (3) the plaintiff must be disinterested in the subject matter; and (4) the plaintiff must have incurred no independent liability to any of the claimants, instead remaining completely indifferent to the outcome of the action.

Rule 22, like statutory interpleader, expressly abolishes the "same debt," "common source," and "disinterested stakeholder" requirements, and some courts have also held that Rule 22 does not require that the plaintiff have no

independent liability to the claimants. Therefore, Rule 22 may be used when the claimants are asserting claims to differing amounts of the money or property at stake, or when the sources of the claims have distinct derivations. Furthermore, Rule 22 allows the stakeholder to also act in the capacity of a claimant, a point made clear in subdivision (a)(2). As written, the only requirement in Rule 22 is that a party may face "claims that may expose [the party] to double or multiple liability." Accordingly, Rule 22 may be available in a broad range of situations.



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4 *Moore's Federal Practice* §§ 22.01 -22.08

James & Hazard, Civil Procedure § 10.19

Friedenthal, Civil Procedure §§ 16.10-16.13

Teply & Whitten, Civil Procedure 653-664



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22.3 LEADING CASES

Amount of Deposit

In re Sinking of M/V Ukola, 806 F.2d 1 (1st Cir. 1986) (the stakeholder must deposit the largest amount claimed by an adverse party with court for statutory interpleader to be proper).

Appeal of Interpleader Claim Without Final Judgment

Abex Corp. v. Ski's Enters., Inc., 748 F.2d 513 (9th Cir. 1984) (the resolution of an interpleader claim is not appealable as an interlocutory order until a final judgment has been entered, unless the court certifies the issue under Rule 54(b) as appealable).

Attorneys' Fees of Disinterested Stakeholder

Septembertide Pub., B.V. v. Stein & Day, Inc., 884 F.2d 675 (2d Cir. 1989) (attorneys' fees may be awarded to a disinterested stakeholder who deposits the fund with the court and wishes to withdraw from the action but is frustrated from doing so by one of the claimants).

Counterclaims in Interpleader Actions

New York Life Ins. Co. v. Deshotel, 142 F.3d 873 (5th Cir. 1998) (once the stakeholder joins with the claimants in an interpleader action, a claimant may file a counterclaim against the stakeholder as an opposing party).

Diversity Not Destroyed by Dismissal of Party

Leimbach v. Allen, 976 F.2d 912 (4th Cir. 1992) (diversity need only be present at the initiation of the action; where a claimant was dismissed and the remaining claimants were not diverse, jurisdiction was not destroyed).

Identifiable Fund

Wausau Ins. Cos. v. Gifford, 954 F.2d 1098 (5th Cir. 1992) (interpleader action was dismissed because there was no single, identifiable fund that was in dispute).

Interpleader and Declaratory Judgment Similar

Commercial Union Ins. Co. v. United States, 999 F.2d 581 (D.C. Cir. 1993) (noting the similarity between interpleader and declaratory judgments; both actions allow a potential defendant to avoid the possibility of multiple liability).

Necessity of Multiple Liability

Washington Elec. Coop., Inc. v. Paterson, Walke & Pratt, P.C., 985 F.2d 677 (2d Cir. 1993) (interpleader is not appropriate where the moving party is not potentially exposed to multiple liability).



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TITLE IV. PARTIES

Chapter 23 Rule 23. Class Actions

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Rule 23. Class Actions

Rule 23 reads as follows:

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

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23.1 COMMENTARY

Rule 23 governs class actions, one of the most innovative joinder devices under the Rules. Class action procedures allow an action to be brought by or against a party who is representative of a class of persons who are similarly situated to the representative party with respect to the action. Each person in the class is not formally joined in the action, but the disposition of the action is binding on them with respect to the issues in the litigation. In practice, class actions brought by plaintiffs who are representative of a class are far more frequent than actions brought by individual plaintiffs against defendant classes. However, Rule 23 applies equally to both kinds of class actions.

Substantial portions of Rule 23 were amended in 2003. The amendments focus on four areas of class action cases: timing of certification decisions and notice provisions; judicial oversight of settlements; appointment of class action attorneys; and attorney compensation. The amendments are discussed in greater detail in the pertinent sections below.

Structure of Class Actions

The structure of Rule 23 suggests a two-stage procedure in class actions. First, subdivision (c) requires that the court make a certification that the class sought to be represented has satisfied the requirements for certification under subdivisions (a) and (b). The second stage comprises the pretrial and trial proceedings themselves. In this regard, the court is directed to make appropriate orders to protect the interests of the members of the class and to regulate the conduct of the representatives and the attorneys for the class under the considerable discretion conferred upon it in subdivisions (d) and (e). In many cases, a third procedural stage, after a final judgment has been entered, is also appropriate. During this stage, the court renders decisions regarding attorneys' fees, makes orders regarding the notification of the members of the class of the disposition of the action, and takes any other steps it deems proper in protecting the interests of the members of the class.

Policies of Rule 23 and Advantages of Class Actions

The advisory committee's note to the 1966 amendments to Rule 23 states that the policies of class actions are to achieve economies of time, expense, and effort, and to promote the uniformity of decision with regard to similarly situated persons. Accordingly, class actions may be advantageous for a number of reasons. First, they avoid the inefficiencies of multiple litigation by allowing a single action to resolve the claims of a large number of persons. In addition to

drastically reducing the burden of individual actions on the courts, the class action allows a large number of persons, each of whom have been damaged or harmed in some small way, to pool their resources together so that the costs of litigation do not outweigh the possible remedy.

Second, class actions provide determinacy on issues that may affect a large number of individuals. Thus, the device allows parties in a class action to reduce the risk of inconsistent obligations because of incompatible judgments in separate actions.

Furthermore, the personal jurisdiction, subject-matter jurisdiction, and venue requirements of federal civil actions apply only to the individual persons acting as representatives of the class, not to each member of the class. This makes class actions useful for purposes of obtaining diversity jurisdiction in federal court, as complete diversity must be present only between the representatives of the class and the adverse parties. However, when federal subject-matter jurisdiction is predicated solely on diversity principles, each member of the class must individually satisfy the \$50,000 amount in controversy requirement, unless the members of the class are attempting to enforce a single title or right in which they share a common and undivided interest.

Prerequisites to Class Actions Generally

Subdivision (a) lists the four prerequisites that must be satisfied before an action can qualify for class action treatment under the Rule. Although courts and commentators have sometimes expressed frustration at the lack of definition of these requirements or guidance on how they are to be applied, they are perhaps best conceptualized as addressing different aspects of the class sought to be certified. The first two requirements, commonly referred to as the "numerosity" and "commonality" requirements, focus on the characteristics of the defined class. The final two requirements, the "typicality" and "adequacy of representation" requirements, focus not on the class itself, but instead on the characteristics and quality of the representatives of the class. This interpretation is supported by the order in which the requirements are presented in the Rule. If the class itself does not satisfy the minimal numerosity and commonality requirements, the first two presented in subdivision (a), it is pointless to consider whether the representatives of the class satisfy the final two requirements set forth in that subdivision.

Numerosity

The numerosity requirement is intended to ensure that the class is large enough such that joinder of the individual class members would be impracticable. This determination is largely dependent on the facts and circumstances on each case, and no one number of individuals renders the class sufficiently "numerous." Case law has instructed that 200 members may not be numerous enough, whereas 30 members may be sufficient in other circumstances.

Illustration 23-1

Two hundred taxpayers wish to commence a class action against the Federal Tax Authority, seeking an order to compel the Authority to recognize tax deductions for several capital losses experienced by the group in the past year. Although individual actions by each of the 200 plaintiffs may be burdensome on the judicial system, the court may refuse to certify the litigation as a class action because 200 litigants is not "numerous" in light of the 120 million taxpayers residing in the jurisdiction.

Illustration 23-2

Thirty female employees wish to commence a class action against Brad's Food Emporium, seeking equitable relief from sexual harassment occurring within their place of employment. Brad's Food Emporium employs a total of 75 individuals, 30 females and 45 males. The court will likely certify the litigation as a class action because a class of 30 employees is likely to be considered "numerous" under

the circumstances.

Commonality

The commonality requirement, at a minimum, suggests that at least one question of law or fact must be common to all members of the class. Although this requirement is frequently considered in conjunction with the typicality requirement, the better view is that the commonality requirement dictates that the class be defined in a manner sufficient to readily identify the members of the class. Cases that have denied certification to classes on the grounds that the class was too vague should be considered as classes that did not satisfy the commonality requirement.

Illustration 23-3

As the representative of all poor persons within the city of Washington, Frank commences an action against the Washington police department, alleging that the department discriminates against persons based upon their economic status. Although Frank and other individual litigants may have valid claims, the court should not certify Frank's suit as a class action, as the designation of the class as "all poor persons within the city of Washington" is too vague to satisfy the requirements of Rule 23(a).

Typicality

The typicality requirement ensures that the claims or defenses of the representative parties substantially duplicate those that would have probably been presented by the absent members of the class. If the same transaction or occurrence lies at the heart of the litigation for the representatives of the class and the individual class members, the requirement should be deemed to have been met.

Illustration 23-4

Jose commences an action against Gargantua Gold Mining Corp. as the representative of a class of all stockholders of the company. Jose alleges that Gargantua failed to provide him with a detailed prospectus of the company at the time he purchased his shares, as required by SEC regulations. Under these circumstances, the court should probably not certify Jose's suit as a class action, as it is unlikely that Jose's claim is typical of the claims of the other members of the class.

Adequacy of Representation

The adequacy of representation requirement plays an important role in the certification process. Perhaps more than any other, this requirement ensures the integrity of the court and the class action device itself by assuring that the absent class members have had an adequate opportunity to have their grievances heard. Because the disposition of the class action is binding on all members of the class, due process objections obtain when those members are not adequately represented. Factors to be considered in determining whether or not this requirement is satisfied include the characteristics of the representatives of the class, including the personal stake of the representatives in the action, and the quality, adequacy, and experience of the attorneys who will represent the class.

Illustration 23-5

Jennifer, a pilot employed by Hyskie Airlines, commences an action against Hyskie Airlines as the representative of all current and former pilots of the airline. In the action, Jennifer alleges that Hyskie Airlines' promotion practices and pension programs constitute unlawful sex discrimination in violation of federal law. Before the class is certified, Hyskie agrees to eliminate the offending conduct, but the parties cannot agree with regard to backpay, pension funding, or retroactive seniority. Under these

circumstances, Jennifer is an inadequate representative of the pilots formerly employed by the airline because of a possible conflict of interest with regard to pension funding and distributions.

Categories of Class Actions Generally

Subdivision (b) defines the three categories of class actions. After the court concludes that the requirements of subdivision (a) have been satisfied, it must determine which category of class action the instant case belongs to. This categorization has implications for the procedure to be taken in the action.

Subdivision (b)(1)(A)--Risk of Inconsistent Obligations

Certification under subdivision (b)(1)(A) is appropriate when the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent obligations or incompatible standards of conduct for the party opposing the class.

Illustration 23-6

In Springfield, a number of the municipality's bondholders would like to bring an action against the municipality seeking to have the bond issue invalidated. However, other bondholders would like to limit the issue, and still others want to enforce interest payments on the issue. Judgments in favor of each of these persons would create inconsistent obligations for the municipality, and a class action covering all of the bondholders is best-suited to a uniform resolution of the case.

Subdivision (b)(1)(B)--Impairment of Interests in Separate Actions

Certification under subdivision (b)(1)(B) is appropriate when the prosecution of separate actions by or against individual members of the class would, as a practical matter, be dispositive of, or substantially impair or impede the ability to protect, the interests of the other members of the class. Because of the similarity of this standard with the definition of "necessary" parties under Rule 19, class actions are excepted, in subdivision (d) of that Rule, from its mandatory joinder requirement.

Illustration 23-7

Shari commences an action against Dave's Publishing Company as the representative of a class of shareholders to force the company to declare a dividend. The court should certify the suit as a class action under 23(b)(1)(B), as success in the action would be dispositive of all other shareholders' interests.

Subdivision (b)(2)--Declaratory or Injunctive Relief Sought

Certification of a class under subdivision (b)(2) is most suitable when the party opposing the class has acted or has refused to act in a manner that has affected the entire class. Thus, declaratory judgments or permanent injunctions are the primary remedies being sought by the representatives of the class in actions certified under this subdivision. However, because of the disfavor accorded to class actions certified under subdivision (b)(3), certification under subdivision (b)(2) is not restricted to class actions in which the remedy sought is limited to only declaratory or injunctive relief. The representatives of the class may also seek monetary damages as an incident to the declaratory judgment or injunction.

Illustration 23-8

Ken commences a civil rights action against Acme Corp. as the representative of a class of customers

seeking injunctive relief from discrimination based on religious belief. The court should certify the suit as a class action under Rule 23(b)(2), as the injunction sought will operate to prevent Acme Corp. from acting in a discriminatory manner in the future.

Illustration 23-9

Assume on the facts of Illustration 23-8 that Ken seeks monetary damages as well as injunctive relief. Although class actions certified under Rule 23(b)(2) ordinarily involve requests for declaratory or injunctive relief, the court will still certify Ken's action as a Rule 23(b)(2) class action because the recovery of damages does not appear to be the primary object of the litigation.

Subdivision (b)(3)--Common Questions of Law or Fact Generally

Certification under subdivision (b)(3) is the most controversial, and perhaps unfortunately, the most frequently used category for classifying class actions. To properly certify a class action under this subdivision, the court is required to make two special findings in addition to the four ordinarily required.

"Dominant Commonality"

The court must first determine that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. Although this requirement would appear to duplicate the commonality prerequisite of subdivision (a), the commonality required for certification under subdivision (b)(3) is more appropriately characterized as "dominant commonality." Such a determination, at the very least, requires the court to find that the common questions of law or fact to be resolved in the class action would be those questions that must be resolved in every individual case if the actions were brought separately.

Illustration 23-10

Cain commences an action against the city of Jefferson as the representative of a class of landowners seeking an order declaring a city regulation as a "taking" and requiring compensation be paid to each of the landowners. Although the amount of compensation to be paid to each landowner presents a separate issue, the court should certify the litigation as a class action under Rule 23(b)(3), as the question of whether the city's regulation constitutes a "taking" predominates over the question as to the amount of compensation that should be paid to each landowner.

Requirement That Class Action Be Superior to Other Methods

Next, to certify a class action under subdivision (b)(3), the court must determine that a class action is superior to other available methods for the fair and efficient adjudication of the matter. Other available methods include individual actions by the members of the class, class arbitration, where available, and administrative proceedings. The Rule presents a nonexhaustive list of the factors to be considered by the court in making these determinations. They include: (1) the interest of the members of the class in maintaining individual actions compared to a single class action; (2) the extent of any litigation concerning the action that has already commenced by or against members of the class; (3) the advantages of litigating the class action in the particular court where the class action was filed, including the location of key evidence or witnesses; and (4) any administrative difficulties that are likely to be encountered in the management of a class action.

Procedural Requirements of Class Actions Generally

Many of the procedural provisions of Rule 23 were amended in 2003, including the notification requirements in

subdivision (c) for class actions certified under subdivision (b)(3). After studying the problems that have arisen in class action practice for over ten years, the Advisory Committee on Civil Rules chose to focus on the procedural aspects of class actions to provide for what the United States Supreme Court has called "structural assurances of fairness." These measures were regarded as less contentious than changes to the substantive certification standards themselves.

Certification of Class Actions Mandatory

Subdivision (c) was substantially amended in 2003. Under the amended version, the court is required to make a certification of the class "at an early practicable time." This specific language was chosen to strike a balance between the former requirement--"as soon as practicable"--and leaving the timing of certification entirely within the discretion of the district court. The standard anticipates that limited discovery will proceed on the certification question, including some discovery of the merits necessary to decide the certification question. However, it should not be read as permitting discovery relating to the probable outcome on the merits--such discovery must await a decision on certification by the court.

Subdivision (c)(1)(B) details the contents of a certification order. The order must include a specific definition of the class being certified and an identification of the claims, issues, and defenses in the case. This specification will eliminate problems in using the interlocutory appeal provisions of subdivision (f).

Certification orders may continue to be amended at any time until a final judgment is entered. An amendment eliminated the ambiguity that the former time limitation--until "the decision on the merits"--may have produced. In some cases, subdivision of a class may be advisable after a decision has been reached but before a remedy has been formulated. In these cases, amendment of a certification order is expressly permitted. The district court's authority to certify a class conditioned on the occurrence or fulfillment of a future event was eliminated.

Notification of Members of a Class Certified Under Subdivision (b)(3)

Subdivision (c)(2)(B) is a provision especially tailored to the constitutional considerations inherent in class actions. The disposition of class actions is, of course, binding on all members of the certified class unless those members have opted out of the class. Yet the great majority of the members of any certified class are not physically present before the court, so the procedural posture of class actions must contain additional protections to preserve the constitutional rights of these absent members to have their disputes resolved fairly in court. Because of the loosely-knit nature of classes certified under subdivision (b)(3), additional protection of the constitutional rights of the absent class members is provided in subdivision (c)(2)(B). This additional protection is thought to be unnecessary in class actions certified under subdivisions (b)(1) or (b)(2) because of the more tightly-defined nature of such classes and the likelihood that members of those classes will be timely and correctly apprised of the existence of the class action and the possible consequences upon its disposition.

Subdivision (c)(2)(B) requires that all members of a class certified under subdivision (b)(3) must be notified that they are members of a class that is the subject of a class action, that each member of the class may choose to "opt out" of the action, that every member who does not choose to "opt out" will be bound by the judgment, whether it is favorable to the class or not, and that each member of the class may be represented in the class action by an attorney of that member's own choosing. The notification must be made in the best manner practicable under the circumstances, and if the names and addresses of the members of the class can be ascertained with reasonable effort, individual notification must be made. This notification is distinct from any service of process in class actions, which generally is required only for the named representatives of the class.

Illustration 23-11

In a certified class consisting of 2000 former employees of Big Off-Blue Corp., a large computer

company with annual revenues of over \$2 billion, the last-known addresses of the employees satisfying the criteria of the class can be ascertained only through a search of Big Off-Blue's files. A judge is likely to order that each of the members of the class must be notified personally of the class action, as the effort and expense involved is not disproportionate to the size of the company with respect to the number of members in the class.

Second "Opt Out" Opportunity

In certain cases, members of a class certified under subdivision (b)(3) will have a second "opt out" opportunity. Under subdivision (e)(3), which was added in 2003, the court has the discretion to order a second opportunity by members of a class to request exclusion from the class after a settlement has been reached. The possibility of a second "opt out" should only be considered in those cases in which the class is certified and the initial "opt out" period has expired before the settlement agreement has been reached. The decision whether to provide a second "opt out" period is entirely within the discretion of the district court—there is no requirement that such an opportunity be made.

This provision was regarded as prudent in light of the reality that the initial decision whether or not to request exclusion from a class will, in some cases, be made considerably before the nature and the scope of liability and damages are known. Providing a second "opt out" opportunity places members of a subdivision (b)(3) class on the same basis as persons in individual lawsuits in this regard.

Notification of Members of a Class Certified Under Subdivisions (b)(1) and (b)(2)

Subdivision (c)(2)(A) was added in 2003 to provide the court with discretion to order similar notice in classes certified under subdivision (b)(1) and (b)(2). Although the more tightly defined nature of classes certified under these subdivisions make it more likely that members of those classes will be timely and correctly apprised of the existence of the class actions and the possible consequences of its disposition, the advisory committee note to the 2003 amendments recognize that there may be cases when members of these classes deserve protection by notice. Such protection is particularly important because there is no right for members of a subdivision (b)(1) or (b)(2) class to request exclusion from the class.

Accordingly, the Rule provides the district court with discretion on the question of notice of classes certified under subdivision (b)(1) and (b)(2). Because many class actions of this kind are brought by public interest groups with modest resources, the decision whether to order notice should balance the risk that the costs of providing notice may deter the use of the class action device against the benefits of notice in the particular case. There is also no requirement that individual notice be provided—the subdivision (c)(2)(A) requires only that "appropriate" notice be given.

Contents of Judgments in Class Actions

Subdivision (c)(3) provides that judgments in all class actions must include and describe those persons that the court determines are members of the class and on whom the judgment will bind. The subdivision further provides that judgments in class actions certified under subdivision (b)(3) must also specify or describe those persons to whom notice of the action had been provided and must specify those persons who requested exclusion from the class.

Court Management of Class Actions--Orders

Subdivision (d) provides the court with substantial authority to retain control over the management of the action. This provision complements the expanded authority of the court under Rule 16. The kinds of orders contemplated for the management of class actions are identified in subdivision (d), but the list is not exhaustive.

Court Management of Class Actions--Dismissals and Settlements

Subdivision (e) was significantly expanded in 2003 to detail the responsibilities of the district court in monitoring and approving settlements and dismissals. Court approval is required for settlement or dismissal of a cases for those cases in which a class has been certified. The additional protection provided by court approval is not necessary in cases in which a withdrawal of a request for class certification is part of a settlement--in such cases, no one will be bound by the settlement other than the parties who actually enter into the agreement, as no class had been certified.

Under subdivision (e)(2), the standard for court approval for class settlements or dismissals is "fair, reasonable, and adequate." The finding must be made after a hearing on the question, and class members must be notified of the hearing in a reasonable manner under subdivision (e)(1)--individual notice for the settlement hearing is not mandatory, but may be required by the court. In certain cases, a second "opt out" opportunity may also be ordered by the court under subdivision (e)(4). The mechanics and operation of this procedural device is discussed in greater detail above.

A finding by the district court that the standard has been met requires transparency in all terms of the proposed settlement, dismissal, or compromise. Accordingly, subdivision (e)(3) requires the parties to file with the court any "side agreement" made in connection with the proposed settlement or dismissal in anticipation of the hearing. The disclosure of any such agreement enables the court to rule fairly on the settlement or dismissal, and the court may direct that a copy of the agreement be provided, with confidentiality safeguards when appropriate, to any party who requests one.

Appeals of Rulings on Class Action Certification Generally

Subdivision (f) was added to Rule 23 in 1998 to permit the courts of appeals a discretionary power to review interlocutory decisions of the trial court with respect to certification of class actions if an application for review is made within prescribed time limits. Under prior practice, certification decisions by trial courts were not ordinarily appealable until a final judgment had been entered in the action. Although appellate review of certification decisions was authorized (and remains authorized) under *28 U.S.C. § 1292(b)*, the application of that provision was limited to decisions that "involve a controlling question of law as to which there is a substantial ground for difference of opinion and [require] that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

This limitation entailed sometimes harsh consequences for the party aggrieved by the certification order of the trial court. For plaintiffs unsuccessfully seeking certification of a class, immediate review of the certification decision will obviate the necessity of litigating the merits of an individual claim, which will often result in a nominal damage award relative to the costs of litigation, solely for the purpose of obtaining a reviewable final judgment upon which to challenge the original certification issue. An order granting certification of a class, however, may unduly coerce a defendant into settling the action rather than "incur the costs of defending a class action and run the risk of potentially ruinous liability." Committee Note to 1998 Amendment to Rule 23.

Accordingly, subdivision (f) grants to the courts of appeals the complete discretion to accept an appeal of a certification order from the trial court. The Committee Note states that the discretion given to the appellate court to grant an application for review is "unfettered" and "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari," essentially rendering the decision of the court of appeals unreviewable. The Committee Note indicates that anticipated justifications for review include novel or unsettled questions of law and certification decisions that are likely dispositive of the litigation, though the court of appeals may grant or deny an appeal for any reason whatsoever. Again analogizing to the power of the Supreme Court with respect to a writ of certiorari, courts of appeals will probably not be required to issue an opinion stating their reasons for granting or denying the application for review.

Only Certification Decisions Affected

Only certification decisions are appealable under subdivision (f); other rulings in class actions must await final judgment for review. However, it should be noted that *28 U.S.C. § 1292(b)* remains available for interlocutory orders of

all kinds, though the applicability of that provision to other kinds of pre-trial orders in class actions will be rare.

Certification of District Court Not Required

Unlike the procedure specified in 28 U.S.C. § 1292(b), certification of the district court is not required for a party to seek review of a certification order of the district court. Nonetheless, the Committee Note contemplates that the district courts will assist the parties and courts of appeals by offering its recommendations on the matter, as it will often "be able to provide cogent advice on the factors that bear on the decision whether to permit appeal."

Procedure for Appealing a Certification Order

Parties have 14 days from the entry of the order within which to file an application for review with the court of appeals. The 3-day extension of Rule 6(d) is inapplicable to the 14-day time period of Rule 23(f) because the period is not triggered by the service of a paper by mail.

If an appeal is granted, the proceedings of the district court are not suspended unless a stay is sought from either the district court or the court of appeals, although a stay should be sought first with the district court.

Appointment of Class Action Counsel

Subdivision (g) was added in 2003 to expand on the requirements of class action counsel implied in the "adequacy of representation" requirement in subdivision (a)(4). The provision requires that class counsel be appointed for each certified class, absent a statutory exception, and that counsel "fairly and adequately" represent the interests of the class. Subdivision (g)(1) distinguishes between those considerations the court must take into account in appointing class action counsel, and considerations and other protective devices which may be used to insure that counsel is fair and adequate. Although courts have long used many of these factors in making the appointment determination, the Rule organizes the court's consideration by listing them explicitly.

Subdivision (g)(2)-(3), in conjunction with several of the provisions in subdivision (g)(1), set out the appointment procedure for class action counsel. Significantly, the provisions includes the express authority to appoint interim class action counsel pending certification of the class. Provisions concerning attorneys' fees may also be included in the order of appointment under subdivision (g)(1)(D).

Attorneys' Fees

The inclusion of subdivision (h) in 2003 was regarded as important due to the prominent and sometimes public role that attorneys' fees play in class action cases. Although Rule 54(d)(2) satisfactorily addresses the question of attorneys' fees in most cases, class action cases present special circumstances indicating the need for a tailored provision.

Subdivision (h) indicates that a court may award attorneys' fees in class action cases only when the parties have addressed the issue by agreement or otherwise authorized by law. The award must be "reasonable," and the district court has considerable discretion in determining the reasonableness of the amount.

Subdivision (h)(1) provides that motions for attorneys' fees must be made under Rule 54(d)(2) at a time set by the court. Courts should pay particular attention to the interplay between Rule 54, Rule 58, and *Federal Rule of Appellate Procedure 4* in this regard. Notice of attorneys' fees motions must be provided to members of a class, though individual notice is not required. In many cases, notice of the motion may be included with the notice of proposed settlement under subdivision (e)(1). The Rule provides any class member with standing to object to the motion for attorneys' fees, and limited discovery on the motion is permitted. The district court has the discretion to order a hearing on the motion, which may be combined with the settlement hearing required under subdivision (e)(2). Subdivision (h)(4) also clarifies

that the district court may refer the motion to a master or magistrate under Rule 54(d)(2)(D).



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TITLE IV. PARTIES

Chapter 23 Rule 23. Class Actions

1-23 Federal Civil Procedure Litigation Manual 23.2

23.2 ADDITIONAL AUTHORITY

5 Moore's Federal Practice §§ 23.01 -23.194

James & Hazard, Civil Procedure §§ 10.20-10.23

Friedenthal, Civil Procedure §§ 16.1-16.8

Teply & Whitten, Civil Procedure 681-698



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TITLE IV. PARTIES

Chapter 23 Rule 23. Class Actions

1-23 Federal Civil Procedure Litigation Manual 23.3

23.3 LEADING CASES

Adequacy of Representation

Smith v. National Credit Union Admin. Bd., 36 F.3d 1077 (11th Cir. 1994) (decertification of subclass was proper where the adequacy of representation requirement was not satisfied).

Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283 (4th Cir. 1991) , cert. denied, 503 U.S. 1005 (1992) (where the representatives of a class were represented by a legal foundation that was generally antagonistic to the interests of the class, the adequacy of representation requirement was not met).

Appeal of Class Certification--Factors

In re Household Int'l Tax Reduction Plan, 441 F.3d 500 (7th Cir. 2006) (while Rule 23(f) gives court of appeals discretion to entertain appeal from certification of class, it sets forth no criteria to guide exercise of that discretion; however, the Seventh Circuit has devised its own criteria, one of which is whether deciding appeal would advance development of law governing class actions).

Certification of Class Determination

Chamberlan v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005) (for purposes of consideration of Rule 23(f) petitions, review of class certification decisions will be most appropriate when: (1) there is death-knell situation for either plaintiff or defendant that is independent of merits of underlying claims, coupled with class certification decision by district court that is questionable; (2) certification decision presents unsettled and fundamental issue of law relating to class actions, important both to specific litigation and generally, that is likely to evade end-of-the-case review; or (3) district court's class certification decision is manifestly erroneous).

Certification Protections Independent of Settlement Protections

Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (the protections against the

potential inequity at the precertification stage of a settlement class action are independent of the protections afforded by the required postcertification review process).

Commonality

Wagner v. Taylor, 836 F.2d 578 (D.C. Cir. 1987) (class certification denied because the commonality requirement had not been met).

Conditional Certification Proper

Denney v. Deutsche Bank Sec., 443 F.3d 253 (2d Cir. 2006) (conditional certification of class was permissible where court conducted Rule 23(a) and (b) analysis that was properly independent of its Rule 23(e) fairness review, and determined that, for purpose of settlement, certification requirements were met).

Default Judgment Not Enforceable to Uncertified Class Members

Partington v. American Int'l Specialty Lines Ins. Co., 443 F.3d 334 (4th Cir. 2006) (class members who had never been certified as a class under Rule 23 did not have an enforceable judgment in their favor and default judgment was unenforceable with respect to those class members).

Defendant Class; Adequacy of Representation Problems

Mayo v. Hartford Life Ins. Co., 214 F.R.D. 465 (S.D. Tex. 2002), *aff'd, remanded, certificate for question declined*, 354 F.3d 400 (5th Cir. 2004) (although the standard to be applied for determining adequacy of representation for a defendant class is same as that used in plaintiff class actions, special problems arise when defendant class is being sued by plaintiff class).

Direct Review of Class Certification Not Permitted Under Bankruptcy Rules

Chrysler Fin. Corp. v. Powe, 312 F.3d 1241 (11th Cir. 2002) (Bankruptcy Rules do not permit direct review of class certification orders as does Rule 23).

Dismissal Prior to Certification

Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401 (9th Cir. 1989) (permission of the court is required when a class action is dismissed before certification actually occurs, or the members of the class would be prejudiced by the dismissal).

Exhaustion of Administrative Remedies Not Required of Class Members

In re Household Int'l Tax Reduction Plan, 441 F.3d 500 (7th Cir. 2006) (unnamed class members in ERISA class action suit against ERISA plan did not have to exhaust plan remedies as condition to being allowed to be members of class; only the named plaintiff was required to exhaust those remedies).

Failure to Specify Kind of Certification

Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987) (because the court did not specify which subdivision of Rule 23(b) it was certifying the action under, the action should be treated as if it was certified under Rule 23(b)(3), and the members of the class should have been notified of the action and provided with an opportunity to opt out of the action).

Holidays Excluded in Appeal of Denial of Class Certification

In re Veneman, 309 F.3d 789 (D.C. Cir. 2002) (ten-day time limit for appealing denial of class certification was subject to Rule 6, which excluded Saturdays, Sundays, and holidays, rather than time-computation rule of Federal Rules of Appellate Procedure, which does not) (pre-2009 time computation).

Inadequate Notice to Class Members

Silber v. Mabon, 957 F.2d 697 (9th Cir. 1992) (method of notice to members of the class of stockholders was held to be insufficient where the costs of forwarding the notice to the actual members was not provided to the custodians of the stock).

Intervention Not Necessary to Appeal Settlement

Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002) (non-representative members of a class who have timely objected to settlement approval at fairness hearing may bring an appeal without first intervening under Rule 24).

Law Firm Not Entitled to Common Fund

In re Cendant Corp. Sec. Litig., 404 F.3d 173 (3d Cir. 2005) (law firms that represented an uncertified plaintiff subclass did not truly create or discover cause of action and, thus, had no claim for compensation under common fund doctrine for work that they conducted prior to appointment of lead plaintiffs).

"Mandatory Class Actions"

Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) ("mandatory class actions" are class actions certified on the basis that the prosecution of separate actions would create a risk of inconsistent or varying adjudications, or impair the ability of nonparties to protect their interests, and do not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right).

Mass Tort Actions

In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989) (mass tort class actions are permissible under Rule 23).

Notification to Class Members Where Monetary Damages Are Sought

Brown v. Tigor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed, 511 U.S. 117 (1994) (per curiam) (in any class action where monetary damages are sought, whether certified under Rule 23(b)(1), (b)(2), or (b)(3), the members of the class must be notified of the action and be given the opportunity to opt out of the action or the judgment will not prevent subsequent actions on the monetary claims).

Post-Judgment Certification Improper

UAW v. Donovan, 746 F.2d 839 (D.C. Cir. 1984), rev'd on other grounds, 477 U.S. 274 (1986) (post-judgment certification was not proper).

Refusal to Allow Members to Opt Out of Litigation

In re Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984) (a writ of mandamus was issued when a class was certified that did not permit the members of the class to opt out of the class action).

Standing Issues Reviewed After Class Certification Issue

Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (issues of the propriety of class certification are logically antecedent to concerns relating to standing under Article III and should be reviewed first on appeal).

Stipulation of Certification

Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325 (1st Cir. 1991) (the court need not certify a class expressly where the parties stipulated as to the certification and the definition of the class).

Subclasses

Diaz v. Romer, 961 F.2d 1508 (10th Cir. 1992) (court properly divided the class into subclasses when it found there was a conflict of interest among the members of the class).

Subdivisions (b)(1) and (b)(2) to Be Narrowly Construed

Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (the drafters of subdivisions (b)(1) and (b)(2), which allow class certification to avoid a risk of inconsistent obligations to the class and to oppose an action or refusal to act on grounds generally applicable to the class, were consciously retrospective in their intent to codify those pre-Rule categories; in contrast, subdivision (b)(3) was forward-looking and anticipated innovations with respect to class certifications).

Subsequent Action Not Barred by Failure to Provide Notice

Besinga v. United States, 923 F.2d 133 (9th Cir. 1991) (because the plaintiff in an action had never been provided with notice of an earlier class action and of the opportunity to opt out of the action, the present action could not be considered to have been barred by the doctrine of *res judicata*).

Substantive Merits to Be Decided After Certification

Wiesmueller v. Kosobucki, 513 F.3d 784 (7th Cir. 2008) (district court erred when it denied class certification motion on mootness grounds after granting defendants' dismissal motion; it should have decided class certification motion first, applying Rule 23 criteria, before addressing substantive merits of party's individual claims).

Summary Judgment Before Certification

Floyd v. Bowen, 833 F.2d 529 (5th Cir. 1987) (a court can grant defendant's summary judgment motion before determining whether the class was properly certified).

Supplemental Jurisdiction Applicable to Rule 23 Plaintiffs

Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (28 U.S.C. § 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under FRCP 19, claims against defendants joined under Rule 20, or

plaintiffs who seek to intervene pursuant to Rule 24; however, § 1367(b) does not prevent the exercise of supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 or certified as class action members under Rule 23).

Time for Appeal Certification Order Under Rule 6

Beck v. Boeing Co., 320 F.3d 1021 (9th Cir. 2003) (ten-day time limit for petition to appeal class certification order was subject to time computation rule of Rule 6, which excluded Saturdays, Sundays, and holidays, rather than time computation rule of Federal Rules of Appellate Procedure, which did not) (pre-2009 time computation).

Title VII Class Actions

General Tel. Co. v. Falcon, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (class actions based on Title VII must satisfy all the prerequisites of Rule 23(a)).

Typicality

Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584 (7th Cir. 1993) (class certification was denied because the typicality requirement had not been met).

Cameron v. Tomes, 990 F.2d 14 (1st Cir. 1993) (unique situation of a member of class that presented an issue that was not litigated as part of the class action was sufficient to allow the member to bring an individual action).



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Rule 23.1. Derivative Actions

Rule 23.1 reads as follows:

Rule 23.1. Derivative Actions

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

1-23.1 Federal Civil Procedure Litigation Manual Rule 23.1. Derivative Actions

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) **Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

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23.1.1 COMMENTARY

Rule 23.1 governs shareholder derivative actions, which are special kinds of class actions that may be brought by the stockholder of a corporation or a member of an incorporated association. The action is designed to provide a shareholder or member with the means to enforce a right of action that belongs to the corporation or association which the persons in control of the corporation or association refuse to enforce. The Rule was added in 1966 to replace the former subdivision (b) of Rule 23. The advisory committee's note indicates that a shareholder derivative action "has distinctive aspects which require the special provisions set forth in the new rule."

Illustration 23.1-1

Ely, a shareholder of Gangster Graphics Incorporated, learns that several officers of the corporation are guilty of criminal wrongdoing. Despite Ely's repeated requests that action be taken by the corporation against the wrongdoers, Gangster Graphics does not pursue the matter. Under Rule 23.1, Ely may commence a shareholder derivative action against Gangster Graphics to force the corporation to take action against the wrongdoers.

Requirements of Derivative Actions

To properly bring a shareholder derivative action under Rule 23.1, the plaintiff must allege those items enumerated in subdivisions (b)(1)-(2) in its complaint. Subdivision (b)(3)(A) also requires the plaintiff to set forth its efforts in obtaining the desired action from those persons in control of the corporation or association, an obligation frequently referred to as the demand requirement. Such a demand generally protects the rights of the directors and shareholders of a corporation, or of the administrators and members of an incorporated association, to control the actions of the organization. In general, only when the organization refuses to take the desired action is a shareholder derivative action appropriate.

The Supreme Court has held, however, that this provision does not, by itself, require that such a demand be made. Instead, whether a demand is required is a substantive issue, governed either by the applicable federal or state law. Rule 23.1 only speaks to the adequacy of the pleadings, requiring only that the plaintiff allege any demand requirements that are applicable to it. The substantive law also dictates when the plaintiff may be properly excused from the demand

requirement. Courts have typically held that a plaintiff is so excused if circumstances exist such that a demand would be futile. In any event, subdivision (b)(3)(B) requires an explanation of the reasons why a demand was not made.

Court's Power to Dismiss

Under subdivision (a), a shareholder derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the other shareholders or members in the action. Subdivision (c) provides the court with the discretion to dismiss the action on this basis or any other basis it deems appropriate. The action can be dismissed only by order of the court, and only after proper notice of the pending dismissal has been provided to all the other shareholders or members. Similarly, the conduct of a properly maintained derivative action is within the discretion of the court.

Alignment of Parties in Derivative Actions

The alignment of the corporation or association is sometimes important for purposes of determining whether complete diversity exists. If the corporation opposes the action, it should be regarded as an indispensable party defendant. Nonetheless, there is support for the alignment of the corporation as a plaintiff when the realignment is necessary to preserve the jurisdictional predicate for the action and the directors of the corporation are divided on the proper stance of the corporation. Shareholder derivative actions also have a special venue provision, *28 U.S.C. § 1401*, and a special service of process provision, *28 U.S.C. § 1695*, that are in addition to the ordinary venue provisions of *28 U.S.C. § 1391* and service provisions of Rule 4.



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23.1.2 ADDITIONAL AUTHORITY

5 Moore's Federal Practice §§ 23.1.01 -23.1.17

James & Hazard, Civil Procedure §§ 10.20-10.23

Friedenthal, Civil Procedure § 16.9

Teply & Whitten, Civil Procedure 698-700



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23.1.3 LEADING CASES

Demand Futility Rule

Auletta v. Ortino, 511 F.3d 611 (6th Cir. 2008) (shareholders failed to meet pleading requirements of Rule 23.1 because they did not state, with sufficient particularity, the "demand futility" requirement).

In re Abbott Labs. Derivative S'holders Litig., 325 F.3d 795 (7th Cir. 2003) (shareholders sufficiently pled allegations of directors' conscious inaction, if true, of breach of duty of good faith to show directors were not protected by business judgment rule; demand should have been excused under demand futility doctrine).

Demand Requirement Function of State Law

Kamen v. Kemper Fin. Servs., 500 U.S. 90, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991) (Rule 23.1 does not create a demand requirement on the plaintiff; instead, it contemplates such a requirement by the applicable substantive law).

Notice to Nonparty Shareholders

Maher v. Zapata Corp., 714 F.2d 436 (5th Cir. 1983) (notice provided to nonparty shareholders of a corporation of a settlement of a derivative action was sufficient to satisfy due process; settlement of derivative actions is favored by the courts).

Particularity Requirement

Gonzalez Turul v. Rogatol Distributions, Inc., 951 F.2d 1 (1st Cir. 1991) (when the plaintiff did not meet the pleading requirement of alleging a demand with particularity or facts demonstrating the excusal to make a demand, the district court erred in not dismissing the action).

Partners Not Required to Bring Derivative Suit

Lefkovitz v. Wagner, 395 F.3d 773 (7th Cir. 2005) (partners could sue other partners in a partnership in their own behalf, and a derivative suit under Rule 23.1 was not required).

Realignment of Parties to Preserve Diversity Permitted

Duffey v. Wheeler, 820 F.2d 1161 (11th Cir. 1987) (corporation was realigned as a plaintiff to preserve complete diversity between the plaintiffs and the defendants).

Standing to Appeal Settlement

Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993) (a nonparty shareholder of a corporation who objected to the settlement of a derivative action had standing to appeal the order approving the settlement).



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23.2.1 COMMENTARY

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Rule 23.2. Actions Relating to Unincorporated Associations

Rule 23.2 reads as follows:

Rule 23.2. Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

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23.2.1 COMMENTARY

Rule 23.2 is a special rule providing that an action by or against the members of an unincorporated association may be brought as a class action. Rule 23.2 was added in 1966 at the same time as the addition of Rule 23.1.

Importance of the Rule

The significance of the Rule lies in the fact that the other methods for bringing an action against an unincorporated association--by suing the association as an entity or by joining all the individual members of the association--necessitate that the personal jurisdiction, venue, and service of process rules operate on each member of the association. Furthermore, when an action by or against an association is brought in one of the two manners stated above, the diversity of the parties is determined with reference to all the members of the association.

Rule 23.2 allows persons who will fairly and adequately protect the interests of the association and its members to act as representatives of the association. Thus, the rules regarding personal jurisdiction, venue, and service of process are applicable only to the named representatives of the association. Diversity jurisdiction will also be determined by the citizenship of the named representatives.

Illustration 23.2-1

The Youth Sports Organization, an unincorporated association that oversees sporting events for the city's youth, commences a breach of contract action against Heather's Sporting Goods Corp. In the complaint, Devon is named as the representative of the Youth Sports Organization. Under these circumstances, only Devon's citizenship and that of the corporation will be used to determine if complete diversity exists between the parties.

Practice Before Rule 23.2

The advisory committee's note explains that, prior to the promulgation of Rule 23.2, actions by or against the representatives of an unincorporated association had been viewed as ordinary class actions under Rule 23. Although this view inaccurately characterized the nature of the action, it was thought to be necessary to provide the association with

"entity treatment," thus allowing the association to bring suit or be sued through the class action device. Rule 23.2 makes this recognition explicit, and keys actions by or against unincorporated associations to the provisions of Rule 23(d) and (e) when appropriate.



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23.2.2 ADDITIONAL AUTHORITY

5 Moore's Federal Practice §§ 23.2.01 -23.2.09

James & Hazard, Civil Procedure §§ 10.20-10.23

Teply & Whitten, Civil Procedure 700-701



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23.2.3 LEADING CASES

Class Actions Against Unincorporated Associations

Kerney v. Fort Griffin Fandangle Ass'n, 624 F.2d 717 (5th Cir. 1980) (Rule 23.2 was designed to enlarge the authorization for class actions against unincorporated associations; even though state law allowed such associations to be sued as an entity, this did not deprive the plaintiff of an action under Rule 23.2).

Conflicting State Law

Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81 (2d Cir. 1990) (the provisions of Rule 23.2 are available even though the applicable state law may be to the contrary).



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Rule 24. Intervention

Rule 24 reads as follows:

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

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24.1 COMMENTARY

Rule 24 governs intervention, a procedure through which a nonparty in an action whose interests are nonetheless affected by the action may seek to become a party. The Rule strikes a balance between protecting the interests of nonparties without infringing upon the rights of existing parties. Historically, the procedure was divided into intervention as of right, which was applicable only in a narrow range of circumstances, and permissive intervention, which required leave of the court. Rule 24 preserves this distinction, but substantially broadens the scope of intervention as of right.

Intervention as of Right--When Appropriate

Subdivision (a) provides two circumstances in which a person may intervene in an action. First, a federal statute may unconditionally provide such a right in certain rare situations, such as intervention by the United States or a state in an action involving a constitutional question.

Subdivision (a)(2) sets forth the second, more frequently-encountered situation. It allows a person to intervene in an action without needing to secure the court's permission to do so if three requirements are met. Of course, the court will determine if the requirements have been met, and if the court finds that intervention as of right is not available to a person, that person may intervene in the action only with the court's permission.

The distinction between the court's determination that a person may not intervene as of right, *i.e.*, that the requirements set forth in subdivision (a)(2) have not been satisfied, and the court's refusal to allow a person to intervene permissively is reflected in the standard of appellate review on these determinations. The determination that the requirements of subdivision (a) have not been met are reviewable *de novo* by the appellate court, whereas a refusal to allow a person to intervene permissively is generally reviewable under a more deferential "abuse of discretion" standard.

Requirements Under Subdivision (a)(2)

A person seeking to intervene under subdivision (a)(2) must first claim an interest relating to the property or transaction that is the subject of the action. Although the traditional intervention device required that the quality of the claimed interest be substantial and legally protectable, such as a property right, recent case law has expanded the concept to

those practical interests that may not be enforceable as legally protectable ones.

Second, the intervenor must demonstrate that the disposition of the action may practically impair or impede that person's ability to subsequently protect the claimed interest. Traditionally, intervention as of right was proper only when the person seeking to intervene demonstrated that it would be legally bound by the judgment, such as through the doctrine of *res judicata*. Under the present version of the Rule, virtually any practical impact on the intervenor's ability to protect the interest, such as the force that a judgment may have on a subsequent action by the intervenor through the doctrine of *stare decisis*, will be sufficient.

Third, a person seeking to intervene must show that the claimed interest is not adequately represented by the existing parties in the action. In many cases, inadequate representation will be readily apparent, such as when the interests of the existing parties are hostile to that of the intervening party, or when a party who may have, at one time, adequately represented the interest of the intervening party but who has since waived the issue or has made a pretrial stipulation to its non-litigation. For example, adequate representation will usually be found to exist in class actions and actions represented by an administrator or executor.

Illustration 24-1

Thomas, the executor of an estate containing several rental properties, commences an action against the tenants of the properties seeking to void the leases and evict the tenants. Sally, a beneficiary under the will, seeks to intervene in the action to protect her interest. Although the resolution of the action will affect Sally's interest as a practical matter, the court will likely deny Sally's petition to intervene because she has made no showing that Thomas will not adequately represent the interests of all beneficiaries of the will.

Permissive Intervention Generally

Subdivision (b) sets forth three circumstances in which a person may intervene with the permission of the court. When a person seeks to intervene under subdivision (b), the court may consider a broad range of factors in deciding whether or not to allow the person to intervene, and, as noted above, the court's decision will be reversed only for an abuse of discretion.

Permissive Intervention--When Appropriate

Intervention with the permission of the court may be appropriate under three circumstances. First, as indicated in subdivision (b)(1)(A), a federal statute may confer a conditional right to intervene in an action. As with intervention as of right, such statutes are applicable only in unusual situations, such as when the action involves public accommodations or unlawful employment practices under the Civil Rights Act of 1964.

Second, under subdivision (b)(1)(B), a person may seek to intervene in an action with the permission of the court when the person's potential claim or defense in a subsequent action has an issue of law or fact in common with the current action. This provision allows the court to grant intervention in a broad range of situations. However, denial of intervention is proper when it would unfairly prejudice the interests of the existing parties or when it would unduly prolong the litigation.

Subdivision (b)(2) describes intervention for a government officer or agency, the final situation in which intervention may be granted by the court. It provides that a federal or state governmental officer or agency may seek intervention in an action when a party to the action invokes a statute, executive order, regulation, or related paper administered by that officer or agency as part of its case-in-chief or defense.

Procedure for Intervention

Subdivision (c) sets forth the procedure to be used when a person seeks to intervene under either subdivision (a) or (b). The person must file a motion with the court, describing the grounds for the intervention and whether the intervention sought is permissive or as of right. The person must also file a pleading, which should delineate the claim or defense for which intervention is sought. In most cases, the pleading will be largely duplicative of the contents of the motion. Copies of the motion and pleading must also be served on all the existing parties in the action.

Motions to intervene under either subdivision (a) or (b) must be made in a "timely" fashion. Subdivision (b)(3) requires the court to consider undue delay and the intervention's prejudicial impact on the existing parties in deciding on the motion to intervene. With respect to the "undue delay" consideration, the court should consider both the amount of time that has elapsed from the beginning of the action as well as the length of time within which the person seeking to intervene had notice of the action before deciding to intervene. In addition, logic implies that the same considerations in making such a determination should not be given equal weight on motions to intervene as of right and motions to intervene permissively. Specifically, the degree to which the interest of a person seeking to intervene as of right may be impaired or impeded should affect the determination whether or not the motion was timely. A denial of a motion to intervene on grounds that it is untimely is reversible only for an abuse of discretion.



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24.2 ADDITIONAL AUTHORITY

6 Moore's Federal Practice §§ 24.01 -24.24

James & Hazard, Civil Procedure § 10.17

Friedenthal, Civil Procedure § 6.10

Teply & Whitten, Civil Procedure 664-681



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24.3 LEADING CASES

Adequacy of Representation

Morgan v. McDonough, 726 F.2d 11 (1st Cir. 1984) (in a continuing school desegregation action, a parent organization was dismissed as an intervening party when the district court held that the school board had become an adequate representative of the interests of the organization).

Amicus Curiae Brief Not Substitute for Intervention Right

Utahns for Better Transp. v. United States DOT, 295 F.3d 1111 (10th Cir. 2002) (the right to file a brief as amicus curiae is not a substitute for the right to intervene as a party in litigation).

Appeal of Motion to Intervene

Plain v. Murphy Family Farms, 296 F.3d 975 (10th Cir. 2002) (if trial court denies motion to intervene, the proper procedure is to pursue an immediate appeal and not to file repetitive motions with trial court).

CERCLA Intervention Comparable

California Dep't of Toxic Substances Control v. Commercial Realty Projects, 309 F.3d 1113 (9th Cir. 2002) (standards that apply to intervention under Rule 24 also apply to intervention under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), except that the burden of showing adequate representation by existing parties is allocated to president or state).

Harmless Improper Intervention

Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006) (although court erred by granting a motion to intervene because intervening party had not met their burden of showing that their interests were not adequately represented, the error did not affect the substantial rights of parties in light of the fact that only one piece of noncrucial evidence was submitted by

the intervening party).

"Impair or Impede" an Interest

B.H. v. McDonald, 49 F.3d 294 (7th Cir. 1995) (an intervenor must demonstrate that the disposition of the action may impair or impede an interest, not simply that the intervenor has an interest in the litigation).

Intervention as of Right

Taylor Communications Group, Inc. v. Southwestern Bell Tel. Co., 172 F.3d 385 (5th Cir. 1999) (to intervene as of right, applicant must meet four prerequisites: (1) application for intervention must be timely; (2) applicant must have interest relating to property or transaction which is subject of action; (3) applicant must be so situated that disposition of action may, as practical matter, impair his ability to protect that interest; and (4) applicant's interest must be inadequately represented by existing parties to suit).

Intervention Authorized by Statute

United States v. Metropolitan St. Louis Sewer Dist., 883 F.2d 54 (8th Cir. 1989) (where a right to intervene is unconditionally granted by statute, the court was without authority to deny the motion to intervene).

Intervention Before Supreme Court

Arizona v. California, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983) (in original actions before the Supreme Court, the Federal Rules are to be used as a procedural guide; in this case, a private party was allowed to intervene in an action between states because it satisfied the requirements of Rule 24(b) (now Rule (b)(1))).

Intervention Not Necessary to Appeal Class Action Settlement

Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002) (non-representative members of a class who have timely objected to settlement approval at fairness hearing may bring an appeal without first intervening under Rule 24).

Intervention on Appeal

Edwards v. City of Houston, 37 F.3d 1097 (5th Cir. 1994) (a person may be allowed to intervene for the purposes of appeal, even though the motion to intervene in the action was denied because it was untimely; listing factors to be considered on appeal for denying a motion to intervene in an action).

Motion to Intervene Untimely

Cuyahoga Valley Ry. Co. v. Tracy, 6 F.3d 389 (6th Cir. 1993) (district court did not abuse its discretion in denying a motion to intervene when it was filed four months after a summary judgment had been granted and the person seeking to intervene had known about the action since its initiation).

Order Permitting Intervention Not Appealable

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987) (an order granting permission to intervene, but denying intervention as of right is not appealable as an interlocutory order).

Permissive Intervention Discretionary

Daggett v. Commission on Governmental Ethics & Election Practices, 172 F.3d 104 (1st Cir. 1999) (once a party seeking permissive intervention has satisfied the threshold requirement of having a claim or defense sharing a common question of law or fact with main action, the trial court can consider almost any factor rationally relevant and enjoys very broad discretion in granting or denying the motion).

Possibility of Affected Interest Sufficient

Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991) (a person may intervene as of right even though it had not been established that the disposition of the action would actually impair or impede the intervenor's interest; it is sufficient that the disposition *may* impair or impede the interest).

Preclusion from Asserting Defense

Development Fin. Corp. v. Alpha Hous. & Health Care, 54 F.3d 156 (3d Cir. 1995) (where the defendant was precluded, by statute, from asserting a certain defense, a party could intervene in the action to see that the defense was made).

Prejudice to Parties More Important Than Lapse of Time

Nissei Sangyo Am., Ltd. v. United States, 31 F.3d 435 (7th Cir. 1994) (the prejudice to the parties is more important than the length of time that had elapsed from the beginning of the action in denying a motion to intervene because it was untimely; denial of motion to intervene as of right is reviewable *de novo*, but a decision on the timeliness of such a motion is reviewable for an abuse of discretion).

Protectable Interest Required

Manasota-88, Inc. v. Tidwell, 896 F.2d 1318 (11th Cir. 1990) (intervention denied because the organization seeking to intervene had no protectable interest in the action).

Public Interest Group Cannot Intervene as of Right

Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323 (6th Cir. 2007), *cert. denied*, -- U.S. --, 169 L. Ed. 2d 725 (2007), *cert. denied*, -- U.S. --, 169 L. Ed. 2d 725 (2008) (in action challenging constitutionality of Legal Birth Definition Act, district court properly denied Rule 24 motion to intervene that was filed by public interest group that was involved in process leading up to adoption of challenged statute; group's interest in case simply pertained to enforceability of Act in general, which was not cognizable as substantial legal interest sufficient to require intervention as of right).

Silent Party Not Permitted

Mansfield v. Paxon, 899 F.2d 649 (7th Cir. 1990) (the Federal Rules do not contain provisions allowing for the intervention of a silent party).

Supplemental Jurisdiction Inapplicable to Rule 24 Plaintiffs

Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (28 U.S.C. § 1367(b), which applies only to diversity cases, withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under FRCP 19, claims against defendants joined under Rule 20, or plaintiffs who seek to intervene pursuant to Rule 24; however, § 1367(b) does not prevent the exercise of supplemental

jurisdiction over the claims of plaintiffs permissively joined under Rule 20 or certified as class action members under Rule 23).

Supreme Court Original Action Intervention

South Carolina v. North Carolina, -- U.S. --, 130 S. Ct. 854, 175 L. Ed. 2d 713 (2010) (the Supreme Court chose not to apply Rule 24's standard for permissive intervention in an original action, as an existing party adequately represented the interest of a party seeking to intervene).

Voting Rights Act; Intervention Permissible

Georgia v. Ashcroft, 539 U.S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003) (court did not abuse its discretion by permitting private parties to intervene in action seeking judicial preclearance of legislative redistricting plan under Voting Rights Act; Act did not preclude intervention, and court found that intervenors had identified interests not adequately represented by existing parties).

Younger Abstention Doctrine Not Circumvented

Canatella v. California, 404 F.3d 1106 (9th Cir. 2005) (because Rule 24 cannot extend federal jurisdiction and the *Younger* abstention imposes mandatory limits on federal courts' ability to exercise jurisdiction, intervention as of right under Rule 24 cannot be used to circumvent *Younger* abstention).



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TITLE IV. PARTIES

Chapter 25 Rule 25. Substitution of Parties

1-25 Federal Civil Procedure Litigation Manual 25.syn

§ 25.syn Synopsis to Chapter 25: Rule 25. Substitution of Parties

Scope Rule 25. Substitution of Parties

25.1 COMMENTARY

25.2 ADDITIONAL AUTHORITY

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TITLE IV. PARTIES

Chapter 25 Rule 25. Substitution of Parties

1-25 Federal Civil Procedure Litigation Manual Rule 25. Substitution of Parties

Rule 25. Substitution of Parties

Rule 25 reads as follows:

Rule 25. Substitution of Parties

(a) Death.

(1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) Service. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or

against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

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TITLE IV. PARTIES

Chapter 25 Rule 25. Substitution of Parties

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25.1 COMMENTARY

Rule 25 provides for the substitution of parties in the event of death, incompetency, transfer of interest, or succession of officers. In general, an action does not terminate simply because the original parties to the action are no longer in a capacity to litigate the action. Rule 25 allows the action to continue by the representative of the original party or the successor in interest. The Rule does not address the actions that are extinguished by the death or incompetency of one of the parties; this is governed by the applicable substantive law.

Substitution on Death or Incompetency

If a party dies or becomes incompetent before the action is completed, that fact should be noted in the record. Under subdivision (a)(3), all parties must then be notified of the death or incompetency, as well as the persons who may be substituted for the deceased or incompetent party.

The court may order the substitution of the proper party if a motion for substitution is made by a party or substituted party no later than 90 days from the date the death or incompetency is noted in the record. A copy of the motion should also be served on all other parties. Although a hearing on the substitution is contemplated by the Rule, the court has the authority to dispense with oral argument and decide the issue on the basis of the motion only or on written briefs in cases in which the issues are not complex or disputed. The court may also allow a longer period for such a motion if the substituted party can demonstrate excusable neglect for the failure to make a motion. Furthermore, if the successors in interest to the deceased party or the representatives of the incompetent party are not readily identifiable, those persons have 90 days from the date that they are identified to file a motion under subdivision (a)(1).

Subdivision (a)(2) provides that an action will not be delayed by the death of one or more of the plaintiffs or defendants if the action can continue by or against the remaining parties. Substituted parties can be added to the continuing proceedings at a later date if a proper motion is made under subdivision (a)(1).

Substitution on Transfer of Interest

Subdivision (c) allows for substitution of parties for a transfer of interest made after the action has been initiated. However, this substitution is not mandatory, and the court may require that the action proceed by or against the original

party. A motion for substitution should be made by the transferee in interest, and copies of the motion should be served on all other parties.

Illustration 25-1

Eve commences a breach of contract action against Hank's Electric for damages to Eve's house caused by the negligent repair of lighting fixtures. Two months later, Eve sells the house to Jane. Under Rule 25(c), Jane may make a motion for substitution so that she is allowed to recover damages to the house. However, the court, at its discretion, may require Eve to proceed with the action.

Substitution on Succession of Public Officers

Subdivision (d) specifies that, in the event that a public officer is a party to an action and the person occupying that office ceases to act in that capacity, the substitution of that person's successor in that office occurs automatically. No motion is necessary to effect the substitution, and an entry in the record concerning the substitution may be made at any time during the course of the litigation.



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25.2 ADDITIONAL AUTHORITY

6 *Moore's Federal Practice §§ 25.01 -25.45*



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25.3 LEADING CASES

Assignment of Judgment-Discovery in Aid of Execution

Luken v. Int'l Yacht Council, 2007 U.S. Dist. LEXIS 83651 (S.D. Fla. 2007), decision reached on appeal, 517 F.3d 1271 (1st Cir. 2008) (plaintiff judgment creditor, although there had been assignment for benefit of its creditors, had standing to serve discovery in aid of execution on defendant judgment debtor because state law required it to aid in administration of estate, and Rule 25(c) permitted it to continue because cause of action survived transfer).

Automatic Substitution of Persons Sued or Suing in Official Capacity

Cheney v. United States Dist. Court, 541 U.S. 913, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004) (regardless of whom they name, actions involving parties acting in an official capacity do not hit personally but the government; accordingly, Rule 25 provides for automatic substitution of the new officer when the originally named officer has been replaced) (Scalia, J., memo.).

Excusable Neglect

Continental Bank, N.A. v. Meyer, 10 F.3d 1293 (7th Cir. 1993) (motion for substitution beyond the 90-day time period was permitted because there was excusable neglect for the delay).

Governing Law

Neumann v. John Hancock Mut. Life Ins. Co., 736 F. Supp. 182 (N.D. Ill. 1990) (federal common law determines whether substitution may be made on a federal claim, and state law on pendent state claims).

Guardian's Obligation to File Substitution Motion

Kaubisch v. Weber, 408 F.3d 540 (8th Cir. 2005) (district court did not abuse its discretion in failing to extend time

for a guardian to file a motion to substitute parties after his ward died, because guardian's misapplication or misreading of the plain language of Rule 25(a) (now Rule 25(a)(1)) did not establish excusable neglect under Rule 6 for failing to file a motion in a timely fashion).

Notation to Identify Successors-in-Interest

McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) (notation on the record of the death of the parties did not begin the 90-day time period in which the appropriate parties could be substituted because the notation did not identify the successors in interest of the deceased parties).

Official Capacity Required for Appeal

Karcher v. May, 484 U.S. 72, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987) (legislators who intervened in an action in their official capacities could not appeal a decision not in their favor after they had lost their positions in the legislature; because the successors of the offices did not appeal the decision, no proper appellant was before the Court).

Party Motion to Substitute Itself Improper Where No Successor Appointed

Organic Cow, LLC v. Center for New Eng. Dairy Compact Research, 335 F.3d 66 (2d Cir. 2003) (it was improper for the district court to grant a motion by a private, non-profit research center to substitute itself as party, as the original party, a commission created by interstate compact approved by Congress, had ceased to exist and Congress had authorized no other entity to act in its stead).

Service of Suggestion of Death by Mail

Russell v. City of Milwaukee, 338 F.3d 662 (7th Cir. 2003) (service of suggestion of death, which did not contain certificate of service, was nonetheless properly made by mail; court did not abuse its discretion in refusing to extend time period for filing of substitution of parties, as there was no showing or argument of excusable neglect).

Substituted Party Bound by Consent of Prior Party

Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc., 53 F.3d 851 (7th Cir. 1995) (a party substituted for another under Rule 25 is bound by the consent of the substituted party to a trial before a magistrate judge).

Substitution of Representative Permitted

First Idaho Corp. v. Davis, 867 F.2d 1241 (9th Cir. 1989) (the court may order the substitution of a deceased party's representative where the applicable state law does not allow the entry of judgment against the deceased party).

Summary Judgment on Transfer Improper

ELCA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc., 53 F.3d 186 (8th Cir. 1995) (the district court improperly granted a summary judgment motion by the defendant when the plaintiff transferred its interest to another entity; the court could have either allowed the original plaintiff to continue or could have granted a substitution motion).

Transfer of Interest; Generally

Travelers Indem. Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989) (substitution of parties under Rule 25(c) will only occur when there is actual transfer of interest after the initiation of the action).



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FEDERAL RULES OF CIVIL PROCEDURE
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TITLE I. SCOPE OF RULES; FORM OF ACTION

1-Part 1 Federal Civil Procedure Litigation Manual Rule 1

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.



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TITLE I. SCOPE OF RULES; FORM OF ACTION

1-Part 1 Federal Civil Procedure Litigation Manual Rule 2

Rule 2. One Form of Action

There is one form of action--the civil action.



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FEDERAL RULES OF CIVIL PROCEDURE
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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 3

Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the court.



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 4

Rule 4. Summons

(a) Contents; Amendments.

(1) Contents. A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) **Amendments.** The court may permit a summons to be amended.

(b) **Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons--or a copy of a summons that is addressed to multiple defendants--must be issued for each defendant to be served.

(c) **Service.**

(1) **In General.** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) **By Whom.** Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) **By a Marshal or Someone Specially Appointed.** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 *U.S.C.* § 1915 or as a seaman under 28 *U.S.C.* § 1916.

(d) **Waiving Service.**

(1) **Requesting a Waiver.** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 4

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent--or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 4

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 4

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States. To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Extending Time. The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with *28 U.S.C. § 1608*.

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 4

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) Affidavit Required. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States. Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law. The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law. On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 4.1

Rule 4.1. Serving Other Process

(a) In General. Process--other than a summons under Rule 4 or a subpoena under Rule 45--must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.



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TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 5

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard *ex parte*; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing--in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) Using Court Facilities. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Serving Numerous Defendants.

(1) In General. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying Parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) Required Filings; Certificate of Service. Any paper after the complaint that is required to be served--together with a certificate of service--must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) **How Filing Is Made--In General.** A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) **Electronic Filing, Signing, or Verification.** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.

(4) **Acceptance by the Clerk.** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 5.1

Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

1-Part 1 Federal Civil Procedure Litigation Manual Rule 5.1

(b) Certification by the Court. The court must, under 28 *U.S.C.* § 2403, certify to the appropriate attorney general that a statute has been questioned.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 5.2

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 5.2

- (1) a financial--account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state--court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a pro se filing in an action brought under 28 *U.S.C.* §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social--Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
- (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
 - (A) the docket maintained by the court; and
 - (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) **Protective Orders.** For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) **Waiver of Protection of Identifiers.** A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 6

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 6

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(c) Motions, Notices of Hearing, and Affidavits.

(1) In General. A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

(2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 7

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

- (1) a complaint;
- (2) an answer to a complaint;
- (3) an answer to a counterclaim designated as a counterclaim;
- (4) an answer to a crossclaim;
- (5) a third-party complaint;
- (6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 7.1

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents. A nongovernmental corporate party must file 2 copies of a disclosure statement that:

- (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
- (2) states that there is no such corporation.

(b) Time to File; Supplemental Filing. A party must:

- (1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and
- (2) promptly file a supplemental statement if any required information changes.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 8

Rule 8. General Rules of Pleading
(version effective Dec. 1, 2009)

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) **In General.** In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials--Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading--including the jurisdictional grounds--may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation--other than one relating to the amount of damages--is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;

- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) **Mistaken Designation.** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) **In General.** Each allegation must be simple, concise, and direct. No technical form is required.

(2) **Alternative Statements of a Claim or Defense.** A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

[Note: The United States Supreme Court is expected to submit proposed amendments to Rule 8 to Congress by the May 1, 2010 deadline. Absent Congressional action to the contrary, these amendments will take effect on December 1, 2010. The amended version of Rule 8 is presented below.]



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- contributory negligence;

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- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
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- release;
- res judicata;
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- statute of limitations; and
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1-Part 1 Federal Civil Procedure Litigation Manual Rule 9

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the

circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) **Conditions Precedent.** In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) **Official Document or Act.** In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) **Time and Place.** An allegation of time or place is material when testing the sufficiency of a pleading.

(g) **Special Damages.** If an item of special damage is claimed, it must be specifically stated.

(h) **Admiralty or Maritime Claim.**

(1) **How Designated.** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) **Designation for Appeal.** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 *U.S.C.* § 1292(a)(3).



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 10

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence--and each defense other than a denial--must be stated in a separate count or defense.

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary

support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

1-Part 1 Federal Civil Procedure Litigation Manual Rule 12

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.



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TITLE III. PLEADINGS AND MOTIONS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 13

Rule 13. Counterclaim and Crossclaim

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that--at the time of its service--the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction

over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim--or to claim a credit--against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated.]

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.



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TITLE III. PLEADINGS AND MOTIONS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 14

Rule 14. Third--Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) Third-Party Defendant's Claims and Defenses. The person served with the summons and third-party complaint--the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) Plaintiff's Claims Against a Third-Party Defendant. The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) Motion to Strike, Sever, or Try Separately. Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) Third-Party Defendant's Claim Against a Nonparty. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) Third-Party Complaint In Rem. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) Scope of Impleader. If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable--either to the plaintiff or to the third-party plaintiff--for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) Defending Against a Demand for Judgment for the Plaintiff. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule

12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.



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TITLE III. PLEADINGS AND MOTIONS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 15

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.



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TITLE III. PLEADINGS AND MOTIONS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 16

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

(b) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and (vi) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

1-Part 1 Federal Civil Procedure Litigation Manual Rule 16

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.



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TITLE IV. PARTIES

1-Part 1 Federal Civil Procedure Litigation Manual Rule 17

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) Action in the Name of the United States for Another's Use or Benefit. When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 18

Rule 18. Joinder of Claims

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 19

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) **Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) **Venue.** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 20

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons--as well as a vessel, cargo, or other property subject to admiralty process in rem--may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders--including an order for separate trials--to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 21

Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 22

Rule 22. Interpleader

(a) Grounds.

(1) By a Plaintiff. Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) By a Defendant. A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements--and does not limit--the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to--and does not supersede or limit--the remedy provided by 28

1-Part 1 Federal Civil Procedure Litigation Manual Rule 22

U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class

members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court

may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).



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FEDERAL RULES OF CIVIL PROCEDURE
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TITLE IV. PARTIES

1-Part 1 Federal Civil Procedure Litigation Manual Rule 23.1

Rule 23.1. Derivative Actions

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) **Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.



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TITLE IV. PARTIES

1-Part 1 Federal Civil Procedure Litigation Manual Rule 23.2

Rule 23.2. Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).



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TITLE IV. PARTIES

1-Part 1 Federal Civil Procedure Litigation Manual Rule 24

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

1-Part 1 Federal Civil Procedure Litigation Manual Rule 24

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.



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TITLE IV. PARTIES

1-Part 1 Federal Civil Procedure Litigation Manual Rule 25

Rule 25. Substitution of Parties

(a) Death.

(1) **Substitution if the Claim Is Not Extinguished.** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) **Continuation Among the Remaining Parties.** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) **Service.** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) **Incompetency.** If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office. An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.



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FEDERAL RULES OF CIVIL PROCEDURE
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TITLE V. DISCLOSURES AND DISCOVERY

1-Part 1 Federal Civil Procedure Litigation Manual Rule 26

**Rule 26. Duty to Disclose; General Provisions Governing Discovery
(version effective Dec. 1, 2009)**

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) **Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) **Conference Timing.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) **Conference Content; Parties' Responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) **Discovery Plan.** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

1-Part 1 Federal Civil Procedure Litigation Manual Rule 26

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 26

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

[Note: The United States Supreme Court is expected to submit proposed amendments to Rule 26 to Congress by the May 1, 2010 deadline. Absent Congressional action to the contrary, these amendments will take effect on December 1, 2010. The amended version of Rule 26 is presented below.]



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TITLE V. DISCLOSURES AND DISCOVERY

1-Part 1 Federal Civil Procedure Litigation Manual Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery
(version effective Dec. 1, 2010
Absent Congressional action)

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other

parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) **Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) **Timing.** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) **Sequence.** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) **In General.** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) **Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) **Conference Timing.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) **Conference Content; Parties' Responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) **Discovery Plan.** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

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(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.



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FEDERAL RULES OF CIVIL PROCEDURE
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TITLE V. DISCLOSURES AND DISCOVERY

1-Part 1 Federal Civil Procedure Litigation Manual Rule 27

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) Petition. A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses,

so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) Notice and Service. At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) Order and Examination. If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) Using the Deposition. A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) In General. The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) Motion. The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) Court Order. If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 28

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States.

(1) In General. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer".

The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) In General. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request--Admitting Evidence. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 29

Rule 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified--in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified--but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 30

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

- (i) the officer's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the officer's administration of the oath or affirmation to the deponent; and
- (v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction. The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided

in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if

the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked--in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.



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TITLE V. DISCLOSURES AND DISCOVERY

1-Part 1 Federal Civil Procedure Litigation Manual Rule 31

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) Service; Required Notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions Directed to an Organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) Questions from Other Parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

- (1) take the deponent's testimony in response to the questions;
- (2) prepare and certify the deposition; and
- (3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Completion or Filing.

- (1) Completion.** The party who noticed the deposition must notify all other parties when it is completed.

(2) **Filing.** A party who files the deposition must promptly notify all other parties of the filing.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 32

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used.

(5) Limitations on Use.

(A) Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place--and this motion was still pending when the deposition was taken.

(B) Unavailable Deponent; Party Could Not Obtain an Attorney. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) **Substituting a Party.** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) **Deposition Taken in an Earlier Action.** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) **Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) **Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) **Waiver of Objections.**

(1) **To the Notice.** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) **To the Officer's Qualification.** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) **To the Taking of the Deposition.**

(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) Objection to a Written Question. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recrossquestion, within 7 days after being served with it.

(4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony--or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition--is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 33

Rule 33. Interrogatories to Parties

(a) In General.

(1) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) **Scope.** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) **Responding Party.** The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) **Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) **Answering Each Interrogatory.** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) **Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) **Signature.** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) **Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) **Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 34

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.**(1) Contents of the Request.** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label

them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) **Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 35

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) **In General.** The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) Motion and Notice; Contents of the Order. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) Request by the Party or Person Examined. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request--and is entitled to receive--from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) Waiver of Privilege. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all examinations of the same condition.

(5) Failure to Deliver a Report. The court on motion may order--on just terms--that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) Scope. This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 36

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the

matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) Objections. The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) Motion Regarding the Sufficiency of an Answer or Objection. The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) Sanctions in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.



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TITLE VI. TRIALS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 38

Rule 38. Right to a Jury Trial; Demand

(a) **Right Preserved.** The right of trial by jury as declared by the *Seventh Amendment to the Constitution*--or as provided by a federal statute--is preserved to the parties inviolate.

(b) **Demand.** On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand--which may be included in a pleading--no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) **Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may--within 14 days after being served with the demand or within a shorter time ordered by the court--serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 39

Rule 39. Trial by Jury or by the Court

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

- (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or
- (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

- (1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 40

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 41

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 42

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 43

Rule 43. Taking Testimony

(a) **In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) **Affirmation Instead of an Oath.** When these rules require an oath, a solemn affirmation suffices.

(c) **Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) **Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 44

Rule 44. Proving an Official Record

(a) Means of Proving.

(1) Domestic Record. Each of the following evidences an official record--or an entry in it--that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record--or by the officer's deputy--and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) Foreign Record.

(A) In General. Each of the following evidences a foreign official record--or an entry in it--that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record--or a copy--that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(B) Final Certification of Genuineness. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(C) Other Means of Proof. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(c) Other Proof. A party may prove an official record--or an entry or lack of an entry in it--by any other method authorized by law.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 44.1

Rule 44.1. Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 45

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements--In General. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(B) Command to Attend a Deposition--Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued from Which Court. A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) Issued by Whom. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.

(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Service in the United States. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) Service in a Foreign Country. *28 U.S.C. § 1783* governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises--or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) **Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 46

Rule 46. Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 47

Rule 47. Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 *U.S.C.* § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 48

Rule 48. Number of Jurors; Verdict

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members..

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 49

Rule 49. Special Verdict; General Verdict and Questions

(a) Special Verdict.

(1) In General. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence;
or

(C) using any other method that the court considers appropriate.

(2) Instructions. The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) **Issues Not Submitted.** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict with Answers to Written Questions.

(1) **In General.** The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) **Verdict and Answers Consistent.** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) **Answers Inconsistent with the Verdict.** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) **Answers Inconsistent with Each Other and the Verdict.** When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 50

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury

subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 51

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and--unless the court rejected the request in a definitive ruling on the record--also properly objected.

(2) **Plain Error.** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.



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TITLE VI. TRIALS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 52

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).



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TITLE VI. TRIALS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 53

Rule 53. Masters

(a) Appointment.

(1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district

judge or magistrate judge of the district.

(2) Disqualification. A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 *U.S.C.* § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) Possible Expense or Delay. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) Notice. Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) Contents. The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate *ex parte* with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) Issuing. The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 *U.S.C.* § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) **Amending.** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) **Master's Authority.**

(1) **In General.** Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) **Sanctions.** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) **Master's Orders.** A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) **Master's Reports.** A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) **Action on the Master's Order, Report, or Recommendations.**

(1) Opportunity for a Hearing; Action in General. In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) Time to Object or Move to Adopt or Modify. A party may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or

(C) will be final.

(4) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) Fixing Compensation. Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) Payment. The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocating Payment. The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.



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TITLE VII. JUDGMENT

1-Part 1 Federal Civil Procedure Litigation Manual Rule 54

Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 55

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 55

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.



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TITLE VII. JUDGMENT

1-Part 1 Federal Civil Procedure Litigation Manual Rule 56

Rule 56. Summary Judgment
(version effective Dec. 1, 2009)

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) By a Defending Party. A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) **Establishing Facts.** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts--including items of damages or other relief--are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) **Establishing Liability.** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) **In General.** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) **Opposing Party's Obligation to Respond.** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) **When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

1-Part 1 Federal Civil Procedure Litigation Manual Rule 56

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

[Note: The United States Supreme Court is expected to submit proposed amendments to Rule 56 to Congress by the May 1, 2010 deadline. Absent Congressional action to the contrary, these amendments will take effect on December 1, 2010. The amended version of Rule 56 is presented below.]



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 56

Rule 56. Summary Judgment
(version effective Dec. 1, 2010
Absent Congressional action)

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored

information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(g) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 57

Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 58

Rule 58. Entering Judgment

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

- (1) for judgment under Rule 50(b);
- (2) to amend or make additional findings under Rule 52(b);
- (3) for attorney's fees under Rule 54;
- (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
- (5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

- (A) the jury returns a general verdict;
- (B) the court awards only costs or a sum certain; or
- (C) the court denies all relief.

(2) Court's Approval Required. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

- (A) the jury returns a special verdict or a general verdict with answers to written questions; or
- (B) the court grants other relief not described in this subdivision (b).

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

- (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
- (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:
 - (A) it is set out in a separate document; or
 - (B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under *Federal Rule of Appellate Procedure 4(a)(4)* as a timely motion under Rule 59.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 59

Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 60

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

1-Part 1 Federal Civil Procedure Litigation Manual Rule 60

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 61

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 62

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

- (1) an interlocutory or final judgment in an action for an injunction or a receivership; or
- (2) a judgment or order that directs an accounting in an action for patent infringement.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:

- (1) under Rule 50, for judgment as a matter of law;
- (2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings--or suspend, modify, restore, or grant an injunction--while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 62.1

Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.



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Rule 63. Judge's Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.



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TITLE VIII. PROVISIONAL AND FINAL REMEDIES

1-Part 1 Federal Civil Procedure Litigation Manual Rule 64

Rule 64. Seizing a Person or Property

(a) Remedies Under State Law--In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following--however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 65

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) **Notice.** The court may issue a preliminary injunction only on notice to the adverse party.

(2) **Consolidating the Hearing with the Trial on the Merits.** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) **Issuing Without Notice.** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or

damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry--not to exceed 14 days--that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice--or on shorter notice set by the court--the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

1-Part 1 Federal Civil Procedure Litigation Manual Rule 65

(C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) *28 U.S.C. § 2361*, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) *28 U.S.C. § 2284*, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 65.1

Rule 65.1. Proceedings Against a Surety

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 66

Rule 66. Receivers

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 67

Rule 67. Deposit into Court

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party--on notice to every other party and by leave of court--may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Investing and Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 *U.S.C.* §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 68

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.



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TITLE VIII. PROVISIONAL AND FINAL REMEDIES

1-Part 1 Federal Civil Procedure Litigation Manual Rule 69

Rule 69. Execution

(a) In General.

(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution--and in proceedings supplementary to and in aid of judgment or execution--must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 *U.S.C.* § 2006, or against an officer of Congress in the circumstances stated in 2 *U.S.C.* § 118, the judgment must be satisfied as those statutes provide.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 70

Rule 70. Enforcing a Judgment for a Specific Act

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done--at the disobedient party's expense--by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting Title. If the real or personal property is within the district, the court--instead of ordering a conveyance--may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 71

Rule 71. Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.



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TITLE IX. SPECIAL PROCEEDINGS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 71.1

Rule 71.1. Condemning Real or Personal Property

(a) Applicability of Other Rules. These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) Joinder of Properties. The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(c) Complaint.

(1) Caption. The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property--designated generally by kind, quantity, and location--and at least one owner of some part of or interest in the property.

(2) Contents. The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) Parties. When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) Procedure. Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(5) Filing; Additional Copies. In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) Process.

(1) Delivering Notice to the Clerk. On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) Contents of the Notice.

1-Part 1 Federal Civil Procedure Litigation Manual Rule 71.1

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) Serving the Notice.

(A) Personal Service. When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) Service by Publication.

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice--once a week for at least 3 successive weeks--in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) Effect of Delivery and Service. Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) Amending the Notice; Proof of Service and Amending the Proof. Rule 4(a)(2) governs amending the notice. Rule 4(l) governs proof of service and amending it.

(e) Appearance or Answer.

(1) Notice of Appearance. A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) Answer. A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) Waiver of Other Objections and Defenses; Evidence on Compensation. A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant--whether or not it has previously appeared or answered--may present evidence on the amount of compensation to be paid and may share in the award.

(f) Amending Pleadings. Without leave of court, the plaintiff may--as often as it wants--amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) Substituting Parties. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) Trial of the Issues.

(1) Issues Other Than Compensation; Compensation. In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) Appointing a Commission; Commission's Powers and Report.

(A) Reasons for Appointing. If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) Alternate Commissioners. The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) Examining the Prospective Commissioners. Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(D) Commission's Powers and Report. A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of the Action or a Defendant.

(1) Dismissing the Action.

(A) By the Plaintiff. If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(B) By Stipulation. Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(C) By Court Order. At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) Dismissing a Defendant. The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(3) **Effect.** A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) Deposit and Its Distribution.

(1) **Deposit.** The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) **Distribution; Adjusting Distribution.** After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) **Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury--or for trying the issue of compensation by jury or commission or both--that law governs.

(l) **Costs.** Costs are not subject to Rule 54(d).



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 72

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) Findings and Recommendations. A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) Objections. Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate

judge considers sufficient.

(3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 73

Rule 73. Magistrate Judges: Trial by Consent; Appeal

(a) Trial by Consent. When authorized under 28 *U.S.C.* § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 *U.S.C.* § 636(c)(5).

(b) Consent Procedure.

(1) In General. When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 *U.S.C.* § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) Reminding the Parties About Consenting. A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

(3) Vacating a Referral. On its own for good cause--or when a party shows extraordinary circumstances--the district judge may vacate a referral to a magistrate judge under this rule.

(c) Appealing a Judgment. In accordance with 28 *U.S.C.* § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.



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TITLE IX. SPECIAL PROCEEDINGS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 74

Rule 74. [Abrogated.]



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FEDERAL RULES OF CIVIL PROCEDURE
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TITLE IX. SPECIAL PROCEEDINGS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 75

Rule 75. [Abrogated.]



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TITLE IX. SPECIAL PROCEEDINGS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 76

Rule 76. [Abrogated.]



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FEDERAL RULES OF CIVIL PROCEDURE
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TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 77

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing--other than one *ex parte*--may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office Hours; Clerk's Orders.

(1) Hours. The clerk's office--with a clerk or deputy on duty--must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A).

(2) Orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve--or authorize the court to relieve--a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).



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TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 78

Rule 78. Hearing Motions; Submission on Briefs

(a) Providing a Regular Schedule for Oral Hearings. A court may establish regular times and places for oral hearings on motions.

(b) Providing for Submission on Briefs. By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.



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TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 79

Rule 79. Records Kept by the Clerk

(a) Civil Docket.

(1) In General. The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(2) Items to be Entered. The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(3) Contents of Entries; Jury Trial Demanded. Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(c) Indexes; Calendars. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(d) Other Records. The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.



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TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 80

Rule 80. Stenographic Transcript as Evidence

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.



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TITLE XI. GENERAL PROVISIONS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 81

Rule 81. Applicability of the Rules in General; Removed Actions

(a) Applicability to Particular Proceedings.

(1) Prize Proceedings. These rules do not apply to prize proceedings in admiralty governed by *10 U.S.C. §§ 7651-7681*.

(2) Bankruptcy. These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(3) Citizenship. These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of *8 U.S.C. § 1451* for service by publication and for answer apply in proceedings to cancel citizenship certificates.

(4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

(5) Proceedings Involving a Subpoena. These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(6) Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:

(A) *7 U.S.C. §§ 292, 499g(c)*, for reviewing an order of the Secretary of Agriculture;

(B) *9 U.S.C.*, relating to arbitration;

(C) *15 U.S.C. § 522*, for reviewing an order of the Secretary of the Interior;

(D) *15 U.S.C. § 715d(c)*, for reviewing an order denying a certificate of clearance;

(E) *29 U.S.C. §§ 159, 160*, for enforcing an order of the National Labor Relations Board;

(F) *33 U.S.C. §§ 918, 921*, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

(G) *45 U.S.C. § 159*, for reviewing an arbitration award in a railway-labor dispute.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(c) Removed Actions.

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

(2) Further Pleading. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) **"State Law" Defined.** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) **"State" Defined.** The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth or territory.

(3) **"Federal Statute" Defined in the District of Columbia.** In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 82

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392.



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TITLE XI. GENERAL PROVISIONS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 83

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) Requirement of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.



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1-Part 1 Federal Civil Procedure Litigation Manual Rule 84

Rule 84. Forms

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.



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Rule 85. Title

These rules may be cited as the Federal Rules of Civil Procedure.



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TITLE XI. GENERAL PROVISIONS

1-Part 1 Federal Civil Procedure Litigation Manual Rule 86

Rule 86. Effective Dates

(a) In General. These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

(1) proceedings in an action commenced after their effective date; and

(2) proceedings after that date in an action then pending unless:

(A) the Supreme Court specifies otherwise; or

(B) the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) December 1, 2007 Amendments. If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.



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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

1-Part 2 Federal Civil Procedure Litigation Manual Rule A

Rule A
Scope of Rules

(1) These Supplemental Rules apply to:

(A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(i) maritime attachment and garnishment,

(ii) actions in rem,

(iii) possessory, petitory, and partition actions, and

(iv) actions for exoneration from or limitation of liability;

(B) forfeiture actions in rem arising from a federal statute; and

1-Part 2 Federal Civil Procedure Litigation Manual Rule A

(C) the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

(2) The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.



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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

1-Part 2 Federal Civil Procedure Litigation Manual Rule B

Rule B

In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d)

1-Part 2 Federal Civil Procedure Litigation Manual Rule B

(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant. No default judgment may be entered except upon proof--which may be by affidavit--that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

(3) Answer.

(a) *By Garnishee.* The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 21 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) *By Defendant.* The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.



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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

1-Part 2 Federal Civil Procedure Litigation Manual Rule C

Rule C

In Rem Actions: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In an action in rem the complaint must:

(a) be verified;

1-Part 2 Federal Civil Procedure Litigation Manual Rule C

(b) describe with reasonable particularity the property that is the subject of the action; and

(c) state that the property is within the district or will be within the district while the action is pending;

(3) Judicial Authorization and Process.

(a) *Arrest Warrant.*

(i) The court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(ii) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) *Service.*

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(c) *Deposit in Court.* If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue--in addition to the warrant--a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(d) *Supplemental Process.* The clerk may upon application issue supplemental process to enforce the court's order without further court order.

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 14 days after execution, the plaintiff must promptly--or within the time that the court allows--give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

(5) Ancillary process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Responsive Pleading; Interrogatories.

(a) *Statement of Interest; Answer.* In an action in rem:

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 14 days after the execution of process, or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another;

and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 21 days after filing the statement of interest or right.

(b) *Interrogatories*. Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served with the answer to the complaint.



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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

1-Part 2 Federal Civil Procedure Litigation Manual Rule D

Rule D
Possessory, Petitory, and Partition Actions

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.



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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

1-Part 2 Federal Civil Procedure Litigation Manual Rule E

Rule E

Actions In Rem and Quasi In Rem: General Provisions

(1) **Applicability.** Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) **Complaint; Security.**

(a) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against the party by any interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) **Process.**

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(b) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release.

(a) *In General.* Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) *Tangible Property.* If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) *Intangible Property.* If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) *Directions With Respect to Property in Custody.* The marshal or other person or organization having the warrant may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) *Expenses of Seizing and Keeping Property; Deposit.* These rules do not alter the provisions of Title 28, U.S.C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(f) *Procedure for Release from Arrest or Attachment.* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

(5) Release of Property.

(a) *Special Bond.* Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisal, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) *General Bond.* The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) *Release by Consent or Stipulation; Order of Court or Clerk; Costs.* Any vessel, cargo, or other property in the custody of the marshal or other person or organization having the warrant may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, other person or organization having the warrant, or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal or other person or organization having the warrant shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) *Possessory, Petitory, and Partition Actions.* The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) Reduction or Impairment of Security. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional securities may be required on motion and hearing.

(7) Security on Counterclaim.

(a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sales.

(a) *Interlocutory Sales; Delivery.*

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold--with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court--if:

1-Part 2 Federal Civil Procedure Litigation Manual Rule E

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing release of the property.

(ii) In the circumstances described in Rule E(9)(a)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

(b) *Sales, Proceeds.* All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

(10) Preservation of Property. When the owner or another person remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on a party's motion or on its own, may enter any order necessary to preserve the property and to prevent its removal.



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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

1-Part 2 Federal Civil Procedure Litigation Manual Rule F

Rule F
Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to Be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisal to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without

filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.



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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

1-Part 2 Federal Civil Procedure Litigation Manual Rule G

Rule G
Forfeiture Actions In Rem

(1) **Scope.** This rule governs a forfeiture action in rem arising from a federal statute. To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

(2) **Complaint.** The complaint must:

(a) be verified;

(b) state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;

(c) describe the property with reasonable particularity;

(d) if the property is tangible, state its location when any seizure occurred and--if different--its location when the action is filed;

(e) identify the statute under which the forfeiture action is brought; and

(f) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

(3) Judicial Authorization and Process.

(a) *Real Property*. If the defendant is real property, the government must proceed under 18 U.S.C. § 985.

(b) *Other Property; Arrest Warrant*. If the defendant is not real property:

(i) the clerk must issue a warrant to arrest the property if it is in the government's possession, custody, or control;

(ii) the court--on finding probable cause--must issue a warrant to arrest the property if it is not in the government's possession, custody, or control and is not subject to a judicial restraining order; and

(iii) a warrant is not necessary if the property is subject to a judicial restraining order.

(c) *Execution of Process*.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be:

(A) a marshal or any other United States officer or employee;

(B) someone under contract with the United States; or

(C) someone specially appointed by the court for that purpose.

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(ii) The authorized person or organization must execute the warrant and any supplemental process on property in the United States as soon as practicable unless:

(A) the property is in the government's possession, custody, or control; or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

(iii) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

(iv) If executing a warrant on property outside the United States is required, the warrant may be transmitted to an appropriate authority for serving process where the property is located.

(4) **Notice.**

(a) *Notice by Publication.*

(i) **When Publication Is Required.** A judgment of forfeiture may be entered only if the government has published notice of the action within a reasonable time after filing the complaint or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than \$ 1,000 and direct notice is sent under Rule G(4)(b) to every person the government can reasonably identify as a potential claimant; or

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(ii) **Content of the Notice.** Unless the court orders otherwise, the notice must:

1-Part 2 Federal Civil Procedure Litigation Manual Rule G

(A) describe the property with reasonable particularity;

(B) state the times under Rule G(5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(iii) Frequency of Publication. Published notice must appear:

(A) once a week for three consecutive weeks; or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an official internet government forfeiture site for at least 30 consecutive days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under Rule G(4)(a)(iv).

(iv) Means of Publication. The government should select from the following options a means of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, publication in a newspaper generally circulated in the district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is outside the United States, publication in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located; or

(C) instead of (A) or (B), posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(b) *Notice to Known Potential Claimants.*

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(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than 21 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant.

(B) Notice may be sent to the potential claimant or to the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case.

(C) Notice sent to a potential claimant who is incarcerated must be sent to the place of incarceration.

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is sent may be sent to the address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom the property was seized who is not incarcerated when notice is sent may be sent to the last address that person gave to the agency that seized the property.

(iv) **When Notice Is Sent.** Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.

(v) **Actual Notice.** A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to send the required notice.

(5) Responsive Pleadings.

(a) *Filing a Claim.*

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed by the claimant under penalty of perjury; and

(D) be served on the government attorney designated under Rule G(4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under Rule G(4)(b);

(B) if notice was published but direct notice was not sent to the claimant or the claimant's attorney, no later than 30 days after final publication of newspaper notice or legal notice under Rule G(4)(a) or no later than 60 days after the first day of publication on an official internet government forfeiture site; or

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(C) if notice was not published and direct notice was not sent to the claimant or the claimant's attorney:

(1) if the property was in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under Rule G(3)(b); or

(2) if the property was not in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. § 985(c) as to real property, or 60 days after process was executed on the property under Rule G(3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor, and if filed on the bailor's behalf must state the authority to do so.

(b) **Answer.** A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 21 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) *Time and Scope.* The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 21 days after the motion is served.

(b) *Answers or Objections.* Answers or objections to these interrogatories must be served within 21 days after the interrogatories are served.

(c) *Government's Response Deferred.* The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until 21 days after the claimant has answered these interrogatories.

(7) Preserving, Preventing Criminal Use, and Disposing of Property; Sales.

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(a) *Preserving and Preventing Criminal Use of Property.* When the government does not have actual possession of the defendant property the court, on motion or on its own, may enter any order necessary to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense

(b) *Interlocutory Sale or Delivery.*

(i) Order to Sell. On motion by a party or a person having custody of the property, the court may order all or part of the property sold if:

(A) the property is perishable or at risk of deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or is disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(ii) Who Makes the Sale. A sale must be made by a United States agency that has authority to sell the property, by the agency's contractor, or by any person the court designates.

(iii) Sale Procedures. The sale is governed by 28 U.S.C. §§ 2001, 2002, and 2004, unless all parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.

(iv) Sale Proceeds. Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.

(v) Delivery on a Claimant's Motion. The court may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit sale under Rule G(7)(b)(i) and gives

security under these rules.

(c) *Disposing of Forfeited Property.* Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

(8) Motions.

(a) *Motion To Suppress Use of the Property as Evidence.* If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) *Motion To Dismiss the Action.*

(i) A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).

(ii) In an action governed by 18 U.S.C. § 983(a)(3)(D) the complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property. The sufficiency of the complaint is governed by Rule G(2).

(c) *Motion To Strike a Claim or Answer.*

(i) At any time before trial, the government may move to strike a claim or answer:

(A) for failing to comply with Rule G(5) or (6), or

(B) because the claimant lacks standing.

(ii) The motion:

1-Part 2 Federal Civil Procedure Litigation Manual Rule G

(A) must be decided before any motion by the claimant to dismiss the action; and

(B) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of the evidence.

(d) *Petition To Release Property.*

(i) If a United States agency or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f), a person who has filed a claim to the property may petition for its release under § 983(f).

(ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the petition may be filed either in the district where the property was seized or in the district where a warrant to seize the property issued. If a judicial forfeiture action against the property is later filed in another district--or if the government shows that the action will be filed in another district--the petition may be transferred to that district under 28 U.S.C. § 1404.

(e) *Excessive Fines.* A claimant may seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment or by motion made after entry of a forfeiture judgment if:

(i) the claimant has pleaded the defense under Rule 8; and

(ii) the parties have had the opportunity to conduct civil discovery on the defense.

(9) **Trial.** Trial is to the court unless any party demands trial by jury under Rule 38.



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Appendix C.syn

§ App. C.syn Synopsis to Appendix App. C: APPENDIX OF FORMS

Forms 1 and 2. (combined) Caption; Date, Signature, Address, E-mail Address, and Telephone Number.

Form 3. Summons.

Form 4. Summons on a Third-Party Complaint.

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

Form 6. Waiver of the Service of Summons.

Form 7. Statement of Jurisdiction.

Form 8. Statement of Reasons for Omitting a Party.

Form 9. Statement Noting a Party's Death.

Form 10. Complaint to Recover a Sum Certain.

Form 11. Complaint for Negligence.

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

Form 14. Complaint for Damages Under the Merchant Marine Act.

Form 15. Complaint for the Conversion of Property.

Form 16. Third-Party Complaint.

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

Form 18. Complaint for Patent Infringement.

Form 19. Complaint for Copyright Infringement and Unfair Competition.

Form 20. Complaint for Interpleader and Declaratory Relief.

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

Form 30. Answer Presenting Defenses Under Rule 12(b).

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

Form 41. Motion to Bring in a Third-Party Defendant.

Form 42. Motion to Intervene as a Defendant Under Rule 24.

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

Form 51. Request for Admissions Under Rule 36.

Form 52. Report of the Parties' Planning Meeting.

Form 60. Notice of Condemnation.

Form 61. Complaint for Condemnation.

Form 70. Judgment on a Jury Verdict.

Form 71. Judgment by the Court without a Jury.

Form 80. Notice of a Magistrate Judge's Availability.

Form 81. Consent to an Assignment to a Magistrate Judge.

Form 82. Order of Assignment to a Magistrate Judge.



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Forms 1 and 2

Forms 1 and 2. (combined) Caption; Date, Signature, Address, E-mail Address, and Telephone Number.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s))		
v.)		
[Name(s) of defendant(s)],	)	Civil Action No. [Number]	
Defendant(s))		
v. [Use if needed])		
[Name(s) of third-party defendant(s)],)		
Third-Party Defendant(s))		
)		
_____)	

[NAME OF DOCUMENT]

Date: [Date] [Signature of the attorney or unrepresented party]

 [Printed name]
 [Address]
 [E-mail address]
 [Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 3

Form 3. Summons.

United States District Court
for the
[] DISTRICT OF []

[Name(s) of plaintiff(s)],

Plaintiff(s)

v.

[Name(s) of defendant(s)],

Defendant(s)

)
)
)
)
)
)
)

Civil Action No. [Number]

SUMMONS

To: [Name of the defendant]

A lawsuit has been filed against you.

Within 21 days [Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3)] after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the

1-App. C Federal Civil Procedure Litigation Manual Form 3

Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, [Name of Plaintiff's Attorney], whose address is [Address of Plaintiff's Attorney]. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: [Date]

[Signature of Clerk of Court]

Clerk of Court

(Court Seal)



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 4

Form 4. Summons on a Third-Party Complaint.

United States District Court
for the
[] DISTRICT OF []

<hr/>	
[Name(s) of plaintiff(s)],)
Plaintiff(s))
v.)
[Name(s) of defendant(s)],)
Defendant(s))
v.)
[Name(s) of third-party defendant(s)],)
Third-Party Defendant(s))
)
<hr/>	

Case No. [Number]

SUMMONS ON A THIRD PARTY COMPLAINT

To: [Name of the third-party defendant]

A lawsuit has been filed against defendant [Name of the defendant], who as third-party plaintiff is making this claim against you to pay part or all of what the defendant may owe to the plaintiff [Name of the plaintiff].

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the

1-App. C Federal Civil Procedure Litigation Manual Form 4

plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, [Name of defendant's attorney], whose address is [Address of defendant's attorney], and also on the plaintiff's attorney, [Name of plaintiff's attorney], whose address is [Address of plaintiff's attorney]. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may--but are not required to--respond to it.

Date: [Date]

[Signature of Clerk of Court]

Clerk of Court

(Court Seal)



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 5

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

United States District Court
for the
[_____] DISTRICT OF [_____]

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

**NOTICE OF A LAWSUIT
AND REQUEST TO WAIVE SERVICE OF A SUMMONS**

To: [Name of the defendant or--if the defendant is a corporation, partnership, or association--name of an officer or agent authorized to receive service]

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of

the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 6

Form 6. Waiver of the Service of Summons.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

WAIVER OF THE SERVICE OF SUMMONS

To: [Name of the plaintiff's attorney or the unrepresented plaintiff]

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from [Date when request sent], the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 7

Form 7. Statement of Jurisdiction.

[Statement of Jurisdiction (choose applicable paragraph).]

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[c. For a claim in the admiralty or maritime jurisdiction.] This is a case of admiralty or maritime jurisdiction. **[To invoke admiralty status under Rule 9(h) use the following:** This is an admiralty or maritime claim within the meaning of Rule 9(h).]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 8

Form 8. Statement of Reasons for Omitting a Party.

[Statement of Reasons for Omitting a Party.]

If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).]

This complaint does not join as a party [name] who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because [state the reason].



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APPENDIX OF FORMS

*1-App. C Federal Civil Procedure Litigation Manual Form 10***Form 10. Complaint to Recover a Sum Certain.**

United States District Court
for the
[_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)

Plaintiff(s))

v.)

[Name(s) of defendant(s)],)

Defendant(s))

)

Civil Action No. [Number]

COMPLAINT TO RECOVER A SUM CERTAIN**1. [Statement of Jurisdiction. See Form 7.]**

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[c. For a claim in the admiralty or maritime jurisdiction.] This is a case of admiralty or maritime jurisdiction. **[To**

invoke admiralty status under Rule 9(h) use the following: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

[Use one or more of the following as appropriate and include a demand for judgment.]

[(a) On a Promissory Note]

2. On [Date], the defendant executed and delivered a note promising to pay the plaintiff on [Date] the sum of \$[_____] with interest at the rate of [_____] percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____].

3. The defendant has not paid the amount owed.

[(b) On an Account]

2. The defendant owes the plaintiff \$[_____] according to the account set out in Exhibit A.

[(c) For Goods Sold and Delivered]

2. The defendant owes the plaintiff \$[_____] for goods sold and delivered by the plaintiff to the defendant from [Date] to [Date].

[(d) For Money Lent]

2. The defendant owes the plaintiff \$[_____] for money lent by the plaintiff to the defendant on [Date].

[(e) For Money Paid by Mistake]

2. The defendant owes the plaintiff \$[_____] for money paid by mistake to the defendant on [Date] under these circumstances: (describe with particularity in accordance with Rule 9(b)).

[(f) For Money Had and Received]

2. The defendant owes the plaintiff \$[_____] for money that was received from [Name] on [Date] to be paid by the defendant to the plaintiff.

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for \$[_____], plus interest and costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

*1-App. C Federal Civil Procedure Litigation Manual Form 11***Form 11. Complaint for Negligence.**

United States District Court
for the
[_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)

Plaintiff(s))

v.)

[Name(s) of defendant(s)],)

Defendant(s))

Civil Action No. [Number]

COMPLAINT FOR NEGLIGENCE**1. [Statement of Jurisdiction. See Form 7.]**

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[c. For a claim in the admiralty or maritime jurisdiction.] This is a case of admiralty or maritime jurisdiction. [**To**

invoke admiralty status under Rule 9(h) use the following: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. On [Date], at [Place], the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$[_____].

Therefore, the plaintiff demands judgment against the defendant for \$[_____], plus costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

*1-App. C Federal Civil Procedure Litigation Manual Form 12***Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.**

United States District Court
for the
[_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)

Plaintiff(s))

v.)

[Name(s) of defendant(s)],)

Defendant(s))

)

Civil Action No. [Number]

**COMPLAINT FOR NEGLIGENCE WHEN THE PLAINTIFF
DOES NOT KNOW WHO IS RESPONSIBLE**

1. [Statement of Jurisdiction. See Form 7.]

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[*c. For a claim in the admiralty or maritime jurisdiction.*] This is a case of admiralty or maritime jurisdiction. [*To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. On [Date], at [Place], defendant [Name of first defendant] or defendant (Name of second defendant) or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of \$[_____].

Therefore, the plaintiff demands judgment against one or both defendants for \$[_____], plus costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 13

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

United States District Court
for the
[] DISTRICT OF []

<hr/>	
[Name(s) of plaintiff(s),)
Plaintiff(s))
v.)
[Name(s) of defendant(s),)
Defendant(s))
)
<hr/>	

Civil Action No. [Number]

**COMPLAINT FOR NEGLIGENCE
UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT**

1. [Statement of Jurisdiction. See Form 7.]

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[*c. For a claim in the admiralty or maritime jurisdiction.*] This is a case of admiralty or maritime jurisdiction. [*To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. [At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.]

3. [On _____ [Date], the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.]

4. [During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.]

5. [The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.]

6. [As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of \$_____].

Therefore, the plaintiff demands judgment against the defendant for \$[_____], and costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

*1-App. C Federal Civil Procedure Litigation Manual Form 14***Form 14. Complaint for Damages Under the Merchant Marine Act.**

United States District Court
for the
[_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)

Plaintiff(s))

v.)

[Name(s) of defendant(s)],)

Defendant(s))

)

Civil Action No. [Number]

COMPLAINT FOR DAMAGES UNDER THE MERCHANT MARINE ACT**1. [Statement of Jurisdiction. See Form 7.]**

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[c. For a claim in the admiralty or maritime jurisdiction.] This is a case of admiralty or maritime jurisdiction. **[To**

invoke admiralty status under Rule 9(h) use the following: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. [At the times below, the defendant owned and operated the vessel _____ (Name of Vessel) and used it to transport cargo for hire by water in interstate and foreign commerce.]

3. [On _____ [Date], at _____ [Place], the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of \$ _____ a month and found, which is equal to a shore worker's wage of \$ _____ a month.]

4. [On _____ [Date], the vessel was at sea on the return voyage. (Describe the weather and the condition of the vessel.)]

5. [Describe as in Form 11 the defendant's negligent conduct.]

6. [As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of \$ _____]

Therefore, the plaintiff demands judgment against the defendant for \$[_____], plus costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

*1-App. C Federal Civil Procedure Litigation Manual Form 15***Form 15. Complaint for the Conversion of Property.**

United States District Court
for the
[_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)

Plaintiff(s))

v.)

[Name(s) of defendant(s)],)

Defendant(s))

)

Civil Action No. [Number]

COMPLAINT FOR THE CONVERSION OF PROPERTY**1. [Statement of Jurisdiction. See Form 7.]**

(a. For diversity-of-citizenship jurisdiction.) The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

(b. For federal-question jurisdiction.) This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

(c. For a claim in the admiralty or maritime jurisdiction.) This is a case of admiralty or maritime jurisdiction. [**To**

invoke admiralty status under Rule 9(h) use the following: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. On [Date], at [Place], the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of [Describe property].

3. The property is worth \$[_____].

Therefore, the plaintiff demands judgment against the defendant for \$[_____], plus costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 16

Form 16. Third-Party Complaint.

United States District Court
for the
[] DISTRICT OF []

<hr/>	
[Name(s) of plaintiff(s)],)
Plaintiff(s))
v.)
[Name(s) of defendant(s)],)
Defendant(s))
v.)
[Name(s) of third-party defendant(s)],)
Third-Party Defendant(s))
)
<hr/>	

Civil Action No. [Number]

THIRD-PARTY COMPLAINT

1. Plaintiff [Name of plaintiff] has filed against defendant [Name of defendant] a complaint, a copy of which is attached.

2. [State grounds entitling (defendant's name) to recover from [third-party defendant's name] for [all or an identified share] of any judgment for [plaintiff's name] against (defendant's name).]

Therefore, the defendant demands judgment against [third-party defendant's name] for [all or an identified share] of sums that may be adjudged against the defendant in the plaintiff's favor.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 17

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

United States District Court
 for the
 [_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)	
Plaintiff(s))	
v.	)	Civil Action No. [Number]
[Name(s) of defendant(s)],)	
Defendant(s))	
)	

**COMPLAINT FOR SPECIFIC PERFORMANCE
 OF A CONTRACT TO CONVEY LAND**

1. [Statement of Jurisdiction. See Form 7.]

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[*c. For a claim in the admiralty or maritime jurisdiction.*] This is a case of admiralty or maritime jurisdiction. [*To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. On [Date], the parties agreed to the contract [attached as Exhibit A] [[summarize the contract]].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) the defendant be required to specifically perform the agreement and pay damages of \$[_____], plus interest and costs, or

(b) if specific performance is not ordered, the defendant be required to pay damages of \$[_____], plus interest and costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

*1-App. C Federal Civil Procedure Litigation Manual Form 18***Form 18. Complaint for Patent Infringement.**

United States District Court
for the
[_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)

Plaintiff(s))

v.)

[Name(s) of defendant(s)],)

Defendant(s))

Civil Action No. [Number]

COMPLAINT FOR PATENT INFRINGEMENT**1. [Statement of Jurisdiction. See Form 7.]**

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[c. For a claim in the admiralty or maritime jurisdiction.] This is a case of admiralty or maritime jurisdiction. [**To**

invoke admiralty status under Rule 9(h) use the following: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. On [Date], United States Letters Patent No. [_____] were issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

- (a) a preliminary and final injunction against the continuing infringement;
- (b) an accounting for damages; and
- (c) interest and costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 19

Form 19. Complaint for Copyright Infringement and Unfair Competition.

United States District Court
 for the
 [_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)	
Plaintiff(s))	
v.	)	Civil Action No. [Number]
[Name(s) of defendant(s)],)	
Defendant(s))	
)	

COMPLAINT FOR COPYRIGHT INFRINGEMENT AND UNFAIR COMPETITION

1. [Statement of Jurisdiction. See Form 7.]

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[*c. For a claim in the admiralty or maritime jurisdiction.*] This is a case of admiralty or maritime jurisdiction. [*To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. Before [Date], the plaintiff, a United States citizen, wrote a book entitled _____
_____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between [Date] and [Date], the plaintiff applied to the copyright office and received a certificate of registration dated [Date] and identified as [Date, Class, Number].

5. Since [Date], the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled [_____], which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) the plaintiff be awarded any other just relief.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 20

Form 20. Complaint for Interpleader and Declaratory Relief.

United States District Court
 for the
 [_____] DISTRICT OF [_____]

[Name(s) of plaintiff(s)],)	
Plaintiff(s))	
v.	)	Civil Action No. [Number]
[Name(s) of defendant(s)],)	
Defendant(s))	
)	

**COMPLAINT FOR INTERPLEADER
 AND DECLARATORY RELIEF**

1. [Statement of Jurisdiction. See Form 7.]

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[*c. For a claim in the admiralty or maritime jurisdiction.*] This is a case of admiralty or maritime jurisdiction. [*To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h)].

2. On [Date], the plaintiff issued a life insurance policy on the life of [Name] with [Name] as the named beneficiary.
3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.
4. The premium due on [Date] was never paid, and the policy lapsed after that date.
5. On [Date], after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.
6. Defendant [Name] claims to be the beneficiary in place of [Name] and has filed a claim to be paid the policy's full amount.
7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.
8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

- (a) each defendant be restrained from commencing any action against the plaintiff on the policy;
- (b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and
- (c) the plaintiff recover its costs.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 21

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

United States District Court
for the
[_____] DISTRICT OF [_____]

_____)	
[Name(s) of plaintiff(s)],)	
Plaintiff(s)	)	Civil Action No. [Number]
v.)	
[Name(s) of defendant(s)],)	
Defendant(s))	
_____)	

**COMPLAINT ON A CLAIM FOR A DEBT
AND TO SET ASIDE A FRAUDULENT CONVEYANCE UNDER RULE 18(b)**

1. [Statement of Jurisdiction. See Form 7.]

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[*c. For a claim in the admiralty or maritime jurisdiction.*] This is a case of admiralty or maritime jurisdiction. [*To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. On [Date], defendant [Name] signed a note promising to pay to the plaintiff on [Date] the sum of \$ [_____] with interest at the rate of [_____] percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant [Name] owes the plaintiff the amount of the note and interest.

4. On [Date], defendant [Name] conveyed all defendant's real and personal property (if less than all, describe it fully) to defendant [Name] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for \$[_____], plus costs, be entered against defendant(s) [Names(s)]; and

(b) the conveyance to defendant [Name] be declared void and any judgment granted be made a lien on the property.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 30

Form 30. Answer Presenting Defenses Under Rule 12(b).

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs [].
2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs [].
3. Defendant admits [identify part of the allegation] in paragraph [] and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

Failure to State a Claim

4. The complaint fails to state a claim upon which relief can be granted.

Failure to Join a Required Party

5. If there is a debt, it is owed jointly by the defendant and [Name], who is a citizen of [_____]. This person can be made a party without depriving this court of jurisdiction over the existing parties.

Affirmative Defense--Statute of Limitations

6. The plaintiff's claim is barred by the statute of limitations because it arose more than [_____] years before this action was commenced.

Counterclaim

7. [Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.]

Crossclaim

8. [Set forth a crossclaim against a coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.]

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 31

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

United States District Court
for the
[_____] DISTRICT OF [_____]

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

ANSWER TO A COMPLAINT FOR MONEY HAD AND RECEIVED WITH A COUNTERCLAIM FOR INTERPLEADER

Response to the Allegations in the Complaint

[See Form 30.]

Counterclaim for Interpleader

1. The defendant received from [Name] a deposit of \$[_____].

2. The plaintiff demands payment of the deposit because of a purported assignment from [Name], who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

- (a) [Name] be made a party to this action;
- (b) the plaintiff and [Name] be required to interplead their respective claims;
- (c) the court decide whether the plaintiff or [Name] or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and
- (d) the defendant recover costs and attorney's fees.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 40

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

United States District Court
for the
[] DISTRICT OF []

[Name(s) of plaintiff(s)],)	
Plaintiff(s))	
v.	)	Civil Action No. [Number]
[Name(s) of defendant(s)],)	
Defendant(s))	
)	

**MOTION TO DISMISS UNDER RULE 12(b)
FOR LACK OF JURISDICTION, IMPROPER VENUE, INSUFFICIENT
SERVICE OF PROCESS, OR FAILURE TO STATE A CLAIM**

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by 28 U.S.C. § 1332;
2. the defendant is not subject to the personal jurisdiction of this court;
3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of [_____] or

5. the complaint fails to state a claim upon which relief can be granted.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 42

Form 42. Motion to Intervene as a Defendant Under Rule 24.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24

1. [Name] moves for leave to intervene as a defendant in this action and to file the attached answer.

[State grounds under Rule 24(a) or (b).]

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

Date: [Date] [Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]

(An Intervener's Answer must be attached. See Form 30.)



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 50

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

United States District Court
for the
[_____] DISTRICT OF [_____]

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

**REQUEST TO PRODUCE DOCUMENTS AND TANGIBLE THINGS,
OR TO ENTER ONTO LAND UNDER RULE 34**

The plaintiff [Name] requests that the defendant [Name] respond within [_____] days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

[Describe each document and the electronically stored information, either individually or by category.]

[State the time, place, and manner of the inspection and any related acts.]

2. To produce and permit the plaintiff to inspect and copy--and to test or sample--the following tangible things:

[Describe each thing, either individually or by category.]

[State the time, place, and manner of the inspection and any related acts.]

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

[Describe the property and each object or operation.]

[State the time and manner of the inspection and any related acts.]

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 51

Form 51. Request for Admissions Under Rule 36.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

REQUEST FOR ADMISSIONS UNDER RULE 36

The plaintiff [Name] asks the defendant [Name] to respond within 30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

[List each document.]

2. The truth of each of the following statements:

[List each statement.]

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 52

Form 52. Report of the Parties' Planning Meeting.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

REPORT OF THE PARTIES' PLANNING MEETING

1. The following persons participated in a Rule 26(f) conference on [Date] by [State the method of conferring]:

[Name], representing the [plaintiff]

[Name], representing the [defendant]

2. Initial Disclosures. The parties [have completed] [will complete by [Date]] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

[Use separate paragraphs or subparagraphs if the parties disagree.]

- (a) Discovery will be needed on these subjects: [Describe].
- (b) [Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.]
- (c) [Maximum number of interrogatories by each party to another party, along with the dates the answers are due.]
- (d) [Maximum number of requests for admission, along with the dates responses are due.]
- (e) [Maximum number of depositions by each party.]
- (f) [Limits on the length of depositions, in hours.]
- (g) [Dates for exchanging reports of expert witnesses]
- (h) [Dates for supplementations under Rule 26(e).]

4. Other Items:

- (a) [A date if the parties ask to meet with the court before a scheduling order.]
- (b) [Requested dates for pretrial conferences.]
- (c) [Final dates for the plaintiff to amend pleadings or to join parties.]
- (d) [Final dates for the defendant to amend pleadings or to join parties.]
- (e) [Final dates to file dispositive motions.]
- (f) [State the prospects for settlement.]
- (g) [Identify any alternative dispute resolution procedure that may enhance settlement prospects.]
- (h) [Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.]
- (i) [Final dates to file objections under Rule 26(a)(3).]
- (j) [Suggested trial date and estimate of trial length.]
- (k) [Other matters.]

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 60

Form 60. Notice of Condemnation.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

NOTICE OF CONDEMNATION

To: [Name of the defendant]

1. A complaint in condemnation has been filed in the United States District Court for the [] District of [], to take property to use for [purpose]. The interest to be taken is [describe]. The court is located in the United States courthouse at this address: [].
2. The property to be taken is described below. You have or claim an interest in it.

[Describe the property.]
3. The authority for taking this property is [cite].

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 21 days [after being served with this notice] [from [insert the date of the last publication of notice]]. Send your answer to this address: [_____].

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

*1-App. C Federal Civil Procedure Litigation Manual Form 61***Form 61. Complaint for Condemnation.**

United States District Court
for the
[_____] DISTRICT OF [_____]

_____)	
[Name(s) of plaintiff(s),)	
Plaintiff(s)	)	Civil Action No. [Number]
v.)	
[Name(s) of defendant(s): name as defendants the)	
property and at least one owner],)	
Defendant(s))	
_____)	

COMPLAINT FOR CONDEMNATION**1. [Statement of Jurisdiction. See Form 7.]**

[a. For diversity-of-citizenship jurisdiction.] The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

[b. For federal-question jurisdiction.] This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, ___ U.S.C. § ___].

[c. For a claim in the admiralty or maritime jurisdiction.] This is a case of admiralty or maritime jurisdiction. [**To**

invoke admiralty status under Rule 9(h) use the following: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is [_____].

4. The property is to be used for [_____].

5. The property to be taken is [describe in enough detail for identification--or attach the description and state "is described in Exhibit A, attached"].

6. The interest to be acquired is [_____].

7. The persons known to the plaintiff to have or claim an interest in the property are: [_____]. [For each person include the interest claimed.]

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

Date: [Date]

[Signature of the attorney or unrepresented party]

[Printed name]

[Address]

[E-mail address]

[Telephone number]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 70

Form 70. Judgment on a Jury Verdict.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

JUDGMENT ON A JURY VERDICT

This action was tried by a jury with Judge [] presiding, and the jury has rendered a verdict.

It is ordered that [the plaintiff [Name] recover from the defendant [Name] the amount of \$[], with prejudgment interest at the rate of [] %, postjudgment interest at the rate of [] %, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant [Name] recover costs from the plaintiff [Name].]

Date: [Date] [Signature of Clerk of Court]

Clerk of Court



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 71

Form 71. Judgment by the Court without a Jury.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

JUDGMENT BY THE COURT WITHOUT A JURY

This action was tried by Judge [] without a jury and the following decision was reached:

It is ordered that [the plaintiff [Name] recover from the defendant [Name] the amount of \$[], with prejudgment interest at the rate of [] %, postjudgment interest at the rate of [] %, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant [Name] recover costs from the plaintiff [Name].]

Date: [Date] [Signature of Clerk of Court]

Clerk of Court



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 80

Form 80. Notice of a Magistrate Judge's Availability.

NOTICE OF A MAGISTRATE JUDGE'S AVAILABILITY

1. A magistrate judge is available under title 28 U.S.C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.
2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.
3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called *Consent to an Assignment to a United States Magistrate Judge* is available from the court clerk's office.



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 81

Form 81. Consent to an Assignment to a Magistrate Judge.

United States District Court
for the
[_____] DISTRICT OF [_____]

_____)	
[Name(s) of plaintiff(s)],)		
Plaintiff(s)	)	Civil Action No. [Number]	
v.)		
[Name(s) of defendant(s)],)		
Defendant(s))		
_____)	

CONSENT TO AN ASSIGNMENT TO A MAGISTRATE JUDGE

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. **(Return this form to the court clerk--not to a judge or magistrate judge).**

Date: [Date]

[Signature

of Party]



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APPENDIX OF FORMS

1-App. C Federal Civil Procedure Litigation Manual Form 82

Form 82. Order of Assignment to a Magistrate Judge.

United States District Court
for the
[] DISTRICT OF []

_____)	
[Name(s) of plaintiff(s)],)	
Plaintiff(s)	)	Civil Action No. [Number]
v.)	
[Name(s) of defendant(s)],)	
Defendant(s))	
_____)	

ORDER OF ASSIGNMENT TO A MAGISTRATE JUDGE

With the parties' consent, it is ordered that this case be assigned to United States Magistrate Judge [Name of magistrate judge] of this district to conduct all proceedings and enter final judgment in accordance with 28 U.S.C. § 636(c).

Date: [Date]

the District Judge]

States District Judge

[Signature

United



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE I. APPLICABILITY OF RULES

1-Part 3 Federal Civil Procedure Litigation Manual RULE 1

RULE 1 Scope of Rules; Title

(a) Scope of Rules.

- (1) These rules govern procedure in the United States courts of appeals.
- (2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) [Abrogated]

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE I. APPLICABILITY OF RULES

1-Part 3 Federal Civil Procedure Litigation Manual RULE 2

RULE 2 Suspension of Rules

On its own or a party's motion, a court of appeals may--to expedite its decision or for other good cause--suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

1-Part 3 Federal Civil Procedure Litigation Manual RULE 3

RULE 3 Appeal as of Right--How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record--excluding the appellant's--or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries--and any later docket entries--to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

1-Part 3 Federal Civil Procedure Litigation Manual RULE 3.1

RULE 3.1 Appeal from a Judgment of a Magistrate Judge in a Civil Case

[Abrogated]



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 4

RULE 4 Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

1-Part 3 Federal Civil Procedure Litigation Manual RULE 4

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) (A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is

entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

- (i) the entry of either the judgment or the order being appealed; or
- (ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

- (i) the entry of the judgment or order being appeal; or
- (ii) the filing of a notice of appeal by any defendant.

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

- (i) for judgment of acquittal under Rule 29;
- (ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or
- (iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment-- to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court docketed the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeal. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 5

RULE 5 Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

- (i) the order, decree, or judgment complained of or any related opinion or memorandum, and
 - (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.
- (2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.
- (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

- (1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:
- (A) pay the district clerk all required fees; and
 - (B) file a cost bond if required under Rule 7.
- (2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.
- (3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 5.1

RULE 5.1 [Appeal by Leave under 28 U.S.C. § 636(c)(5)]

(Abrogated Apr. 24, 1998, eff. Dec. 1, 1998)



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 6

RULE 6 Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for rehearing.**

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate

panel announces or enters a judgment, order, or decree--but before disposition of the motion for rehearing--becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4--excluding Rules 4(a)(4) and 4(b)-- measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The record on appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006--and serve on the appellee--a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) Forwarding the record.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the record. Upon receiving the record--or a certified copy of the docket entries sent in place of the redesignated record--the circuit clerk must file it and immediately notify all parties of the filing date.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 7

RULE 7 Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 8

RULE 8 Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

- (A) a stay of the judgment or order of a district court pending appeal;
- (B) approval of a supersedeas bond; or
- (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

- (i) show that moving first in the district court would be impracticable; or
- (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

- (i) the reasons for granting the relief requested and the facts relied on;
- (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
- (iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make the procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) Proceeding Against a Surety. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) Stay in a Criminal Case. Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 9

RULE 9 Release in a Criminal Case

(a) Release Before Judgment of Conviction.

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) Release After Judgment of Conviction. A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) Criteria for Release. The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 10

RULE 10 The Record on Appeal

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

- (1) the original papers and exhibits filed in the district court;
- (2) the transcript of proceedings, if any; and
- (3) a certified copy of the docket entries prepared by the district clerk.

(b) The Transcript of Proceedings.

(1) **Appellant's Duty to Order.** Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

- (i) the order must be in writing;
 - (ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and
 - (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or
- (B) file a certificate stating that no transcript will be ordered.

(2) **Unsupported Finding or Conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) **Partial Transcript.** Unless the entire transcript is ordered:

(A) the appellant must--within the 14 days provided in Rule 10(b)(1)--file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) **Payment.** At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) **Agreed Statement as the Record on Appeal.** In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the courts resolution of the issues. If the statement is truthful, it--together with any additions that the district court may consider necessary to a full presentation of the issues on appeal-- must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) **Correction or Modification of the Record.**

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 11

RULE 11 Forwarding the Record

(a) Appellant's Duty. An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(b) Duties of Reporter and District Clerk.

(1) Reporter's Duty to Prepare and File a Transcript. The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk.

(B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties.

(C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing.

(D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

(2) District Clerk's Duty to Forward. When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts

of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal. The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellees' brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.

(d) [Abrogated]

(e) Retaining the Record by Court Order.

(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals.

(3) If part or all of the record retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.

(f) Retaining Parts of the Record in the District Court by Stipulation of the Parties. The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order--

- for a stay pending appeal;

the district clerk must send the court of appeals any parts of the record designated by any party.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

1-Part 3 Federal Civil Procedure Litigation Manual RULE 12

RULE 12 Docketing the Appeal; Filing a Representation Statement; Filing the Record

(a) Docketing the Appeal. Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(b) Filing a Representation Statement. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) Filing the Record, Partial Record, or Certificate. Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 12.1

RULE 12.1 Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

1-Part 3 Federal Civil Procedure Litigation Manual RULE 13

RULE 13 Review of a Decision of the Tax Court

(a) How Obtained; Time for Filing Notice of Appeal.

(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(b) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(c) Contents of the Notice of Appeal; Service; Effect of Filing and Service. Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) The Record on Appeal; Forwarding; Filing.

1-Part 3 Federal Civil Procedure Litigation Manual RULE 13

(1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

(2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provisions for the record.



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TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

1-Part 3 Federal Civil Procedure Litigation Manual RULE 14

RULE 14 Applicability of Other Rules to the Review of a Tax Court Decision

All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to the review of a Tax Court decision.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD,
COMMISSION, OR OFFICER

1-Part 3 Federal Civil Procedure Litigation Manual RULE 15

RULE 15 Review or Enforcement of an Agency Order--How Obtained; Intervention

(a) Petition for Review; Joint Petition.

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition--using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) Application or Cross-Application to Enforce an Order; Answer; Default.

1-Part 3 Federal Civil Procedure Litigation Manual RULE 15

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) Service of the Petition or Application. The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(d) Intervention. Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion--or other notice of intervention authorized by statute--must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(e) Payment of Fees. When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 15.1

RULE 15.1 Briefs and Oral Argument in a National Labor Relations Board Proceeding

In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 16

RULE 16 The Record on Review or Enforcement

(a) Composition of the Record. The record on review or enforcement of an agency order consists of:

- (1) the order involved;
- (2) any findings or report on which it is based; and
- (3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) Omissions From or Misstatements in the Record. The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 17

RULE 17 Filing the Record

(a) Agency to File; Time for Filing; Notice of Filing. The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) Filing--What Constitutes.

(1) The agency must file:

(A) the original or a certified copy of the entire record or parts designated by the parties; or

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

(2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.

(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 18

RULE 18 Stay Pending Review

(a) Motion for a Stay.

(1) **Initial Motion Before an Agency.** A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.

(2) **Motion in the Court of Appeals.** A motion for a stay may be made to the court of appeals or one of its judges.

(A) The motion must:

(i) show that moving first before the agency would be impracticable; or

(ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reason given by the agency for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(b) **Bond.** The court may condition relief on the filing of a bond or other appropriate security.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 19

RULE 19 Settlement of a Judgment Enforcing an Agency Order in Part

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 20

RULE 20 Applicability of Rules to the Review or Enforcement of an Agency Order

All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE V. EXTRAORDINARY WRITS

1-Part 3 Federal Civil Procedure Litigation Manual RULE 21

RULE 21 Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(b) Denial; Order Directing Answer; Briefs; Precedence.

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer

within a fixed time.

(2) The clerk must serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(d) Form of Papers; Number of Copies. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

1-Part 3 Federal Civil Procedure Litigation Manual RULE 22

RULE 22 Habeas Corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 23

RULE 23 Custody or Release of a Prisoner in a Habeas Corpus Proceeding

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) Detention or Release Pending Review of Decision Not to Release. While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

- (1) detained in the custody from which release is sought;
- (2) detained in other appropriate custody; or
- (3) released on personal recognizance, with or without surety.

(c) Release Pending Review of Decision Ordering Release. While a decision ordering the release of a prisoner is under review, the prisoner must--unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise--be released on person recognizance, with or without surety.

(d) Modification of the Initial Order on Custody. An initial order governing the prisoner's custody or release, including any recognizance of surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.



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TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

1-Part 3 Federal Civil Procedure Litigation Manual RULE 24

RULE 24 Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court--before or after the notice of appeal is filed--certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of

appeals when the district court does any of the following:

- (A) denies a motion to proceed on appeal in forma pauperis;
- (B) certifies that the appeal is not taken in good faith; or
- (C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding. When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purposes of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE VII. GENERAL PROVISIONS

1-Part 3 Federal Civil Procedure Litigation Manual RULE 25

RULE 25 Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing: Method and Timeliness.

(A) **In general.** Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing; it is:

- (i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or
- (ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days.

(C) **Inmate filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) **Service of All Papers Required.** Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) **Manner of Service.**

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 calendar days; or

(D) by electronic means if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) **Proof of Service.**

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

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- (i) the date and manner of service;
 - (ii) the names of the persons served; and
 - (iii) their mail or electronic addresses, facsimile numbers, or the address of the places of delivery, as appropriate for the manner of service.
- (2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.
- (3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.



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FEDERAL RULES OF APPELLATE PROCEDURE
TITLE VII. GENERAL PROVISIONS

1-Part 3 Federal Civil Procedure Litigation Manual RULE 26

RULE 26 Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Period Stated in Hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

"Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

- (A) for electronic filing in the district court, at midnight in the court's time zone;
- (B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;
- (C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)--and filing by mail under Rule 13(b)--at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and
- (D) for filing by other means, when the clerk's office is scheduled to close.

(5) **"Next Day" Defined.** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) **"Legal Holiday" Defined.** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.



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FEDERAL RULES OF APPELLATE PROCEDURE
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1-Part 3 Federal Civil Procedure Litigation Manual RULE 26.1

RULE 26.1 Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying any parent corporation and any publicly held company that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If a statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.



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FEDERAL RULES OF APPELLATE PROCEDURE
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1-Part 3 Federal Civil Procedure Litigation Manual RULE 27

RULE 27 Motions

(a) In General.

(1) **Application for Relief.** An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(2) Contents of a Motion.

(A) **Grounds and relief sought.** A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) Accompanying documents.

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) Documents barred or not required.

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) Response.

1-Part 3 Federal Civil Procedure Litigation Manual RULE 27

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10- day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) **Request for affirmative relief.** A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(4) **Reply to Response.** Any reply to a response must be filed within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(b) **Disposition of a Motion for a Procedural Order.** The court may act on a motion for a procedural order--including a motion under Rule 26(b)--at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

(c) **Power of a Single Judge to Entertain a Motion.** A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

(d) **Forms of Papers; Page Limits; and Number of Copies.**

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) **Cover.** A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8 1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and they type-style requirements of Rule 32(a)(6).

(2) **Page Limits.** A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

(3) **Number of Copies.** An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 28

RULE 28 Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

- (1) a corporate disclosure statement if required by Rule 26.1;
- (2) a table of contents, with page references;
- (3) a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;
- (4) a jurisdictional statement, including:
 - (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
 - (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
 - (C) the filing dates establishing the timeliness of the appeal or petition for review; and
 - (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;
- (5) a statement of the issues presented for review;
- (6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
- (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see

Rule 28(e);

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statements:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with reference to the pages of the reply brief where they are cited.

(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the page of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, etc. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) [Reserved]

(h) [Reserved]

(i) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed--or after oral argument but before a decision--a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 28.1

RULE 28.1 Cross-Appeals

(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) Briefs. In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

- (A) the jurisdictional statement;
- (B) the statement of the issues;
- (C) the statement of the case;
- (D) the statement of the facts; and
- (E) the statement of the standard of review.

(4) **Appellant's Principal Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (11) and must be limited to the issues presented by the cross-appeal.

(5) **Appellant's Principal Brief.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; and intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) **Length.**

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.** (A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

- (i) it contains no more than 14,000 words; or
- (ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

- (i) it contains no more than 16,500 words; or
- (ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) **Time to Serve and File a Brief.** Briefs must be served and filed as follows:

- (1) the appellant's principal brief, within 40 days after the record is filed;
- (2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;
- (3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and
- (4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 29

RULE 29 Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus curiae brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities--cases (alphabetically arranged), statutes and other authorities--with references to the pages of the brief where they are cited;

(3) a concise statement of the identify of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(5) a certificate of compliance, if required by Rule 32(a)(7).

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 30

RULE 30 Appendix to the Briefs

(a) Appellant's Responsibility.

(1) **Contents of the Appendix.** The appellant must prepare and file an appendix to the briefs containing:

- (A) the relevant docket entries in the proceeding below;
- (B) the relevant portions of the pleadings, charge, findings, or opinion;
- (C) the judgment, order, or decision in question; and
- (D) other parts of the record to which the parties wish to direct the court's attention.

(2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) All Parties' Responsibilities.

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the

appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) **Costs of Appendix.** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Deferred Appendix.

(1) **Deferral Until After Briefs Are Filed.** The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented

(2) **References to the Record.**

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board,

commission, or officer was used in a district- court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) Appeal on the Original Record Without an Appendix. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 31

RULE 31 Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) (1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) Consequence of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 32

RULE 32 Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(1) Reproduction.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's red; an intervenor's or amicus curiae's, green; and any reply brief, gray, and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of the counsel representing the party for whom the brief is filed.

(3) **Binding.** The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) **Paper Size, Line Spacing, and Margins.** The brief must be on 8 1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) **Typeface.** Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but san-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10 1/2 characters per inch.

(6) **Type Styles.** A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) **Length.**

(A) **Page limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) **Type-volume limitation.**

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) **Certificate of compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) **Form of an Appendix.** An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following

exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 1/2 by 11 inches, and need not lie reasonably flat when open.

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) Signature. Every brief, motion or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.



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FEDERAL RULES OF APPELLATE PROCEDURE
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1-Part 3 Federal Civil Procedure Litigation Manual RULE 32.1

RULE 32.1 Citing Judicial Dispositions

(a) Citations Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been

- (i) designated as "unpublished," "not for publication," non-precedential," "not precedent," or the like; and
- (ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment or other written disposition with the brief or other paper in which it is cited.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 33

RULE 33 Appeal Conferences

The court may direct the attorneys--and, when appropriate, the parties--to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceeding or implementing any settlement agreement.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 34

RULE 34 Oral Argument

(a) In General.

(1) **Party's Statement.** Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) Nonappearance of a Party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 35

RULE 35 En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
- (2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

- (1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

- (3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition

for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) Number of Copies. The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.



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RULE 36 Entry of Judgment; Notice

(a) Entry. A judgement is entered when it is noted on the docket. The clerk must prepare, sign and enter the judgment:

- (1) after receiving the court's opinion--but if settlement of the judgment's form is required, after final settlement; or
- (2) if a judgment is rendered without an opinion, as the court instructs.

(b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion--or the judgment, if no opinion was written--and a notice of the date when the judgment was entered.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 37

RULE 37 Interest on Judgment

(a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(b) When the Court Reverses. If a court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 38

RULE 38 Frivolous Appeals--Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 39

RULE 39 Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of Costs: Objections; Insertion and Mandate.

- (1) A party who wants costs taxed must--within 14 days after entry of judgment--file with the circuit clerk, with

proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must--upon the circuit clerk's request--add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.



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RULE 40 Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) **Answer.** v

(4) **Action by the Court.** If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 41

RULE 41 Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

1-Part 3 Federal Civil Procedure Litigation Manual RULE 41

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 42

RULE 42 Voluntary Dismissal

(a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 43

RULE 43 Substitution of Parties

(a) Death of a Party.

(1) **After Notice of Appeal Is Filed.** If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) **Before Notice of Appeals Is Filed--Potential Appellant.** If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative--or, if there is no personal representative, the decedent's attorney of record--may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) **Before Notice of Appeals Is Filed--Potential Appellee.** If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) Substitution for a Reason Other Than Death. If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) Public Officer: Identification; Substitution.

(1) **Identification of Party.** A public officer who is a party to an appeal or other proceeding in an official capacity

may be described a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) **Automatic Substitution of Officeholder.** When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 44

RULE 44 Cases Involving a Constitutional Question When the United States or the Relevant State Is Not a Party

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a state in a proceeding in which that state or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the state.



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RULE 45 Clerk's Duties

(a) General Provisions.

(1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) Records.

(1) **The Docket.** The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) **Calendar.** Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) **Other Records.** The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.



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RULE 46 Attorneys

(a) Admission to the Bar.

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

"I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) **Standard.** A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

1-Part 3 Federal Civil Procedure Litigation Manual RULE 46

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) **Procedure.** The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) **Order.** The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) **Discipline.** A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.



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1-Part 3 Federal Civil Procedure Litigation Manual RULE 47

RULE 47 Local Rules by Court of Appeals

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with--but not duplicative of--Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There Is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.



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RULE 48 Masters

(a) Appointment; Powers. A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

- (1) regulating all aspects of a hearing;
- (2) taking all appropriate action for the efficient performance of the master's duties under the order;
- (3) requiring the production of evidence on all matters embraced in the reference; and
- (4) administering oaths and examining witnesses and parties.

(b) Compensation. If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.**APPENDIX OF FORMS**

Form 1. Notice of Appeal to a Court of Appeals
From a Judgment or Order of a District Court

United States District Court for the
_____ District of _____

File Number _____

1-Part 3 Federal Civil Procedure Litigation Manual RULE 48

A.B., Plaintiff)
 v.) *Notice of Appeal*
 C.D., Defendant)
)
)

Notice is hereby given that _____ [here name all parties taking the appeal], [plaintiffs] [defendants] in the above named case, n* hereby appeal to the United States Court of Appeals for the _____ Circuit [from the final judgment] [from an order [describing it]] entered in this action on the ____ day of _____, 20____.

Signed: _____

Attorney for _____

Address: _____

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
 Washington, D.C.

United States District Court for the
 _____ District of _____

A. B., Petitioner)
 v.) Docket No. _____
 Commissioner of Internal Revenue, Respondent)
)
)

Notice of Appeal

Notice is hereby given that _____ [here name all parties taking the appeal] n* _____ hereby appeals to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20____ [relating to _____].

Signed: _____

1-Part 3 Federal Civil Procedure Litigation Manual RULE 48

Counsel for _____

Address: _____

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the _____ Circuit

A. B., Petitioner)	
v.	)	Petition for Review
XYZ Commission, Respondent)	
)	
)	

_____ [here name all parties bringing the petition] n* hereby petition the court for review of the Order of the XYZ Commission [describe the order] entered on _____, 20_____.

(s) _____

Attorney for Petitioners

Address: _____

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

United States District Court for the _____ District of _____

A. B., Plaintiff)	
v.)	Case No. _____
C. D., Defendant)	
)	
)	

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1-Part 3 Federal Civil Procedure Litigation Manual RULE 48

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My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

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	You	Spouse	You	Spouse
Employment	\$ _____	\$ _____	\$ _____	\$ _____
Self-employment	\$ _____	\$ _____	\$ _____	\$ _____
Income from real property (such as rental income)	\$ _____	\$ _____	\$ _____	\$ _____
Interest and dividends	\$ _____	\$ _____	\$ _____	\$ _____
Gifts	\$ _____	\$ _____	\$ _____	\$ _____
Alimony	\$ _____	\$ _____	\$ _____	\$ _____
Child support	\$ _____	\$ _____	\$ _____	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ _____	\$ _____	\$ _____	\$ _____
Disability (such as social security, insurance payments)	\$ _____	\$ _____	\$ _____	\$ _____
Unemployment payments	\$ _____	\$ _____	\$ _____	\$ _____
Public-assistance (such as wel- fare)	\$ _____	\$ _____	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____	\$ _____	\$ _____

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Total monthly income: \$ _____ \$ _____ \$ _____ \$ _____

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? \$ _____ Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor vehicle #1 (Value)
_____	_____	Make & year: _____
_____	_____	Model: _____
_____	_____	Registration: _____
Motor vehicle #2 (Value)	Other real estate (Value)	Other assets (Value)
Make & year: _____	_____	_____
Model: _____	_____	_____
Registration: _____	_____	_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse	Amount owed to you	Amount owed to your
_____	_____	_____

money

spouse

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home mortgage payment (include lot rented for mobile home)	\$ _____	\$ _____
Are real estate taxes included? [] Yes [] No		
Is property insurance included? [] Yes [] No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ _____	\$ _____
Home maintenance (repairs and upkeep)	\$ _____	\$ _____
Food	\$ _____	\$ _____
Clothing	\$ _____	\$ _____
Laundry and dry-cleaning	\$ _____	\$ _____
Medical and dental expenses	\$ _____	\$ _____
Transportation (not including motor vehicle payments)	\$ _____	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ _____	\$ _____
Insurance (not deducted from wages or included in Mortgage payments)	\$ _____	\$ _____
Homeowner's or renter's	\$ _____	\$ _____
Life	\$ _____	\$ _____
Health	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Taxes (not deducted from wages or included in Mortgage payments) (specify): _____	\$ _____	\$ _____

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Installment payments	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Credit card (name): _____	\$ _____	\$ _____
Department store (name): _____	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Alimony, maintenance, and support paid to others	\$ _____	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____
Total monthly expenses:	\$ _____	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No

If yes, describe on an attached sheet.

10. Have you paid--or will you be paying--an attorney any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? \$ _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid--or will you be paying--anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? \$ _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

13. State the address of your legal residence.

Your daytime phone number: (_____) _____

Your age: _____ Your years of schooling: _____

Your social security number: _____ Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the
_____ District of _____

In re _____ ,)	
Debtor)	
_____ , Plaintiff	)	File No. _____
v.)	
_____ , Defendant)	
)	
)	

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20_____. [here describe the judgment, order, or decree] _____.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____

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Attorney for Appellant

Address: _____

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], or

this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s) _____

Attorney for _____

Dated: _____

Table Calculation of Days

[Click here to view image.](#)

FOOTNOTES:

(n1)Footnote *. See Rule 3(c) for permissible ways of identifying appellants.

(n2)Footnote *. See Rule 3(c) for permissible ways of identifying appellants.

(n3)Footnote *. See Rule 15.



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Federal Civil Procedure Litigation Manual

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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 26 Rule 26. Duty to Disclose; General Provisions Governing Discovery

1-26 Federal Civil Procedure Litigation Manual 26.syn

§ 26.syn Synopsis to Chapter 26: Rule 26. Duty to Disclose; General Provisions Governing Discovery

Scope Rule 26. Duty to Disclose; General Provisions Governing Discovery

26.1 COMMENTARY

26.2 ADDITIONAL AUTHORITY

26.3 LEADING CASES



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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 26 Rule 26. Duty to Disclose; General Provisions Governing Discovery

1-26 Federal Civil Procedure Litigation Manual Rule 26. Duty to Disclose; General Provisions Governing Discovery

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Rule 26 reads as follows:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702, 703, or 705*.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the data or other information considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under *Federal Rule of Evidence 402* or *403*--is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) **Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) **Conference Timing.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) **Conference Content; Parties' Responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) **Discovery Plan.** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

[Note: The United States Supreme Court is expected to submit proposed amendments to Rule 26 to Congress by the May 1, 2010 deadline. These amendments address disclosures made by non-retained expert witnesses and the application of the work-product doctrine to reports by testifying expert witnesses. Absent Congressional action to the contrary, these amendments will take effect on December 1, 2010. The text of the amended version of Rule 26 appears in the front gray pages of this manual and is discussed briefly below.]

* * * * *



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Federal Civil Procedure Litigation Manual

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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 26 Rule 26. Duty to Disclose; General Provisions Governing Discovery

1-26 Federal Civil Procedure Litigation Manual 26.1

26.1 COMMENTARY

Rule 26 is possibly the most important Rule of Civil Procedure. It defines the scope of discoverable material and establishes a background of required discovery disclosures against which all other rules concerning discovery operate. Rule 26 also requires a discovery planning meeting during which the attorneys or parties can plan the course of the discovery process in the action. The Rule also contains a host of other provisions, including ones governing protective orders, privilege, the work-product doctrine, and supplementation of responses to discovery requests and required disclosures.

In essence, Rule 26 is designed to incorporate the basic philosophy of discovery under the Rules: parties should be able to obtain all information relevant in an action that is in the possession of any person before the trial occurs, unless the information is privileged. Rule 26 makes the discovery process the most important aspect of litigation for determining the facts and issues involved in an action; it completes the shift away from the formalized pleading rules that existed before the promulgation of the Rules in 1937.

Scope of 2000 Amendments

The 2000 amendments to Rule 26 include significant changes to many of the fundamental standards and principles governing discovery practice in federal courts. Although the basic structure of the discovery rules remains unchanged, the amended rules differ considerably from the existing rules in many respects. It is strongly recommended that attorneys and judges educate themselves thoroughly with the amendments and anticipate how the changes will affect litigation in federal courts.

Duty of Mandatory Disclosure Generally

Rule 26 was revised substantially in 1993 and again in 2000. There was an enormous amount of controversy surrounding the Supreme Court's promulgation of these amendments, perhaps more so than any other Rule or amendment to a Rule. Much of the controversy centered on the fact that the Rule, as amended, imposes a duty of disclosure on all the parties. Under the Rule, all parties in an action must provide to all other parties certain kinds of information without being served with a formal discovery request. Thus, these kinds of information are properly referred to as discovery disclosures, rather than discovery responses. Disclosure of this information is mandatory unless

otherwise ordered by the court or stipulated to by the parties.

■ "Opt Out" Provisions Eliminated

In part because of the controversial nature of these disclosure provisions, individual districts or courts were permitted, through local rules or standing orders, to "opt out" of some or all of the disclosure provisions or to experiment with disclosure rules tailored to local practice. The 2000 amendments invalidate these local rules and establish a nationally uniform practice.

■ Exceptions to Mandatory Disclosure Requirements

Court orders in individual cases continue to be permitted under the amended Rule, however, and such orders are required if a party makes an objection under subdivision (a)(1). Parties may also stipulate to forego disclosure entirely, but the stipulation is subject to court order as part of its case management functions under Rule 16.

■ Kinds of Mandatory Disclosures

The mandatory disclosures occur at three separate times in an action: very early in the action, to exchange fundamental information about the parties and the issues; at certain points during the discovery process, to exchange information concerning expert witnesses; and shortly before trial, to exchange information about witnesses and other evidence that will be presented.

■ Form and Filing of Disclosures

Under subdivision (a)(4), all mandatory disclosures must be made in writing, signed by the attorneys or the parties, and served on all other parties in accordance with Rule 5. Contemporaneous amendments to Rule 5(d)(1) prohibit the filing of most discovery materials and disclosures until they are "used in the proceeding" or unless otherwise ordered by the court, and Rule 26(a)(4) has been amended accordingly. As under the prior version of the Rule, pretrial disclosures under subdivision (a)(3) must continue to be filed with the court, and the amendment adds the requirement that the filing must be made "promptly."

Initial Disclosures

Disclosures under subdivision (a)(1) are often referred to as "initial disclosures." The 2000 amendments narrow the scope of the parties' initial disclosure obligation to the identification of those witnesses and those documents that the disclosing party may use to support its claims or defenses. Any use of the document or witness in the litigation will trigger the disclosure requirement, including use at a pretrial conference, motion hearing, or at trial. The identities of witnesses or documents intended to be used must be turned over to the opposing parties without the need for a formal discovery request.

■ Scope of Initial Disclosures Narrowed by the 2000 Amendments

Under the prior version of the Rule, far broader disclosures, including the identity of each individual "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings," were required. The amended Rule removes these requirements, both with respect to witnesses it does not intend to use and the particularized allegation requirement. Under the current version of the Rule, only those witnesses and documents "likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses" are required to be disclosed, a standard that is intended to encompass a narrower range of information than the "relevant to disputed facts" standard under the current version. Documents or witnesses used to deny or rebut claims or defenses, however, are included within the scope of the amended disclosure requirement. Under

a 2006 amendment, a party must also disclose all electronically stored information that it may use to support its claims or defenses. The phrase "electronically stored information" was intended to have the broadest possible scope, so any form of information will be covered under the disclosure requirement.

■ **Identity of Witnesses and Documents**

Under subdivision (a)(1)(A)(i), the identities of witnesses who are likely to have discoverable information that the disclosing party may use to support its claims or defenses must be disclosed. Subdivision (a)(1)(A)(ii) similarly requires disclosure of all documents that the disclosing party may use to support its claims or defenses.

■ **Damage Computation Disclosures**

Subdivision (a)(1)(A)(iii) requires a party to disclose any method and supporting documentation used for computing alleged damages. The term "damages" should include any kind of monetary relief, including restitution or quantum meruit, whether or not recoverable under a theory of damages.

■ **Insurance Documents**

Although evidence of a party's insurance of insurability used to prove wrongful conduct is normally inadmissible at trial under *Federal Rule of Evidence 411*, subdivision (a)(1)(A)(iv) requires that any insurance agreement bearing on the issues in the action must also be disclosed.

■ **Proceedings Exempt from Disclosure Requirement**

Subdivision (a)(1)(B) exempts nine categories of proceedings from the initial disclosure requirement. The advisory committee note indicates that this provision was intended to identify those cases "in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case." Formal discovery itself is not prohibited in these proceedings, of course, but the disclosures ordinarily required in other actions or proceedings are exempted. The advisory committee note indicates there is likely to be little or no discovery in most of the exempted proceedings. These proceedings are also exempted from the discovery conference under subdivision (f)(1) and the moratorium on discovery set forth in subdivision (d)(1).

According to the Advisory Committee Note, the exemptions from the initial disclosure requirement in subdivision (a)(1)(B) will likely affect a substantial percentage of the actions filed in federal court. According to 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these eight categories total approximately one-third of all actions filed. Subdivision (a)(1)(B) eliminates the need for required disclosures in these cases unless otherwise ordered by the court.

■ **Impeachment Information Not Required to Be Disclosed**

Information intended to be used by a party solely for the purpose of impeachment is exempt from the initial disclosure requirement. The disclosure of such information is similarly excluded from the pretrial disclosure requirement under subdivision (a)(3)(A).

■ **Disclosure Timetable**

Subdivision (a)(1)(C) provides that the time within which initial disclosures must be made is 14 days after the discovery conference, unless the court orders otherwise. This deadline was selected to correspond with the discovery conference report required in subdivision (f), which must also be submitted within 14 days of the conference. It should be noted that the scheduling conference or order required by Rule 16(b) must occur or be issued at least 21 days after the Rule

26(f) discovery conference.

The 14-day deadline does not apply if a party objects to initial disclosure during the discovery conference and states its objection to that effect in the discovery report. The court's order must then specify the time period within which any remaining disclosures must be made. The 14-day deadline also does not apply to parties who have not yet been served or joined in the action by the date of the discovery conference. Under subdivision (a)(1)(D), these parties have 30 days after being served or joined in which to make the required disclosures, though a stipulation or court order to waive or modify disclosures will presumptively apply to such parties as well.

■ **Sanctions and Duty to Supplement**

The failure to disclose information required under the Rule is sanctionable under Rule 37(c)(1), and the parties remain under a duty to supplement their disclosures under Rule 26(e)(1).

Disclosures of Expert Testimony

Disclosures involving experts and expert testimony are governed by subdivision (a)(2). Every party must disclose to every other party the identity of any witness who it intends to call as an expert witness at trial. In addition to identifying the experts to be used at trial, the parties are required to provide detailed written reports by the expert witnesses concerning the expected subject of their testimony. Separate reports should be made for each expert witness. The report must contain a complete statement of all opinions the witness will express and the basis and reasons for those opinions. It must also contain all facts or data considered by the witness in forming their opinions, as well as any exhibits that will be used to summarize or support their opinions. The report must also contain any information that will be used to qualify that witness as an expert, including any publications authored by the expert witness in the last 10 years. Finally, the report must contain the amount of compensation to be paid to the expert witness for the testimony, and a list of all other cases in which the expert witness has testified in the capacity of an expert within the last 4 years, including those cases in which the expert witness has provided deposition testimony.

However, the Rule distinguishes between trial witness experts who are subject to the written report requirement and those who are not (this distinction should not be confused with the distinction under subdivision (B)(4) between trial witness experts and "consulting" experts). Only those trial witness experts "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony" are required to provide a written report. Some witnesses who may be qualified as experts at trial may not be "specially" retained or employed by a party as an expert. Physicians who also testify as fact witnesses are particularly salient examples of non-"specially" retained experts under the Rule. However, the requirement may nonetheless be imposed on experts who would be otherwise excepted by local rule, order, or written stipulation. Similarly, the requirement of a written report may be waived for particular experts.

These disclosures must be made at least 90 days before the trial is scheduled to begin, unless an expert is being used to rebut the testimony of another expert on the same subject, in which case the disclosure of that expert must be made within 30 days after the disclosure of the expert whose testimony is being rebutted. A meeting at which these disclosures are exchanged is usually set forth in a scheduling order under Rule 16, by order of the court, or by stipulation of the parties.

Illustration 26-1

Jennifer's Shoe Superstore commences a breach of contract action against Manufacturing Plus, which hires a market expert to testify that Jennifer's estimate of lost profits is inflated. A trial date is set for November 1. Manufacturing Plus must disclose the name of its expert, a report generated by its expert, information as to the expert's qualification, and the amount of compensation paid to the expert no later

than August 3. If the required disclosures are in fact made on this date, Jennifer's Shoe Superstore must disclose the name of any rebuttal expert witness no later than September 2.

2010 Amendments on Expert Disclosures

The practice of disclosing expert witness reports produced widespread efficiencies in deposition protocol and the elimination of depositions altogether where the written report provided most of the information that would have been uncovered during depositions. The popularity of the rule with courts led to the adoption of local rules or standing orders requiring reports from all experts, including those not ordinarily subject to the requirement. This proved unpopular with those expert witnesses, such as physicians, whose primary occupational duty comprised something other than giving expert testimony. In practice, the difficulty in procuring reports from these witnesses rendered unworkable the local rules requiring such reports, notwithstanding their advantages in making litigation more efficient. As a compromise position, the amended rule provides that a party who intends to rely on a trial witness expert not "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony" must provide a streamlined report disclosing the subject matter of the expected testimony and summarizing the facts and opinions that the witness is expected to offer. These minimal requirements should hopefully prove workable in practice without sacrificing their litigation advantages.

Pretrial Disclosures

Pretrial disclosures of evidence are governed by subdivision (a)(3). These disclosures must be made at least 30 days before the trial is scheduled to begin, unless otherwise ordered by the court, and are frequently exchanged at the final pretrial conference held pursuant to Rule 16(d).

■ Disclosure of Testifying Witnesses

Parties must disclose the names, addresses, and telephone numbers of all witnesses who may be called upon to testify at trial, including those witnesses whose depositions will be used in lieu of live testimony. If deposition testimony is to be presented other than stenographically, a transcript of the testimony must be disclosed. The disclosure should distinguish between those witnesses that are expected to testify or whose deposition testimony is expected to be introduced into evidence, and those witnesses who may be called or whose deposition testimony may be introduced into evidence if the need arises.

■ Disclosure of Testifying Witnesses

In addition to the identities of witnesses who will testify at trial, the parties are also required to provide lists of all exhibits or other documentation that may be offered into evidence. As with witness lists, documentation and exhibit lists should also be separated into those documents or exhibits that a party is expected to introduce into evidence and those documents or exhibits that may be introduced into evidence if the need arises.

■ Impeachment Sources Excluded From Disclosure

Subdivision (a)(3) excuses pretrial disclosure of the identity of witnesses, documentation, or other information to be used solely for the purpose of impeachment. It should be noted that impeachment information is similarly excluded from the initial disclosure requirement in subdivision (a)(1).

■ Filing of Pretrial Disclosures With the Court

Although amendments to Rule 5(d) formally eliminated any requirement that virtually all disclosures and discovery materials be filed with the court, pretrial disclosures are one of the exceptions to the rule. Accordingly, pretrial disclosures under subdivision (a)(3) must be filed with the court, and the 2000 amendment adds the requirement that the filing must be made "promptly."

■ **Objections to Evidence Disclosed Before Trial**

Under subdivision (a)(3)(B), any objections to the introduction into evidence of the depositions, the deposition testimony, or the documents or exhibits must be made within 14 days of the pretrial disclosures, unless otherwise ordered by the court, or they will be deemed to have been waived unless good cause is shown. These objections include all objections concerning the introduction of depositions under Rule 32(a) except those relating to the relevance of the testimony.

Scope of Discovery

Perhaps the most fundamental provision in the Federal Rules of Civil Procedure relating to discovery is the scope of discoverable matter set forth in Rule 26(b)(1): "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense". In an effort to involve the court more actively in discovery practice, the court retains the authority to order, for good cause, discovery of any matter "relevant to the subject matter involved in the action," the standard under the prior version of the Rule.

■ **Significance of the Amendments**

The importance of the 2000 amendments should not be underestimated by the federal bar. In part, it signals a change in emphasis from the wide-open discovery philosophy embraced by the current version of the Rule to one underscoring more limited and deliberate discovery practice. The advisory committee note highlights this change by indicating that the amendment is intended to alert the parties that they have "no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings" and to signal the court that it has "the authority to confine discovery to the claims and defenses asserted in the pleadings."

■ **Objections to Matter Beyond Scope of Discovery**

Although there is no express provision in the amended Rule for an objection to discovery exceeding the scope of discovery, it clearly anticipates that a motion, ostensibly under subdivision (c), should be made to the court. The court must then determine if the requested discovery is relevant to the claims or defenses of a party. If not, it must determine whether it nonetheless falls within the broader standard of "relevant to the subject matter of the action." Finally, the court must determine whether good cause exists for allowing the broader discovery request. The advisory committee note states that the distinction between information relevant to the claims and defenses of a party and information relevant to the subject matter of the action "cannot be defined with precision," and caselaw will inevitably be relied upon to differentiate the two standards in specific cases.

■ **Discovery of Inadmissible Material**

The 2000 amendments also modify the provision concerning the discovery of inadmissible information. Although information still need not be admissible at trial to be discoverable, the Rule now requires that the matter must be "relevant" to be discoverable even if it would be inadmissible. The amendment retains the requirement that the discovery of the information must be reasonably calculated to lead to the discovery of admissible evidence. The term "relevant" is used to indicate matter otherwise within the narrowed scope of discoverable information under the amended rule, or within the broader scope if so ordered by the court.

Illustration 26-2

Andrew and Sarah witness an automobile accident that is the subject of litigation between Paul and Caroline. At Andrew's deposition, Paul's attorney asked, "Did Sarah tell you that Caroline was speeding?" Andrew replied, "Yes, Sarah said that Caroline was traveling at least 75 miles per hour." Andrew's response is hearsay and will likely be inadmissible at trial. Nevertheless, Andrew's testimony is reasonably calculated to lead to admissible evidence, namely the testimony of Sarah. Therefore, the question is within the scope of discovery as defined by Rule 26(b)(1).

Objections to Discovery Requests Generally

Subdivision (b)(2) sets forth limitations on the frequency and extent of discovery and impliedly suggests proper objections to discovery requests. This list of potential objections in subdivision (b)(2)(C) is not exhaustive, but suggests grounds for granting a motion for a protective order made pursuant to subdivision (c). A 2006 amendment to the Rule was designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information, and that amendment is now set out as subdivision (b)(2)(B). In some cases, the burdens and costs of retrieving or accessing the information may be prohibitive. Accordingly, a party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the ordinary limitations on discovery, and must identify sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources. Motions for a protective order and for sanctions are available for conflicts arising on these issues that cannot be resolved by the parties.

Objections to discovery requests based upon claims of privilege are not expressly set forth in the Rule; however, they are implied throughout the entire litigation process. Privileges are governed by constitutional law, statutory law, and Federal Rules of Evidence.

Local Rule Options Not Permitted

In addition to establishing a nationally uniform practice with respect to required disclosures, subdivision (b)(2)(A) forbids local rule variations on several discovery rules. Examples include the removal of prior authority under subdivision (d) to exempt cases by local rule from the moratorium on discovery before the discovery conference (the eight categories of proceedings listed in subdivision (a)(1)(C) are exempted from the moratorium), to exempt cases from the conference requirement altogether, to vary the number of permitted discovery events, and to alter the length of depositions. The Rule makes clear that the discovery limits can be modified by court order or stipulation in individual cases, but standing orders and local rules are no longer permitted. A lone exception exists for requests for admission under Rule 36; local rules imposing limits on requests for admission continue to be authorized.

Work-Product Doctrine

Subdivision (b)(3) incorporates, in part, the decision in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), which recognized a qualified immunity from discovery for certain kinds of information prepared in anticipation of litigation or trial--the work-product doctrine. Prior to that decision, the broad scope of discoverable information prompted some litigators to simply allow their adversaries to investigate and prepare the case for them, obtaining the materials through the liberal discovery rules. The phrase "prepared in anticipation of litigation or for trial" has generated a fair amount of interpretive difficulty, and an extended discussion is beyond the scope of this manual. Substantial bodies of case law have developed in response to specific applications of this standard, and practitioners are advised to use additional research tools on the issue.

The "free rider" problem was resolved by the promulgation of subdivision (b)(3)(A) in 1970. It states that documents and other tangible things prepared by a party, the party's attorney, or another representative of that party in anticipation of litigation or trial are discoverable only after a two-pronged demonstration is made. First, under subdivision (b)(3)(A)(i), a party must show that it has a substantial need of the materials to properly prepare its case for trial. Second, under subdivision (b)(3)(A)(ii), a party must demonstrate that it is unable without undue hardship to obtain the same information or its substantial equivalent through other means. Even if such a showing is made by a party, a feat that has proved inordinately difficult in practice, the disclosure is limited to information of a factual nature. The party who had originally prepared the materials is not required to disclose the notes or documents containing the mental impressions, conclusions, opinions, or legal theories of its attorney or other representative concerning the litigation.

Illustration 26-3

Paul is injured in a boating accident. Prior to the commencement of litigation, Paul's attorney conducts an investigation in order to properly assess the legal liability of the manufacturer of the boat. After receiving a summons and complaint, the attorney for the manufacturer of the boat requests a copy of the report made by Paul's attorney concerning his investigation. Under Rule 26(b)(3)(A), the report made by Paul's attorney is privileged and protected from discovery. Opposing counsel may obtain a similar report by conducting their own investigation or employing an expert to conduct an investigation. Thus, the attorney for the boat manufacturer would not be able to demonstrate a "substantial need" in obtaining a copy of the report or an "undue hardship" in obtaining similar information by other means.

Waiver of Work-Product Objection

This qualified immunity from disclosure of work product prepared in anticipation of litigation or trial may be waived if a statement concerning the information has been "previously made." Subdivision (b)(3)(C) states that any party may obtain a previous statement of a party without making the required two-pronged demonstration. The Rule defines a "previous statement" under subdivision (b)(3)(C)(i)-(ii): if it is written, adopted, or approved by a party, or any recording of an oral statement by a party, including depositions. Non-parties may, upon request, also obtain any previously-made statements concerning the action or the subject matter of the action. A court order may be necessary to secure the statement in this latter situation, and the Rule anticipates such a situation.

Illustration 26-4

Assume on the facts of Illustration 26-3 that the claimed privilege involves a discussion between Paul and his attorney concerning the investigation, rather than a report generated by Paul's attorney. If Paul reveals a portion of this discussion at his deposition, Paul has waived the protection afforded under Rule 26(b)(3).

Depositions of Experts

Subdivision (b)(4)(A) permits a party to depose any expert witness who is expected to testify at trial. The party taking the deposition must obtain a report on the expert witness under subdivision (a)(2)(B) before deposing the expert witness. Subdivision (b)(4)(D) permits a party to depose or serve interrogatories on any expert retained by a party but is not expected to testify at trial only in conjunction with certain physical and mental examinations or on a showing of special need. The party must demonstrate that it cannot obtain facts or opinions on the same subject matter through the use of other expert witnesses or through other means. This demonstration will rarely be made by a party, except possibly in circumstances where the subject matter is so highly specialized that the expert is uniquely qualified to testify on the matter. The party taking the deposition must pay the expert a reasonable fee for her time, including travel expenses to and from the deposition.

2010 Amendments Concerning Discovery Expert Witness Reports

Amendments to subdivision (b)(4) in 2010 are intended to address the problems created by the open-ended nature of the discovery between counsel and expert witnesses. The language of the Rule permitted the discovery of all communications between attorneys and trial witness experts, including all drafts of any reports by the expert. This produced reciprocal problems of lawyers and experts taking elaborate steps to avoid creating discoverable documents and taking elaborate steps to discover the other opposing party's expert draft reports and expert communications. These practices led to the logical, yet extremely wasteful, practice of hiring two sets of experts: so-called "consultation" experts who did the work and developed the expert opinions (and whose efforts were covered by the work-product doctrine), and trial witness experts who simply did the testifying. The effect of this firewall was to avoid creating a discoverable record of the collaborative interaction with the experts.

The amended rule seeks to solve this problem by operationalizing with greater specificity the scope of discoverable information used by and concerning experts. On the one hand, discovery of the bases of an expert's opinion is critical. The amendments make clear that while discovery of draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied on in forming an opinion. In theory, protecting the "feedback loop" between attorneys and experts against discovery by prohibiting the discovery of draft expert reports and some attorney-expert communications will foreclose certain avenues of impeachment, experience with a similar rule in New Jersey has shown that the loss of these tactics has not significantly inhibited the ability of attorneys to expose the weaknesses of an expert's opinion or decreased the quality of cross-examination.

Privilege and Work-Product Claims Set Forth With Specificity

Subdivision (b)(5) is an important provision that applies in many different situations throughout the discovery process. It provides that a party may not withhold information that is the subject of a discovery request under a blanket claim of privilege work-product doctrine. The party must describe the information withheld in a manner that allows other parties or the court to assess the claim. The failure to describe the information subject to the claim may result in a waiver of that claim. If necessary, the court may also order that a more detailed description of the information be provided. Although this provision is made expressly applicable to discoverable information only, information that is not disclosed but is required to be disclosed under subdivision (a) should be covered by analogy.

Illustration 26-5

Assume on the facts of Illustration 26-4 that the attorney for the boat manufacturer requests disclosure of Paul's conclusions concerning the exact cause of the accident. Under Rule 26(b)(5), Paul cannot refuse to disclose such information on the bare assertion that it is protected by the work-product doctrine. Rather, Paul must provide a detailed description of the claim of privilege. For example, Paul may explain that any information concerning Paul's opinions of the cause of the accident is privileged, as Paul and his attorney had a discussion concerning the cause of the accident.

Protective Orders

Subdivision (c) provides the court with broad discretion to fashion protective orders to guard against abuses of the discovery process. Grounds for granting a motion for a protective order are listed in subdivision (c)(1)(A), but the list is not exhaustive. Before making a motion for a protective order, a party is required to confer with the affected party in an attempt to resolve the matter without court intervention. The protective order should set forth the terms or conditions

under which discovery may proceed, and the failure to obey a protective order is sanctionable under Rule 37(b). The party opposing the motion for a protective order, whether or not an order is actually issued, must pay the reasonable expenses incurred by the party making the motion, including attorneys' fees, unless the court finds that the motion was substantially justified or that other circumstances would make an award of expenses and fees unjust.

Illustration 26-6

Assume on the facts of Illustration 26-5 that, in addition to requesting Paul's conclusions concerning the exact cause of the accident, the boat manufacturer makes a motion for a protective order from the court. Before making the motion, the boat manufacturer must confer with Paul and seek to resolve the matter without court intervention. If the parties are unable to resolve the matter and the court grants the boat manufacturer's motion, Paul must pay the reasonable expenses of the boat manufacturer's attorney in making the motion, unless the court find that the motion is substantially justified under the circumstances.

Timing and Sequence of Discovery

Subdivision (d)(1) states that the discovery process may not begin until the parties have held the discovery planning meeting contemplated by subdivision (f). This provision can be altered by stipulation of the parties or by court order in specific cases, but the practice of issuing "standing" orders eliminating the discovery moratorium has been prohibited. Discovery may proceed in any order in the convenience of parties or witnesses, unless otherwise provided by stipulation, court order, or local rule.

The moratorium on discovery before the discovery planning conference does not apply to the categories of proceedings exempted from the initial disclosure requirements under subdivision (a)(1)(B). In any of those nine kinds of proceedings, discovery may begin immediately.

Duty to Supplement Disclosures and Discovery Responses

Rule 26(e) imposes a duty on parties to supplement mandatory disclosures and responses to discovery requests with additional or corrective information if the party learns that the information originally disclosed or included in a response is incorrect or incomplete. This duty extends to the reports and depositions of expert witnesses who are expected to testify at trial. The duty also extends throughout the litigation process, up to and including the trial. Failure to supplement disclosures and responses to discovery requests is a proper ground for a motion to compel a response under Rule 37(a)(3).

Illustration 26-7

Abel sues Terry for personal injuries suffered in an automobile accident. As part of his initial disclosures, Abel provides Terry with the names and addresses of all witnesses he has knowledge of at the time of the disclosure. Four months later, Abel learns of two other witnesses that were not included in his initial disclosure. Under Rule 26(e), Abel must supplement his initial disclosures and provide Terry with the names and addresses of the two witnesses.

Discovery Conferences

Subdivision (f) requires all parties in an action to attend a discovery conference as soon as possible after the initiation of the action. The scheduling of the conference is left to the parties and their attorneys, but must be held at least 21 days before the scheduling conference is held or the scheduling order is filed under Rule 16(b). Scheduling orders are due no later than 90 days after the appearance of a defendant, and no later than 120 days after the service of the complaint on a

defendant, whichever period expires first. Thus, discovery conferences must be held no later than 68 days from the appearance of a defendant, and no later than 98 days after the service of the complaint on a defendant, whichever period expires first. If a pretrial conference under Rule 16(a) is held to discuss and prepare the scheduling order, then the latest date at which a discovery conference must be held will be altered accordingly. In most cases, attorneys should schedule the discovery conference as soon as possible, as no discovery may take place until the meeting has been held, subject to the exceptions discussed above.

Illustration 26-8

Assume on the facts of Illustration 26-7 that Abel serves Terry with a summons and complaint on April 1 and Terry makes his first appearance on April 20. Under these circumstances, scheduling orders are due no later than June 30. Thus, Abel and Terry must schedule a discovery conference no later than June 9.

■ Purpose of Discovery Conference

At the discovery conference, the parties or their attorneys should first discuss the nature of the claims and defenses involved in the action and the possibilities of settlement to determine if discovery will be needed. They should also discuss the method of exchange of mandatory disclosures under subdivision (a) and develop a proposed discovery plan. The plan should include all of the items listed as subdivisions (f)(3)(A)-(F), as well as who is responsible for drafting a report of the plan. This report should outline the essential details of the discovery plan, and must be filed with the court in which the action is pending within 14 days of the meeting. The court must receive this report before scheduling any kind of pretrial conference. An important feature of subdivision (f) is its requirement that the parties discuss the wide range of issues involving the discovery of electronically stored information. In complex litigation involving large corporations, the parties may need several discussions familiarizing themselves with each other's information systems. Other topics for discussion involving electronically stored information include the accessibility of data, the cost or burden of retrieving the information, any built-in search functionality within the parties' information systems, the form in which electronically stored information might be produced, and steps taken by the parties to preserve discoverable electronically stored information that may otherwise be subject to deletion or overwriting because of the routine operation of an information system. Specific provisions were added to Rule 34 involving production requests in this regard, so it is important to begin to address issues that may arise later in litigation or avoid future conflicts entirely.

■ Face-to-Face Meeting Not Required

The discovery "conference" is not required to be a face-to-face meeting. Although the advisory committee note recommends such conferences over telephone or video conferences, it recognizes that "geographic conditions in some districts may exact costs far out of proportion to [the benefits of face-to-face meetings]." The amended Rule allows the court to order a face-to-face meeting only in individual cases.

■ Timetable for Discovery Conference and Report

Under the amended deadlines, the discovery conference must occur at least 21 days before the scheduling conference under Rule 16, and the discovery report must be filed no more than 14 days after the discovery conference. These deadlines help to ensure that the court has ample time to review the report before the scheduling conference or the entry of the scheduling order. These deadlines may be shortened by local rule in districts that have expedited case processing rules.

■ Discovery Conferences Required

The 2000 amendments change subdivision (f) to prohibit local rules which opt out of the discovery conference requirement. As with the moratorium on discovery in subdivision (d), the nine categories of proceedings listed in

subdivision (a)(1)CE are exempted from the conference requirement. Additionally, the court retains the authority to dispose of the conference in individual cases (or order one where it would be otherwise exempted), but local rules or standing orders disposing of the requirement are not permitted. This discovery conference requirement cannot be abrogated by stipulation of the parties.

Signature and Certification Requirements

Subdivision (g) sets forth the signature and certification requirements of mandatory disclosures, discovery requests, responses to discovery requests, and objections to discovery requests. The provisions of this subdivision parallel those in Rule 11(a)-(b), which set forth the grounds of imposing sanctions outside the discovery process. Subdivision (g)(3) allows the court to impose a variety of sanctions for the failure to comply with the signature and certification requirements listed in that subdivision. These sanctions may be imposed upon motion by a party or *sua sponte* by the court. Unlike sanctions under Rule 37(b), sanctions under subdivision (g) do not require the refusal to comply with an order of the court.



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Federal Civil Procedure Litigation Manual

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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 26 Rule 26. Duty to Disclose; General Provisions Governing Discovery

1-26 Federal Civil Procedure Litigation Manual 26.2

26.2 ADDITIONAL AUTHORITY

6 *Moore's Federal Practice* §§ 26.01 -26.155

James & Hazard, *Civil Procedure* §§ 5.3, 5.8, 5.11

Friedenthal, *Civil Procedure* §§ 7.1, 7.5, 7.6, 7.13, 7.15, 7.18

Teply & Whitten, *Civil Procedure* 707-735



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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 26 Rule 26. Duty to Disclose; General Provisions Governing Discovery

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26.3 LEADING CASES

Appeal of Discovery Order

Allendale Mut. Ins. Co. v. Bull Data Sys., 32 F.3d 1175 (7th Cir. 1994) (discovery order not appealable as an interlocutory injunction).

"Compelling Reason" Standard Higher Than "Good Cause"

Kamakana v. City & County of Honolulu, 447 F.3d 1172 (9th Cir. 2006) (a "good cause" showing by itself, which is sufficient for protective order under Rule 26(c), is not sufficient to satisfy the "compelling reason" standard that a party must meet to rebut the presumption of public access to dispositive pleadings and attachments).

Consultants Protected by Work-Product Doctrine

In re Cendant Corp. Sec. Litig., 343 F.3d 658 (3d Cir. 2005) (litigation consultants, retained to aid in witness preparation, may qualify as non-attorneys protected by the work product doctrine; litigation consultant's advice based on information disclosed during private communications between client, attorney, and consultant may be considered "opinion" work product requiring a showing of exceptional circumstances for the advice to be discoverable).

Criminal Proceeding Pending

Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987) (discovery in a civil action will be delayed during the pendency of a criminal proceeding involving the same subject matter if there is a risk of self-incrimination).

Discretion to Resolve Discovery Problems

Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., 334 F.3d 390 (4th Cir. 2003) (discovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted; however, district courts have broad discretion in resolving discovery problems that arise).

Docket Procedure

Martel v. County of Los Angeles, 34 F.3d 731 (9th Cir. 1994) (district's court advanced docket procedure, called the "rocket docket," did not properly allow the parties to conduct discovery as they are entitled under the Rules).

Duty to Supplement--Noncompliance Objection Waived

Colon-Millin v. Sears Roebuck de P.R., 455 F.3d 30 (1st Cir. 2006) (although defendants did not comply with their obligation to supplement their responses to interrogatories, a jury verdict in favor of defendants and denial of plaintiff's motion for new trial were affirmed because the plaintiff failed to respond to surprise at trial in manner that justified new trial, did not object to defense witnesses' testimony, and did not request continuance in order to respond or seek any other sanction for discovery violation).

Duty to Supplement Disclosures; Purpose

Sheek v. Asia Badger, Inc., 235 F.3d 687 (1st Cir. 2000) (the duty to supplement disclosures helps a party avoid the burden of responding to unexpected and last-minute changes in the expert testimony of the opposing party).

Expert Not Listed as Witness; Testimony Improper

Bank of China v. NBM LLC, 359 F.3d 171 (2d Cir. 2004) (where witness had not been on the expert witness list as required under Rule 26(a) and had not been qualified as expert under *Fed. R. Evid. 702*, it was improper to allow the witness to give expert testimony while testifying as a lay witness under *Fed. R. Evid. 702*).

Expert Properly Excluded

Pena-Crespo v. Puerto Rico, 408 F.3d 10 (1st Cir. 2005) (psychiatric expert was properly excluded from testifying because party offering expert failed to provide a written expert report and documents submitted did not explain basis for opinion, did not describe any exhibits to be used by expert, did not list publications or other cases in which expert testified, did not set forth expected compensation, did not submit translation to medical evaluation or resume that was submitted to court in Spanish).

Expert Testimony Excluded

Coastal Fuels, Inc. v. Caribbean Petroleum Corp., 175 F.3d 18 (1st Cir. 1999) (exclusion of expert testimony was not an abuse of discretion where there was considerable and unjustified variance between expert's pretrial report and his testimony and a finding that the expert had unintentionally misled the court into believing that he had performed certain crucial calculations when he had not in fact done them).

Expert Testimony Excluded--Factors

Jacobsen v. Deseret Book Co., 287 F.3d 936 (10th Cir. 2002) (the trial court should consider the following factors in excluding expert testimony for violation of rule requiring that expert reports contain a complete statement of all opinions to be expressed: (1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness).

Expert Witness Fees Recoverable

Research Systems Corp. v. IPSOS Publicite, 276 F.3d 914 (7th Cir. 2002) (district court did not abuse its discretion by permitting defendants to recover expert witness fees incurred in connection with plaintiff's depositions of experts, where plaintiff offered no specific evidence to support its allegation that defendants never intended to call experts at trial, and disclosed them just to distract plaintiff from its trial preparations and to burden it with added expense of depositions).

Expert Witness Protection Distinct From Work Product

In re Cendant Corp. Sec. Litig., 343 F.3d 658 (3d Cir. 2003) (Rule 26(b)(3) work product protection is different and independent from expert witness protection under Rule 26(b)(4)(B)).

Expert's Opinions Limited to Those in Report

Hammel v. Eau Galle Cheese Factory, 407 F.3d 852 (7th Cir. 2005) (trial judge properly restricted the testimony of a vocational expert to opinions set forth in his expert witness report, as plaintiff had failed to disclose the complete report to the defendant prior to trial).

Fact Witness Exclusion Improper as Sanction for Expert Witness Discovery Sanction

Gomez v. Rivera Rodriguez, 344 F.3d 103 (1st Cir. 2003) (it was improper for the trial court to refuse to allow testimony of fact witness as a discovery sanction for failing to present expert witness report).

Harmless Discovery Disclosure Failure

Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879 (8th Cir. 2006) (the trial court did not err by failing to exclude evidence based on a party's failure to make an initial disclosure because the opposing party was on notice that the evidence was relied upon because it was discussed in a deposition and there was no allegation that another expert based his trial testimony on new information; the failure to disclose was thus harmless and did not mandate the exclusion of evidence).

Impeachment Evidence

DeBiasio v. Illinois Cent. R.R., 52 F.3d 678 (7th Cir. 1995) (evidence offered for impeachment purposes is not required to be disclosed under Rule 26, and thus, the court's refusal to allow the evidence was improper).

In Camera Review of Privilege Claims

American Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y of United States, 406 F.3d 867 (7th Cir. 2005) (appropriate method for a determination of documents claimed to have been privileged is an in camera review by magistrate or appointed special master of every document on privilege log challenged by plaintiff).

Late Compliance with Discovery Order Insufficient to Avoid Sanction

Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este, 456 F.3d 272 (1st Cir. 2006) (plaintiff's violation of time-specific orders pursuant to case-management order and Rule 26(a)(2)(B) (now Rule 26(a)(2)(C)) was not cured by subsequent compliance after discovery period had ended, and preclusion of expert testimony was justified in accordance with Rule 37(c)(1)).

Limitations on Discovery Exist

Heidelberg Ams., Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 38 (1st Cir. 2003) (while district courts are to interpret liberally the discovery provisions of the federal rules of civil procedure to encourage the free flow of information among litigants, limits do exist).

Names and Addresses Discoverable

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989) (in a class action under the ADEA, the names and addresses of discharged employees of the defendant were allowed to be discovered by the plaintiffs).

Name of Expert Insufficient

Reese v. Herbert, 527 F.3d 1253 (1st Cir. 2008) (as threshold matter, revelation of plaintiff's expert's name was not enough to discharge plaintiff's obligation under federal and local rules; "disclosure of expert testimony" within meaning of federal rule contemplated not only identification of expert, but also provision of written report containing complete statement of all opinions and basis and reasons therefore).

Name of Party Discoverable

Dotson v. Bravo, 321 F.3d 663 (7th Cir. 2003) (disclosure of the true name of a party undoubtedly is required under former Rule 26(a)(1)(A) (now Rule 26(a)(1)(A)(i)) and (e)(1) (now (e)(1)(A))).

Opinion Work Product

Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999) (opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances).

Protective Order; Appellate Review

Smith v. BIC Corp., 869 F.2d 194 (3d Cir. 1989) (denial of a motion for a protective order will be reversed if clearly erroneous or based upon an error of law).

Protective Order; Issuance

Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986) (the issuance of a protective order is reviewed under the good cause standard of Rule 26(c), not under the "least restrictive means" standard of *First Amendment* analysis).

Protective Orders

Landry v. Air Line Pilots Ass'n Int'l, 892 F.2d 1238 (5th Cir. 1990) (the party that moves for a protective order under Rule 26(c) bears the burden of demonstrating that protection is needed).

Protective Order; Violation

Forrest Creek Assoc. v. McLean Savings & Loan Ass'n, 831 F.2d 1238 (4th Cir. 1987) (willfulness of an attorney who violates a protective order should be considered before imposing sanctions).

Public Access to Discovery

Phillips v. GMC, 289 F.3d 1117 (9th Cir. 2002) (in general, the public can gain access to litigation documents and

information produced during discovery unless the party opposing disclosure shows good cause why a protective order is necessary).

Sanctions Mandatory

Malautea v. Suzuki Motor Co., 987 F.2d 1536 (11th Cir. 1993) (sanctions under Rule 26(g) are mandatory where offending conduct is discovered).

Solicitation Letters to Potential Clients Protected as Work Product

Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens, P.A., 525 F.3d 1107 (1st Cir. 2008) (discovery request for copies of one thousand letters mailed by law firm was barred under work product doctrine in Rule 26(b)(3)(A)).

Supplemental Expert Testimony Must Be Disclosed

Wegener v. Johnson, 527 F.3d 687 (8th Cir. 2008) (district court did not err by excluding supplemental testimony from patient's expert in medical malpractice case because expert's supplemental testimony was being offered to contradict testimony of doctor's experts, meaning it was required to be disclosed in timely fashion in accordance with Rule 26(a)(2)(C)(ii); to extent that there was any error in excluding testimony error would have been harmless because patient had offered similar evidence from other sources).

Work Product Doctrine

Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) (stronger showing than substantial need and inability to obtain information without undue hardship is required to obtain mental impressions and work product of an attorney).

Work Product Doctrine; Analysis for Discoverability

United States v. Torf (In re Grand Jury Subpoena), 350 F.3d 1010 (9th Cir. 2003) , reprinted as amended, 357 F.3d 900 (9th Cir. 2003) (protection under "work product" doctrine cannot be decided simply by looking at the motive that contributed to the document's preparation, but the circumstances surrounding the document's preparation nature of document, and factual situation of particular case must also be considered).



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TITLE V. DISCLOSURES AND DISCOVERY
Chapter 27 Rule 27. Depositions to Perpetuate Testimony

1-27 Federal Civil Procedure Litigation Manual 27.syn

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1-27 Federal Civil Procedure Litigation Manual Rule 27. Depositions to Perpetuate Testimony

Rule 27. Depositions to Perpetuate Testimony

Rule 27 reads as follows:

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) Petition. A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses,

so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) Notice and Service. At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) Order and Examination. If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) Using the Deposition. A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) In General. The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) Motion. The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) Court Order. If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.

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27.1 COMMENTARY

Rule 27(a) provides for "perpetuation by petition" and allows a person to use certain discovery mechanisms for the purpose of obtaining information or documents to be used in an action that has not been yet initiated. Although Rule 27 is entitled "*Depositions to Perpetuate Testimony*," (emphasis added) and uses the phrase "perpetuate testimony" to describe the action a person may request under the Rule, subdivision (a)(3) makes clear that depositions, requests for production of documents, and requests for physical and mental examinations are all available in petitions under the Rule. Subdivision (c) differentiates the Rule from "perpetuation by an action," which is a civil action providing for similar kinds of requests. An action for perpetuation may be maintained under the pertinent statutory or case law, and is, of course, subject to all the procedures of the Rules incumbent on civil actions.

Depositions for Use in Future Actions

Subdivision (a)(1) states that a person desiring to use a discovery mechanism for use in a future action must file a petition under Rule 27 in any district court in which an expected adverse party resides. The contents of the petition should include the items set out in subdivisions (a)(1)(A)-(E). Subdivision (a)(1) also states that the petition should also include a request for the court to make an order authorizing the petitioner to take the desired actions, and subdivision (a)(2) contemplates a hearing at which the formal application should be made.

Subdivision (a)(2) sets forth the notice and service provisions of petitions under Rule 27. Although Rule 27 requires that all persons named in the petition must be served with notice of the hearing and a copy of the petition at least 21 days before the hearing on the matter, it is not a proper objection to a Rule 27 motion that the court lacks personal jurisdiction over a person so served or that venue is improperly laid. As a Rule 27 petition is not a civil action, it is not subject to the normal criteria incumbent on civil actions.

Subdivision (a)(2) was amended in 2005 to delete outdated references to specific service of process provisions in Rule 4. The current Rule provides for service either inside or outside the district or state according to any of the methods of service provided for in Rule 4. If service of the notice and petition cannot be made with due diligence on any of the persons named in the petition, the court has the authority to direct an alternate means of service. As a hearing under Rule 27 is not a civil action, the court is not constitutionally bound by the service provisions of Rule 4. However, the court is directed to appoint an attorney for all persons not served under the service provisions of Rule 4. The final

sentence of subdivision (a)(2) keys the operation of that Rule to guardianship provisions of Rule 17(c) in the event that a person named in the petition is a minor or incompetent person.

Under subdivision (a)(3), the court may make an order for the relief requested in the petition if it finds that the perpetuation of the testimony may prevent a failure or delay of justice. The court should also determine that good cause exists for the failure of the petitioner to bring an action. Subdivision (a)(4) allows depositions taken under the Rule to be used in actions involving the same subject matter in any district court in accordance with Rule 32(a).

Depositions Pending Appeal

Subdivision (b) is similar to subdivision (a), but allows a party to make a motion to perpetuate testimony after a judgment has been entered in an action and while the action is on or awaiting appeal. The contents, notice, and manner of service of the motion is further specified in the Rule. The Rule allows the court to grant the motion under the same standard as in subdivision (a), except, of course, the party is not required to show good cause why the action has not yet been initiated.



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27.2 ADDITIONAL AUTHORITY

6 *Moore's Federal Practice* §§ 27.01 -27.52

Friedenthal, *Civil Procedure* § 7.7

Tepley & Whitten, *Civil Procedure* 763



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27.3 LEADING CASES

Action Already Commenced

Shore v. Acands, Inc., 644 F.2d 386 (5th Cir. 1981) (grant of a Rule 27 petition was reversed because the action had already been initiated, thereby precluding the applicability of subdivision (a), no judgment had been entered, thereby precluding the applicability of subdivision (b), and the district did not have personal jurisdiction over all the persons named in the petition, thereby precluding the possibility of an action to perpetuate testimony under subdivision (c)).

Criminal Proceeding Pending

In re Application of Eisenberg, 654 F.2d 1107 (5th Cir. 1981) (Rule 27 motion cannot be granted where the information sought by the petitioner is for use in a criminal proceeding).

Need to Preserve Evidence

In re Applications of El Paso, 887 F.2d 1103 (D.C. Cir. 1989) (deposition pending an appeal of a judgment may be authorized only on a Rule 27 motion and when the party seeking the order demonstrates that there is a need for preserving the evidence).

Nonparty Discovery

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004) (because the Federal Rules of Civil Procedure make only limited provisions for nonlitigants to obtain certain discovery, a court should not permit discovery where both of the following are true: (1) a private person seeking discovery would not be entitled to that discovery under foreign law; and (2) the discovery would not be available under domestic law in analogous circumstances).

Requirements to Perpetuate Testimony

In re Bay County Middlegrounds Landfill Site, 171 F.3d 1044 (6th Cir. 1999) (under Rule 27, depositions may be taken before an action is commenced if the deposition will prevent failure or delay of justice, the testimony is relevant, and not simply cumulative, and likely to provide material distinctly useful to a finder of fact; a determination that the evidence is absolutely unique is not necessary, but there must be a reasonable showing of the need to perpetuate the testimony).

Standard on Appeal

In re Petition of Price, 723 F.2d 1193 (5th Cir. 1984) (issuance of an order under Rule 27 reviewed under an abuse of discretion standard; however, the court declined review when the action had already been initiated and the issue could be appealed when a judgment had been entered).



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Rule 28. Persons Before Whom Depositions May Be Taken

Rule 28 reads as follows:

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States.

(1) In General. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer." The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) In General. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request--Admitting Evidence. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

* * * * *



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28.1 COMMENTARY

Rule 28 governs persons before whom depositions may be taken. The Rule is tied to Rule 30(b)(4), which states that depositions must be conducted before an officer appointed or designated under Rule 28, and is interrelated with Rule 29, which governs stipulations between parties involving discovery procedure.

Depositions in the United States

If a deposition is to be taken within the United States or one of its territories or insular possessions, the deposition must be conducted by a person authorized by federal, state, or local law to administer oaths. If no such person can conveniently be found, the court in which the action is pending may appoint a person to take the deposition. In such a case, the appointee is then authorized to take oaths for purposes of the deposition. Rule 29 likewise allows the parties to stipulate to a person before whom a deposition may be taken. However, in no event shall a deposition be taken before any of the persons listed in subdivision (c). This provision is intended to protect the parties from any possible conflict of interest concerning the person conducting the deposition. If a deposition is taken by telephone or by other remote electronic means, Rule 30(b)(4) provides that the deposition will be considered to have occurred in the district and at the place where the deponent answers the questions.

Depositions in Foreign Countries

Subdivision (b)(1) lists four methods for taking a deposition in a foreign country. If the country has signed a treaty or convention with the United States regarding deposition procedures, such as the Hague Convention on the Taking of Evidence Abroad in civil or commercial matters, the deposition must be taken in accordance with that treaty or convention. If not, subdivisions (b)(1)(B)-(C) provides a party with three alternate methods of conducting depositions: pursuant to a letter of request, sometimes referred to as a letter rogatory; by notifying the opposing parties of its intention to take a deposition before a person authorized by the laws of that country or the United States to administer oaths; or before a person commissioned by the court to conduct a deposition and administer oaths.



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28.2 ADDITIONAL AUTHORITY

6 *Moore's Federal Practice* §§ 28.01 -28.32

Friedenthal, *Civil Procedure* § 7.7

Teply & Whitten, *Civil Procedure* 742, 764



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28.3 LEADING CASES

Discovery in Foreign Litigation

Bayer AG v. Betachem, Inc., 173 F.3d 188 (3d Cir. 1999) (28 U.S.C. § 1782, which permits discovery in connection with foreign litigation, does not entitle party in foreign litigation to unbridled and unlimited discovery; rather, the discovery process is generally guided by the Federal Rules of Civil Procedure).

Foreign Parties

In re Application of Malev Hungarian Airlines, 964 F.2d 97 (2d Cir. 1992) (interpreting the letter of request statute, 28 U.S.C. § 1782, as not requiring a foreign party to petition the Hungarian court before sending a letter of request to a United States district court).

Letters of Request

DBMS Consultants, Ltd. v. Computer Assocs. Int'l, Inc., 131 F.R.D. 367 (D. Mass. 1990) (a party should first attempt to obtain discoverable information in a letter of request through depositions on written questions; if this method did not work, then the court would issue a letter of request for a different method).

Oath Administration Waived

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) (depositions properly admitted when opposing party's counsel failed to accept offer to procure a foreign notary authorized to administer oaths under Rule 28; accordingly, party waived objection to "procedural" objections under Rule 32(d)(3)(B)).



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1-29 Federal Civil Procedure Litigation Manual Rule 29. Stipulations About Discovery Procedure

Rule 29. Stipulations About Discovery Procedure

Rule 29 reads as follows:

Rule 29. Stipulations About Discovery Procedure Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified--in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified--but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

* * * * *



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TITLE V. DISCLOSURES AND DISCOVERY
Chapter 29 Rule 29. Stipulations About Discovery Procedure

1-29 Federal Civil Procedure Litigation Manual 29.1

29.1 COMMENTARY

Rule 29 is a broad provision that allows the parties to enter into stipulations regarding the alteration of virtually any aspect of discovery procedure. Such stipulations allow the parties to fashion less expensive and time-consuming procedures than those provided for under the Rules or by local rule. The stipulations must be in writing and should be filed with the court. Although the court's approval is not expressly required for the parties to enter into these kinds of stipulations, with the exceptions noted at the end of the Rule, the court has the authority to revoke this right of stipulation.

Stipulations Concerning Depositions

Subdivision (a) provides that parties may stipulate to the manner in which depositions may be taken, including the person before whom a deposition must be taken. In this respect, Rule 29 is keyed to Rule 28, which is the general provision regarding persons before whom stipulations may be taken. However, in no event shall a deposition be taken before any of the persons listed in Rule 28(c), which is intended to protect the parties from any possible conflict of interest.

Stipulations Concerning Other Discovery Mechanisms

Under subdivision (b), the parties may likewise agree to modify any other aspect of discovery procedure provided by local rule or by these Rules. However, if the parties desire to alter the 30-day periods for responding to interrogatories, requests for production, or requests for admission in Rules 33, 34, or 36, the permission of the court is expressly required. Additionally, local rules may require the court's permission for other kinds of stipulations involving discovery procedure.



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Chapter 29 Rule 29. Stipulations About Discovery Procedure

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29.2 ADDITIONAL AUTHORITY

6 Moore's Federal Practice §§ 29.01 -29.07

Friedenthal, Civil Procedure § 7.7

Tepley & Whitten, Civil Procedure 742



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§ 30.syn Synopsis to Chapter 30: Rule 30. Depositions by Oral Examination

Scope Rule 30. Depositions by Oral Examination

30.1 COMMENTARY

30.2 ADDITIONAL AUTHORITY

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TITLE V. DISCLOSURES AND DISCOVERY
Chapter 30 Rule 30. Depositions by Oral Examination

1-30 Federal Civil Procedure Litigation Manual Rule 30. Depositions by Oral Examination

Rule 30. Depositions by Oral Examination

Rule 30 reads as follows:

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

- (i) the officer's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the officer's administration of the oath or affirmation to the deponent; and
- (v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction. The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided

in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if

the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked--in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

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TITLE V. DISCLOSURES AND DISCOVERY
Chapter 30 Rule 30. Depositions by Oral Examination

1-30 Federal Civil Procedure Litigation Manual 30.1

30.1 COMMENTARY

Rule 30 is an important Rule that sets forth the procedures to be used in scheduling and conducting oral depositions. Like many of the Rules governing discovery, Rule 30 is keyed to Rule 26, which contains general provisions governing discovery, in many respects.

When Depositions May Be Taken

Under subdivision (a)(1), a party is generally not required to secure the permission of the court before taking a deposition, with the exceptions stated in subdivision (a)(2). If a party wishes to take the deposition of another party, proper notice under subdivision (b)(1) is all that is required to compel the party's attendance. However, if the person to be deposed is not a party to the action, subdivision (a)(1) provides that subpoenas may be issued in accordance with the provisions of Rule 45 to compel the attendance of that person at the deposition.

Ten-Deposition Limit

Subdivision (a)(2)(A)(i) sets a limit of ten on the number of oral and written depositions that a party may take without seeking the permission of the court. In some circumstances, it may be suitable to either reduce or enlarge this limit. The discovery planning meeting required by Rule 26(f) and the scheduling conference under Rule 16(b) are appropriate times at which to consider an enlargement or reduction in the limit. Depositions of organizations under subdivision (b)(6) are counted as single depositions toward this limit, even though the organization may designate more than one person to testify.

The ten-deposition limit applies to parties comprising the opposing sides of a controversy, and not to individual parties. Thus, co-defendants joined under Rule 19 are limited to a total of ten depositions. However, a defendant that crossclaims against another defendant should be allowed to take an additional ten depositions with respect to the crossclaim. In actions where there are multiple parties on either side of a controversy, the parties should confer and agree on the depositions that should be taken, as they will be limited to a total of ten. If the parties cannot reach a consensus, a motion to take additional depositions should be made to the court. Alternatively, the court may be requested to resolve the dispute without exceeding the ten-deposition limit.

Illustration 30-1

Blake and Bernice sue Cindy and Carmen for personal injuries suffered in a hunting accident. Blake and Bernice are limited to 10 depositions as plaintiffs in the action. If Blake and Bernice are unable to determine which depositions are to be counted toward the ten-deposition limit, they must make a motion to the court to resolve the dispute or increase the ten-deposition limit. Furthermore, if Blake makes a crossclaim against Bernice, Blake and Bernice should then be allowed to take an additional 10 depositions with respect to the crossclaim.

When Leave of the Court Is Required

Subdivision (a)(2) lists the four circumstances that are excepted from the general rule that permission of the court is not required to take the oral deposition of a party. As noted in subdivision (a)(2)(B), if the deponent is incarcerated, leave of the court is required. This requirement is not subject to exception by stipulation of the parties. Prisoners that are parties are also subject to this requirement.

The permission of the court is also required in the following situations: (1) when a party desires to take more than ten oral depositions or depositions upon written questions; (2) when a party desires to depose a person a second time; and (3) when a party seeks to depose a person before the date of the discovery planning meeting required by Rule 26(d). This third situation is excepted from the leave requirement--the "exigent circumstances" exception--if notice of the deposition under subdivision (b) certifies and supports with appropriate facts that the deponent is expected to leave the country and become unavailable for examination by deposition. In addition, all of these three situations in which leave of the court is required to take an oral deposition may be excepted from this requirement by stipulation of the opposing party.

Service and Contents of Notice

Subdivision (b)(1) lists the information that must be included in the notice of an intent to take oral depositions. Notice to take oral depositions must be served on every party in the action, not just the deponent. If a subpoena to produce documents is also served on a non-party deponent or a request for documents of a party deponent is properly made under Rule 34, the subpoena and request, in addition to the list of the specific materials requested, should be attached to the notice.

Recording the Deposition

The party taking the deposition has the choice of the method of recording the testimony and must pay the cost of the recording. Permission from the court or opposing parties to take depositions other than by stenographic means is not required. However, if a party desires to take a deposition by telephone or by other remote electronic means, subdivision (b)(4) states that permission of the court or stipulation of the opposing party is required. The deposition will then be deemed to have taken place at the location where the deponent answers the questions. If a deposition is to be used at trial or in conjunction with a summary judgment motion, a transcript of the deposition will be necessary. Although this poses little problem when the deposition is taken stenographically, if videotape or audiotape is used as the sole means of recording the *deposition testimony*, the party taking the deposition must arrange for a transcription of the tape. If the party being deposed or a party not involved in the deposition nonetheless desires that the deposition be recorded by an additional method other than that specified in the notice, subdivision (b)(3)(B) allows them to arrange for additional methods of recording the deposition at their own expense.

Illustration 30-2

Alice commences a breach of contract action against Nancy, alleging that Nancy delivered low quality

goods in violation of the terms of the contract. As part of discovery, Alice wishes to depose William, the quality control manager employed by Nancy. Since Alice wishes to present the testimony as part of a summary judgment motion, she requests the deposition be taken stenographically so that a transcript of the deposition is produced. Nancy, however, wishes to have the deposition taken by videotape. Under Rule 30, Alice may take the deposition by stenographic means, and she is required to pay the cost of the stenographer. In addition, Nancy may have the deposition recorded via videotape, but she must pay the cost of doing so.

Formal Requirements of a Deposition

An oral deposition must be conducted before an officer or appointee according to the provisions of Rule 28, or before a person stipulated to by the parties according to the provisions of Rule 29. The deposition begins with a statement on the record by the officer or appointee conducting the deposition of (1) the officer's or appointee's name and business address, (2) the date, time, and location of the deposition, and (3) the name of the deponent. If audiotape, videotape, or other nonstenographic means are used to record the deposition, these items must be repeated whenever a new tape or unit of recording is used. The officer or appointee must administer the oath or affirmation on the record, and must identify all person present at the deposition. These latter two items need only be stated at the beginning of the first tape or recording unit if the deposition is taken other than through stenographic means.

The officer or appointee is responsible for the administration of the oath or affirmation and the recording of the testimony, a point made explicit in subdivision (c)(1). When the deposition has been completed, the officer or appointee should so indicate on the record and repeat any stipulations entered into by the attorneys regarding the deposition. Subdivision (b)(5)(B) also contains a special admonition, designed to safeguard the integrity of the testimony, that the demeanor of persons at the deposition should not be distorted through unusual recording techniques.

Depositions of Organizations

If a corporation or other organization is the subject of the deposition, the party taking the deposition need not specify in its notice the persons who will actually testify at the deposition. Instead, a description with reasonable particularity of the matters upon which the deposition is requested is sufficient. The corporation or organization must then designate those persons who will testify on behalf of the corporation or organization, and a subpoena directing a non-party corporation or organization to be deposed must contain notification to this effect. The corporation or organization may also limit the testimony of any its designated persons to certain matters, eliminating possible speculative testimony.

Illustration 30-3

Roger commences a shareholder derivative suit against the officers of Great Grape Juice, Inc., challenging the merger of Great Grape Juice, Inc. and Okay Purple Cider Company. As part of his discovery, Roger wishes to depose staff accountants of Great Grape Juice Inc., but does not know the precise identity of the corporation's employees. Under Rule 30, Roger does not need to specify the precise name of the person he wishes to depose. Rather, he may notify Great Grape Juice, Inc. that he wishes to depose staff accountants who are familiar with the corporation's financial performance over the past five years. In response, Great Grape Juice, Inc. is required to designate the staff accountants who will be testifying and notify Roger of their participation.

Deposition Proceedings

The operation of the Federal Rules of Evidence and the order of the examination of witnesses at depositions is the same as those at trial, with several exceptions. Subdivision (c)(1) indicates that *Federal Rule of Evidence 103*, which concerns offers of proof and timely objections, and Rule 615, which concerns the exclusion of witnesses, are excepted. Other

Federal Rules of Evidence, such as Rule 210, which concerns judicial notice, and Rule 614, which concerns the calling and interrogation of witnesses by the court, are not expressly inoperative to depositions, but they are clearly inapplicable. The exception of *Federal Rule of Evidence 615* from depositions was added in 1993 to address the question of whether other deponents could attend a deposition. Some courts had held that such persons could be excluded through the invocation of *Federal Rule of Evidence 615* by the moving party. The advisory committee's note states that, under the 1993 revision of the Rule, this exclusion is not automatic. Potential deponents can still be sequestered from the taking of deposition testimony, but this is a matter that should be addressed under an order pursuant to Rule 26(c).

Subdivision (c)(3) complements Rule 31, which governs depositions on written questions. The provision envisions the situation where additional parties may desire that the deponent respond to certain questions, but the parties or their attorneys cannot attend the deposition or the modest number of questions do not justify an appearance. Parties are thus allowed to submit written questions in a sealed envelope to the party taking the deposition, who shall give them to the officer or appointee conducting the deposition, who, in turn, will read them to the deponent. A further benefit of this mechanism is that its utilization should not count as an additional deposition toward the ten-deposition limit.

Illustration 30-4

Assume on the facts of Illustration 30-3 that the Securities and Exchange Commission (SEC), a third party plaintiff, desires that the staff accountants answer seven brief questions. However, the SEC cannot arrange for one of its attorneys to attend the scheduled deposition. The SEC may submit written questions in a sealed envelope to Roger's attorney. In turn, Roger's attorney must give the questions to the officer conducting the deposition. This allows the SEC to have their questions answered without an additional deposition.

Objections at Depositions Generally

The advisory committee's notes to the 1993 and 2000 amendments to the Rule acknowledged that depositions had become unduly prolonged and unfairly frustrated by lengthy objections and colloquy on how the deponent should respond. Thus, the Rule now directs that objections to questions posed during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner on the record. Furthermore, it has been suggested that directions to a deponent not to respond to a question can be even more disruptive than objections to the question. Therefore, under the 1993 revision of the Rule, most objections will not operate to justify the deponent's refusal to answer the question. Furthermore, most objections to questions asked at depositions will be preserved at trial, either by operation of Rule 32 or by stipulation.

Illustration 30-5

Assume on the facts of Illustration 30-3 that the attorney for Great Grape Juice, Inc. objects to the content of a question asked by Roger's attorney. The objection does not permit the staff accountants to refuse to answer the question, and the objection will be preserved at trial.

Prior to 2000, the Rule technically permitted only objections to "evidence," and it engendered confusion as to whether objections to discovery were permitted. A 2000 amendment clarified this confusion by referring to "any" objections during a deposition. The 2000 amendments also clarified that a person may be instructed not to respond to a deposition question to enforce any limitation directed by the court, not simply those limitations in connection with limitations on evidence.

Who May Instruct a Deponent Not to Answer

The 2000 amendment to subdivision (c)(2) also clarified any person may instruct a witness not to answer a deposition question on privilege grounds, to enforce a court order, or to make a motion for a protective order under subdivision (d)(3). Under a prior version of the Rule, only a "party" was permitted to make such an instruction. that the deponent or any party may make a motion to terminate or limit the deposition for one of the reasons set forth in that subdivision. The purpose of this clarification was to impose the same limitations applicable to parties on non-parties. Accordingly, the limitations set forth in subdivision (c)(2) are applicable to any person instructing the deponent not to answer a deposition question.

Kinds of Objections at Depositions

Objections at or concerning depositions are best understood as falling into one of four categories: *fundamental* objections, *content* objections, *form* objections, and *procedural* objections. The distinctions between these categories are important for purposes of determining whether the objection is waived if not raised at the deposition or as soon as the error or irregularity is discovered, whether the deponent is required to answer the question in spite of the objection, and whether the objection can be cured at the deposition. These determinations are culled through an analysis of the interplay between the relevant provisions of Rule 30 and Rule 32. Although attorneys frequently stipulate at a deposition that all objections except those to the form of the question are reserved by the parties, this stipulation is rarely necessary, as the Rules operate to preserve most objections except to the form of the questions even without a stipulation. Nonetheless, such a stipulation will sometimes resolve doubt on the matter and save the parties the time and expense of an argument on the issue.

Fundamental Objections Generally

Objections to questions to which a deponent may be instructed not to respond may be referred to as *fundamental* objections. Subdivision (c)(2) lists the only three grounds on which such an objection may be made: (1) to preserve a privilege or protect against disclosure (*e.g.*, claiming the work product doctrine); (2) to enforce a court order limiting the nature or length of discovery; and (3) to discontinue the deposition to permit the deponent to make a motion under subdivision (d)(3). All other grounds for objections are not justifications for a refusal to answer, and the party taking the deposition may make a motion to the court requesting an order for the deponent to answer the question. When an attorney has instructed a deponent not to respond to a question on permissible grounds, this fact should be clearly noted in the record. Nonetheless, attorneys frequently stipulate that a deponent's refusal to answer a question or an attorney's instruction not to answer a question will be considered as a directive from the officer or appointee conducting the deposition to the deponent to answer the question and the deponent's subsequent refusal to do so.

Illustration 30-6

Assume on the facts of Illustration 30-3 that the attorney for Great Grape Juice, Inc. objects to a question posed by Roger's attorney and instructs the deponent not to answer the question. The attorney makes the objection because she fears that the answer will adversely affect the outcome of the litigation. As the grounds for the objection do not fall within those enumerated in 30(c)(2), the justification for the objection is without merit. Roger's attorney may make a motion to compel the deponent to answer the question.

Fundamental Objections--Waiver

The Rules are not explicit on the question whether the failure to raise a *fundamental* objection of the kind described above constitutes a waiver of that objection if the deposition transcript is used at trial. Of course, if such an objection is made, the deponent will normally be instructed not to answer, and a judicial determination of the objection will frequently be made under subdivision (d)(3). However, when no such objection is made, through inadvertence or mistake, for example, it is unclear whether a party can later object to the introduction of that testimony on grounds that

would have enabled the deponent to refuse to answer the question at the deposition.

Of the three *fundamental* objections listed in subdivision (c)(2), probably the one most frequently encountered in this regard, and unfortunately the most complicated, is the question of privilege. A deponent's response to a question that would have been subject to an objection to enforce a limitation on evidence ordered by the court will usually be harmless at trial. This exception was included to encourage the parties to adhere to their discovery plan under Rule 26 as well as any pretrial conference orders under Rule 16 and to prevent lines of questioning at depositions that would serve no useful purpose in the action. If no objection was made and the deponent answered the question anyway, the harm for which the exception was intended to prevent has already occurred. Thus, there seems to be little reason to grant an objection at trial on these grounds. Likewise, the right of a party not to answer a question at a deposition so that the party is afforded the opportunity to make a subdivision (d)(3) motion expires if the deponent does not make such a motion.

However, when a deponent responds to a question that would have been protected from disclosure by privilege had the person so objected, the issue whether the privilege has been waived must be analyzed on several levels. As privilege issues involve the substantive rights of persons, the function of the Rules, which can neither abridge, enlarge, nor modify substantive rights, is secondary in the analysis. First, it must be determined whether the applicable law would permit the privilege to be reasserted at a future proceeding. If the answer to the question is no, the procedure dictated by the Rules may still operate to allow the objection at trial and thus preclude the admission of the evidence. If the answer to the question is yes, the privilege must be allowed to be reasserted and the evidence therefore excluded, notwithstanding any provision in the Rules to the contrary.

Illustration 30-7

Christie sues Nick for personal injuries suffered in a boating accident. As part of discovery, Nick wishes to depose Christie. At the deposition, Christie provided information that would have been protected from disclosure by privilege. The information conveyed does not modify the substantive rights of Christie or Nick. If applicable law does not permit the privilege to be reasserted at a future proceeding, the procedure dictated by the Rules may operate to allow an objection and protect the information from disclosure at trial. If applicable law does permit the privilege to be reasserted at a future proceeding, the privilege must be allowed to be reasserted at trial and the information is protected from disclosure.

Federal Rule of Evidence 501 instructs that the applicable state law governs privileges in diversity actions where state law supplies the rule of decision as to a claim or defense, and that federal common law principles, "in light of reason and experience," govern privileges in federal question actions. Under general federal common law principles, the disclosure of privileged information by the holder of the privilege results in a waiver of that privilege, even if the disclosure is inadvertent. However, several courts have held that where a person is under the mistaken belief that the privileged information must be revealed, the person may reassert the privilege at a future proceeding. Both views are supported by sound reasoning, and the proper result seems to hinge on the particular facts of the case and whether the person attempting to reassert the privilege took affirmative steps toward protecting the privilege when the information was disclosed.

Therefore, where a person reveals information at a deposition that would otherwise be supported by a claim of privilege, careful attention should be paid to any objections to the questions on the record. If the party displays hesitancy at answering the questions or inquires of her attorney of the consequences of answering the questions, the privilege should be permitted to be reasserted at trial. However, if neither the attorney nor the party reveal any reservation or misgiving concerning the questions under consideration, the privilege should be deemed to have been waived. It should be noted that applicable state law may mandate a different analysis than that recommended here in diversity actions.

Even if the substantive law would preclude the reassertion of the privilege, the Rules may operate to protect the

privilege, and thereby exclude the deposition from trial. Rule 32(d)(3) catalogs different kinds of objections to the taking of deposition testimony and whether the failure to object on those grounds at the deposition constitutes a waiver of that objection. Specifically, subdivision (d)(3)(A) states that objections to the competency of a witness or the relevancy of the testimony are not waived if they are not made at the deposition. Objections based on grounds that the question is outside the scope of a discovery order do not fall within either of these descriptions, and are thus not excepted from the non-waiver operation of this subdivision. However, Rule 32(b) appears to encompass this contingency: "An objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were then present and testifying." As noted, the admissibility of the evidence at trial would then be determined by the applicable substantive law. In this way, then, the answer to the question of whether the privilege could be reasserted at trial under the procedure of the Rules is coupled to the applicable substantive law.

Content Objections

Objections to questions on the grounds stated in Rule 32(d)(3)(A)--the competency of the witness or the relevancy of the evidence--and any other objection contemplated by Rule 32(b), such as hearsay, may be characterized as *content* objections. Objections on these grounds do not allow a deponent to refuse to answer the question. Although the Rules do not forbid these objections at a deposition, the necessity of doing so has been obviated by the non-waiver provisions of Rule 32. A failure to raise these objections at a deposition does not preclude a party from later raising them at trial and rendering the deposition testimony inadmissible. Nonetheless, conscientious litigators may wish to point out to their adversaries that a particular line of questioning may be clearly inadmissible, thus sparing the offending attorneys the time and effort of asking the questions. Of course, information gathered at depositions may be useful for strategic purposes even if it would be inadmissible at trial.

Form Objections

Objections to questions on grounds involving the form of the questions or the responsiveness of the answers, such as an objection that a leading question has been asked, may be referred to as *form* objections. These objections are usually cured or rectified by the parties or their attorneys at the deposition itself. The failure to raise such an objection at the deposition constitutes a waiver of the objection at trial and on appeal.

Procedural Objections

Finally, objections to any error or irregularity in the manner in which the deposition occurred, including the notice for taking a deposition, the method of recordation of the deposition, the oath or affirmation, the conduct of the parties, the location of the deposition, the officer or appointee conducting the deposition, or the preparation of the transcript or recording of the deposition, may be referred to as *procedural* objections. As with *form* objections, *procedural* objections must be raised in a timely manner at the deposition or at the time they are discovered to prevent waiver of those objections. At times, the subject of the objection may be cured at the deposition.

Illustration 30-8

If the officer or appointee fails to administer the oath to a deponent, the error may be remedied at once.

In other instances, however, the objection is properly a matter for judicial decision, such as when a person not yet joined as a party but who is expected to be so joined has a right to attend a deposition. Such an objection should be made on the record to preserve the issue at trial and on appeal.

Time Limits on Depositions

Amendments to Rule 30 in 2000 added a new subdivision (d)(1), which imposes a one-day, seven-hour time limit for

any deposition taken of a person, absent extenuating circumstances. The amendment was adopted because of a concern that lengthy depositions can result in undue costs and delays in some circumstances. Both the one-day and seven-hour time limits are independent of one another, so three-hour depositions on consecutive days of a single individual are not permitted under the Rule. Breaks for meals and other purposes are not counted toward the 7-hour time limit. The time limit may be extended by stipulation or by order of the court upon a showing of good cause by the party seeking a longer time period.

■ **Court Modification of Time Limits Permitted**

The amendment supersedes any local rule imposing a time limit on depositions. However, the court retains the authority to order shorter time periods in individual cases and to order that depositions be taken for limited periods on different days.

■ **Good Cause for Modifying Time Limits**

The advisory committee note anticipates that the parties and the witness will make reasonable accommodations through stipulations to avoid unnecessary motions to the court. Circumstances in which a stipulation may be appropriate, and factors to be considered by the court in modifying the time limitations, include:

- Whether the deponent is an expert witness;
- Questioning on events occurring over a long period of time;
- Multiple party questioning;
- Questioning by the witness's own attorney;
- Lack of preparation by a witness, including the failure to become familiar with documents provided in advance;
- Failure to produce documents by a witness; and
- The need for an interpreter.

Additional time should also be permitted by the court if, in accordance with Rule 26(b)(2), an extension is necessary to permit a fair examination of the deponent. If the witness or another person impedes or delays the deposition, a court order allowing additional time is mandatory, and sanctions under subdivision (d)(2) are authorized (including the imposition of sanctions on persons not parties or their attorneys). Emergencies and other extenuating factors are also circumstances in which an extension will be appropriate, though sanctions will rarely be appropriate under these circumstances.

Motions to Terminate

Subdivision (d)(3) allows depositions to be interrupted for the purpose of making a motion to the court upon a showing

that the deposition is being conducted in bad faith or in an unreasonable, oppressive, annoying, or embarrassing manner. A motion under this subdivision is also appropriate when a deponent refuses to answer a question on the instruction of an attorney. The court can respond to the motion in any number of ways, including orders to respond or to resume the deposition, a protective order under Rule 26(c), or sanctions on the offending party under Rule 37.

Illustration 30-9

Bob sues Jill for trespassing on Bob's property. At Jill's deposition, Jill's attorney repeatedly and without justification directs Jill not to answer the questions posed by Bob, thereby frustrating the purpose of the deposition. Under Rule 30, Bob may interrupt the deposition and seek the court's protection. In turn, the court may instruct Jill to answer the questions and order the deposition to resume, grant Jill a protective order under Rule 26(c), or enter sanctions on Jill or her attorney under Rule 37.

Copies

The officer or appointee conducting the deposition is required to retain a copy of the transcript or recording unless otherwise ordered by the court or agreed upon by the parties. This usually means that the person who recorded the deposition, stenographically or otherwise, will be the person in possession of the record of the deposition when the deposition has concluded. That person must provide any interested party or a non-party deponent of a copy of the transcript or recording of the deposition upon payment of reasonable charges for the copy.

Review and Signing of Transcripts

The transcript or the recording of the deposition is not required to be signed by the deponent unless a request under subdivision (e) to review the transcript or recording is made before the deposition is completed. Prior to the 1993 amendment, the review and signature requirements were automatic if a transcript or recording of the deposition was made, subject to waiver by the parties. These requirements had caused problems for court reporters, who frequently were unable to secure the signatures of the deponents or the transcripts or recording themselves. Under the new version of the Rule, the deponent must review and sign the transcript or recording only if such a request is made. The deponent then has 30 days from the date the transcript or recording is made available by the transcriptionist in which to review the testimony. If any changes regarding the form or substance are made by the deponent, the officer or appointee is required to append those changes to the transcript or recording filed under subdivision (f).

Certification

After all required signatures have been obtained and changes to the transcripts or recording of the deposition noted, the officer or appointee conducting the deposition is required to execute a certificate of authentication attesting that the deponents were duly sworn and that the contents of the transcript or recording of the deposition are a true record of the deponent's testimony. The certificate must be included with the transcript or recording.

Filing of Depositions With the Court Not Permitted

Subdivision (f)(1) has been amended to conform with the non-filing requirements of Rule 5. The amendment removes the requirement that deposition transcripts be filed with the court until used in a proceeding. The requirement that the attorney who arranged for the transcription is responsible for its storage and preservation has been retained.

Exhibits

Documents, material objects, or other exhibits used at a deposition must be properly identified and attached to the record of the deposition. However, if persons in possession or control of the documents or objects desire to retain the

originals, they are provided with two alternatives: they can make copies of the documents to be attached to the record of the deposition, subject to verification with the originals by any party; or, they may allow the parties to view and inspect the originals at the deposition and permit them to be marked for identification purposes, subject to later production as exhibits at trial.

Failure to Attend

Subdivision (g) allows a court to order the party taking a deposition to pay the reasonable expenses, including attorneys' fees, of a party attending that deposition in two circumstances. First, if the party taking a deposition does not show up at the correct time and place of the deposition, subdivision (g) permits expenses of the parties attending the deposition to be charged against the absent party. Although not expressly permitted, expenses incurred by a non-party deponent when a party fails to attend a deposition should be allowed by analogy. Second, if a party fails to serve a non-party deponent with a subpoena, thereby resulting in the absence of that person, and a party relies on the notice of the taking of the deposition in attending the deposition, the reasonable expenses of attending the deposition incurred by the party relying on the notice should be paid by the party who failed to serve the subpoena.

Illustration 30-10

Dan sues Betsy for personal injuries suffered in a hunting accident. As part of discovery, Betsy wishes to depose Wanda, a passerby who witnessed the events leading to the accident. However, Betsy fails to serve Wanda with the subpoena she obtained from the courthouse, which directs Wanda to appear at Betsy's office at 9 a.m. on January 27. Nevertheless, Dan drives 250 miles to Betsy's office to observe the deposition. Predictably, Wanda does not appear at Betsy's office on January 27. Under Rule 30(g), the court may order Betsy to pay the reasonable expenses of Dan in attending the deposition.



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Chapter 30 Rule 30. Depositions by Oral Examination

1-30 Federal Civil Procedure Litigation Manual 30.2

30.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 30.01 -30.73

James & Hazard, Civil Procedure § 5.3

Friedenthal, Civil Procedure §§ 7.7, 7.18

Teply & Whitten, Civil Procedure 735-736, 742-749



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30.3 LEADING CASES

Changes to Deposition Transcript Corrective Only

Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217 (9th Cir. 2005) (Rule 30(e) is to be used for corrective, not contradictory, changes to deposition testimony; the language of the Rule does not allow a party to include changes offered solely to create a material factual dispute in an effort to avoid summary judgment).

Corporations Subject to Subpoenas

Rosenruist-Gestao e Servicos LDA v. Virgin Enters., 511 F.3d 437 (4th Cir. 2007), cert. denied, 2008 U.S. LEXIS 4416 (2008) (because term "witness," as used in 35 U.S.C. § 24, is not limited to natural persons and allows district court to reach corporations, they are subject to the issuance of Rule 30(b)(6) subpoenas in Patent and Trademark Office proceedings).

Corrections to Depositions; Standard for Sham Deposition

Burns v. Board of County Comm'rs, 330 F.3d 1275 (10th Cir. 2003) (because there is no reason to treat deposition corrections differently than affidavit corrections, a party's attempt to amend his or her deposition testimony has to be evaluated under same factors that are considered in determining whether an affidavit is fraudulent).

Costs of Depositions

Little v. Mitsubishi Motors N. Am., Inc., 514 F.3d 699 (7th Cir. 2008) (prevailing party could collect costs of both video-recording and stenographically transcribing same deposition under Rule 30(b) and costs were authorized under 28 U.S.C. § 1920 because employer used video deposition to support its summary judgment motion and was required by Rule 26(a)(3)(A)(ii) and Rule 32(c) to provide transcript).

Commercial Credit Equip. Corp. v. Stamps, 920 F.2d 1361 (7th Cir. 1990) (expenses resulting from the transcription of videotaped depositions not taxable as costs under Rule 54(d), as Rule 30(b)(4) (now Rule 30(b)(3)(B)) specifies that

they must be paid by the party requesting them).

National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co., 748 F.2d 602 (11th Cir. 1984) (not an abuse of discretion for the district to award partial costs in travelling to and attending a deposition).

Falsification of Transcript; Sanctions

Combs v. Rockwell Int'l Corp., 927 F.2d 486 (9th Cir. 1991) (it was not an abuse of discretion for the district court to dismiss an action as a sanction against the plaintiff where the plaintiff and his attorney had falsified a deposition transcript).

Reasonable Notice

Federal Aviation Admin. v. Landy, 705 F.2d 624 (2d Cir. 1983) (four days' notice of a deposition to the opposing party reasonable under the circumstances; only a court order could grant a stay of a deposition, which was not granted).

Natural Organics, Inc. v. Proteins Plus, Inc., 724 F. Supp. 50 (E.D.N.Y. 1989) (one-day's notice of short deposition conducted over the telephone reasonable under the circumstances).



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1-31 Federal Civil Procedure Litigation Manual 31.syn

§ 31.syn Synopsis to Chapter 31: Rule 31. Depositions by Written Questions

Scope Rule 31. Depositions by Written Questions

31.1 COMMENTARY

31.2 ADDITIONAL AUTHORITY



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1-31 Federal Civil Procedure Litigation Manual Rule 31. Depositions by Written Questions

Rule 31. Depositions by Written Questions

Rule 31 reads as follows:

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) Service; Required Notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions Directed to an Organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) Questions from Other Parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Completion or Filing.

(1) **Completion.** The party who noticed the deposition must notify all other parties when it is completed.

(2) **Filing.** A party who files the deposition must promptly notify all other parties of the filing.

* * * * *



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TITLE V. DISCLOSURES AND DISCOVERY
Chapter 31 Rule 31. Depositions by Written Questions

1-31 Federal Civil Procedure Litigation Manual 31.1

31.1 COMMENTARY

Rule 31 allows parties to depose any person, party or non-party, upon written questions. Depositions upon written questions differ from oral depositions only in the manner that the questions are asked of the deponent, and not in the manner that the deponent is to respond to the questions. Persons subject to depositions upon written questions must still answer the questions orally before a person authorized or appointed to administer oaths and conduct depositions. In this way, depositions upon written questions are distinct from interrogatories, which are governed by Rule 33.

Relationship to Rule 30

The provisions of Rule 31 closely parallel those of Rule 30, which govern oral depositions. The notice and leave provisions of the two Rules are identical. Notice of the deposition and copies of the written questions must be served on the person to be deposed and the officer or appointee authorized to conduct the deposition. Subdivision (a)(4) allows a party to take depositions upon written questions of an organization in the same manner that it may take oral depositions of that organization in accordance with Rule 30(b)(6).

Time Periods for Depositions by Written Questions

If the person to be deposed is a party, subdivision (a)(5) sets forth a 28-day period within which written questions may be cross-examined, redirected, and re-crossed. Within 14 days after being served with notice of the depositions and the list of questions, the deposed party may serve cross questions on all other parties. Within 7 days of the receipt of the cross questions, the party may then serve redirect questions on any party to which the redirected questions may be applicable. Within 7 days of the receipt of these redirect questions, the originally deposed party may then serve recross questions. These time limitations are effective from the dates that the parties received notice of the deposition and the list of questions, not the date of the actual deposition itself. The final sentence of subdivision (a)(5) provides that these time periods may be enlarged or shortened by the court for good cause shown.

Illustration 31-1

Maggy commences a wrongful termination action against her former employer, Quincy. Maggy wishes to depose Quincy by written questions. On February 1, Maggy serves Quincy with a notice of the

deposition and a list of eighteen questions. Quincy may serve cross questions on Maggy no later than February 15. In accordance with Rule 31, Quincy does indeed serve cross questions on Maggy on February 15. Rule 31 permits Maggy to serve redirect questions on Quincy no later than February 22. On February 22, Maggy does serve redirect questions on Quincy. Under the terms of Rule 31, Quincy may then serve recross questions on Maggy no later than March 1.

Procedure for Depositions by Written Questions

The officer indicated in the notice of deposition is required to conduct the deposition in accordance with the provisions of Rule 30(c), (e), and (f). The preparation, certification, and filing requirements of officers conducting depositions upon written questions likewise parallel those of officers conducting oral questions as provided in Rule 30(f). Subdivision (c) requires that the party taking the deposition shall notify all other parties when the deposition is completed, as well as when the deposition is filed with the court.

Comparison With Oral Depositions

Depositions upon written questions are not used frequently, as the inflexibility of the procedure and attenuated nature of the examination, cross-examination, redirect, and recross makes this method of discovery unwieldy. Additionally, depositions upon written questions are sometimes ineffective in assessing the demeanor of a witness when testifying. The procedure allows deponents to carefully rehearse their responses to the questions with their attorneys, as deponents must be provided with the list of the written questions before the deposition actually occurs. The primary advantage of the method is that they are cost-effective for the party taking the depositions; neither that party nor the attorney for that party is required to attend the deposition.



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1-31 Federal Civil Procedure Litigation Manual 31.2

31.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 31.01 -31.17

Friedenthal, Civil Procedure § 7.8

Teply & Whitten, Civil Procedure 747-749



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1-32 Federal Civil Procedure Litigation Manual Rule 32. Using Depositions in Court Proceedings

Rule 32. Using Depositions in Court Proceedings

Rule 32 reads as follows:

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used.

(5) Limitations on Use.

(A) Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place--and this motion was still pending when the deposition was taken.

(B) Unavailable Deponent; Party Could Not Obtain an Attorney. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may

itself introduce any other parts.

(7) Substituting a Party. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) Deposition Taken in an Earlier Action. A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) To the Notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the Officer's Qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition.

(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) Objection to a Written Question. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recrossquestion, within 7 days after being served with it.

(4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony--or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition--is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

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1-32 Federal Civil Procedure Litigation Manual 32.1

32.1 COMMENTARY

Rule 32 governs the use of depositions at trial or other court proceedings, including hearings on motions. Although subdivision (a)(4)(E) indicates a clear preference for live testimony in lieu of deposition testimony, depositions may be introduced as evidence in certain situations and with certain procedural safeguards.

Admission of Depositions at Trial; Exceptions

Subdivision (a)(1) states that all or any part of a deposition may be used at a trial, hearing, or proceeding against any party under the following circumstances: (1) the party had notice of the deposition or was present or represented at the deposition; (2) the deposition testimony must be admissible under the Federal Rules of Evidence, applied as if the witness were then present and testifying; and (3) the use of the deposition is permitted under the remainder of the Rule, and thus not subject to the exceptions stated in the Rule. However, perhaps the most fundamental limitation on this rule is the condition that the deposition testimony must be admissible under the Federal Rules of Evidence, applied as if the witness were then present and testifying. The importance of this limitation is highlighted by its repetition in subdivision (b).

As noted, Rule 32 contains multiple grounds upon which the opponent of deposition testimony may object and seek to have the evidence excluded. However, these grounds should be considered as conceptually distinct from those based upon the Federal Rules of Evidence. The objections contemplated in subdivision (d) should be regarded as objections to the admission of the *deposition transcript*, rather than objections to the admission of the *deposition testimony*, which are contemplated under subdivision (b).

Admissibility of Depositions Under Federal Rules of Evidence

The admissibility of deposition transcripts under the Federal Rules of Evidence poses no particular problem, as they are normally self-authenticating documents under *Federal Rule of Evidence 903(2)*, and are excepted from the so-called "best evidence rule" through the operation of *Federal Rule of Evidence 1005*. Deposition transcripts are also encompassed by the public records exception of *Federal Rule of Evidence 803(8)* from the rule excluding hearsay.

It should be noted, however, that the deposition testimony must satisfy the basic requirements for admissibility under

the Federal Rules of Evidence: relevancy, authentication, "best evidence," and hearsay. Objections on these grounds remain available to the opponent of the deposition testimony.

When Depositions Are Allowed

Subdivision (a)(2) states that depositions may be used by any party against any other party or witness for impeachment purposes. It should be noted that *Federal Rule of Evidence 801(d)(1)(A)* excludes prior inconsistent statements in depositions used for impeachment purposes from its definition of hearsay, so that depositions appropriately used in this manner are presumptively admissible.

Depositions of parties or persons designated by party organizations to provide deposition testimony are admissible for any purpose under subdivision (a)(3). This provision parallels *Federal Rule of Evidence 801(d)(2)*, which excepts from its definition of hearsay those admissions of a party-opponent.

Subdivision (a)(4) allows the use of a deposition of any person, whether or not they are a party, by any party for any purpose if the court finds that any of the circumstances listed in that subdivision have been met. Although those situations might be characterized as circumstances in which the witness is "unavailable," utmost care should be exercised so as not to confuse these provisions with *Federal Rule of Evidence 804(a)*, which sets forth, in general, a more stringent definition of "unavailability" for purposes of determining whether certain hearsay exceptions obtain. One of these exceptions covers former testimony, which includes depositions, so that if a witness is "unavailable" within the meaning of *Federal Rule of Evidence 804(a)* and under Rule 32(a)(4), the deposition testimony will be admissible unless some other exclusionary rule or doctrine renders it inadmissible. In some situations, such as when a witness has died, both of these requirements will be satisfied. However, in other situations, most notably the one envisioned by the "100-mile bulge" provision in subdivision (a)(4)(B), the "unavailability" requirement of *Federal Rule of Evidence 804(a)* may not be satisfied. In this situation, the deposition testimony must be excepted from the hearsay exclusionary rule through the operation of some other provision.

Objections to Admission of Deposition Generally

As noted, Rule 32 also provides grounds upon which the opponent of a deposition may object to its admissibility. These grounds are divided into separate categories in subdivision (d). Some of these objections must be raised at or soon after the time they are discovered, whereas other kinds of objections may be raised for the first time at trial or at a hearing.

Content Objections

Objections to questions on the grounds stated in subdivision (d)(3)(A)--the competency of the witness or the relevancy of the evidence--and any other objection contemplated by subdivision (b), such as hearsay, may be characterized as *content* objections. As noted, these objections are properly understood as objections to the underlying testimony of the deposition rather than objections to the deposition itself. The failure to raise these objections at a deposition does not preclude a party from later raising them at trial, unless the basis for the objection is such that it might have been remedied if raised at the deposition.

Form Objections

Objections to questions on grounds stated in subdivision (d)(3)(B) relating to the form of the questions or the responsiveness of the answers, such as an objection that a leading question has been asked, may be referred to as *form* objections. These objections are usually cured or rectified by the parties or their attorneys at the deposition itself. The failure to raise such an objection at the deposition constitutes a waiver of the objection at trial and on appeal.

Procedural Objections

Objections to any error or irregularity in the manner in which the deposition occurred, including the notice for taking a deposition, the method of recordation of the deposition, the oath or affirmation, the conduct of the parties, the location of the deposition, the officer or appointee conducting the deposition, or the preparation of the transcript or recording of the deposition may be referred to as *procedural* objections. Objections falling into this category are described with greater specificity in subdivisions (d)(1)-(2), (d)(3)(B)-(C), and (d)(4). Like *form* objections, they must be raised in a timely manner at the deposition, when they are discovered, or within the time limits set forth in the Rule to prevent waiver of the objections.

Miscellaneous Exceptions

Subdivision (a)(5) also sets out two additional grounds upon which an opponent of deposition testimony may seek to have the evidence excluded at trial. Subdivision (a)(5)(A) provides that, when a party who has received less than 14 days notice of a deposition and files a timely motion for a protective order under Rule 26(c)(1)(B) to cancel or delay the deposition, a deposition taken before the protective motion is ruled upon shall not be used at trial against the party seeking the protective order. Ordinarily, the filing of a motion for a protective order does not serve to protect the party; the protection depends upon the court's determination on the motion. This provision does not relieve the deponent of the obligation of attending the deposition, nor is it applicable to the party-deponent seeking the protective order. However, the party-deponent is protected from non-attendance at a deposition in these situations under Rule 37(d).

Illustration 32-1

On September 15, Bart receives a notice to take his deposition on September 20. Bart immediately makes a motion for a protective order under Rule 26(c)(2) to delay the deposition. Bart submits to a deposition on September 20. On September 30, the court grants Bart's motion for a protective order. Under Rule 32, the deposition taken on September 25 cannot be used against Bart at trial, as the deposition was taken before the court ruled on Bart's motion for a protective order.

Form of Depositions Presented at Trial

The second ground for objecting to the use of a deposition is set out in subdivision (a)(5)(A). It provides that a deposition taken under the "exigent circumstances exception" described in Rule 30(a)(2)(A)(iii) may not be used at trial against a party if that party was unable through the exercise of due diligence to obtain counsel to represent it at the deposition. Several points should be noted in conjunction with this provision. First, the provision does not imply that the "exigent circumstances" exception will be rendered unavailable to a party if a motion under Rule 32(a)(4) is made. A person properly notified under Rule 30(a)(2)(A)(iii) must still attend the deposition.

Second, the exception does not apply when the moving party is also the deponent. It simply provides that, when a deposition of a witness is taken under the "exigent circumstances" exception of Rule 30, the deposition may not be used against a party at trial if that party did not have sufficient time to secure the services of an attorney to represent the party at the deposition.

Subdivision (c) indicates that a party must provide a transcript of any deposition testimony offered by the party. At the offering party's option, the testimony may be submitted in nontranscript form as well. Additionally, if the proceeding at which the deposition is presented is a jury trial, parties must present depositions used other than for impeachment purposes in a nonstenographic form if one is available, unless the court allows otherwise. Subdivision (c) supplements Rule 26(a)(3)(A)(ii), which requires a party expecting to present deposition testimony in a nonstenographic form as substantive evidence to provide the other parties with a transcript of the pertinent portions of the deposition.

Use of Only Part of a Deposition

If a party offers into evidence only part of a deposition, subdivision (a)(6) allows an adverse party to require the party offering the deposition as evidence to introduce any other part of the deposition that should in fairness be considered with the part introduced. Under the final clause of that subdivision, all parties have a right to introduce any other part of the deposition originally offered as well. The first provision differs from the second, however, in that an adverse party seeking to have portions of the deposition relevant to that offered by the original party does not have to introduce those portions itself. It may actually require the offeror to introduce the portions of the deposition originally omitted. Doing so may have strategic advantages for the adverse party at trial.

Illustration 32-2

Katie commences a negligence action against Howard to recover for personal injuries suffered in an automobile accident. At trial, Katie introduces a portion of Howard's deposition that suggests Howard was driving under the influence of alcohol at the time of the accident. Under Rule 32, Howard may require Katie to introduce any other part of the deposition that should in fairness be considered with the part Katie introduced. Thus, Howard may require Katie to submit as evidence portions of the deposition that indicate that Howard's blood alcohol content was within legal limits. In addition, Rule 32 allows Howard to introduce any other part of the deposition that Katie originally offered.

Admission of Depositions Unaffected by Substitution of Parties or Subsequent Actions

Subdivision (a)(7) provides that the substitution of parties under Rule 25 does not affect the rights of the parties to use and introduce into evidence depositions taken prior to the substitution. Also, depositions may be used as provided in subdivision (a)(8) when they were taken in a prior action, whether brought in state or federal court, between the same parties or their representatives involving the same subject matter. This prevents the necessity of taking repetitious depositions in the event that the action is voluntarily or involuntarily dismissed.



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TITLE V. DISCLOSURES AND DISCOVERY
Chapter 32 Rule 32. Using Depositions in Court Proceedings

1-32 Federal Civil Procedure Litigation Manual 32.2

32.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 32.01 -32.65

Friedenthal, Civil Procedure § 7.17

Teply & Whitten, Civil Procedure 745-747, 765-767



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1-32 Federal Civil Procedure Litigation Manual 32.3

32.3 LEADING CASES

Costs of Deposition

Little v. Mitsubishi Motors N.A., 514 F.3d 699 (7th Cir. 2008) (prevailing party could collect costs of both video-recording and stenographically transcribing same deposition under Rule 30(b) and costs were authorized under 28 U.S.C. § 1920 because employer used video deposition to support its summary judgment motion and was required by Rule 26(a)(3)(A)(ii) and Rule 32(c) to provide transcript).

Court May Set Discovery Deadline

Chrysler Int'l Corp. v. Chemaly, 280 F.3d 1358 (11th Cir. 2002) (the district court may set a discovery deadline as the time limit for taking of depositions to be used at trial).

De Bene Esse Deposition; Later Testimony Not Allowed

Manley v. AmBase Corp., 337 F.3d 237 (2d Cir. 2003) (where a party had an opportunity to impeach the chairman of a corporation at a de bene esse deposition, which was a substitute for trial testimony and in which the district court directed the parties to conduct as though they were at trial, the district court properly refused to allow the party to offer into evidence at a second trial statements made by the chairman).

Depositions of Deceased Experts

Gill v. Westinghouse Elec. Corp., 714 F.2d 1105 (1983) (deposition testimony of expert who had died before trial was properly admitted at trial).

Exclusion of Deposition Testimony; Failure to Serve Subpoena

Hanson v. Parkside Surgery Ctr., 872 F.2d 745 (6th Cir. 1989) (where plaintiff did not serve the witness with a

timely subpoena to testify, the court properly excluded the deposition of the witness at trial).

Expert Witness More Than 100 Miles From Trial

Polys v. Trans-Colorado Airlines, 941 F.2d 1404 (10th Cir. 1991) (deposition of expert witness should not be admitted simply because the witness was more than 100 miles from the trial; the court considered other factors, such as surprise and the need to evaluate the expert's demeanor).

Expert Witness Outside Country

Alfonso v. Lund, 783 F.2d 958 (10th Cir. 1986) (where an expert witness was outside the country at the time of trial, admission of the witness's deposition was proper).

Live Testimony Prohibited Where Deposition Testimony Adduced

R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc., 945 F.2d 269 (9th Cir. 1991) (where a party forced the opposing party to present deposition testimony of witnesses rather than live testimony, that party could not thereafter produce the witnesses for purposes of testifying in open court; the parties were properly required to use deposition testimony only).

Oath Administration Waived

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) (depositions properly admitted when opposing party's counsel failed to accept offer to procure a foreign notary authorized to administer oaths under Rule 28; accordingly, party waived objection to "procedural" failings under Rule 32(d)(3)(B)).

Objections; Leading Questions

Associated Business Tel. Sys. Corp. v. Greater Capital Corp., 729 F. Supp. 1488 (D.N.J. 1990) (if an objection that leading questions are being used is timely made at the taking of the deposition, the objection may be sufficient to exclude the deposition at trial), *aff'd*, 919 F.2d 133 (3d Cir. 1990) .

Physicians Not Presumptively Unavailable

Allgeier v. United States, 909 F.2d 869 (6th Cir. 1990) (physicians are not treated as automatically unavailable because of the nature of their profession).

Repetitious Testimony

Gauthier v. Crosby Marine Serv., Inc., 752 F.2d 1085 (5th Cir. 1985) (although Rule 32 authorizes the use of depositions of a party for any purpose, the district court properly excluded depositions when it presented repetitious testimony).



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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 33 Rule 33. Interrogatories to Parties

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1-33 Federal Civil Procedure Litigation Manual Rule 33. Interrogatories to Parties

Rule 33. Interrogatories to Parties

Rule 33 reads as follows:

Rule 33. Interrogatories to Parties

(a) In General.

(1) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) **Scope.** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) **Responding Party.** The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) **Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) **Answering Each Interrogatory.** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) **Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) **Signature.** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) **Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) **Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

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33.1 COMMENTARY

Interrogatories are an efficient, comparatively inexpensive discovery mechanism for ascertaining answers to basic factual questions relevant in an action. Unlike depositions, interrogatories may be served only upon other parties in the action, and not on non-party witnesses. Interrogatories should not replace depositions as a method for examining potential witnesses in an action, nor should they replace admissions as a method of establishing facts that cannot later be disputed at trial. Instead, they function as a means of acquiring basic information upon which a party may rely in formulating subsequent discovery plans. Although answers to interrogatories are not conclusively established for the purpose of presentation at trial, parties and attorneys are sanctionable under Rule 37 for providing false and misleading answers to interrogatories.

Limits on Interrogatories

Under subdivision (a)(2), interrogatories may inquire into any matter within the scope of discovery. Rule 33(a)(1) sets a limit of 25 on the number of interrogatories that a party may serve on any other party. This limit can be enlarged or diminished by stipulation of the parties or with the court's permission. This limit is a proper subject for discussion at the discovery planning meeting held pursuant to Rule 26(f). Because the mandatory disclosure rules of Rule 26 require that much of the information previously discoverable by interrogatories will be automatically disclosed by the parties, the limit of 25 interrogatories will usually be sufficient in all but complex cases. Parties may not evade this limit by subdividing questions into subparts; each discrete question will be counted as a separate interrogatory toward the limit of 25 regardless of how the questions are numbered.

How, When, and By Whom Interrogatories Must Be Answered

Interrogatories must be answered by the parties or an officer or agent designated by a party-organization. Although the attorneys for the parties cannot answer on behalf of their clients, attorneys frequently draft proposed responses and objections, which are then reviewed and approved by their clients.

Parties have 30 days from the service of the interrogatories within which to respond or note objections to the interrogatories. This time limit may be enlarged or diminished by stipulation or by order of the court. Each interrogatory must be answered completely and fully under oath, or if an interrogatory is objectionable for any reason, the objection

must be set forth with specificity in lieu of a response. All grounds for objecting to an interrogatory must be stated or they will be deemed to have been waived, unless good cause is shown for the failure to state the objection. Parties objecting to part of a question must answer the parts of questions that are not objectionable, and if an interrogatory can be construed by the respondent in an unobjectionable manner, the party should so state and respond accordingly. The answers to the interrogatories must be signed by the respondent and the attorney preparing the answers and objections. Interrogatories may not be served before the discovery planning meeting held pursuant to Rule 26(f) without the court's permission or stipulation of the affected parties.

Illustration 33-1

Jeff commences a tort action against Karla for personal injuries suffered when Karla attacked Jeff with tennis racket. On September 17, Jeff serves Karla with a set of 25 interrogatories. Karla objects to a portion of interrogatory 15. Under Rule 33, Karla cannot refuse to answer the entire interrogatory. Rather, Karla must specify the grounds for her objection and answer the parts of the interrogatory that are not objectionable. Once completed, Karla and her attorney must sign the answers and serve them upon Jeff no later than October 17.

Objections to Interrogatories

Although proper objections to interrogatories are not articulated in the Rule, they include objections that a response would place an undue financial burden on the responding party, that the interrogatories are not specific enough to enable the respondent to formulate an adequate answer, that the interrogatories are repetitious, unnecessary, outside the scope of discoverable matters or are intended to harass the responding party, or that the interrogatories ask for purely legal conclusions. With regard to this final objection, subdivision (a)(2) distinguishes among opinions relating to facts, opinions relating to the application of law to facts, and opinions relating to legal conclusions. The first two kinds of opinions are not proper grounds for objection, although the lines separating these categories of opinions are sometimes difficult to discern. Careful practitioners should instruct their clients not to respond to interrogatories that arguably ask for legal conclusions and should state this objection on the answer form. Alternatively, a practitioner may make a motion to the court seeking guidance on whether the party has proper grounds for refusing to respond to the interrogatory.

If a party refuses to answer an interrogatory, the party submitting the interrogatories may make a motion to compel an answer under Rule 37(a) to the court. It should be noted that Rule 37 requires a party to make a good faith attempt to confer with the opposing party and resolve the matter without court intervention before making the motion. If a motion is made, the court should consider any objection stated in conjunction with the failure to answer, if any, and make a determination on the matter. Alternatively, the court may order that the subject of the interrogatory be discussed at the next pretrial conference scheduled.

Illustration 33-2

Assume on the facts of Illustration 33-1 that Karla objects to interrogatory 23 as well, claiming that the information requested is irrelevant to the litigation. After conferring with Karla in an effort to resolve the matter, Jeff may make a motion to compel Karla to answer the interrogatory.

Use of Interrogatories at Trial

Subdivision (c) states that answers to interrogatories may be used at trial to the extent permitted under the Federal Rules of Evidence. Because a party responding to interrogatories is not subject to examination or cross-examination with regard to its responses, these answers will not satisfy the prior testimony exception to the rule excluding hearsay. Thus, parties will generally be unable to introduce their own answers to interrogatories unless the statements satisfy another

exception to the evidentiary rule excluding hearsay. Answers to interrogatories can be used by adverse parties through the party-admission exception to the rule excluding hearsay.

Option to Produce Business Records

Subdivision (d) allows a party to simply refer the party requesting an answer to an interrogatory to the business records within which the answer may be found without spending the time or incurring the expense of ascertaining the answer itself. However, a party wishing to use this option must demonstrate that the burden of ascertaining the answer is substantially the same for both parties, and must identify and specify the records within which the answers will be located. This identification and specification may, by itself, result in substantial time and expense. Of course, the party must also allow the party requesting the information to access and examine the records in question.

The phrase "electronically stored information" was added to Rule 33(d) in 2006 to clarify that the option to refer the interrogating party to business records applies to information stored in electronic form. The burden of ascertaining the answer must be substantially the same for both parties, as is the case for non-electronically stored information, and electing this option may require the responding party to provide the interrogating party with access to its information system, including items such as passwords, information on application software, or other technical assistance. Full access to an information system may not be necessary; as the advisory committee note indicates, the "key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party." In some cases, it may be preferable for a responding party to spend the additional time or resources to ascertain the answer rather than provide the interrogating with sensitive or confidential information located in its computer databases or contained in a similar electronic form.



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33.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 33.01 -33.175

James & Hazard, Civil Procedure §§ 5.4, 5.12

Friedenthal, Civil Procedure § 7.9

Teply & Whitten, Civil Procedure 749-754, 765



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33.3 LEADING CASES

Admissibility of Responses at Trial

McNeese v. Reading & Bates Drilling Co., 749 F.2d 270 (5th Cir. 1985) (district court properly refused to admit answers to interrogatories into evidence where the answers were being offered to prove the truth of the contents of the answers).

Deadline for Discovery Requests

Thomas v. Pacificorp, 324 F.3d 1176 (10th Cir. 2003) (under the federal rules of civil procedure, discovery requests must be served at least thirty days prior to a completion of discovery deadline).

Default Judgment Upheld

Davis v. Fendler, 650 F.2d 1154 (9th Cir. 1981) (default judgment against defendant upheld where the defendant failed to answer interrogatories or assert a timely objection of privilege).

Failure to Respond

Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp., 711 F.2d 902 (9th Cir. 1983) (defendants' failure to respond to plaintiffs' interrogatories was improper where they simply stated that their business records were available without specifying which business records contained the requested information and where the records were located).

Reliance on Misleading Responses

Averbach v. Rival Mfg. Co., 879 F.2d 1196 (3d Cir. 1989) (where defendants misleadingly answered the plaintiff's interrogatories and the plaintiff relied on the answers in preparing for trial, a future action for fraud was permitted).



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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 34 Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

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1-34 Federal Civil Procedure Litigation Manual Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Rule 34 reads as follows:

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

1-34 Federal Civil Procedure Litigation Manual Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

1-34 Federal Civil Procedure Litigation Manual Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) **Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

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34.1 COMMENTARY

Rule 34 governs production and entry requests. Production requests are requests by a party to inspect, copy, sample, or test documents, tangible things, or electronically stored information that are in the possession or control of another party. Entry requests are requests by a party to be admitted to land or other property in the possession or control of another party for the purposes of inspection, measurement, surveying, photographing, testing, or sampling the property or objects on the property. Although Rule 34 is applicable only to parties, subdivision (c) allows a subpoena *duces tecum* to be served on a non-party in conjunction with Rule 45 for production and entry requests.

Electronically Stored Information

Rule 34 was amended in 2006 to reflect the practical realities of conducting discovery in an increasingly electronic environment. Although courts have stretched the definition of "document" in the rules to cover many kinds of electronically stored information for years, the Advisory Committee felt that clarifying amendments were needed. Accordingly, the amendments confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The Rule now extends to electronically stored documents, images, spreadsheets, or any other data or data compilations "stored in any medium from which information can be obtained"--a description intended by the Advisory Committee to have the broadest possible scope. The Rule, as written, should prove sufficiently flexible to accommodate future technological developments. The "possession, custody or control" language in subdivision (a)(1) is already sufficiently flexible to address issues of remote storage of electronically stored information, such as data or information contained on servers not physically owned by a party but who nonetheless has access to such information.

There is no distinction under the rule between hard copies of documents containing information and electronic forms containing the same information unless the parties have so provided in a discovery planning order or otherwise. Similarly, references to "documents" throughout the rules are intended to include all forms of electronically controlled information.

A crucial feature of the amended rule is the requirement that, under some circumstances, a party responding to a production request party must "translate" information it produces into a "reasonably usable" form. This requirement may entail providing some amount of technical support or other assistance to allow the requesting party to access the

information. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. Of course, the rule does not require a party to provide opposing parties with unfettered access to its computers or information databases if doing so exceeds the scope of the request. In such a case, the responding party may produce the electronically stored information in a "reasonably usable" form that does not provide the requesting party with confidential or other nonrequested information. However, the Advisory Committee Note admonishes parties against using this provision to hamper or frustrate a requesting party by providing electronically stored information in an unusable or burdensome form. Specifically, the note mentions search functionality as an example in this regard; if electronically stored information is searchable when stored in its ordinary form, the party producing the information must ensure continued search functionality for the information. Regardless of whether the information is provided in its usual or a different "reasonably usable" form, subdivision (b)(2)(E)(iii) specifies that a party need not produce the same electronically stored information in more than one form.

Serving Production or Entry Requests

To make use of this discovery mechanism, a party must serve a written request on the other party that is the subject of the request. The request must either specify the particular documents, things, items of electronically information that are the object of the request, or must describe those items by category. The production request must also propose a time, place, and manner for the requested actions, and may specify the form or forms in which electronically stored information is to be produced. The variety of forms in which electronically stored information may be produced are numerous, and Rule 26 has been amended to reflect that a discussion on this subject should be included in the parties' discovery planning meeting. The production request cannot be served before this meeting is held without the permission of the court or by stipulation of the parties. Rule 30(b)(2) provides that this request may be attached to a notice to take the party's deposition.

Responding to Production or Entry Requests

The party to whom the production or entry request is directed has 30 days within which to respond to the request, subject to alteration by the court or by stipulation of the parties. The response should indicate the extent to which the party agrees to comply with the request, and should specifically state any objections to the request. The response must also specify the form it intends to use for producing electronically stored information if the requesting party does not do so in their request. Objections to the production or entry request, including objections to the form in which electronically stored information has been requested, must be made in the response thereto or they will be deemed to have been waived. The production or entry will then proceed to the extent agreed upon in the response. If an objection to a request is made or the production or entry is not permitted by the party according to the terms set forth in the response, the party submitting the request for production or entry may make a motion to compel discovery under Rule 37(a) to the court. It should be noted that Rule 37 requires a party to make a good faith attempt to confer with the opposing party and resolve the matter without court intervention before making a motion. If a motion is made, the court should consider any objection stated in conjunction with the failure to comply with the request, if any, and make a determination on the matter.

Illustration 34-1

Annette steals a valuable painting from Tom's dining room and sells it to Ivan. Tom commences an action against Annette and Ivan to recover damages for the value of the painting, which has been destroyed. In an effort to debase Tom's estimate of the painting's value, Annette serves Tom with a written request for production of a copy of the most recent appraisal of the painting. Tom must respond to the request no later than September 9. If Tom agrees to comply with the request, Tom must indicate his agreement and provide a copy of the requested appraisal. Alternatively, Tom may refuse to comply with the request. In doing so, Tom is required to specifically state his objections. If Tom does object to

Annette's request, Annette may elect to make a motion to compel Tom's compliance. However, before Annette makes a motion to compel, Annette is required to confer with Tom in an effort to resolve the matter without court intervention.

Duty to Keep Documents Organized

Subdivisions (b)(2)(E)(i)-(ii) were added in 1980 to ensure that the party producing documents for inspection must do so as they are kept and organized in the usual course of business. This provision was intended to prevent a party from intentionally mixing together critical documents or "smoking guns" with other documents to obscure the significance of the former documents. As noted above, this provision may apply with particular force to electronically stored information, where concealment or disguise may be easily attained.



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TITLE V. DISCLOSURES AND DISCOVERY

Chapter 34 Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

1-34 Federal Civil Procedure Litigation Manual 34.2

34.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 34.01 -34.16

James & Hazard, Civil Procedure § 5.5

Friedenthal, Civil Procedure § 7.11

Teply & Whitten, Civil Procedure 754-757



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1-34 Federal Civil Procedure Litigation Manual 34.3

34.3 LEADING CASES

Broad Discovery Request Not Permitted

Regan-Touhy v. Walgreen Co., 526 F.3d 641 (1st Cir. 2008) (document request for all documents that referred to, mentioned, or related in any way to plaintiff, to one of defendant's employees, or litigation, or allegations, facts, and circumstances concerning litigation, was overly broad and failed to comply with duty to state discovery requests with reasonable particularity, pursuant to Rule 34(b)(1)(A)).

Duplicate Information No Excuse for Failure to Produce

Australian Gold, Inc. v. Hatfield, 436 F.3d 1228 (10th Cir. 2006) (defendants' failure to produce documents that were later discovered by opposing party supported a finding that the defendants violated Rule 34; the fact that the documents allegedly reiterated information contained in other documents was no defense).

Grounds for Objection to Be Stated Specifically

Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540 (10th Cir. 1984) (an objection to a production request based upon privilege is waived if the grounds for the objection are not specifically set forth in the response).

Inconvenience of Party

New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983) (discovery order that permitted the plaintiffs to inspect the defendants' premises and take photographs was upheld because the utility of the mechanism outweighed the inconvenience of the defendants).

Production in Different Form

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982) (a party that is the object of a production request may produce the materials in a different form from that which was requested).

Subsequent Law Firm--Prompt Response

Hobley v. Burge, 433 F.3d 946 (7th Cir. 2006) (an order finding that a law firm had withheld documents without proper notice of privilege was vacated where: (1) district court erred in subjecting law firm to discovery obligations of party under Rule 34(b) and by transferring blame for the infractions from former lawyers; and (2) law firm did not accrue an obligation to assert its privilege claim until it received a court order, to which the law firm responded promptly).



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Scope Rule 35. Physical and Mental Examinations

35.1 COMMENTARY

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1-35 Federal Civil Procedure Litigation Manual Rule 35. Physical and Mental Examinations

Rule 35. Physical and Mental Examinations

Rule 35 reads as follows:

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) Motion and Notice; Contents of the Order. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) **Request by the Party or Person Examined.** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) **Contents.** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) **Request by the Moving Party.** After delivering the reports, the party who moved for the examination may request--and is entitled to receive--from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) **Waiver of Privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all examinations of the same condition.

(5) **Failure to Deliver a Report.** The court on motion may order--on just terms--that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) **Scope.** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

* * * * *



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TITLE V. DISCLOSURES AND DISCOVERY
Chapter 35 Rule 35. Physical and Mental Examinations

1-35 Federal Civil Procedure Litigation Manual 35.1

35.1 COMMENTARY

In actions where a physical or mental condition of a party is at issue, physical or mental examinations are often necessary to determine the degree to which the condition contributed to the liability of the parties. Rule 35 governs these kinds of examinations. Subdivision (a)(1) allows a party to request an order from the court requiring that a party or person within the legal control or custody of a party submit to a physical or mental examination. Such an order is desirable because the examination occurs before a suitably certified or licensed person chosen by the party making the request. If an examination takes place, the person examined has the right to review the contents of the report of the examiner. However, the exercise of this right has, at times, dire consequences for the person examined. Subdivision (b) details these consequences.

Examinations by Stipulation

Physical and mental examinations may also be agreed upon by the parties. Accordingly, they are a proper subject for discussion at the discovery planning meeting held pursuant to Rule 26(f). However, examinations that are conducted by agreement of the parties are subject to the same provisions concerning the report of the examiner that are set forth in subdivision (b) as if the examination had been ordered by the court, unless the agreement between the parties provides otherwise.

Examinations by Order of the Court

Unlike many discovery mechanisms, orders for physical and mental examinations are not automatically available. The Rule states that the court may order an examination if a mental or physical condition of a party or person within the custody or legal control of a party is "in controversy." Thus, only parties or dependents of parties are subject to physical or mental examination by order of the court. Additionally, a relevant mental or physical condition must be "in controversy" before the examination can be ordered. This requirement will be satisfied when a party raises an issue of its own mental or physical condition in a pleading or other paper filed with the court. However, to properly place a physical or mental condition of an opposing party "in controversy," a party may not rest upon conclusory allegations in its pleadings. It must make some kind of affirmative showing, by affidavit or otherwise, that the condition is genuinely "in controversy."

A request for an order under subdivision (a)(2) compelling a person to submit to a physical or mental examination must be made upon motion by a party. The motion should specify the person to be examined, the kind of examination to be taken, the time and place of the proposed examination, and the certifications of the person conducting the examination. The motion should also demonstrate that there is good cause for ordering the examination, and must notify the person to be examined and all parties of the motion. If the court is satisfied that the requirements of the Rule have been met, it will issue an order compelling the person to submit to the examination under the terms in the motion, or as modified by the court.

Illustration 35-1

Barry commences a tort action against Regina for personal injuries to his lower back suffered in an automobile accident. Two weeks after Regina is served with the summons and complaint, Regina observes Barry changing a tire on his truck. Under Rule 35, Regina may make a motion to the court requesting that Barry undergo a physical examination to determine the extent of any injuries to Barry's lower back.

Report of the Examination

After the examination occurs, the party against whom the order was made or the person examined may request a copy of a written report of the examination. The report should contain all the diagnoses and conclusions of the examiner, including the results of any laboratory tests. The request for the report includes a request for any reports of earlier examinations of the same condition, whether or not conducted by the same examiner.

If such a request is made or a deposition of the examiner is taken, the person examined must turn over all reports concerning the condition in controversy, including any reports generated after the examination ordered. The party also waives any claim of privilege relating to the condition. These consequences often present a difficult choice for a party that is subject to an order for examination. That party may obtain any information resulting from the examination that may be used against it at trial, but in doing so, must reveal any similar information to the opposing party concerning the condition.

Illustration 35-2

Assume on the facts of Illustration 35-1 that the court orders Barry to submit to a physical examination. After the examination occurs, Barry may request a copy of the written report of the examination as well as any reports of earlier examinations of the same condition. In doing so, Barry waives any claim of privilege pertaining to the condition of his lower back. The doctor who performed the examination must then provide Barry with a copy of any and all reports relating to Barry's lower back.



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35.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 35.01 -35.12

James & Hazard, Civil Procedure § 5.6

Friedenthal, Civil Procedure § 7.12

Teply & Whitten, Civil Procedure 757-760



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35.3 LEADING CASES

Costs of Examination

In re American President Lines, 929 F.2d 226 (6th Cir. 1991) (apportionment of expenses of medical examinations ordered by the court is within the discretion of the court, and a writ of mandamus will not issue to challenge the apportionment before a final judgment is reached).

Emotional Distress Claims Triggers Examination Right

Herrera v. Lufkin Indus., 474 F.3d 675 (1st Cir. 2007) (district court did not abuse its discretion when it ordered employee who sued his former employer for a racially hostile work environment to undergo mental examination pursuant to Rule 35; employee claimed intentional infliction of emotional distress, and employee's mental state was relevant to that claim).

Examinations of Persons Within Custody of Party

Schempp v. Reniker, 809 F.2d 541 (8th Cir. 1987) (when the parent of a child refused to allow a psychiatric examination of the child ordered by the court, dismissal of the action without prejudice was not improper).

No Immediate Appealability of Mental Examination Order

Goodman v. Harris Co., 443 F.3d 464 (5th Cir. 2006) (order requiring party to submit to mental examination was not immediately appealable because it was not a final order under 28 U.S.C. § 1291 and did not satisfy the requirements of a "collateral order" under common law doctrine).

Order for Examination; Appeal

Reise v. Board of Regents of the Univ. of Wis. Sys., 957 F.2d 293 (7th Cir. 1992) (order to compel party to submit to a mental examination not appealable as an interlocutory order).

Refusal to Comply with Order; Sanctions

De Crescenzo v. Maersk Container Serv. Co., 741 F.2d 17 (2d Cir. 1984) (plaintiff's refusal to cooperate fully in an examination did not justify a dismissal of the action).



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1-36 Federal Civil Procedure Litigation Manual Rule 36. Requests for Admission

Rule 36. Requests for Admission

Rule 36 reads as follows:

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the

matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) Objections. The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) Motion Regarding the Sufficiency of an Answer or Objection. The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

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36.1 COMMENTARY

Rule 36 governs requests for admissions by parties. This discovery mechanism is useful because matters that are the subject of admissions are conclusively established for the purposes of that action and thus need not be proven at trial.

When and on Whom Requests for Admissions May Be Served

Requests for admission may be served only on other parties, and only after the discovery planning meeting held pursuant to Rule 26(f) has occurred. This latter restriction is subject to alteration by order of the court or by stipulation of the parties.

Contents of Requests for Admissions

A party may seek the admission of any statement or opinion of fact, or application of law to fact, within the scope of discovery as defined in Rule 26(b)(1), including the genuineness of any documents described and attached to the request. Each matter that is the subject of a request for admission must be set forth separately in the request, enabling the party to respond to each matter in kind.

Responding to Requests for Admissions Generally

Under subdivision (a)(3), a party to whom requests for admission are directed has 30 days within which to respond to the requests. This time period may be lengthened or shortened by order of the court or by written stipulation of the parties. It is crucial that parties respond to requests for admission within the proper time period, as a party will be deemed to have admitted each matter to which it does not timely respond, even if the assertion is demonstrably false. The response must be signed by the party or the attorney preparing the response.

Illustration 36-1

Lucy commences a wrongful termination action against Eddy, alleging that she was fired because she refused to submit to Eddy's sexual advances. On October 10, Lucy serves a request for admission upon Eddy, requesting that Eddy admit that he is heterosexual. Eddy has until November 9 to respond to

Lucy's request for admission. If Eddy fails to respond by November 9, the issue will be accepted as true, even if Eddy is in fact not heterosexual.

Kinds of Responses to Requests for Admission

A careful examination of subdivisions (a)(4)-(5) reveals that a response to a request for admission may take one of four forms. First, the responding party may simply admit the matter that is the subject of the request. Second, the responding party may specifically deny the matter that is the subject of the request. A blanket denial is not sufficient, as the Rule states that "[a] denial must fairly respond to the substance of the matter . . ." If only part of a matter can be denied, the responding party is required to specify the portion that is admitted and specifically deny the remainder.

Illustration 36-2

Assume on the facts of Illustration 36-1 that Lucy also requests that Eddy admit that he is the owner of the business in question. Although Eddy owns only a 60 percent share in the business, Eddy may not respond with a blanket denial by claiming that Lucy's averment is "untrue." Eddy may specifically deny that he is the sole owner of the business. Still, Eddy must admit that he owns 60 percent of the business.

Third, a party may respond to a request by stating that the matter cannot be either admitted or denied. This kind of response is proper when a party does not object to the substance of the request, but simply cannot truthfully respond to the request one way or the other. This failure to admit or deny must be supported by specific reasons for doing so. Lack of information or knowledge is not a proper ground upon which a failure to admit or deny can be predicated, unless the party affirms that it has made a reasonable inquiry into the truth of the matter requested and still cannot truthfully admit or deny the matter. The Rule thus places a burden on the responding party to take affirmative steps toward ascertaining the truth of the matters requested. This duty parallels that placed on parties under Rule 33 in answering interrogatories.

Illustration 36-3

Assume on the facts of Illustration 36-1 that Lucy also requests that Eddy admit that other female employees have complained about sexual harassment. Eddy cannot deny this averment simply because he has no personal knowledge of such complaints. Rather, Eddy must take reasonable steps to ascertain the truth of the matter. Accordingly, Eddy reviews the complaint forms on file at the business. However, the forms are destroyed every two years. Consequently, Eddy may respond to Lucy's request by stating that the matter cannot be either admitted or denied due to a lack of information or knowledge about the matter requested.

Finally, a party may also object to the substance of a specific request for admission. An objection to a request is distinct from a denial or a failure to admit or deny, as it does not even acknowledge the propriety of the request. A party objecting to a request may do so on a variety of grounds, including privilege, the vagueness of the request, or that the request is outside the scope of discoverable information under Rule 26(b)(1). The reasons for the objection must be included in the response to the request.

Illustration 36-4

Assume on the facts of Illustration 36-3 that Eddy believes that Lucy's request for admission is outside the scope of discoverable information. Under Rule 36, Eddy may refuse to admit or deny the averment and object to the substance of the request.

Motions to Compel a Response

The party requesting the admissions may make a motion to the court under subdivision (a)(6) to determine the sufficiency of the answers or to rule on an objection to a request. It should be noted that Rule 37 normally requires a party to make a good faith attempt to confer with the opposing party and resolve the matter without court intervention before making a motion. However, this good-faith requirement of Rule 37 is not applicable to requests for admission. If a motion is made, the court should rule on any answer or objection to a request, and make an order in accordance with the ruling. The court may also defer a ruling on the matter until a scheduled pretrial conference is held or until another time that the court deems appropriate.

Effects of Admissions; Amendment

Subdivision (b) indicates that any matter admitted by a party is conclusively established for the purposes of that action and need not be proven by the opposing party at trial. The admission does not have res judicata effect, however, and cannot be used in subsequent actions against the party making the admission. Thus, in actions that are dismissed and re-initiated for technical reasons, requests for admission should be re-served on the parties. A withdrawal or an amendment of an admission should be permitted by the court under the standards set forth in Rule 16. Thus, an amendment or withdrawal of an admission should be allowed unless the opposing party can demonstrate that an amendment or withdrawal will result in prejudice to that party.



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36.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 36.01 -36.13

James & Hazard, Civil Procedure § 5.7

Friedenthal, Civil Procedure §§ 7.10, 7.16

Teply & Whitten, Civil Procedure 760-762, 764-765



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36.3 LEADING CASES

Admission as Sanction

An-Port, Inc. v. MBR Indus., Inc., 772 F. Supp. 1301 (D.P.R. 1991) (plaintiff's refusal to cooperate with discovery requests resulted in an admission of facts under Rule 36).

Amendment of Admissions Permitted

Raiser v. Utah Cty., 409 F.3d 1243 (10th Cir. 2005) (where a party was deemed to have admitted requests for admissions by failing to comply within the Rule 36 deadline, the party should have been allowed to withdraw or amend the admissions because they conceded the core elements of their cause of action and opposing party would not be prejudiced by the amendment).

Attorneys' Fees Granted

Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346 (7th Cir. 2006) (where a party requested that the opposing party admit a fact that was subsequently proven so thoroughly that the opposing party ultimately conceded the matter, the district is instructed to award attorney fees and other costs incurred by the party in proving the matter it originally requested the opposing party admit).

Contradictory Evidence

999 v. C.I.T. Corp., 776 F.2d 866 (9th Cir. 1985) (evidence that contradicts matters admitted under Rule 36 may be excluded at trial).

Failure to Respond as Basis for Summary Judgment

United States v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987) (summary judgment may be predicated on a failure to respond to requests for admission).

Failure to Withdrawal Default Admission

McCann v. Mangialardi, 337 F.3d 782 (7th Cir. 2003) , corrected, 2003 U.S. App. LEXIS 19565 (7th Cir. 2003) (because a party failed to answer a request for admission and made no attempt to withdraw a default admission under, the matter was "conclusively established" for purposes of litigation).

Opinion Not Admission

SDV/ACCI, Inc. v. AT&T Corp., 522 F.3d 955 (9th Cir. 2008) (deposition testimony in which closely held corporation's owner admitted belief that declarant did not "hate" him at time she sent e-mails was admission of opinion under *Fed. R. Evid. 801* and not binding admission under Rule 36, and genuine issues of material fact remained as to whether malice was declarant's primary reason to include alleged defamation in her e-mails and whether declarant lacked good faith belief in truth of her statement).

Unintentional Failure to Respond

Bergemann v. United States, 820 F.2d 1117 (10th Cir. 1987) (a party's unintentional failure to respond to a request for admission does not result in an admission of that matter if the parties were not thereby prejudiced).

Untimely Requests for Admission Disregarded

Laborers' Pension Fund v. Blackmore Sewer Constr., Inc., 298 F.3d 600 (7th Cir. 2002) (requests for admission served five days before discovery deadline and less than 30 days before trial date were untimely and could be disregarded by district court).

Untimely Responses

Smith v. First Nat'l Bank of Atlanta, 837 F.2d 1575 (11th Cir. 1988) (party was allowed to file a response to requests for admission after the 30-day time period because no prejudice would have resulted to the parties and the presentation of the merits would not have been harmed).

Withdrawal of Admissions

Farr Man & Co. v. M/V Rozita, 903 F.2d 871 (1st Cir. 1990) (where defendants discovered at trial that the plaintiff had already received compensation for injuries received allegedly attributable to the defendants, the defendants were allowed to withdraw admissions to prevent manifest injustice).



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Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Rule 37 reads as follows:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

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(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) Sanctions in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

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(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

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(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A) the request was held objectionable under Rule 36(a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

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(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

* * * * *



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TITLE V. DISCLOSURES AND DISCOVERY

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37.1 COMMENTARY

A party's refusal to abide by the discovery provisions of Rules 26-36 does not subject that party to sanctions under Rule 11. Instead, Rule 11(d) expressly provides that discovery requests, responses, objections, and motions are covered by Rule 37, which details the sanctions available to the court for violation of discovery orders and abuse of the discovery process. Rule 37 also sets forth the procedure for making a motion to compel disclosure or discovery.

Motion for Order to Compel Discovery Generally

Subdivision (a)(1) allows a party to make a motion requesting an order to compel a person to take certain actions concerning discovery. If the motion concerns a party, the motion should be made to the court in which the action is pending. Subdivision (a)(2) indicates that a motion concerning a person that is not a party in the action should be made to the court in the district where the discovery is being taken or supposed to be taken. Motions concerning parties should be made to the court in which the action is pending.

Grounds for Granting Motions for Orders to Compel Discovery

Subdivision (a)(3) specifies the actions or refusals that are proper grounds for a party to make a motion for an order compelling discovery. These actions include the failure to make a required disclosure under Rule 26(a), the failure to answer a question at an oral deposition or to a deposition upon written questions, the failure to answer an interrogatory, the failure to respond to a request for production or entry, and the failure to permit an inspection or entry as requested. A motion for an order to compel a corporation or organization to designate a person to answer questions at oral depositions or to a deposition upon written questions is also contemplated by the Rule. However, before such a motion can be made, the movant must make a good faith attempt to confer with the opposing party and resolve the matter without court intervention. Subdivision (a)(4) indicates that a person cannot avoid an order to compel discovery by presenting an evasive or incomplete disclosure, answer, or response. Such a disclosure, answer, or response will be treated by the court as a failure to so perform.

Illustration 37-1

Pam commences an action against Steve for the wrongful death of her husband, who was killed in a

farming accident. As part of discovery, Pam serves a written interrogatory upon Steve, asking whether Steve was intoxicated at the time of the accident. In his answer to Pam's interrogatory, Steve indicated that he had "enjoyed a refreshing beverage or two" on the day in question. As this answer constitutes an evasive or incomplete disclosure and, therefore, is an insufficient response, Pam may make a motion to compel Steve to accurately and completely answer the interrogatory. Prior to doing so, however, Pam must confer with Steve or his attorney in an effort to resolve the matter without the court's intervention.

Motions for Orders to Compel Discovery; Expenses and Fees

Under subdivision (a)(5)(A), if a motion for an order to compel discovery is granted by the court, or if the requested action is performed after the motion is filed, the movant is entitled to the reasonable expenses incurred in making the motion, including attorneys' fees. These expenses and fees must be taxed against the person whose actions or failures to act gave rise to the motion, that person's attorney, or both. The court is required to provide these persons with an opportunity to be heard to allow them to demonstrate that one of the exceptions for awarding expenses and fees listed in subdivisions (a)(5)(A)(i)-(iii) exists. These exceptions include a finding that the party making the motion did not attempt to confer with the opposing party as required by subdivision (a)(1), that the opposing party's actions or failures to act were substantially justified, or that other circumstances would make such an award unjust.

Under subdivision (a)(5)(B), if a motion for an order to compel discovery is denied by the court, the movant or the movant's attorney is required to pay the reasonable expenses of the party opposing the motion, including attorneys' fees, unless the court finds that motion was substantially justified or that other circumstances would make such an award unjust. The court must provide the movant with an opportunity to be heard on the matter. The court may also make any kind of protective order authorized under Rule 26(c).

If a motion for an order to compel discovery is granted in part and denied in part, the court, after providing the parties with an opportunity to be heard on the matter, has broad discretion to apportion the expenses of making and opposing the motion between the parties under subdivision (a)(5)(C). The court may also make any kind of protective order authorized under Rule 26(c).

Illustration 37-2

Assume on the facts of Illustration 37-1 that Pam makes a motion to the court to compel Steve to answer the interrogatory. If the motion is granted by the court, Steve must pay the reasonable expenses incurred by Pam in making the motion, unless the court finds that the motion was substantially justified. If the motion is denied by the court, Pam must pay the reasonable expenses of Steve in opposing the motion, unless the court find that the motion was substantially justified or that the circumstances make the award unjust. If the motion is granted in part and denied in part, the court may apportion the expenses of making and opposing the motion as it sees fit.

Sanctions on Parties and Non-Parties Distinguished

Subdivision (b) distinguishes between sanctions by the district in which a deposition is being taken and sanctions by the court in which the action is pending. Sanctions available to the court in which a deposition is being taken is limited to the court's contempt sanction under subdivision (b)(1). Sanctions available to the court in which the action is pending are more expansive, and are set out in greater detail in subdivision (b)(2).

Illustration 37-3

Assume on the facts of Illustration 37-1 that Pam and Steve are conducting discovery in a district other than the one in which the action is pending. On December 23, Pam serves Dick, the doctor who treated

Pam's husband prior to his death, with a notice of deposition. Dick refuses to attend the deposition. If Pam seeks an order to compel Dick to attend, Pam's motion must be made to the court adjudicating the litigation, and the court's sanction is limited to contempt.

Sanctions that May Be Imposed by the Court

Subdivisions (b)(2), (c), (d), and (f) govern the kinds of sanctions that may be imposed by the court in which the action is pending. These subdivisions set out, in great detail, which sanctions may be imposed for certain discovery violations. From these subdivisions, it is possible to identify nine distinct kinds of sanctions:

- (1) an order mandating that certain facts at issue in an action will be deemed to have been conclusively established;
- (2) an order forbidding a party to support or oppose certain claims or defenses, or forbidding a party to introduce certain matters into evidence;
- (3) an order striking certain pleadings or parts of pleadings, staying all proceedings until the violation is rectified, dismissing an action, or entering a default judgment;
- (4) staying all proceedings until the violation is rectified;
- (5) dismissing an action, in whole or in part;
- (6) entering a default judgment;
- (7) contempt of court;
- (8) an order requiring the party in violation to pay the reasonable expenses, including attorneys' fees, incurred by the other parties as a result of the violation, unless the court finds that the violation was substantially justified or that other circumstances would make an award of expenses and fees unjust; and
- (9) informing the jury of the party's violation.

When Certain Sanctions Are Appropriate

The following is a list of discovery violations and the categories of sanctions, as enumerated above, that may be imposed by the court for the violations:

1. If a party fails to obey a court order permitting discovery, a court order to compel discovery under Rule 37(a), or a protective order under Rule 26(c), sanctions (1)-(8) are available.
2. If a party fails to obey an order to submit to a physical or mental examination under Rule 35, sanctions (1)-(6) and (8) are available. Therefore, a person who refuses to comply with an order to submit to a physical or mental examination cannot be held in contempt of court for the failure to do so, but a person may be held in contempt of court for the failure to obey an order to pay any expenses or fees incurred by other parties resulting from its refusal to comply with the order to submit to the examination.

Illustration 37-4

Theresa is ordered to submit to a mental examination pursuant to Rule 35. Notwithstanding the court order, Theresa refuses to appear for the examination. Theresa also refuses to comply with a court order directing her to pay the expenses incurred by other parties as a result of her failure to appear. Although Rule 37 precludes the court from holding Theresa in contempt for her failure to submit to a medical examination, Rule 37 does allow the court to enter a contempt order against Theresa for her failure to pay the expenses incurred by the other parties as a result of her refusal to comply with the order to submit to the examination.

3. If a non-party fails to obey any kind of court order concerning discovery, only sanction (7) is available. It should be noted that Rule 45(e) also provides for contempt sanctions on non-parties who fail to obey subpoenas. However, if a subpoena purports to require a non-party to attend a deposition or to produce documents more than 100 miles from the non-party's residence or principal place of business that is outside the state in which the action is pending, that subdivision excuses the non-party for the nonattendance.

Illustration 37-5

Mark, a witness in a large toxic tort case, refuses to comply with a subpoena that directs him to submit to a deposition. The deposition is scheduled to take place at the office of the plaintiff's attorney, which is located nearly 300 miles from Mark's residence. Under Rule 37, Mark cannot be sanctioned for refusing to comply with the subpoena.

Curiously, if the conduct of a non-party deponent gives rise to a motion to compel discovery under subdivision (a), that subdivision allows the court to tax the reasonable expenses, including attorneys' fees, of the moving party against the non-party deponent. However, subdivision (b) does not provide for this sanction against non-parties for their refusals to obey orders of the court under subdivision (a). Thus, a non-party may be properly ordered to pay the reasonable expenses of a party making a motion for an order to compel discovery and may be held in contempt for the refusal to pay. However, the non-party may not be held responsible for the expenses incurred by a party for the non-party's refusal to pay the expenses incurred in making the motion to compel discovery.

4. If a party fails to disclose required information under Rule 26(a) or supplement discovery responses under Rule 26(e) without substantial justification for doing so, sanctions (1)-(6) and (8)-(9) are available. In this situation, subdivision (c)(1) makes sanction (2) mandatory with regard to the nondisclosed information.

5. If a party-deponent fails to attend her own deposition, a party fails to answer interrogatories, or a party fails to respond to requests for production or entry, sanctions (1)-(6) and (8) are available. However, before the motion for an order to compel discovery can be made, the party making the motion is subject to the good-faith conference requirement discussed in conjunction with Rule 37(a). Additionally, subdivision (d)(2) creates an exception for absentee party-deponents who make a motion for a protective order under Rule 26(c) that has not been ruled upon at the time of the deposition. Ordinarily, the filing of a motion for a protective order does not serve to protect the party; the protection depends upon the court's determination on the motion. However, under this provision, the party-deponent is protected from non-attendance at a deposition in such situations.

Illustration 37-6

Glen sues Jeff in tort for repeatedly trespassing on his land. As part of discovery, Glen notifies Jeff that he wishes to depose him on November 11. On November 7, Jeff makes a motion to the court for a protective order. As of November 11, the court has not ruled on Jeff's motion. Jeff does not attend the scheduled deposition. Rule 37(d) protects Jeff from any sanctions that may be imposed as a result of his non-attendance of the deposition.

6. If a party fails to participate in the discovery planning meeting held pursuant to Rule 26(f) in good faith, sanction (8) is available.

Denial of a Matter Requested to Be Admitted

Subdivision (c)(2) is a special provision relating to requests for admission under Rule 36. If a party denies a matter that is later proved to be true at trial, that party is responsible for the reasonable expenses, including attorneys' fees, incurred by the opposing party in proving the truth of the matter. The inclusion of this provision amongst discovery violations is curious, as the nature of a failure to admit a fact later proved at trial is certainly not sanctionable in most situations. Thus, the provision is subject to the far-reaching exceptions stated in subdivision (c)(2)(A)-(D).

Illustration 37-7

Assume on the facts of Illustration 37-6 that Glen serves Jeff with a request for admission that asks Jeff to admit that he was aware that Glen owned the land on which the alleged trespass took place. Jeff promptly denies the averment. However, two months later, after interviewing five witnesses, Glen learns that Jeff bragged to two individuals about his illegal trespassing activities. Glen produces these two witnesses at trial, and the jury accepts their testimony as proof that Jeff was aware that the land was owned by Glen. Under Rule 37(c)(2), Glen may recover reasonable expenses, including attorneys' fees, from Jeff for the cost of proving the truth of the matter.

Lost or Damaged Electronically Stored Information

Subdivision (e) was added in 2006 to clarify that sanctions cannot be imposed, absent "exceptional circumstances," for loss of electronically stored information resulting from the routine operation of the party's electronic information system, if that operation was in good faith. The provision is necessary because of the need for many electronic information systems to purge or overwrite certain kinds of information or data to operate in a routine fashion. Although the Rule protects against the loss of electronically stored information in "good faith," the Advisory Committee Note clarifies that "good faith" may entail an affirmative obligation by a party to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information--an important component of what is frequently referred to as a "litigation hold." A party may be under a statutory or other obligation to preserve information or data that it would otherwise not preserve according to the routine operation of its information system. When such an obligation arises, the "routine" loss of or damage to information may form the basis for a finding of bad faith.

In addition, the "exceptional circumstances" provision was designed to protect against the loss of highly prejudicial information or data, even if the loss was made in good faith. Under such circumstances, the court should take special care to fashion a sanction to remedy the prejudice rather than punish the "culpable" party.



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37.2 ADDITIONAL AUTHORITY

7 Moore's Federal Practice §§ 37.01 -37.122

James & Hazard, Civil Procedure § 5.14

Friedenthal, Civil Procedure §§ 7.13, 7.16

Teply & Whitten, Civil Procedure 741, 753-754, 756, 760



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37.3 LEADING CASES

Amendment of Rule After Sanctions Inapplicable

Toth v. Grand Trunk R.R., 306 F.3d 335 (6th Cir. 2002) (pre-amendment Rules apply to order denying discovery sanctions issued prior to effective date of amendment).

Appealability of Sanction

Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999) (an order imposing sanctions on an attorney under Rule 37(a)(4) (now Rule 37(a)(5)) and disqualifying the attorney from the case is not a "final decision" from which an appeal lies).

Attorneys' Fees Not Recoverable for Underlying Discovery Requests

Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002) (under Rule 37, the moving party can recover attorney fees incurred for motions to compel and for sanctions, but not for underlying discovery requests, as fees for the underlying discovery requests were not caused by any failure to comply and would have been incurred whether or not there had been a discovery dispute).

Briefs Provide Opportunity to Be Heard

Paladin Assocs. v. Montana Power Co., 328 F.3d 1145 (9th Cir. 2003) (discovery sanction was not an abuse of discretion, as the opportunity to submit briefs was an "opportunity to be heard" within meaning of Rule 37(c)(1)).

Costs of Motions for Sanctions

Mercy v. County of Suffolk, N.Y., 748 F.2d 52 (2d Cir. 1984) (failure to award expenses to the non-moving party at the time a motion for a protective order was denied does not imply that an award was improper at that time; party's success on the merits of the case has no relationship to an award of expenses under Rule 37).

Rockwell Int'l, Inc. v. Pos-A-Traction Indus, Inc., 712 F.2d 1324 (9th Cir. 1983) (reasonable expenses can be taxed against a non-party deponent if that person's conduct gives rise to a motion to compel discovery).

Damages Limitation Proper Sanction

Pena-Crespo v. Puerto Rico, 408 F.3d 10 (1st Cir. 2005) (district court properly limited party's damages where the only evidence on the question of damages came from an expert who was properly excluded due to discovery misconduct under Rule 37).

Default Judgment as Sanction

Stokey v. Teller Training Distribs., Inc., 9 F.3d 631 (7th Cir. 1993) (sanction of default judgment against a party was improper even though the party did not cooperate in the discovery process where an earlier default judgment had been vacated by an appellate court).

Default Order Appropriate

SEC v. Homa, 514 F.3d 661 (7th Cir. 2008) (in action in which Securities and Exchange Commission was granted order freezing assets of defendant and two nonparties appealed from judgment of contempt of district court for failing to comply with order, district court did not err in defaulting nonparty and in ordering turnover of its assets where (1) it was clear that nonparty, through its officers, directors and shareholders, intentionally and willfully refused to comply with district court's discovery orders; and (2) without compliance with its deposition subpoenas, receiver was denied ability to conduct crucial discovery that went to heart of receiver's petition for appointment as receiver of nonparty).

Destruction of Evidence

Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686 (D.C. Cir. 1987) (where a party obstructed depositions and destroyed evidence, monetary sanctions were proper).

Discretion to Resolve Discovery Problems

Carefirst of Maryland v. Carefirst Pregnancy Ctrs., 334 F.3d 390 (4th Cir. 2003) (discovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted; however, district courts have broad discretion in resolving discovery problems that arise).

Dismissal as Sanction

Angulo-Alvarez v. Aponte de la Torre, 170 F.3d 246 (1st Cir. 1999) (trial court did not abuse its discretion in employing sanction of dismissal without first considering less severe sanctions for failure to comply with order requiring answers to interrogatories).

Jones v. Niagara Frontier Transp. Auth., 836 F.2d 731 (2d Cir. 1987) (dismissal of action for refusing to obey an order compelling discovery proper under extreme circumstances).

Duplicate Information No Excuse for Failure to Produce

Australian Gold, Inc. v. Hatfield, 436 F.3d 1228 (10th Cir. 2006) (defendants' failure to produce documents that were later discovered by opposing party supported a finding that the defendants violated Rule 34; the fact that the documents allegedly reiterated information contained in other documents was no defense).

Exclusion of Expert Witness

Heidtman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999) (court did not abuse its discretion in excluding expert witnesses as a discovery sanction where party failed to timely disclose expert witnesses, provided no explanation for its actions, and failed to show that the exclusion affected substantial rights).

Expert Not Permitted to Testify

Torres v. City of Los Angeles, 540 F.3d 1031 (9th Cir. 2008) (in arrestee's § 1983 action, district court abused its discretion in denying arrestee's motion in limine seeking to bar under Rule 37(c)(1) testimony of police officers' witness who was expert on gang-related activities; witness fell squarely in category of witnesses to which Rule 26(a)(2)(B) applied and, therefore, should not have been permitted to testify without providing written expert report).

Failure to Admit; Good Faith Argument

Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) (party's failure to admit a fact was based upon a good faith argument, so the denial of award of costs to the prevailing party on the matter was not improper).

Harmless Discovery Disclosure Failure

Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879 (8th Cir. 2006) (the trial court did not err by failing to exclude evidence based on a party's failure to make an initial disclosure because the opposing party was on notice that the evidence was relied upon because it was discussed in a deposition and there was no allegation that another expert based his trial testimony on new information; the failure to disclose was thus harmless and did not mandate the exclusion of evidence).

Late Compliance With Discovery Order Insufficient to Avoid Sanction

Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este, 456 F.3d 272 (1st Cir. 2006) (plaintiff's violation of time-specific orders pursuant to case-management order and Rule 26(a)(2)(B) (now Rule 26(a)(2)(C)) was not cured by subsequent compliance after discovery period had ended, and preclusion of expert testimony was justified in accordance with Rule 37(c)(1)).

Opportunity to Be Heard on Sanctions

Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990) (a party upon whom sanctions are imposed must be given some opportunity to be heard, but this does not necessarily mean that an oral hearing must be held).

Order to Precede Sanctions

United States v. One 1987 BMW 325, 985 F.2d 655 (1st Cir. 1993) (court should first make an order compelling a response to interrogatories before sanctioning the party for refusing to obey the order).

Pro Se Litigant Fees Not Recoverable

Pickholtz v. Rainbow Techs., Inc., 284 F.3d 1365 (Fed. Cir. 2002) (Rule 37, which authorizes an award of attorney fees incurred in bringing motion to compel compliance with a discovery order, does not allow a pro se litigant to recover fees for his own time, as one cannot "incur" fees that are payable to oneself).

Refusal to Allow Testimony as Sanction

Scaggs v. Consolidated Rail Corp., 6 F.3d 1290 (7th Cir. 1993) (when a party did not identify certain expert witnesses until several days before trial, the court's refusal to allow the testimony of the witnesses was a proper sanction).

Request for Admission Attorneys' Fees Granted

Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346 (7th Cir. 2006) (where a party requested that the opposing party admit a fact that was subsequently proven so thoroughly that the opposing party ultimately conceded the matter, the district is instructed to award attorney fees and other costs incurred by the party in proving the matter it originally requested the opposing party admit).

Sanctions Before Order

Avionic Co. v. General Dynamics Corp., 957 F.2d 555 (8th Cir. 1992) (where the magistrate judge indicated to the offending party that an order to compel discovery was forthcoming, the imposition of sanctions under Rule 37(b) for failure to comply with the discovery request was sanctionable).

Sanctions--Factors to Be Considered

Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002) (district court should consider five factors before imposing sanction of dismissal for discovery violations: (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its docket, (3) the risk of prejudice to the defendants, (4) the public policy favoring disposition of cases on their merits, and (5) the availability of less drastic sanctions).

Sanctions for Refusal to Cooperate

Thomas E. Hoar, Inc. v. Sara Lee Corp., 882 F.2d 682 (2d Cir. 1989) (where a party persistently refused to cooperate with the discovery process and disobeyed court orders, monetary sanctions were not improper).

Sanctions Not Available for Inadequate Response

Badalamenti v. Dunham's, Inc., 896 F.2d 1359 (Fed. Cir. 1990) (an inadequate response to a request for production of documents may be the subject of a motion for an order to compel a different response, but sanctions are not available when a response, though inadequate, has been made).

Sanctions Under Rule 26(g)(3) Distinguished

Lillie v. United States, 40 F.3d 1105 (10th Cir. 1994) (sanctions pursuant to Rule 37(b) were unavailable because a motion for an order to compel discovery had not been made by the opposing party; however, sanctions under Rule 26(g)(3) do not require that an order of the court be disobeyed).

Self-Incrimination Privilege Claim Not Sanctionable

Evans v. City of Chicago, 513 F.3d 735 (7th Cir. 2008) (in § 1983 case against police officers who had earlier refused discovery on *Fifth Amendment* grounds, trial judge did not abuse his discretion by declining to order sanctions under Rule 37(b)(2) against officers for claiming and then later withdrawing self-incrimination privilege; judge reasonably could have concluded that officers were not "gaming" system but rather were concerned about ongoing special prosecutor's investigation at time they claimed privilege).

Striking of Pleadings as Sanction

Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980) (court may properly strike a party's pleadings as a sanction for failing to obey the court's discovery order).

Timely Seeking of Sanctions

Brandt v. Vulcan, Inc., 30 F.3d 752 (7th Cir. 1994) (where a party did not seek sanctions in a timely fashion, the court's refusal to impose sanctions was not improper).

Violation of Order of Magistrate Judge

McLeod, Alexander, Powel & Appfel, P.C. v. Quarles, 894 F.2d 1482 (5th Cir. 1990) (violation of a magistrate judge's discovery order was sufficient to trigger sanction under Rule 37(b)).



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TITLE VI. TRIALS

Chapter 38 Rule 38. Right to a Jury Trial; Demand

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Rule 38. Right to a Jury Trial; Demand

Rule 38 reads as follows:

Rule 38. Right to a Jury Trial; Demand

(a) **Right Preserved.** The right of trial by jury as declared by the *Seventh Amendment to the Constitution*--or as provided by a federal statute--is preserved to the parties inviolate.

(b) **Demand.** On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand--which may be included in a pleading--no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) **Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may--within 14 days after being served with the demand or within a shorter time ordered by the court--serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

* * * * *



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38.1 COMMENTARY

Rule 38, of course, does not create the right to a jury trial. The *Seventh Amendment to the Constitution* declares that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The question whether a party has a constitutional right to a jury trial, then, is analyzed according to the rights of parties to a jury trial that existed in 1789.

These issues are left entirely unaffected by Rule 38, a point reiterated in subdivision (a). Courts and practitioners seeking relevant case law on the right to jury trial are thus advised to consult the additional authority listed at the end of this Chapter rather than the commentary provided here, which focuses entirely on the procedural aspects of the Rule.

Illustration 38-1

Cindy commences an action against the owner of Bob's Bait Shop alleging that Bob unlawfully discriminates against women by selling inferior bait to them. In her action, Cindy seeks only an injunction against future abuses. Rule 38 does not provide Cindy with a right to jury trial. Instead, Cindy must look to the case law surrounding the right to trial by jury when the requested remedy is in the form of an injunction. Unless the operative state law confers a right to jury trial under these circumstances, it is doubtful that Cindy will be able to demand a jury trial, as actions in 1789 in which injunctions were the requested remedy were properly the domain of equity courts in which judges traditionally decided the issues.

It should also be noted that Congress has also granted additional rights to a jury trial by statute. The right to a jury trial in particular circumstances may also be created by the Supreme Court through its rule-making power, as it did in Rule 71.1. Rule 71.1 provides for the right to a jury trial in condemnation proceedings in certain circumstances.

Demand for Jury Trial

To exercise the right to jury trial in a civil action, a party must make a timely demand according to the provisions of Rule 38(b). The demand may be made in a pleading, or it may be the subject of a separate motion. If made by motion, it

must be served on all opposing parties no later than 14 days from the date of service of the final pleading. It should be noted that Rule 15(a) allows a final pleading to be amended once as a matter of course within 21 days of service of the pleading. This provision may be used to amend one's pleading to include a jury demand if more than 14 days but less than 21 have elapsed since the pleading has been served on all the parties.

Subdivision (b)(2) is intended to make clear that demands for jury trials must also be filed with the court. Under Rule 79, the clerk of courts is required to maintain separate dockets, calendars, and indices for jury actions. Demands for jury trials may not be made orally.

Illustration 38-2

Greg commences a negligence action against Victoria for personal injuries suffered in a hunting accident, and Victoria serves an answer on October 1. Victoria would like the case to be decided before a jury, but she fails to make a demand for a jury trial in her answer. Victoria may make a motion for a jury trial no later than October 15, or she may amend her answer at any time before October 22, provided that the action has not yet been placed on the trial calendar.

Subdivision (c) expressly provides that a party may demand a jury trial on selected issues only, and that such a demand must specify the issues so selected. For example, a defendant in a negligence action may demand a jury trial on the issue of damages only. However, this demand must still be made in a pleading or by motion within 14 days of the service of the final pleading. The party may not decide, after the issue of liability has been decided by the court, to have the issue of damages decided by a jury. If a general demand for a jury trial is made, it will be considered as a demand for a jury trial on all the issues that can be constitutionally considered by a jury. If a party demands a jury trial only on selected issues, the opposing party may, within 14 days of being served with the original jury demand, demand a jury on the remaining issues.

Waiver of Right to Jury Trial

Subdivision (d) makes it clear that the right to a jury trial is waived if it is not made in accordance with the provisions of subdivisions (b) and (c). The Rule also expressly provides that, once requested, a jury trial may be waived only by the express consent of all the parties. Despite this language, several courts have held that a party's acquiescence to a trial before the court or before a magistrate judge may also constitute an effective waiver.

Demand for Jury Trial in Removed Actions

Rule 81(c)(3)(C) provides that, in actions removed from state court, a party may make an effective demand for jury trial by serving on the opposing party a demand within 14 days of the removal or within 14 days of receipt of the notice of the removal. Alternatively, a party that has made a proper demand for a jury trial in the state court need not repeat the demand after removal.



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38.2 ADDITIONAL AUTHORITY

8 *Moore's Federal Practice* §§ 38.01 -38.52

James & Hazard, *Civil Procedure* §§ 8.1-8.9

Friedenthal, *Civil Procedure* §§ 11.1, 11.3, 11.4, 11.9

Teply & Whitten, *Civil Procedure* 796-798, 805-823



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38.3 LEADING CASES

Bench Trial Request in Amended Complaint

Becker v. Tidewater Inc., 405 F.3d 257 (5th Cir. 2005) (amendment of complaint permitted to request bench trial on claims for which no jury right existed).

Contract Silent on Jury Question

IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989 (7th Cir. 2008) (if parties' contract is silent on issue of bench trial, then Rule 38 will govern; Rule 38 states that omission of jury demand from complaint or answer forfeits any opportunity to have case heard by jury).

Corporate Dissolution Action Equitable, Not Legal

Bogosian v. Woloohojian Realty Corp., 323 F.3d 55 (1st Cir. 2003) (a plaintiff bringing a corporate dissolution action does not have right to a jury trial where her claims for dissolution, breach of fiduciary duty, and fraud raised equitable, not legal issues, and plaintiff failed to make a timely jury demand).

Different Standards on JMAL and New Trial Motions

Russell v. United Parcel Servs., Inc., 666 F.2d 1188 (8th Cir. 1981) (applying the differing standards for motions on judgments as a matter of law and for motions for new trials).

Failure to Object Waives Jury Claim

Bostic v. Goodnight, 443 F.3d 1044 (8th Cir. 2006) (because appellant's objection was based on the potential for double damages rather than the *Seventh Amendment*, he waived his right to jury trial on a self-dealing claim by failing to object to submission of that issue to district court rather than jury).

Implied Waiver by Pro Se Litigant

Jennings v. McCormick, 154 F.3d 542 (5th Cir. 1998) (the mere participation of a party, without objection and unrepresented by counsel, does not constitute an unquestionable knowing and voluntary waiver of the right to a jury trial; however, an error in disregarding or overlooking a timely demand for a jury trial is harmless if the evidence could not have withstood a motion for directed verdict at trial).

Implied Waiver of Prior Demand for Jury Trial

United States v. 1966 Beechcraft Aircraft Model King Air A90, 777 F.2d 947 (4th Cir. 1985) (right to jury trial may be waived by acquiescing to a bench trial).

Jury Demand for Claims Against Persons Added to Litigation

Frost v. Agnos, 152 F.3d 1124 (9th Cir. 1998) (where a demand for a jury trial occurred prior to the filing of an answer, there was no waiver of the right to a jury trial with respect to claims against the party filing the answer; 10-day service provision for filing a demand for a jury trial does not preclude a subsequent demand to persons served with process after the expiration of that time period).

Jury Demands in Removed Actions

Houston N. Hosp. Properties v. Telco Leasing, Inc., 688 F.2d 408 (5th Cir. 1982) (in removal action, where right to jury trial had not been made in accordance with either Rule 38 or state law, appearance of the words "jury requested" on the court's docket was insufficient to constitute an effective demand).

Liability Issue Jury Demand Not Requested

Lutz v. Glendale Union High Sch., Dist. No. 205, 403 F.3d 1061 (9th Cir. 2005) (jury verdict was vacated where plaintiff failed to make a timely request for a jury trial on the issue of liability even though a jury trial was properly requested on damages).

Magistrate's Order Not a Pleading for Purposes of Jury Demand

Burns v. Lawther, 53 F.3d 1237 (11th Cir. 1995) (the time within which a jury demand must be made is not calculated from the date of a response to an order of a magistrate judge, as that is not a formal pleading under Rule 7(a)).

Multiple Defendants; Timing of Jury Demand

In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990) (in a case involving multiple defendants, the final pleading filed by the last defendant on a common issue determined the time period in which a jury demand could be made; right to jury trial limited to the common issue).

Opposing Party's Jury Demand

California Scents v. Surco Prods., 406 F.3d 1102 (9th Cir. 2005) (issues raised in party's complaint were embraced by opposing party's jury demand because the claims turned on the same matrix of facts).

Procedural Requirements Disallowed

Solis v. County of Los Angeles, 514 F.3d 946 (9th Cir. 2008) (district judge's waiver provision required pro se

prisoner to satisfy additional procedural requirements beyond filing jury demand, namely, filing of jury instructions and special verdict forms, or to forfeit his jury trial right; such rule was clearly inconsistent with Rule 38(d)'s limitation of waiver to failure to file jury demand and consequently could not be enforced).

Waiver of Jury Demand in Writing

Bellmore v. Mobil Oil Corp., 783 F.2d 300 (2d Cir. 1986) (demand for jury trial may be subsequently waived by the party through a written waiver).



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TITLE VI. TRIALS

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Rule 39. Trial by Jury or by the Court

Rule 39 reads as follows:

Rule 39. Trial by Jury or by the Court

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

- (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or
- (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

- (1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

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39.1 COMMENTARY

Rule 39 complements Rule 38 in specifying the procedure to be used when a party makes a demand for a jury trial. As noted in Chapter 38, Rules 38 and 39 do not create a right to jury trial. Courts and practitioners seeking relevant case law on the right to jury trial are thus advised to consult the additional authority listed at the end of Chapter 38 rather than the commentary provided here, which focuses entirely on the procedural aspects of the Rule.

When a party has made a proper demand for a jury trial under Rule 38 or Rule 81(c)(3)(C) in an action removed from state court, subdivision (a) directs the clerk of the court to enter a notation to that effect on the court's docket. Rule 79(c) requires the clerk to keep a separate index of jury actions.

Waiver of Prior Demand for Jury Trial

Subdivision (a) delineates the circumstances in which a party may waive a prior demand for a jury trial. Such a waiver must be made by all parties in writing or by oral stipulation in open court under subdivision (a)(1). Upon motion or its own initiative, under subdivision (a)(2), a court may also nullify the jury demand by finding that the right to a jury trial does not exist under the Constitution, law of Congress, or by Rule.

Jury Trial Ordered by the Court

Subdivision (b) does not enlarge the parties' right to a jury trial, but provides the court with discretion to order a jury trial on any or all of the issues when a party has failed to make such a demand. Technically, this provision does not allow the court to grant an untimely demand for a jury trial, but provides the court with the means to attain that result. All actions not tried by a jury shall be tried to the court.

The power granted to the court in subdivision (b) to order a jury trial should be distinguished from the power to employ an advisory jury granted in subdivision (c). Subdivision (b) applies only when a right to jury trial exists but is not demanded by the parties; subdivision (c) applies only when a right to jury trial does not exist. Thus, Rule 39 does not grant the judge the power to employ an advisory jury where the right to a jury trial exists but is not demanded by any of the parties. However, such a procedure may be provided for by local rule.

Illustration 39-1

Marcia sues Nicole for personal injuries suffered when Nicole's dog attacked Marcia. Although both parties have a right to a jury trial under applicable case law, neither party makes a jury demand by pleading or by motion. Under Rule 39, however, the trial judge may order a jury trial on any or all of the issues of the case. However, the trial judge may not employ an advisory jury to assist in the resolution of the action in the absence of a local rule authorizing one.

Advisory Jury Trial

Subdivision (c) allows the court, upon motion or its own initiative, to employ an advisory jury in actions in which neither party has the right to demand a jury trial. The consent of the parties is not required to employ an advisory jury, a point implied by the absence of a requirement to secure the parties' consent under subdivision (c)(1), and the court may accept or reject the findings of the advisory jury. However, if the court employs an advisory jury, the court must still make findings in the record upon which an appellate court may review. If the parties consent to a jury under subdivision (c)(2), the decision of the jury has the same effect as that of a jury trial demanded as of right.

Illustration 39-2

Assume on the facts of Illustration 39-1 that Marcia seeks only equitable relief and, under the applicable law, does not have a right to a jury trial. Under Rule 39(c)(1), the court may employ an advisory jury to assist her in the resolution of the action. The court is required neither to seek Marcia's or Nicole's consent nor to accept or reject the findings of the advisory jury.



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39.2 ADDITIONAL AUTHORITY

8 *Moore's Federal Practice* §§ 39.01 -39.43

Friedenthal, *Civil Procedure* §§ 11.3, 11.4, 11.9



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Advisory Jury Appropriate Where No Right to Jury Trial Exists

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) (court may empanel an advisory jury on issues to which no right to jury trial attaches, such as availability of back pay or front pay in claims under Civil Rights Act of 1991).

Corporate Dissolution Action Equitable, Not Legal

Bogosian v. Woloohojian Realty Corp., 323 F.3d 55 (1st Cir. 2003) (a plaintiff bringing a corporate dissolution action does not have right to a jury trial where her claims for dissolution, breach of fiduciary duty, and fraud raised equitable, not legal issues, and plaintiff failed to make a timely jury demand).

Failure to Object Waives Jury Claim

Bostic v. Goodnight, 443 F.3d 1044 (8th Cir. 2006) (because appellant's objection was based on the potential for double damages rather than the *Seventh Amendment*, he waived his right to jury trial on a self-dealing claim by failing to object to submission of that issue to district court rather than jury).

Findings and Conclusions by Court Required in Advisory Jury Trial

Adkins v. GAF Corp., 923 F.2d 1225 (6th Cir. 1991) (a court employing an advisory jury must nevertheless make findings of fact and conclusions of law that can be reviewed by an appellate court).

Findings of Advisory Jury Not Binding

Gragg v. City of Omaha, 20 F.3d 357 (8th Cir. 1994) (the court may accept or reject the findings of an advisory jury).

Grant of Untimely Demand for Jury Trial

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) (Rule 39 provides the court with the discretion to grant an untimely demand for a jury trial).

Implied Waiver of Jury Trial

Tray-Wrap, Inc. v. Six L's Packing Co., 984 F.2d 65 (2d Cir. 1993) (for conduct of the parties to constitute an effective waiver of the right to a jury trial, the conduct must "clearly indicate" the parties' intention to do so).

"Mere Inadvertence" Insufficient to Justify Failure to Demand Jury

Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998) (the trial court does not abuse its discretion by denying a motion under Rule 39(b) when the failure to make a jury demand under Rule 38 in a timely fashion results from the mere inadvertence of the moving party).

Participation in Bench Trial

CoxCom, Inc. v. Chaffee, 536 F.3d 101 (1st Cir. 2008) (though party requested jury trial in their answer pursuant to Rule 39, they were not entitled under *Seventh Amendment* to jury trial on damages as their participation in bench trial without objection constituted waiver of jury trial right).

Standards Under Rule 39 and Rule 6 Distinguished

Raymond v. IBM, 148 F.3d 63 (2d Cir. 1998) (although the court should not permit a party to demand a jury trial under Rule 39(b) absent an explanation beyond mere inadvertence for the original failure to serve jury demand in a timely fashion, mere inadvertence, without more, can, in some circumstances, be enough to constitute "excusable neglect" under Rule 6(b) for enlarging the time period under Rule 38 for demanding a jury trial).

Stipulated Testimony and Participation Constitute Waiver of Jury Trial

Fillmore v. Page, 358 F.3d 496 (7th Cir. 2004) (party's decision to submit stipulated testimony for use in further proceedings and his participation in a request to dispense with a second trial was an invitation to judge to resolve matters without aid of jury and a waiver of the party's right to jury under Rule 39(a)).

Waiver by Inaction or Acquiescence

In re City of Philadelphia Litig., 158 F.3d 723 (3d Cir. 1998) (an intentional relinquishment of the right to a jury trial under Rule 39 is not required to waive the right; unlike other constitutional rights, the right to a jury trial can be waived by inaction or acquiescence; furthermore, it is incumbent upon a party who has made a general demand for a jury trial to lodge a specific objection to a bench trial of an issue to preserve any *Seventh Amendment* right to a jury trial with respect to that issue).



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1-40 Federal Civil Procedure Litigation Manual Rule 40. Scheduling Cases for Trial

Rule 40. Scheduling Cases for Trial

Rule 40 reads as follows:

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

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40.1 COMMENTARY

Rule 40 requires district courts to provide for the ordering of actions on the trial calendar by local rule. The list of possible ways in which actions may be placed on the docket calendar is not limited by Rule 40. Local rules, however, must comply with statutes of the United States and with provisions in other Rules. For example, Rule 65 provides that hearings on preliminary injunctions must take precedence on the court's docket over any other hearing or trial except older hearings on preliminary motions. Local rules may also provide for the granting or denial of continuances in appropriate circumstances.



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40.2 ADDITIONAL AUTHORITY

8 *Moore's Federal Practice* §§ 40.01 -40.03

Teply & Whitten, *Civil Procedure* 796



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40.3 LEADING CASES

Continuances; Generally

Arabian Am Oil Co. v. Scarfone, 939 F.2d 1472 (11th Cir. 1991) (the right to grant a continuance is within the discretion of the court; where party had acted to delay proceedings several times and counsel withdraws from the case two days before trial, the court did not abuse its discretion in denying a continuance).



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Rule 41. Dismissal of Actions

Rule 41 reads as follows:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

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41.1 COMMENTARY

Rule 41 provides for dismissals of actions. An action may be dismissed voluntarily either as of right or by order of the court, but an action may be dismissed involuntarily only by order of the court. The term "voluntary" as used in this Rule refers to the position of the plaintiff, so that an "involuntary" dismissal is one sought by the defendant against the plaintiff. The Rule also governs the dismissal of counterclaims and crossclaims under Rule 13, third-party claims under Rule 14, and provides for the payment of costs of previously-dismissed actions.

Voluntary Dismissal as of Right

Subdivision (a) separates voluntary dismissals, *i.e.*, dismissals sought by the plaintiff, into three types: dismissal as of right (provided for under subdivision (a)(1)(A)(i)); dismissal by stipulation (provided for under subdivision (a)(2)(A)(ii)); and dismissal by order of the court (provided for under subdivision (a)(2)). A plaintiff may dismiss an action under subdivision (a)(1)(A)(i) without prejudice or order of the court at any time before a responsive pleading or a motion for summary judgment is served, whichever occurs first. This limitation on voluntary dismissal is generally more restrictive than analogous provisions under state civil procedure rules. Some states, for example, permit voluntary dismissal as of right by the plaintiff at any time before a final judgment is rendered, including during trial. Other states restrict this right to pretrial exercise, *i.e.*, the action may be dismissed by the plaintiff as of right at any time before the trial has been set on the court calendar. However, even under the restrictive Federal Rule, a defendant who files a Rule 12 motion before responding to a pleading does not affect the plaintiff's right to dismiss the action without prejudice.

Illustration 41-1

Ahmed sues Chandler for personal injuries suffered in a hydroplane accident. Chandler immediately files a motion under subdivision (a)(1)(A)(i) to dismiss the action for improper venue under Rule 12. As Chandler has not filed an answer or made a motion for summary judgment, Ahmed may dismiss the action without prejudice, thereby discharging the current action but retaining his right to sue on the same cause of action in the future.

Subdivision (a)(1)(B) specifies the effect of dismissals as of right and dismissals by stipulation. For all such dismissals, the right of voluntary dismissal without prejudice by the plaintiff is limited to a single dismissal; a plaintiff who has

previously dismissed an action based on or including the same claim in any federal or state court cannot thereafter dismiss the action under subdivision (a)(1)(A) without prejudice. A plaintiff in such a situation may petition the court for dismissal without prejudice under subdivision (a)(2), but the circumstances under which a dismissal without prejudice would be appropriate are highly unusual.

Illustration 41-2

Assume on the facts of Illustration 41-1 that Ahmed does in fact dismiss his action against Chandler. Two months later, Ahmed brings the same action against Chandler and Chandler's brother, Todd. However, Ahmed again wishes to have the matter dismissed without prejudice. Under Rule 41, Ahmed cannot unilaterally dismiss the action without prejudice with regard to Chandler. Rather, Ahmed must petition the court for dismissal without prejudice under Rule 41(a)(2).

Voluntary Dismissals by Stipulation

Somewhat misleadingly, subdivision (a)(1)(A)(ii) is grouped with the other kinds of "voluntary" dismissals. As noted, the term "voluntary" refers to the position of the plaintiff and implies that the defendant is opposed to such a dismissal. This subdivision, on the other hand, governs dismissals by stipulation of all the parties and, as such, are both "voluntary" *and* "involuntary," though, as the heading for the subdivision indicates, does not require a court order. All the parties to an action must agree and sign the stipulation to make it effective. Dismissals by stipulation occur frequently when parties have settled their disputes through negotiation. When this occurs, the parties may ensure that the stipulation expressly provides that the dismissal is with prejudice; otherwise, either party is free to re-file a complaint.

Illustration 41-3

Assume on the facts of Illustration 41-2 that the court denies Ahmed's motion to dismiss the action a second time without prejudice, but Ahmed is allowed to dismiss the action against Todd. After six months of discovery, Ahmed and Chandler arrive at a settlement in the amount of \$50. In accordance with Rule 41(a)(1)(ii), the parties dismiss the action by stipulation. However, their stipulation fails to indicate that the action is being dismissed "with prejudice." The stipulation does not prevent Ahmed from re-filing the complaint against Chandler.

Voluntary Dismissals by Order of the Court

Subdivision (a)(2) articulates the court's discretion to grant motions to dismiss by the plaintiff "on terms that the court considers proper." Strictly speaking, "good cause" need not be shown, though the court's discretion to allow or disallow such a dismissal is implied in the Rule. However, this discretion is restricted in cases where the defendant has filed a counterclaim before plaintiff's motion to dismiss and the defendant objects to the motion. In this situation, the court cannot grant the motion to dismiss unless independent grounds for hearing the counterclaim exist. Otherwise, the grant of plaintiff's motion to dismiss acts as an involuntary dismissal of defendant's claim against her wishes. As with the two types of dismissals authorized by subdivision (a)(1), a dismissal under subdivision (a)(2) is without prejudice unless otherwise specified.

Illustration 41-4

Assume on the facts of Illustration 41-1 that Chandler files a counterclaim before Ahmed makes a motion to dismiss the action without prejudice. Chandler objects to Ahmed's motion, which was made in accordance with the provisions of Rule 41(a). Under Rule 41(a)(2), the court cannot grant Ahmed's motion unless independent grounds for hearing Chandler's counterclaim exist.

Involuntary Dismissals

Subdivision (b) governs involuntary dismissals, *i.e.*, dismissals sought by the defendant. Subdivision (b) reverses the presumption in subdivision (a) that a dismissal is without prejudice unless otherwise provided; subdivision (b) expressly states that a dismissal made under that subdivision operates as an adjudication on the merits of the case, unless otherwise specified by the court in its order. Dismissals against plaintiffs are drastic measures, and should not be imposed by the court lightly. The Rule lists the plaintiff's failure to prosecute or comply with the Rules as instances in which an involuntary dismissal may be appropriate; nevertheless, the court does not have unfettered discretion to dismiss an action against a plaintiff. Warnings or other sanctions are advised before a court considers outright dismissal.

Illustration 41-5

Jane commences a libel action against Hannah, but Jane fails to appear at any of the pretrial conferences and allows the action to remain on the court's docket for over 3 years without taking any further action in the case. In this situation, the court's dismissal of the action under Rule 41(b) may be appropriate. The dismissal would be with prejudice, and Jane's action against Hannah is considered to have been adjudicated on the merits.

Subdivision (b) also lists the exceptions to an involuntary dismissal with prejudice. A dismissal for lack of jurisdiction, improper venue, or failure to join an indispensable party is without prejudice to the plaintiff. The Supreme Court, in *Costello v. United States*, 365 U.S. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961), held that the failure to satisfy a "precondition to suit" also operates to justify a dismissal without prejudice to the plaintiff. These failures can be broadly defined as those dismissals that simply cannot be corrected through any of the provisions in the Rules. In *Costello*, the "precondition of suit" was the filing of an affidavit required before the action could be brought. After the suit was filed, there was simply nothing that could be done by the plaintiff to rectify the error except for dismissal of the action and re-filing of a complaint once the affidavit was properly filed. Under this circumstance, the Court ruled that the plaintiff's suit should be dismissed without prejudice.

Illustration 41-6

On January 1, Lillian loans Robert \$50,000 in exchange for a promissory note maturing on August 30. On June 15, Robert's business collapses, and Lillian fears that her note will be worthless. Lillian proceeds to commence a breach of contract action against Robert on July 1. Finding that the action is immature, the court dismisses the action. The court's dismissal on grounds that Lillian's action has not satisfied a precondition to suit should fit within the *Costello* interpretation of the exception to Rule 41(b). Once Lillian brings the action prematurely, no procedural means exist to correct Lillian's error. Thus, Lillian's action will be dismissed without prejudice.

Application to Counterclaims, Crossclaims, and Third-Party Claims

Subdivision (c) indicates that the dismissal provisions of subdivision (a)(1)(A)(i)--the dismissals as of right--apply to counterclaims, crossclaims, and third-party claims. Thus, the terms "plaintiff" and "defendant" as used in the Rule do not necessarily refer to the party filing the original complaint and answer. Rather, a defendant who brings a counterclaim against a plaintiff may dismiss the counterclaim "voluntarily" under subdivision (a)(1)(A)(i), but may seek dismissal of the original claim brought by the plaintiff only "involuntarily" under subdivision (b).

Illustration 41-7

Jason sues Chuck for personal injuries suffered in a farming accident. Chuck promptly files a

counterclaim for damages to his combine. After Jason files a motion for a jury trial, Chuck decides to dismiss his counterclaim. This dismissal is considered "voluntary" under Rule 41(a) and is presumed to be without prejudice. If Chuck later pursues the counterclaim against Jason as an independent action, Jason may seek dismissal of the counterclaim "involuntarily" under Rule 41(b).

Costs

Finally, subdivision (d) provides that the court may impose costs for the previously dismissed action against a plaintiff if that plaintiff re-commences the same proceeding. It should be noted that the subdivision does not provide the court with the power to impose costs for the re-commenced proceeding; that issue is governed by Rule 54. Additionally, subdivision (d) does not provide for the imposition of costs on the plaintiff when the plaintiff does not re-file the action; that issue is likewise governed by Rule 54. Furthermore, subdivision (d) does not provide the court with any authority to dismiss the second action for plaintiff's failure to pay the costs of the previously dismissed action. However, if a court so orders a plaintiff to pay such costs under subdivision (d), the court may then dismiss the second action upon motion under subdivision (b) for failure to comply with an order of the court.

Illustration 41-8

Buck sues Rich for compensatory damages stemming from a fire in their college dorm room which destroyed Buck's compact disc collection. After Rich makes a litany of threatening-sounding Rule 12 motions, Buck is intimidated and decides to dismiss the action. Four months later, after Buck has had a chance to confer with his other roommates, Buck re-commences his claim against Rich. Under Rule 41(d), the court may impose upon Buck Rich's costs for bringing the earlier Rule 12 motions. Costs for Buck's pending action will be determined under Rule 54. If Buck refuses to pay these costs, the court may not dismiss Buck's action a second time *for a refusal to pay costs*. However, if Rich moves the court for an order requiring Buck to pay these costs by a specified date and Buck refuses to do so, the court may probably dismiss Buck's second action *for failure to comply with an order of the court*.



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41.2 ADDITIONAL AUTHORITY

8 *Moore's Federal Practice* §§ 41.01 -41.70

Friedenthal, *Civil Procedure* §§ 9.5, 14.7

Teply & Whitten, *Civil Procedure* 790-793



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41.3 LEADING CASES

Collateral Estoppel Effect of Pre-Dismissal Rulings

In re DES Litig., 7 F.3d 20 (2d Cir. 1993) (although a dismissal under Rule 41 with prejudice operates as res judicata on the parties, pre-dismissal adverse rulings do not have collateral estoppel effect on the parties).

Converted Summary Judgment Motion Made Explicit by Court

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003) (a Rule 12(b)(6) motion to dismiss supported by extraneous materials cannot be regarded as one for summary judgment until the district court acts to convert it by indicating, preferably by explicit ruling, that it will not exclude those materials from its consideration; accordingly, until the district court converts the motion to dismiss into a summary judgment motion, a plaintiff is free to file proper notice of dismissal under Rule 41(a)(1)).

Copyright Action Fees

Riviera Distribs. v. Jones, 517 F.3d 926 (7th Cir. 2008) (defendants were entitled to attorneys' fees in copyright action because: (1) they obtained favorable judgment when district court dismissed plaintiffs' copyright infringement action with prejudice under Rule 41(a)(2); (2) district court recognized them as prevailing party when it awarded costs under Rule 54, so they were also prevailing party for purpose of 17 USC § 505; and (3) case was good candidate for fee shifting under § 505 because it was filed despite a signed agreement not to sue but to engage in alternative dispute resolution of any future claims).

Court's Authority Over Disputed Settlement Agreement

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (district court does not have inherent discretion to review terms of a settlement agreement when the parties disagree over the terms of the agreement; settlement disagreement is essentially a contract claim, unreviewable by district court absent independent jurisdictional grounds).

Factors to Be Considered Before Dismissal for Failure to Comply With Rules

Olsen v. Mapes, 333 F.3d 1199 (10th Cir. 2003) (a district court must consider the following factors before dismissing an action for a party failure to comply with the Rules or any order of court: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions).

Failure to Prosecute

Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (Rule 41(b) dismissal need not be made by motion; discretionary powers of court allow for dismissal for failure to prosecute).

Failure to Prosecute--Balancing Test

Emerson v. Thiel College, 296 F.3d 184 (3d Cir. 2002) (to determine whether a district court abused its discretion for dismissing a case for failure to prosecute or to comply with its orders, the appellate court balances the following factors: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense).

Involuntary Dismissal; Negligent Conduct

Adams v. Trustees of the N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863 (3d Cir. 1994) (where party's delay was merely negligent, as opposed to willful or in bad faith, dismissal of action was improper).

Involuntary Dismissal; Untimely Filing

Dickerson v. Board of Educ., 32 F.3d 1114 (7th Cir. 1994) (where plaintiff failed to file pre-trial order in timely fashion and gave no reason for the failure, district court did not abuse its discretion in dismissing the action).

No Authority to Dismiss Because of Failure to Pay Costs

Fisher v. Chevron Chem. Co., 716 F. Supp. 1283 (W.D. Mo. 1989) (Rule 41(d) does not provide the court with the power to dismiss an action because a party has failed to pay the costs from a previously-dismissed action).

Noncompliance With Local Rule

Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988 (6th Cir. 1999) (trial court can dismiss action for noncompliance with local rule only if behavior of noncomplying party rises to level of a failure to prosecute under Rule 41(b)).

Offer of Judgment Must Include Dismissal Terms

Fafel v. DiPaola, 399 F.3d 403 (1st Cir. 2005) (a judgment under Rule 68 necessarily incorporates the terms of underlying offer, with or without additional terms in a settlement agreement providing for dismissal of claims under Rule 41).

Oral Dismissal Valid

Role v. Eureka Lodge No. 434, 402 F.3d 314 (2d Cir. 2005) (oral stipulation of dismissal entered into by parties on the record before magistrate judge was enforceable despite the fact there no formal, signed stipulation by the parties).

Plaintiff's Objection--No Voluntary Dismissal

Hargis v. Foster, 282 F.3d 1154 (9th Cir. 2002) (a court may not voluntarily dismiss a claim over plaintiff's objection).

Rule 12(b)(6) Motion Does Not Affect Dismissal Right

In re Bath & Kitchen Fixtures Antitrust Litig., 535 F.3d 161 (3d Cir. 2008) (Third Circuit applies Rule 41 literally and rejects the contention that the filing of a Rule 12(b)(6) dismissal motion or entry of order granting plaintiff leave to amend complaint, and extension of time within which to do so, limits or nullifies plaintiff's right to voluntarily dismiss complaint by filing notice of dismissal under Rule 41(a)(1); notice of dismissal is timely filed, and it has effect of automatically dismissing suit, when defendant has filed neither answer nor motion for summary judgment as of date of notice and no district court order has clearly put end to action).

Rule 15 Compared

Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683 (9th Cir. 2005) (Rule 15(a), like Rule 41(a)(2), requires judicial approval after a responsive pleading is filed absent stipulation by opposing party).

Sanction; Dismissal As

Lopez-Gonzalez v. Municipality of Comerio, 404 F.3d 548 (1st Cir. 2005) (action properly dismissed under Rule 41(b) as a sanction for failure to comply with court order).

Sanctions After Voluntary Dismissal

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (after voluntary dismissal, court may still impose Rule 11 sanctions on the parties; case occurred before the 1993 amendments to Rule 11).

Signature on Settlement Agreement Necessary

Camacho v. Mancuso, 53 F.3d 48 (4th Cir. 1995) (failure of parties to sign stipulated dismissal prevented the dismissal from becoming effective).

Stipulated Dismissal Not Controllable by Court

Smith v. Phillips, 881 F.2d 902 (10th Cir. 1989) (terms of a stipulated dismissal under Rule 41(a)(1)(ii) (now Rule 41(a)(1)(A)(ii)) are not subject to alteration by the court).

Unwanted Effect of Dismissal Does Not Render It Involuntary

Dean v. Pilgrim's Pride Corp., 395 F.3d 471 (4th Cir. 2005) (the fact that party's attorney had misinterpreted a state savings statute did not render a prior dismissal under Rule 41(a) involuntary or otherwise negate the party's intent to abandon the action).

Voluntary Dismissal Before Service of Answer on All Parties

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) (where defendant had filed an answer but it had not been served on all the plaintiffs, plaintiffs could voluntarily dismiss action under former Rule 41(a)(1)(i) (now Rule 41(a)(1)(A)(i)).



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Chapter 42 Rule 42. Consolidation; Separate Trials

1-42 Federal Civil Procedure Litigation Manual Rule 42. Consolidation; Separate Trials

Rule 42. Consolidation; Separate Trials

Rule 42 reads as follows:

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

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42.1 COMMENTARY

Rule 42 provides for the consolidation and separation of trials. Such actions are within the discretion of the court, and will be reversed only upon a showing of prejudice to a party or the denial of a substantive right.

Consolidation of Trials

Subdivision (a) states that a court may order the consolidation of actions involving "a common question of law or fact." The actions to be consolidated should be at the same stage in the litigation, but this is not required under the Rule. Any of the trial stages may be consolidated, and a consolidation neither requires nor precludes consolidation of the other stages. Cases may be transferred to another district court for the purpose of consolidation.

Illustration 42-1

On December 30, an airplane carrying thirty passengers exploded in flames and fell to the ground. Two months later, Cynthia, the widow of one of the passengers, commences a wrongful death action against Frank's Faulty Airplanes, the manufacturer of the airplane. Three months after Cynthia commences her action, Tracy, whose baggage was being transported in the airplane, commences a negligence action against Frank's Faulty Airplanes. Although the two suits were commenced at different times and involve separate claims, the court may, at its discretion, consolidate the two actions for the purposes of determining the liability of Frank's Faulty Airplanes.

Separation of Trials

Subdivision (b) allows for separate trials or proceedings for convenience, to avoid prejudice or where the separation will "expedite and economize" the action. Separation is sometimes necessary because of the ease of joining counterclaims, crossclaims, or third-party claims under the Rules. Separation of the liability and damages aspects of a trial is also contemplated by the Rule, and separation is permitted even if the applicable state law forbids the practice.

Illustration 42-2

Assume on the facts of Illustration 42-1 that Frank's Faulty Airplanes files a third-party complaint

against Defective Devices Inc., the supplier of parts used to manufacture the airplane. Under Rule 42(b), the court may bifurcate the third-party action from the original actions of Cynthia and Tracy if the court feels that a consolidated action may prejudice the parties or confuse the jury.



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42.2 ADDITIONAL AUTHORITY

8 *Moore's Federal Practice* §§ 42.01 -42.24

Friedenthal, *Civil Procedure* § 11.5



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42.3 LEADING CASES

Common Question of Law or Fact Required

Enterprise Bank v. Saettele, 21 F.3d 233 (8th Cir. 1994) (consolidation order reversed where there were no common questions of law or fact and consolidation resulted in adversarial relationship between coparties).

Consolidation of Cases Sua Sponte

Devlin v. Transportation Communs. Int'l Union, 175 F.3d 121 (2d Cir. 1999) (trial court can consolidate related cases sua sponte; in assessing whether consolidation is appropriate, the court should consider both equity and judicial economy, though the latter cannot be permitted to prevail at the expense of the former).

Different Stages of Litigation

Mills v. Beech Aircraft Corp., 886 F.2d 758 (5th Cir. 1989) (where two actions were at different stages in the litigation process, it was proper for the district court to deny the consolidation motion).

Exemplar Trial

In re Air Crash Disaster, 720 F. Supp. 1505 (D. Colo. 1988), *rev'd on other grounds*, 964 F.2d 1059 (10th Cir. 1992) (use of exemplar trial in complex litigation action approved).

Motion to Sever Claims or Remove Parties

Reinholdson v. State, 346 F.3d 847 (8th Cir. 2003) (district court's grant of motion to sever claims so that individual issues could be tried separately, but retain jurisdiction over common claims, was considered interlocutory and non-appealable, as the motion would be construed as having been made under Rule 42(b) rather than Rule 21).

Objection to Consolidation Necessary

Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993) (consolidation not reviewed because it was not objected to).

Procedure for Determining Whether Separation Is Appropriate

Houseman v. United States Aviation Underwriters, 171 F.3d 1117 (7th Cir. 1999) (in considering whether to separate trials, the court first must determine whether separate trials would avoid prejudice to a party or promote judicial economy; once one of these criteria is satisfied, the court must ensure that the decision to bifurcate does not unfairly prejudice the non-moving party; finally, separate trials must not be granted if doing so would violate the *Seventh Amendment*).

Separation of Trials Permitted; State Law Inapplicable

Oulds v. Principal Mut. Life Ins. Co., 6 F.3d 1431 (10th Cir. 1993) (separation of trials allowed even though state law did not permit such a procedure).

Transfer of Action

In re Joint E. & S. Dists. Asbestos Litig., 769 F. Supp. 85 (E. & S.D.N.Y. 1991) (district court may transfer action to another district for the purpose of consolidation).

Trial of Damages Before Liability

Angelo v. Armstrong World Indus., Inc., 11 F.3d 957 (10th Cir. 1993) (not an abuse of discretion for court to order trial of damages issue before liability issue).

Trifurcation of Litigation Proper

Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142 (5th Cir. 1991) (consolidation and subsequent trifurcation of proceedings of 92 asbestos actions proper where plaintiffs failed to object at trial).



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TITLE VI. TRIALS

Chapter 43 Rule 43. Taking Testimony

1-43 Federal Civil Procedure Litigation Manual Rule 43. Taking Testimony

Rule 43. Taking Testimony

Rule 43 reads as follows:

Rule 43. Taking Testimony

(a) **In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) **Affirmation Instead of an Oath.** When these rules require an oath, a solemn affirmation suffices.

(c) **Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) **Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

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43.1 COMMENTARY

Rule 43 covers miscellaneous matters relating to the taking of testimony. Subdivision (a) was revised substantially in 1996, with the changes discussed below.

Affirmation or Oath

Subdivision (b) should be compared to *Federal Rule of Evidence 603*, which requires that every testifying witness declare that the witness will testify truthfully by oath or affirmation "calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." Rule 43(b) makes this directive applicable to situations under the Civil Rules in which an oath is required.

Discretion to Hear Oral Argument on Motions

Subdivision (c) is a largely forgotten provision that confers broad discretion upon the trial judge to order oral argument on a motion. It supplements, in part, the provisions of Rule 12(d), which states that the court has the authority to conduct preliminary hearings on motions under Rule 12 or may choose to defer argument until trial. Rule 43 implies that the court has the authority to dispense with oral argument altogether when deciding Rule 12 motions if it feels that oral argument would not enhance a proper understanding of the issues. Oral argument on other motions may be absolutely dispensed with by the trial judge, and affidavits may be used to decide the motion.

Interpreters

Subdivision (d) provides for the selection and compensation of interpreters. The court may accept the recommendation of a party for an interpreter, or may appoint one of its own choosing. It should be noted that *Federal Rule of Evidence 604* states that interpreters are subject to the provisions of the Rules of Evidence with regard to the qualification of expert witnesses and the oath. Additionally, the court may order the reasonable compensation of interpreters be paid from the court's own funds, or may tax the compensation as costs to a party under Rule 54(d)(1).

Form of Testimony in Court

Subdivision (a) was revised in 1996 to allow for testimony to be taken by means other than orally. The revised Rule makes it clear that testimony may be given in open court by other means, such as writing or sign language, if the witness is not able to communicate orally. The advisory committee's note also states that, if a witness cannot communicate through traditional means, the development of advanced technology may enable testimony to be given through a computer or similar device.

The second sentence of subdivision (a) was added in 1996. Although live testimony in open court is preferred, the contemporaneous transmission of testimony from a different location is now permitted under the Rule. However, this procedure can be used only on a showing of good cause in compelling circumstances. The importance of presenting live testimony, the presence of the factfinder, and the opportunity to judge the demeanor of a witness face-to-face should not be disregarded. Accordingly, contemporaneous transmission from a different location cannot be justified merely by showing that it is inconvenient for the witness to attend the trial. The advisory committee's note suggests that this procedure is appropriate when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Although the parties may agree that testimony should be presented in this manner, the court is not bound by such a stipulation and can insist on live testimony.

Illustration 43-1

Diane is a key witness in a wrongful death action against Rita's Mining Company. After the trial begins, however, Diane has a medical emergency unrelated to the action which requires her hospitalization 300 miles from the courthouse. Because the date of Diane's release from the hospital is uncertain and a jury has already been impaneled, a recess is not advisable. Under Rule 43, the trial judge may allow Diane to testify through two-way video conferencing technology.

The advisory committee's note also indicates that audio transmission without video images may be sufficient in some circumstances, particularly in regard to less important testimony, although video transmission is preferred when the cost of the transmission is reasonable in relation to the matters in dispute, the ability of the parties to pay the additional costs associated with video transmission, and the circumstances justifying transmission. Transmission that merely produces the equivalent of a written statement, such as a TDD translation device used by persons with hearing impairments, should not ordinarily be used.

In any event, additional safeguards should be adopted to ensure the accurate identification of the witness and to protect against influence by persons present with the witness. Advance notice of the contemporaneous transmission should be given to the opposing party to provide for the possibility of deposing the witness as a means to supplement the testimony as well as to present an opportunity to argue for attendance of the witness at trial.



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43.2 ADDITIONAL AUTHORITY

8 *Moore's Federal Practice* §§ 43.01 -43.06

Weissenberger's Federal Evidence §§ 603.1-603.3, 604.1-604.3



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TITLE VI. TRIALS

Chapter 43 Rule 43. Taking Testimony

1-43 Federal Civil Procedure Litigation Manual 43.3

43.3 LEADING CASES

Civil Contempt Proceeding Not a Trial

Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492 (9th Cir. 1983) (a civil contempt proceeding may not be tried on the basis of affidavits only, as it is a trial under Rule 43(a) and not a hearing on a motion under Rule 43(e) (now Rule 43(c)).

Interpreter Required for Entirety of Testimony

Borges v. Our Lady of the Sea Corp., 935 F.2d 436 (1st Cir. 1991) (in its instructions to the jury, court properly disallowed the testimony of a witness who testified through an interpreter because the interpreter did not re-appear for the continuation of the testimony).

Motion Required

Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. Co., 536 F.3d 939 (8th Cir. 2008) (borrower did not properly move for leave to conduct discovery pursuant to Rule 54(d)(2)(C) or opportunity for adversary submissions pursuant to former Rule 43(e) regarding lender's request for attorney fees under terms of promissory note, as borrower's request appeared in its response to lender's motion and not in separately filed motion).

Oral Argument on Motion for Post-Judgment Relief Not Required

United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853 (9th Cir. 1992) (court may decline to hear oral argument on a motion for post-judgment relief where the main issue is legal and not factual).



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TITLE VI. TRIALS

Chapter 44 Rule 44. Proving an Official Record

1-44 Federal Civil Procedure Litigation Manual 44.syn

§ 44.syn Synopsis to Chapter 44: Rule 44. Proving an Official Record

Scope Rule 44. Proving an Official Record

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TITLE VI. TRIALS

Chapter 44 Rule 44. Proving an Official Record

1-44 Federal Civil Procedure Litigation Manual Rule 44. Proving an Official Record

Rule 44. Proving an Official Record

Rule 44 reads as follows:

Rule 44. Proving an Official Record

(a) Means of Proving.

(1) Domestic Record. Each of the following evidences an official record--or an entry in it--that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record--or by the officer's deputy--and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) Foreign Record.

(A) In General. Each of the following evidences a foreign official record--or an entry in it--that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record--or a copy--that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(B) Final Certification of Genuineness. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(C) Other Means of Proof. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(c) Other Proof. A party may prove an official record--or an entry or lack of an entry in it--by any other method authorized by law.

* * * * *



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Chapter 44 Rule 44. Proving an Official Record

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44.1 COMMENTARY

Rule 44 supplements the methods of authenticating a document enumerated in Article IX of the Federal Rules of Evidence. It does not replace any of those enumerated methods, and is incorporated through the clarifying provision embodied in *Federal Rule of Evidence 901(b)(10)*.

Procedure for Authentication

Subdivision (a) sets forth the procedure to be used for authenticating official records of domestic or foreign governments. A domestic or foreign record may be authenticated either through an official publication of the record or through a copy of the record to which a person listed and certified in the manner prescribed in the Rule has attested to its validity.

Subdivision (b) provides simply that evidence of the absence of an official record to prove the nonexistence of the record may be proved by a written statement, authenticated according to subdivision (a), to that effect. Subdivision (c) states that the methods of authentication listed in the Rule are not intended to supersede any other method of authentication for official records that may be provided for by statute or state law.



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44.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 44.01 -44.07



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44.3 LEADING CASES

Authentication of State Judgment

AMFAC Distrib. Corp. v. Harrelson, 842 F.2d 304 (11th Cir. 1988) (a judgment of a state court that is authenticated in substantial compliance of Rule 44(a) is sufficient to effect the authentication).



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Chapter 44.1 Rule 44.1. Determining Foreign Law

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§ 44.1.syn Synopsis to Chapter 44.1: Rule 44.1. Determining Foreign Law

Scope Rule 44.1. Determining Foreign Law

44.1.1 COMMENTARY

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TITLE VI. TRIALS

Chapter 44.1 Rule 44.1. Determining Foreign Law

1-44.1 Federal Civil Procedure Litigation Manual Rule 44.1. Determining Foreign Law

Rule 44.1. Determining Foreign Law

Rule 44.1 reads as follows:

Rule 44.1. Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

* * * * *



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44.1.1 COMMENTARY

Rule 44.1 was added in 1966 to provide for the determination of foreign law. However, judicial notice of law, as opposed to judicial notice of facts, is expressly beyond the scope of the Federal Rules of Evidence. The Rule allows the court to consider any source or material, which need not be admissible at trial, in determining the proper interpretation of foreign law. This determination is reviewed on appeal as a ruling on a question of law.

Belated Notice of Reliance of Foreign Law

Texas Int'l Magnetics, Inc. v. Auriga-Aurex, Inc. (In re Magnetic Audiotape Antitrust Litig.), 334 F.3d 204 (2d Cir. 2003) (foreign corporation's belated notice of its intended reliance on foreign law, and its failure to provide foreign law, precluded appellate review and barred corporation from asserting foreign bankruptcy proceedings as defense)

Notice of Intent to Raise Issue of Foreign Law

Parties who intend to raise issues of foreign law are required to so notify both the court and the opposing parties. This notification may be done in the pleadings or in some other written paper filed with the court. This notice should provide the court with sufficient time to make any required determinations of foreign law.



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TITLE VI. TRIALS

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44.1.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 44.1.01 -44.1.05

Weissenberger's Federal Evidence § 201.2



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44.1.3 LEADING CASES

Constructive Notice of Foreign Law

Melea, Ltd. v. Jawer SA, 511 F.3d 1060 (1st Cir. 2007) (pursuant to Rule 44.1, corporation received fair notice of issue of foreign law because opposing corporation repeatedly argued before district court that foreign law governed dispute, fact taken into account in district court's opinion).

Independent Research to Determine Foreign Law

Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212 (3d Cir. 2006) (determinations of the content of foreign law are questions of law reviewed de novo, and the court of appeals may consider material not considered in the lower court; Rule 44.1 provides courts with broad authority to conduct their own independent research to determine foreign law).

Intent to Raise Foreign Law

Clarkson Co. v. Shaheen, 660 F.2d 506 (2d Cir. 1981) (New York state law, and not foreign law, was applied because neither party had notified anyone of their intention to raise issues of foreign law and both parties acted as if the state law applied).

Review of Determination of Foreign Law

Reebok Int'l, Ltd. v. McLaughlin, 49 F.3d 1387 (9th Cir. 1995) (determination of foreign law is reviewed on appeal as a ruling on a question of law).



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TITLE VI. TRIALS
Chapter 45 Rule 45. Subpoena

1-45 Federal Civil Procedure Litigation Manual Rule 45. Subpoena

Rule 45. Subpoena

Rule 45 reads as follows:

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements--In General. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(B) Command to Attend a Deposition--Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued from Which Court. A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) Issued by Whom. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.

(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Service in the United States. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) Service in a Foreign Country. *28 U.S.C. § 1783* governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises--or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

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TITLE VI. TRIALS

Chapter 45 Rule 45. Subpoena

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45.1 COMMENTARY

The procedures for issuing, serving, and responding to a subpoena are detailed in Rule 45. Subpoenas are usually issued to persons who are not parties in an action, and they direct those persons to attend depositions, provide trial testimony, produce certain kinds of discoverable documents, provide access to electronically stored information, and other kinds of actions necessary for the disposition of a civil action. The contents of Rule 45 are similar to those of and are related to a number of other Rules, most notably Rules 26, 30, 34, and 37, which relate to discovery. The Rule was reorganized and amended in 1991 to clarify questions concerning a subpoena *duces tecum* and the protection of persons subject to subpoenas which had arisen under the prior version of the Rule. Significant amendments were also made in 2006 to conform the provisions in the Rule to changes in other Rules relating to the discovery of electronically stored information. The Rule was further re-styled in 2007 in conjunction with the comprehensive reorganization and simplification of the Rules.

Form and Issuance of Subpoenas

Subpoenas may be issued by attorneys as officers of the court. Subdivision (a)(3) states that blank subpoenas shall be issued to parties by the clerk, who shall sign the subpoena. Attorneys or parties are then responsible for completing the contents of the subpoena, which must include the items listed in (a)(1)(A)(i)-(iii), and, if issued by an attorney, must be signed by the attorney. Subdivision (a)(1)(A)(iv) requires that the full text of subdivisions (c) and (d) be included in the subpoena to alert the persons to whom the subpoena is directed of their rights and duties under Rule 45. Attorneys are responsible for any possible abuse of a subpoena, which is actionable as a tort.

Subdivision (a)(1)(B) was added in 2005 to guarantee that non-party deponents are notified of the method for recording deposition testimony. Under the former version of the Rule, non-party deponents were not required to be notified of the method of recording unless they were so informed by a party or another party specified an additional method of recording under Rule 30(b)(3). The current version of the Rule now requires that the method of recording be stated directly in the subpoena. Although a non-party deponent may not refuse to attend a deposition because of an objection to the method of recording a deposition, the notice of the recording method stated in the subpoena provides non-party deponents with an opportunity to make a motion for a protective order under Rule 26(c) if concerns are raised about the method of recording the deposition.

Subdivision (a)(1)(C) was amended in 2006 to provide that a subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2)(B) was amended in parallel fashion, as was Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) was amended to provide that if the subpoena does not specify the form or forms for electronically stored information the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable.

Service of and Relief from Subpoenas

Subdivision (b)(2) specifies where a subpoena may be served. Under subdivision (a)(2), a subpoena for a deposition or production of documents must still be issued from a district court in the district in which the deposition or production will take place. Relief from such a subpoena is likewise appropriate in the district in which the proposed deposition or production of documents would have occurred.

Illustration 45-1

Samantha is the plaintiff in a toxic tort action against Olivia's Oil Refining. Samantha wishes to depose Wally, a former employee of Olivia's Oil Refining. Wally resides in Orange County, which is located 150 miles from the district in which Samantha commenced her action, and Wally indicates that a deposition near his place of business would be most convenient for him. Rule 45 authorizes Samantha's attorney to serve the subpoena upon Wally. However, the subpoena must be issued from a trial court that is located within the judicial district of Orange County.

Production of Documents

Rule 45 no longer requires the deposition of the custodian who is in control of discoverable material. The production of such material may be compelled independent of any deposition. Similarly, the Rule authorizes a subpoena to be issued to compel the inspection of premises in the possession of a non-party. Although Rule 37 authorizes the inspection of premises in the possession of parties, no analogous provision had previously existed for the inspection of the premises of non-parties.

Illustration 45-2

Assume on the facts of Illustration 45-1 that Samantha merely wants to acquire copies of Wally's notes taken while he was an employee. Under Rule 45(a)(1)(D), Samantha need not depose Wally to acquire these documents, and may simply serve upon Wally a subpoena containing a request for the production of documents.

Subdivision (a)(1)(A)(iii) subjects non-parties to the same rules governing parties with respect to materials within the non-party's control that are not located within the district in which the subpoena was served. Non-parties are thus required to produce such materials even if the materials are located in a different district.

Illustration 45-3

Assume on the facts of Illustration 45-2 that Wally's notes are stored at his summer home, which is located in a different judicial district than the one in which Wally resides. Under Rule 45(a)(1)(A)(iii), Wally must produce the documents, though Samantha will generally be required to pay expenses associated with the procurement of the notes under Rule 45(c)(2)(B)(ii).

Service of Subpoenas

Subdivision (b)(1) provides that a subpoena may be served by anyone 18 years or older that is not a party in the action. Service of the subpoena must be made personally, and service is not complete until the attendance fees and mileage allowances have been tendered. Service of prior notice under Rule 5(b) was added in 1991 to afford other parties the opportunity to object to the production or inspection or to make demands for additional documents. This provision was not needed before 1991 because depositions, which are already subject to the notice requirements of Rule 30 and 31, were required in production or inspection demands. As these demands are now allowed to be made independent of an underlying deposition, a separate notice provision is required. Subdivisions (b)(2)-(3) and (b)(4) specify the service and proof of service requirements of subpoenas, respectively.

Illustration 45-4

Assume on the facts of Illustration 45-1 that Samantha also wishes to subpoena business records that are in the possession of Amy, the accountant for Olivia's Oil Refining. Under Rule 45(b), Samantha must serve Olivia's Oil Refining with prior notice of her intention to subpoena business records from Amy. If no objections are raised, Samantha may employ anyone 18 years or older who is not a party of the action to serve the subpoena upon Amy.

Protection of Persons Subject to Subpoenas

Subdivision (c) was added in 1991 to state the rights of witnesses under the Rule. Subdivision (c)(1) articulates the expanded liability of the attorney correlative to the increased powers of attorneys to issue subpoenas under subdivision (a). The Rule specifies that an attorney may be responsible for lost earnings of a non-party as a result of misuse of a subpoena. In this respect, the rule augments the general statements of attorney responsibility articulated in Rule 26(g)(1)(B)(ii)-(iii).

Subdivision (c)(2)(A) reiterates the directive of subdivision (a)(1)(C) that a person who is the subject of a production or inspection request need not be present at the place of production or inspection unless that person is also directed to appear at a deposition, albeit in slightly different terms. The subdivision also increases the time within which a person may respond to a subpoena from 10 days to 14 days. Subdivision (c)(2)(B)(ii) also protects non-parties from significant expense in complying with production requests.

Subdivision (c)(3) lists the grounds under which a subpoena may be quashed or modified by a district court. It distinguishes those circumstances in which modification or quashing is mandatory from those in which the court has discretion. Grounds requiring modification or quashing include the failure to allow a reasonable time to comply with the subpoena, requested disclosure of privileged information, and subjecting the person to whom the subpoena was directed to an undue burden. Although these grounds require court intervention, the determination of whether those grounds have been satisfied is within the discretion of the court, so persons objecting to subpoenas on those grounds should not believe that modification or quashing of a subpoena will be automatic.

Subdivision (c)(3)(A)(ii) states an additional ground for required modification or quashing of a subpoena that is more objectively determined: the maximum distance a non-party can be required to travel to satisfy the demands of a subpoena is 100 miles from the person's residence or principal place of business, subject to the exception for required attendance at a trial. A non-party may be compelled to travel and give testimony at a trial if that person is located anywhere within the state in which the trial is held, unless the person can demonstrate that such a demand will result in substantial expense. If this demonstration is made, the court may modify or quash the subpoena. Alternatively, if the party relying on the person's testimony can show that there is a substantial need for the testimony, the court may order the person to attend the trial under conditions that it may specify, such as the reimbursement of the substantial expenses incurred by the testifying non-party by the party relying on the testimony.

An objection may also be made to the form or forms of electronically stored information requested in a subpoena. Any order requiring compliance with the request must "protect" non-parties from significant expense resulting from providing the information in requested forms. In other words, an order may not be issued if compliance would result in significant expense.

Duties in Responding to a Subpoena

Subdivision (d) was also added by the 1991 amendments to the Rule. It extends to non-parties the duty to organize and arrange documents that are the subject of a subpoena imposed on parties by Rule 34(b). With respect to electronically stored information, a person responding to a subpoena must provide the information or data in a "reasonably usable" form. Rule 34 imposes an obligation on parties to "translate" such information into a "reasonably usable" form, and it is not clear whether the failure to include the word in the analogous provision in Rule 45 implies that persons responding to subpoenas do not have such an obligation. It seems clear that a person responding to a subpoena may have some obligation to provide some amount of technical support or other assistance to allow the requesting party to access the information, but the obligation imposed on parties responding to production requests under Rule 34 would seemingly go further than that imposed on non-parties under Rule 45.

The Rule also imposes a similar duty on non-parties to describe the nature of the documents that are withheld for reasons of privilege or work product doctrine that is imposed on parties under Rule 26(b)(5)(a)(ii). The description must be sufficient to allow the party seeking access to the documents to challenge the claim of privilege or work product doctrine before the court. A person who desires to assert a privilege or work product doctrine claim with regard to documents must also disclose that claim promptly to the attorney issuing the subpoena.

Illustration 45-5

Blake commences a breach of contract action against Patricia, alleging that Patricia misrepresented the quality of the contract goods in question. Blake serves a subpoena upon Eve, a former business associate of Patricia, requesting that Eve provide Blake with any and all documents that address the quality of the goods produced by Patricia. Eve refuses to comply with the subpoena, claiming that the documents constitute privileged information. Under Rule 45, Eve must specifically state the documents being withheld under the claim of privilege. Though not a party to the action, Eve must nonetheless specify the grounds for her claim of privilege.

Contempt for Failure to Obey a Subpoena

Subdivision (e) states that a person who fails to obey the terms of a subpoena without adequate excuse may be held in contempt of the court from which the subpoena was issued. The term "adequate excuse" is not defined in the Rule, but the advisory committee's note states that contempt should be applied in a sparing manner when the non-party witness has been overborne by a party or attorney. For example, the Rule expressly precludes contempt when a subpoena commands a non-party to travel more than 100 miles from the person's residence or principal place of business to attend a deposition or to produce documents in violation of subdivision (c)(3)(A)(ii). Nonetheless, a person may be held in contempt of a subpoena that overreaches its authority in other respects under Rule 45.



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45.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 45.01 -45.04

James & Hazard, Civil Procedure § 5.3

Friedenthal, Civil Procedure § 7.11

Teply & Whitten, Civil Procedure 736-741



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Appearance in Response to Subpoena Duces Tecum Waives Summons Requirement

Bollore SA v. Import Warehouse, 448 F.3d 317 (5th Cir. 2006) (although persons were not properly served with summons as required under Rule 4, having been instead served only with a subpoena duces tecum requiring that they produce documents, those persons waived their right to contest the issue by making an appearance and by failing to assign issue as error on appeal).

Attendance and Mileage Fees Required

CF & I Steel Corp. v. Mitsui & Co., 713 F.2d 494 (9th Cir. 1983) (service of subpoena is not effected when attendance fees and mileage fees are not tendered with the subpoena).

Documents to Serve as Basis for Testimony

In re American Tobacco Co., 880 F.2d 1520 (2d Cir. 1989) (a subpoena to compel production of data that would serve as the underlying basis for expert testimony at trial was not quashed).

Documents Under Claim of Privilege

Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422 (Fed. Cir. 1993) (a party issuing a subpoena requesting production of documents where the documents were withheld under a claim of privilege must demonstrate a need for the information requested).

Ex Parte Motion to Quash

Reinders Bros., Inc. v. Rain Bird E. Sales Corp., 627 F.2d 44 (7th Cir. 1980) (motion to quash a subpoena *ex parte* was upheld).

Failure to Respond to Subpoena; Contempt

Fremont Energy Corp. v. Seattle Post Intelligencer, 688 F.2d 1285 (9th Cir. 1982) (person that is the subject of a subpoena must be provided with notice and an opportunity to demonstrate adequate excuse before contempt sanctions can be levied).

No Rule Governs Subpoena

Flowers v. First Hawaiian Bank, 295 F.3d 966 (9th Cir. 2002) (where no rule governs the issuance of a subpoena, it cannot be considered as having been issued "under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts" for purpose of examining applicability of the Right to Financial Privacy Act (RFPA)).

Quash; Related Action

Heidelberg Ams., Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 38 (1st Cir. 2003) (where a nonparty is served with a subpoena encompassing a decade's worth of materials and asking for all documents received, reviewed, or generated by nonparties relating to any type of business affiliation with the plaintiff in unrelated suit, the district court did not abuse its discretion in quashing subpoena under Rule 45(c)(3) (now Rule 45(c)(3)(A)(iv)); the materials sought were not probative of a threshold issue and the burden on the nonparties was significant).

Subpoena Duces Tecum; Generally

Kendrick v. Heckler, 778 F.2d 253 (5th Cir. 1985) (a motion for an order to produce documents subject to a subpoena may be made before, during, or after the deposition of the person in question).



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§ 46.syn Synopsis to Chapter 46: Rule 46. Objecting to a Ruling or Order

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46.1 COMMENTARY

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1-46 Federal Civil Procedure Litigation Manual Rule 46. Objecting to a Ruling or Order

Rule 46. Objecting to a Ruling or Order

Rule 46 reads as follows:

Rule 46. Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

* * * * *



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46.1 COMMENTARY

Rule 46 eliminates the common law requirement of formal exceptions to rulings or orders of the court to preserve the issue for appeal. However, a party must still object to a ruling or order in a manner sufficient to indicate to the district judge the party's position on the matter. To make a sufficient objection, the Rule requires either that a party make known to the court the action the party desires for the court to take or to object to the action or order and state the grounds for the objection. The Rule further provides that a party does not waive any objection to a ruling or order for any purposes when the party had no opportunity to object to the ruling or order. In addition to preserving issues for purposes of appeal, objections should be used to preserve issues to be considered on motions for a new trial to the district court.

Comparison to Federal Rules of Evidence

Rule 46 should be compared to *Federal Rule of Evidence 103(a)*, which states that error may not be predicated on a ruling unless it affects a substantial right of a party and, in the case of the admission of evidence, a timely objection or motion to strike appears of record stating the specific ground of objection or is apparent from the context, or, in the case of the exclusion of evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context. The two Rules are intended to be complementary, such that an objection that does not satisfy the test of one Rule should not satisfy that of the other.



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46.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 46.01 -46.03

Weissenberger's Federal Evidence §§ 103.1 -.2



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46.3 LEADING CASES

Actions Demonstrating Objection

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988) (party substantially complied with Rule 46 when the actions of his attorney made the district judge aware of their position on the matter, though the specific grounds for an objection were not articulated in the record).

Failure to Object

Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc., 984 F.2d 1118 (11th Cir. 1993) (party who did not object to prejudicial statements in opposing party's closing statement is not entitled to a new trial on that basis).

Cooper v. Dyke, 814 F.2d 941 (4th Cir. 1987) (failure to object to unusual jury deliberations did not justify the ordering of a new trial).

Formal Exception Unnecessary

Curreri v. International Bhd. of Teamsters, 722 F.2d 6 (1st Cir. 1983) (formal exception to rulings of the court are unnecessary; where the party made it clear that its position conflicted with that of the court, the issue was preserved for appeal).

Objections Presented in Brief

Marlin v. Moody Nat'l Bank N.A., 533 F.3d 374 (5th Cir. 2008) (in response to fees-and-costs statements, plaintiffs objected to imposition of sanctions and they were not required to have done more; they had no opportunity to object to sanctions when, in its order awarding summary judgment, district court, without notice, ruled, sua sponte, that they would be imposed).

Objections to Sanction Award Sufficient When Made

Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981) (party who failed to object to court's exclusion of juror testimony nonetheless preserved the issue for appeal by making its position known to the district judge in briefs filed with the motions).



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1-47 Federal Civil Procedure Litigation Manual Rule 47. Selecting Jurors

Rule 47. Selecting Jurors

Rule 47 reads as follows:

Rule 47. Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

* * * * *



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Chapter 47 Rule 47. Selecting Jurors

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47.1 COMMENTARY

Rule 47 governs the selection of jurors. The Rule is keyed to 28 U.S.C. § 1870, which covers both challenges of jurors for cause and peremptory challenges. Rule 47 is paired with Rule 48, which governs the number of jurors. The 1991 amendments to the two Rules abolished the institution of the alternate juror, and replaced it with a jury of a flexible number.

Voir Dire by the Parties or by the Court

Under subdivision (a), the district judge has a vast amount of discretion to decide upon the form, scope, and content of voir dire examinations. Additionally, the court has the discretion to conduct voir dire itself, or it may allow the attorneys or their parties to conduct the examination. If the court chooses to conduct voir dire itself, the Rule appears to require the court to allow the parties to submit proposed questions or to supplement the examination with additional questions. The court may refuse to ask proposed questions of prospective jurors, but the court should not be unreasonable in its refusal.

Peremptory Challenges

Subdivision (b) allows the parties the number of peremptory challenges provided for in 28 U.S.C. § 1870, which is currently three. Peremptory challenges have drawn the attention of the Supreme Court in the last decade, as at least five cases on the issue have been the subject of Supreme Court opinion. In *Batson v. Kentucky*, [476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)], the Supreme Court held that peremptory challenges may not be exercised by the State in a criminal case on the basis of race. The ban on racially discriminatory peremptory challenges has been applied to defendants in criminal cases and to all parties in civil actions. In *J.E.B. v. Alabama ex rel. T.B.*, [511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)], the holding of *Batson* was extended to forbid peremptory challenges on the basis of sex in selected cases.

Challenges for Cause

Challenges of jurors for cause are not mentioned in Rule 47 but are likewise governed by 28 U.S.C. § 1870. Dismissals of prospective jurors for cause are discretionary, and will not be overturned on appeal absent a clear abuse of discretion.

Illustration 47-1

Grounds for challenging jurors for cause include bias, relationships with the parties or witnesses, or employment in certain occupations.

Juror Excusal

Subdivision (c) states that the court may excuse a juror at any time for good cause. Excusal of a juror is within the sound discretion of the court, and is not, by itself, grounds for a mistrial.

Illustration 47-2

Examples of good cause include sickness or family emergency, as well as juror misconduct.



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47.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 47.01 -47.43

James & Hazard, Civil Procedure § 8.13

Friedenthal, Civil Procedure § 11.10

Teply & Whitten, Civil Procedure 798-799



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47.3 LEADING CASES

Peremptory Challenges; Demonstration of Pretext

Davidson v. Harris, 30 F.3d 963 (8th Cir. 1994) (a party can show that the reason proffered for the exercise of peremptory challenge of jurors was a pretext by demonstrating that retained jurors shared the characteristic that was the basis for the proffered reason).

Peremptory Challenges; Race-Based

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) (parties in a civil action may not exercise peremptory challenges on the basis of race).

Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (extending the principle in *Batson* to include claims by a white criminal defendant that the State was deliberately excluding black prospective jurors).

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (racially motivated peremptory challenges may not be exercised by the State in a criminal case).

Peremptory Challenges; Sex-Based

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (peremptory challenges may not be exercised on the basis of sex).

Peremptory Challenges; Superstition

Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (an explanation for the exercise of a peremptory challenge will be accepted if it is not racially motivated, even though it may be characterized as "silly or superstitious").

Right to Voir Dire

Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980) (defendant was denied the opportunity to ask reasonable questions of perspective jurors by the district judge and was thus denied the defendant's *Sixth Amendment* right to an impartial jury).



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Rule 48. Number of Jurors; Verdict

Rule 48 reads as follows:

Rule 48. Number of Jurors; Verdict

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

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48.1 COMMENTARY

Rule 48 is paired with Rule 47, which governs the selection of jurors. The 1991 amendments to the two Rules abolished the institution of the alternate juror and replaced it with a jury of a flexible number. Rule 48 now provides for juries ranging in number from six to twelve and allows juries of fewer than six members in exceptional circumstances if the parties agree. Additionally, the Rule states that all verdicts in civil trials shall be by unanimous vote unless the parties agree otherwise.

Under Rule 47(c), jurors may be excused by the district court for cause. Prior to the adoption of the 1991 amendments, the excused juror would be replaced by an alternate juror to maintain the requisite number of jurors, or if no alternate juror were available, a mistrial would be declared. Under the present version, the excusal of a juror for cause does not, in and of itself, justify a mistrial. As a jury may be comprised of any number of jurors from six to twelve, the excusal of a juror will rarely bring the number of members on the jury below six. Accordingly, juries of more than six members are recommended.

Juries of fewer than twelve members are not required, though the court may insist on a jury of less than twelve. Contrary to the former version of Rule 47, which stated that alternate jurors were not permitted to participate in the deliberations unless called upon to replace a member of the jury, all members of a jury are now required to participate in the verdict. As the alternate juror has been abolished and fewer than twelve members of a jury may constitute a lawful jury, there is no conflict in this provision.

A jury may be polled concerning its verdict under subdivision (c), which was added in 2009. Polling is mandatory on request of a party and may be ordered by the court *sua sponte*. If the poll does not reveal the number of votes required for a verdict (usually unanimous, but occasionally less by stipulation of the parties), the judge may either direct further deliberations or order a new trial.



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9 *Moore's Federal Practice* §§ 48.01 -48.05

James & Hazard, Civil Procedure § 8.12

Friedenthal, Civil Procedure § 11.11

Teply & Whitten, Civil Procedure 800 n.19



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48.3 LEADING CASES

Mistrial Due to Juror Disagreement

Grossheim v. Freightliner Corp., 974 F.2d 745 (6th Cir. 1992) (a mistrial was properly declared where a juror stated that she disagreed with the verdict even though she assented to the vote during the jury's deliberations).

Unanimity Required on Ultimate Issues

Jazzabi v. Allstate Ins. Co., 278 F.3d 979 (9th Cir. 2002) (although civil juries need not reach unanimous agreement on all the preliminary factual issues underlying the verdict, they must render unanimous verdicts on the ultimate issues of a given case, and not just the final verdict itself).

Unanimous Verdict Requirement

Montiel v. City of Los Angeles, 2 F.3d 335 (9th Cir. 1993) (court was within its discretion in requiring unanimous jury of twelve, even though it made it more difficult for the plaintiff to prevail).

Bledsoe v. Garcia, 742 F.2d 1237 (10th Cir. 1984) (the judge should instruct the jury that a unanimous verdict is required if the parties do not agree otherwise).



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Rule 49. Special Verdict; General Verdict and Questions

Rule 49 reads as follows:

Rule 49. Special Verdict; General Verdict and Questions

(a) Special Verdict.

(1) In General. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence;
or

(C) using any other method that the court considers appropriate.

(2) Instructions. The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) Issues Not Submitted. A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict with Answers to Written Questions.

(1) In General. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) Verdict and Answers Consistent. When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) Answers Inconsistent with the Verdict. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) Answers Inconsistent with Each Other and the Verdict. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

* * * * *



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49.1 COMMENTARY

Ordinarily, the jury returns a verdict that is in the form of a general verdict. A general verdict is simply a finding for one party or the other, accompanied by dollar amounts to which the parties are entitled, if any. Interestingly, general verdicts are not specifically provided for in the Rules. Instead, they are implied in Rules 47-51. It is likewise implied that judgments on general verdicts must be entered by the court, unless the court grants a motion for judgment as a matter of law under Rule 50 or a motion for a new trial under Rule 59.

Special Verdicts Generally

Rule 49 was re-formatted in 2007 as part of the comprehensive restyling amendments. As a result, the operation of Rule 49 is much easier to discern. Under the Rule, two different kinds of verdicts are authorized: special verdicts and general verdicts with answers to written questions, frequently referred to as "interrogatories." A special verdict under Rule 49(a) simply requires the jury to determine specific questions of fact without making a determination as to which party will prevail. Under Rule 49(a), the court is not authorized to enter a judgment solely on a special verdict; the court must state its conclusions of law based upon the findings of fact of the special verdict and enter a judgment therefrom according to Rules 52(a) and 58.

Illustration 49-1

Gloria sues Derek for personal injuries suffered in a boating accident. At trial, the jury renders its verdict on a special verdict form, responding affirmatively to the sole question of whether Derek operated the boat in a negligent fashion. Under Rule 49(a), the court must state separately its conclusions of law based upon the jury's finding of fact and enter a judgment accordingly. The judgment is then appealable as having been made by the court.

A general verdict with answers to written questions, or accompanied by interrogatories, is actually a request for the jury to determine the facts, apply the law, and make a decision on the ultimate question of liability. The interrogatories feature simply acts as a check on the propriety and accuracy of the general verdict by determining the fidelity of the general verdict with the answers to the interrogatories. Thus, the entry of judgment is authorized in response to a general verdict accompanied by interrogatories in certain situations.

Illustration 49-2

Assume on the facts of Illustration 49-1 that the jury instead issues a general verdict accompanied by interrogatories. In its verdict, the jury answers specific questions concerning whether Derek operated the boat in a negligent fashion, whether Derek's negligence caused Gloria's injuries, and whether Gloria's damage claim appropriately compensates her for her injuries. If the jury's answers to the interrogatories are consistent with each other and with the general verdict, the judge must enter judgment in accordance with the general verdict.

Under subdivision (a)(1), a special verdict may be ordered by the court. Although the parties may request that a special verdict be used, the decision is within the complete discretion of the court. The judge is required to submit the factual issues to be determined by the jury in a special verdict in an appropriate form, which often is in writing, and instruct the jury on their limited role. Subdivisions (a)(1)(A)-(B) provide examples of proper methods of submitting special verdicts to the jury, though the court retains the discretion under subdivision (a)(1)(C) to use another method. To avoid confusion on whether the submission of written questions to the jury constitutes a request for a special verdict or one for a general verdict accompanied by interrogatories, the court should so specify to the parties.

Waiver of Jury Trial of Issues in Special Verdicts

The jury is not required to decide every disputed issue of fact in an action. However, under subdivision (a)(3), a party who fails to demand that a disputed issue of fact be submitted to the jury waives the right to have that issue tried by a jury, and cannot raise the issue for the first time on appeal. Thus, it is important that attorneys be apprised of the contents of the court's instructions and form of the questions submitted to the jury. The court may make findings of fact of any issue not submitted to the jury; however, these supplementary findings should be consistent with the jury's findings. Factual issues that are determined by neither the jury nor the court are deemed to have been made in accordance with the judgment ultimately entered by the court.

Illustration 49-3

Assume on the facts of Illustration 49-1 that the court does not charge the jury with the decision concerning Gloria's contributory negligence. By not requesting that the court include the issue in the verdict form, the parties have waived their right to have the issue tried by the jury. The court may make findings of fact concerning the issue of contributory negligence. However, these findings must be consistent with the jury's verdict. Thus, if the jury finds that Derek is solely responsible for Gloria's injuries, the court cannot reduce the degree of Derek's liability by finding that Gloria was contributory negligent. If neither the jury nor the court issues findings of facts concerning Gloria's contributory negligence, the issue will be deemed to have been made in accordance with the judgment entered by the court. Thus, if the jury finds that Derek is entirely liable for Gloria's injuries and the jury and court are silent on the issue of contributory negligence, factual issues concerning contributory negligence are considered to have been resolved in favor of Gloria.

Jury Interrogatories; Consistency With General Verdict

Subdivision (b) authorizes the submission of interrogatories to the jury when a general verdict is to be returned. The interrogatories must be in written form, and the judge is directed to instruct the jury both on their duty to return a general verdict and to provide responses to the written interrogatories as indicated in subdivision (b)(1). As the jury is making a determination on the ultimate question of liability between the parties in its general verdict form, Rule 49(b)(2) requires the entry of judgment on the general verdict if the answers to the interrogatories are consistent with one another and with the general verdict.

If the answers to the interrogatories are consistent with one another but one or more of the answers is inconsistent with the general verdict, the court has three options, set forth as subdivisions (b)(3)(A)-(C). Under subdivision (b)(3)(A), the court may enter a judgment contrary to that indicated by the general verdict but in accord with all of the answers provided to the interrogatories. Alternately, under subdivision (b)(3)(B), the judge may resubmit the general verdict and interrogatories to the jury for further consideration and with instructions appropriate under the circumstances. The court may also in its discretion order a new trial under subdivision (b)(3)(C), although this option should rarely be utilized when the less drastic measure of resubmission of the general verdict and interrogatories to the jury has been taken.

Illustration 49-4

In a civil action to recover damages for intentional infliction of emotional distress caused by an accident at Howie's Deep Pockets Amusement Park, the jury returns a general verdict with interrogatories which awards \$750,000 to Caroline. However, the jury's answers to the interrogatories reveal that the jury concludes that Howie's Deep Pockets Amusement Park did not intentionally cause the accident and that Caroline's emotional distress was not proximately caused by the accident at Howie's Amusement Park. Under Rule 49(b)(3)(A), the court may enter judgment in favor of Howie's Deep Pockets Amusement Park despite the general verdict by the jury. Alternatively, the court may resubmit the general verdict with interrogatories to the jury for further consideration or order a new trial.

If one or more of the answers to the interrogatories is inconsistent with the others and also inconsistent with the verdict, the court should ordinarily resubmit the general verdict and the interrogatories to the jury for further consideration and with instructions appropriate under the circumstances, as indicated in subdivision (b)(4). The court may order a new trial, but the same note of caution discussed in the preceding paragraph applies with full force in this situation as well. The court may not enter a judgment, and an objection of a party is not necessary to preclude an entry of judgment in this situation. Resubmission of the general verdict and the interrogatories with appropriate instructions is usually the recommended course of action.

Illustration 49-5

Assume on the facts of Illustration 49-4 that the jury's answers to the interrogatories indicate that Howie's Deep Pockets Amusement Park did not intentionally cause the accident, but that the accident was the proximate cause of Caroline's emotional distress. The jury also finds that Caroline does not suffer from any unreasonable emotional distress, but nonetheless awards her the sum of \$750,000. The court should resubmit the general verdict and interrogatories to the jury or order a new trial under subdivision (b)(4).

Findings of fact in special verdicts must be consistent with one another. Because subdivision (a) does not provide for the resubmission of special verdicts to the jury, a mistrial should be declared when the findings cannot be reconciled.



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49.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 49.01 -49.20

James & Hazard, Civil Procedure § 7.15

Friedenthal, Civil Procedure § 12.1

Teply & Whitten, Civil Procedure 849-851



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49.3 LEADING CASES

Court's Determination of Issues Not Submitted to Jury

Goeken v. Kay, 751 F.2d 469 (1st Cir. 1985) (the court may determine issues of fact in the trial that were not submitted to the jury in a special verdict).

Failure to Object to Form of Special Verdict

Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492 (1st Cir. 1994) (a party's failure to object to an issue being omitted from a special verdict waives the right to have the issue tried before a jury).

Inconsistent Special Verdict; Procedure

Duk v. MGM Grand Hotel, Inc., 320 F.3d 1052 (9th Cir. 2003) (where a jury's special verdict was inconsistent, the district court properly resubmitted the verdict for clarification; where two verdicts were reconcilable, the district court abuses its discretion when it orders a new trial).

New Trial; Jury Inconsistency

Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994) (new trial was ordered when the jury inconsistently found that the defendant's actions were both reasonable and with malice).

Thomas v. Stalter, 20 F.3d 298 (7th Cir. 1994) (new trial was ordered when the jury returned a general verdict for the plaintiff but found that there were damages).

Notification to Parties of Intent to Use Interrogatories

Brown v. Tennessee Gas Pipeline Co., 623 F.2d 450 (6th Cir. 1980) (district court could inform the parties that it was submitting interrogatories to the jury after the attorneys had finished their closing arguments).

Objections to Jury's Findings and Judgment Distinguished

Denny v. Ford Motor Co., 42 F.3d 106 (2d Cir. 1994) (a party's failure to object to the jury's findings is not a waiver of an objection to the judgment).

Requirement of Consistency

Wilks v. Reyes, 5 F.3d 412 (9th Cir. 1993) (if there is a view of the answers to the interrogatories and the general verdict that is conceivably consistent, judgment must be entered on the verdict; only very inconsistent answers to interrogatories with the general verdict can justify an entry of judgment contrary to that of the general verdict).

Resubmission of Case to Jury

Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983) (the court can order the resubmission of the general verdict and the interrogatories to the jury if the answers are inconsistent with the general verdict).

"Special Verdicts" Defined

Jarvis v. Ford Motor Co., 283 F.3d 33 (2d Cir. 2002) (where the jury was instructed to apply legal principles and assign liability, the answers to the questions submitted to the jury were not "special verdicts," despite the use of those words in the title appended to the form, and thus Rule of Civil Procedure on special verdicts did not apply in determining timeliness of objection to allegedly inconsistent verdicts).

Special Verdicts; Generally

Latuso v. Uniroyal, Inc., 783 F.2d 1241 (5th Cir. 1986) (a party who does not object to the omission of an issue in a special verdict cannot raise the issue for the first time on appeal).

Taherzadeh v. Clements, 781 F.2d 1093 (5th Cir. 1986) (if a party demands that a factual issue be presented to the jury in a special verdict, the court cannot determine the issue).

Special Verdict Not Required

Garwood v. International Paper Co., 666 F.2d 217 (5th Cir. 1982) (district court is not required to use a special verdict when the parties agree to the procedure).

Waiver of Issues Submitted to Jury

Austin-Westshore Constr. Co. v. Federated Dep't Stores, Inc., 934 F.2d 1217 (11th Cir. 1991) (the grant of a motion for judgment as a matter of law may be based only on issues raised before the close of the evidence; as the motion was made after the general verdict with interrogatories was returned, it was waived on all issues submitted to the jury).



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TITLE VI. TRIALS

Chapter 50 Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

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§ 50.syn Synopsis to Chapter 50: Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

Scope Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

50.1 COMMENTARY

50.2 ADDITIONAL AUTHORITY

50.3 LEADING CASES



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1-50 Federal Civil Procedure Litigation Manual Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

Rule 50 reads as follows:

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for

1-50 Federal Civil Procedure Litigation Manual Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

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TITLE VI. TRIALS

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50.1 COMMENTARY

Rule 50 provides for motions analogous to the motions under the common law for a directed verdict and for a judgment notwithstanding the verdict, commonly referred to as a "motion JNOV," representing the Latin name for the motion, *judgment non obstante veredicto*. The 1991 amendments to Rule 50 implement the term "judgment as a matter of law" to describe these motions, but they are often referred to under their common law appellations. The failure to correctly designate a motion for judgment as a matter of law as such should not be fatal to the party making the motion, and courts should treat motions for JNOV or for directed verdicts as if they were brought under Rule 50.

Relationship to Summary Judgment

The advisory committee's note to the 1991 amendments indicates that the employment of the term "judgment as a matter of law" is designed, in part, to call attention to the relationship between Rule 50 and Rule 56, which uses an identical standard for the purpose of determining, in part, whether summary judgment is appropriate. However, this choice to adopt the "judgment as a matter of law" standard to correspond with the identical component of the summary judgment standard may be logically flawed. Rather, motions under Rule 50 are more correctly keyed to the second part of the summary judgment standard--"no genuine issue of material fact exists." As discussed in Chapter 56, the "judgment as a matter of law" component of the standard for summary judgment connects it to a judgment on the pleadings under Rule 12(c), and makes it, in part, a mechanism for determining the legal sufficiency of the pleadings. The "genuine issue" component of the summary judgment standard connects it to motions under Rule 50, and makes it a mechanism for determining the legal insufficiency of the evidence.

This interpretation is reinforced by the further guidance provided in subdivision (a)(1) on the "judgment as a matter of law" standard: "[A] reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." This articulation of the standard is actually quite similar to the "genuine issue" component of the standard for summary judgment, as additional materials outside the pleadings become necessary for this determination under a motion for summary judgment. The articulated standard in subdivision (a)(1) bears no resemblance to the "judgment as a matter of law" component of the summary judgment standard, in which matters outside the pleadings are not even relevant. Thus, terminology such as "judgment when no genuine issue of material fact exists" would be more fitting for motions under Rule 50.

Motion for Judgment as a Matter of Law Before Jury Retires

Rule 50(a)(2) allows a party to move for judgment as a matter of law at any time during a trial, but before the case is submitted to the jury. A party making such a motion must specify the judgment sought as well as the grounds entitling that party to judgment. Such specification is crucial because a court cannot consider post-trial motions for judgment as a matter of law under subdivision (b) on grounds different than those articulated by the party so moving under subdivision (a).

Illustration 50-1

Janice commences a breach of contract action against Tiffany, alleging that Tiffany failed to deliver a parcel of land as required in the contract. After Janice has presented her case to the jury, Tiffany makes a motion for judgment as a matter of law, arguing that, the contract lacked adequate consideration under the applicable law. The court delays decision of Tiffany's motion until after the jury returns its verdict. The jury then finds for Janice. If it only now occurs to Tiffany that the contract is unenforceable because it does not comply with the statute of frauds, she may not make a motion for judgment as a matter of law on those grounds.

Typically, motions for judgment as a matter of law under subdivision (a) are made by the defense at the close of the plaintiff's case-in-chief, and by both parties at the close of all the evidence. In essence, a motion for judgment as a matter of law under subdivision (a) is comparable to a motion for summary judgment under Rule 56, but is raised during the trial and not before it. It is thus appropriate only when a party fails to introduce into evidence any proof on an issue essential to a claim or defense, or under the words of the Rule, when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." As noted above, this standard was articulated as a result of the 1991 amendments to the Rule (and as modified under a 2006 amendment), and it provides guidance not only to a determination of when judgment as a matter of law is appropriate under Rule 50(a), but also when it is appropriate under Rule 50(b)-(d) and Rule 56.

Although judgment as a matter of law under subdivision (a) may be appropriate in some circumstances, it may nonetheless be prudent for the court to forego making a decision on the motion until after the jury returns with its verdict. This action is expressly contemplated by subdivision (b), which provides for post-trial motions for judgment as a matter of law.

Post-Trial Motions Generally

Subdivisions (b) and (d), in conjunction with Rule 52(b) and Rule 59, govern most of the common post-trial motions. The time periods for these motions, which were extended to 28 days in 2009, are measured from the date of entry of judgment to when they must be *filed* with the court. These post-trial motions are typically brought after the trial has ended and the judgment has been entered, though local rules may provide for the filing of these motions before a judgment has been entered. The motions are all interrelated, a fact to which the frequent cross-references in those Rules attest. Nonetheless, the standards of and procedures for motions made under these Rules are different, and should neither be confused by practitioners nor co-mingled by courts.

The 28-day time periods designated in subdivisions (b) and (d) are strict deadlines that may not be extended by the court. Rule 6(b), which provides for the enlargement of time periods, expressly exempts these subdivisions from the operation of its provisions. Significantly, the deadlines in subdivisions (b) and (d) are filing deadlines, not service deadlines, so the 3-day extension of Rule 6(d) is not applicable.

Illustration 50-2

Terry commences an attorney malpractice suit against Jennifer, alleging that Jennifer repeatedly failed to make motions within the correct time period. Terry obtains a judgment against Jennifer for \$45,000, and the judgment is entered the following day, Friday, June 17. Jennifer is notified of the entry of judgment by first-class mail. Under Rule 50(b), Jennifer has 28 days within which to file a motion for judgment as a matter of law or a motion for a new trial, and this period is not subject to the 3-day extension of Rule 6(d). Under Rule 6(a), the 28-day period begins on Saturday, June 18 and expires on Friday, July 15. The deadline may not be extended beyond July 15 by the court for any reason.

Theory of Motions Under Rule 50 and Motions for a New Trial

Behind the convoluted structure of Rule 50 lies a certain procedural elegance based on sound legal theory. These subdivisions create a procedural framework within which motions for judgment as a matter of law and motions for new trials may be made and decided. This framework is derived from the interrelationship between the two motions and the differing standards of appellate review governing actions of the court and jury verdicts. In short, motions for judgment as a matter of law must be made under subdivision (a) if a party desires to so move at any time either before or after judgment because of the general inability of appellate courts to disturb jury verdicts.

Illustration 50-3

Kathryn commences an action against her neighbor, Ted, for private nuisance. Ted is convinced that his defense defeats Kathryn's claim as a matter of law, and he therefore moves for summary judgment before trial. The judge denies the motion and orders discovery proceedings to begin. At trial, Ted does not move for judgment as a matter of law, as he assumes that the judge will simply deny what seems to Ted to be the same motion again. The jury returns a verdict in favor of Kathryn. Under Rule 50, Ted cannot thereafter move for judgment as a matter of law, as he did make such a motion before the matter was submitted to the jury. Ted may, however, move for a new trial under Rule 59.

A party who does not move for judgment as a matter of law before the jury deliberates on the matter simply has no recourse if the jury returns with a verdict that is unfavorable to that party, except for a motion for a new trial. Because jury verdicts produce the finality desired by courts and parties, motions for judgment as a matter of law under subdivision (a) are usually delayed until after the jury returns from its deliberations. Nonetheless, the court's ability to grant a motion for judgment as a matter of law for the verdict-loser after the jury returns the verdict is not impaired because the Rule deems the motion as a renewal of the motion made under subdivision (a), *before* the jury returned from its deliberations.

Additionally, under subdivision (c)(1), when motions for new trials are joined with motions for judgment as a matter of law, the motions for new trials are ruled upon conditionally. If the court's decision on the motion for judgment as a matter of law is disturbed by an appellate court, only then is the conditional decision on the motion for a new trial triggered. This elegant structure preserves the possibility of the finality produced by jury verdicts, while providing the district court the means to enter judgment for a party that is clearly entitled to such judgment as a matter of law. Appellate courts have a correspondingly broad range of options: they may affirm a new trial order by the trial court; they may reverse both a grant of a motion for judgment as a matter of law and a denial of a motion for new trial by the trial court, thereby granting a new trial; or they may reverse a grant of a motion for judgment as a matter of law by the trial court and reinstate the jury verdict.

Illustration 50-4

Assume on the facts of Illustration 50-3 that Ted does, in fact, make a motion for judgment as a matter of law before the court submits the case to the jury. The court delays decision on the motion until after the jury renders its verdict, which is in favor of Kathryn. Ted promptly renews his motion and joins with it a

motion for a new trial. The court denies his motion for judgment as a matter of law but conditionally grants his motion for a new trial. If Ted appeals, the appellate court has three options: it may *affirm* the trial court's denial of judgment as a matter of law, thereby allowing the jury verdict to stand; it may *reverse* the trial court's denial of judgment as a matter of law but *affirm* the trial court's order for a new trial, thereby producing a new trial; or it may *reverse* both the trial court's denial of judgment as a matter of law and the trial court's order for a new trial, thereby granting judgment as a matter of law in favor of Ted.

Motion for Judgment as a Matter of Law After Trial Generally

Subdivision (b) allows a court to delay deciding a motion for judgment as a matter of law under subdivision (a) until after the jury deliberates on the matter. After the matter has been submitted to the jury, the moving party may renew its motion for judgment as a matter of law no later than 28 days after the judgment resulting from the jury verdict, if any, was entered by the clerk, but renewal is not necessary for the court to preserve the motion. Prior to 2006, the Rule technically permitted the court to consider a renewed or delayed motion for judgment as a matter of law under subdivision (b) only if the same motion was made under subdivision (a) at, or very near to, the close of all the evidence. However, the technical requirement of the Rule had long served only as a trap for unwary lawyers, and then only for those few courts that actually enforced it. Accordingly, a 2006 amendment to subdivision (b) provides for the renewal of any motion for judgment as a matter of law made under subdivision (a), regardless of when it was made. The amendment thus conforms the text of the Rule to current practice. Thus, a defendant who moves for judgment as a matter of law at the close of plaintiff's case-in-chief does not preserve the motion for the operation of subdivision (b) unless it so moves again at the close of all the evidence, or unless it puts on no defense at all.

Illustration 50-5

Bernard is a defendant in a libel action brought by Andrea. At the close of Andrea's case, Bernard makes a motion for judgment as a matter of law, arguing that the statement he made was true and thus not libelous. The court denies the motion on the grounds that no evidence of truth has been yet introduced. Bernard then presents his case-in-defense, but forgets to make a motion for judgment as a matter of law at the close of all the evidence. The jury returns a verdict in favor of Andrea. Prior to 2006, Bernard was technically not allowed to renew his motion for judgment as a matter of law, as it will be regarded as a renewal of the motion denied at the close of Andrea's case-in-chief. However, after 2006, the renewal of the motion will be proper.

The moving party may also join with the motion for judgment as a matter of law a motion for a new trial under Rule 59. A motion for a new trial is necessary if the party desires one, as the newly restyled Rule under the 2007 amendments implies that a "renewed" motion for judgment as a matter of law does not include a motion for a new trial, as it specifically permits a party to include a new trial motion in her request. Experienced litigators invariably join motions for judgment as a matter of law with motions for new trials, and the Rule thus anticipates the joinder of those motions in a single request.

It should also be noted that the party originally moving for judgment as a matter of law under subdivision (a) may not desire to renew that motion, in that the jury may have returned a verdict in its favor. However, the verdict-winner may nonetheless desire to make a motion for a new trial conditioned on the adverse party's failure to join such a motion with a motion for judgment as a matter of law. The motion for a new trial by the verdict-winner would thus preserve the opportunity for the court to grant a new trial in lieu of granting the motion for judgment as a matter of law, thereby rendering the jury verdict moot.

Illustration 50-6

Assume on the facts of Illustration 50-5 that both Andrea and Bernard move for judgment as a matter of law during trial. The court delays a decision on their motions until after the jury renders its verdict. The jury then renders a verdict in favor of Andrea. Under these circumstances, Andrea may somewhat paradoxically wish to make a motion for a new trial if Bernard renews his motion for judgment as a matter of law but intentionally does not join with it a motion for a new trial. If this occurred, the trial court may feel that it should either grant Bernard's motion or allow the jury verdict to stand. Andrea's motion for a new trial would thus preserve the opportunity for the court to grant the intermediary action of a new trial.

In deciding a delayed or renewed motion for judgment as a matter of law under subdivision (a) after the action has been submitted to the jury, the court is provided with three options: (1) to allow the judgment resulting from a jury verdict to stand; (2) to order a new trial; or (3) to enter judgment as a matter of law. If the jury does not return a verdict, the court is authorized to order a new trial or enter judgment as a matter of law.

Interestingly, although judgments from special verdicts and answer to questions, or interrogatories, accompanying a general verdict are governed by Rule 49, judgments from general verdicts are not specifically provided for in the Rules. Instead, they are implied in Rules 47-51. If a jury returns a general verdict, it is understood that the court must enter judgment on that verdict, unless the court grants a motion for judgment as a matter of law under Rule 50 or a motion for a new trial under Rule 59.

Operation of Decisions on Motions When Appealed

Subdivisions (c)-(e) detail the operation of decisions on motions for judgment as a matter of law and conditional decisions for motions for new trials if an appeal is taken from the action. Those subdivisions anticipate the four distinct situations resulting from the grant or denial of a motion for judgment as a matter of law and the conditional grant or denial of a motion for a new trial. Although the Rule does not detail the operation of decisions for judgment as a matter of law when no motion for a new trial is made if an appeal is taken from the action, the permutations are greatly simplified in that instance. As has been noted, this situation rarely arises, as experienced litigators routinely join motions for new trials with motions for judgment as a matter of law. If, for some reason, motions for new trials are not made by the parties, the operation of subdivisions (c)-(e) can also be triggered because the court has the authority to order a new trial *sua sponte* under Rule 59(d).

Subdivision (c) directs that, if a motion for judgment as a matter of law is granted, the court should also rule conditionally on the motion for new trial, if one is made, and specify the grounds for conditionally ruling on that motion. Ordinarily, the grant of a motion for a new trial destroys the finality of the judgment, and prevents the immediate appeal of the judgment. However, when such a motion is granted conditionally in conjunction with the grant of a motion for judgment as a matter of law, subdivision (c)(2) states that the grant of a motion for new trial does not preclude the appeal of the judgment. Instead, the grant of the motion for a new trial will be effective if the judgment as a matter of law is reversed or vacated on appeal, unless the appellate court orders otherwise.

Illustration 50-7

Assume on the facts of Illustration 50-6 that, after the jury returns with its verdict for Kathryn, Bernard makes a motion for judgment as a matter of law, which the court grants, and joins with it a motion for a new trial, which the court conditionally grants. On review, the appellate court grants a summary reversal of the trial court's grant of judgment as a matter of law, but does not specify any other action to be taken. At this point, the trial court's conditional grant of Bernard's motion for a new trial will take effect.

If the motion for a new trial is denied conditionally in conjunction with the grant of a motion for judgment as a matter of law, the order denying the motion for a new trial is appealable by the appellee. Denials of motions for new trials are

not normally appealable as such under Rule 59. However, if an appellate court reverses or vacates the judgment as a matter of law, the Rule appears to authorize the appellate court to order a new trial, notwithstanding the denial of that motion in the lower court.

Illustration 50-8

Assume on the facts of Illustration 50-7 that the court grants Bernard's motion for judgment as a matter of law but conditionally denies his motion for a new trial. If Kathryn appeals the court's grant of Bernard's motion as a matter of law, Bernard may cross-appeal the trial court's denial of Bernard's motion for a new trial.

Subdivision (e) directs that, if a motion for judgment as a matter of law is denied and that denial is appealed, the appellee may assert grounds for the first time on appeal that it is entitled to a new trial if the appellate court reverses or vacates the denial of the motion for judgment as a matter of law. As noted above, the careful practitioner should make a motion for a new trial even when a jury verdict is in her favor, thereby preserving the opportunity for the court to grant a new trial in lieu of granting the motion for judgment as a matter of law and rendering the contingency of subdivision (e) immaterial.

Illustration 50-9

Assume on the facts of Illustration 50-7 that Bernard fails to join a motion for a new trial with his motion for judgment as a matter of law. The court denies his motion and Bernard appeals. The appellate court vacates the trial court's order of Bernard's motion and is prepared to direct the trial court to enter an order granting Bernard's motion. At this point, Kathryn may argue for a new trial on grounds not advanced at trial below, thus avoiding an entirely adverse ruling on appeal.



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50.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 50.01 -50.95

James & Hazard, *Civil Procedure* §§ 7.16-7.22

Friedenthal, *Civil Procedure* §§ 12.3-12.4

Teply & Whitten, *Civil Procedure* 855-857



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50.3 LEADING CASES

Appellate Court Not Required to Remand for New Trial

Weisgram v. Marley Co., 528 U.S. 440, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000) (under Rule 50, the appellate court is not required to remand the case to the trial court for a determination as to whether a new trial is proper when it determines that evidence was erroneously admitted at trial and that the remaining evidence is factually insufficient to constitute a submissible case; the Rule provides the appellate court with the authority to direct the entry of judgment as a matter of law on its own).

Appellate Court Powerless to Enter Judgment Where No Postverdict Motion Made

Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006) (a court of appeals may not order the district court to enter a judgment in favor of a party who has not made a postverdict motion under Rule 50(b)).

Close of Evidence; Motion Made Before

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020 (9th Cir. 2003) (a motion for judgment as matter of law based on the sufficiency of evidence must be made before the close of all evidence).

Credibility Determinations Not Permitted

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (the standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56, and the court should review all of the evidence in the record; furthermore, the court must draw all reasonable inferences in favor of the nonmoving party, and in doing so it may not make credibility determinations or weigh the evidence).

Decision on Directed Verdict Not Required Before Jury Verdict

Gomez v. St. Jude Med. Diagnostic Div., 442 F.3d 919 (5th Cir. 2006) (Rule 50 does not require the trial court to withhold judgment on a Rule 50(b) motion until after the case has been submitted to the jury and only if the jury returns with a verdict rendering the motion necessary; although the procedure is recommended, it is not required).

Different Standards on JMAL and New Trial Motions

Russell v. United Parcel Servs., Inc., 666 F.2d 1188 (8th Cir. 1981) (applying the differing standards for motions on judgments as a matter of law and for motions for new trials).

Failure to Make Motion Before Jury Retires

Downes v. Volkswagen, Inc., 41 F.3d 1132 (7th Cir. 1994) (party could not move for judgment as a matter of law after the jury had returned with its verdict because it had not so moved under subdivision (a)).

Failure to Make Motion When No Prima Facie Case Is Presented

Miller v. Rowan Cos., 815 F.2d 1021 (5th Cir. 1987) (if the defendant presents no evidence, the failure to make a motion for judgment as a matter of law at the close of all the evidence is not fatal if the defendant so moved at the close of the plaintiff's case-in-chief).

Failure to Renew Objection

Varda, Inc. v. Insurance Co. of N. Am., 45 F.3d 634 (2d Cir. 1995) (party who fails to renew motion for judgment as a matter of law after the verdict is returned cannot object on grounds of insufficiency of the evidence on appeal).

Grant of New Trial; When Appropriate

McCann v. Texas City Refining, Inc., 984 F.2d 667 (5th Cir. 1993) (appellate court could only order a new trial where the party failed to move for judgment as a matter of law and the district committed plain error).

Insufficiency of Proof Basis for Motion

Alternate Fuels, Inc. v. Cabanas, 538 F.3d 969 (8th Cir. 2008) (state official's motions for judgment as matter of law made during trial on mining company's tortious interference with contracts claim could not be basis of appeal where official gave no legal or factual basis for motions, as required by Rule 50(a)(2), and there was no discussion between parties or court indicating insufficiency in proof).

JMAL Motion Not Made

United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc., 400 F.3d 428 (6th Cir. 2005) (party waived right to file a renewed motion when the party failed to make a motion for judgment as matter of law at the close of all evidence).

Legal Theory Required to Be Made in Motion

Ford v. County of Grand Traverse, 535 F.3d 483 (6th Cir. 2008) (county waived its argument that it could not be held liable under § 1983 in absence of constitutional violation by officials because it failed to present its legal theory in its Rule 50(a) motion).

Motion on Different Grounds

Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995) (party who moves for judgment as a matter of law on grounds different than those advanced by the party when making the motion before the verdict is not precluded from having judgment entered on the distinct grounds if the nonmoving party fails to object to the distinct grounds).

Motion Proper Where Facts Are Undisputed

Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984) (where the material facts were a matter of record and undisputed by the parties, the grant of a motion for judgment as a matter of law under Rule 50(a) was proper).

Pleading Requirement Satisfied by Directed Verdict Motion

Hinz v. Neuroscience, Inc., 538 F.3d 979 (8th Cir. 2008) (in breach of contract case, Rule 50(b) motion for judgment as matter of law reversing damages award against product distributors satisfied particularity requirement under Rule 7(b), as district court was permitted to consider distributors' pre-verdict Rule 50(a) motion to determine whether Rule 50(b) motion was adequate).

"Reasonable Jury" Standard

Lewis v. City of Irvine, 899 F.2d 451 (6th Cir. 1990) (applying the "reasonable jury" standard).

Renewal of Motion Not Necessary

Mosser v. Fruehauf Corp., 940 F.2d 77 (4th Cir. 1991) (party need not renew its motion for judgment as a matter of law after the verdict is returned; the court is deemed to have delayed the decision on the earlier motion).

Simultaneous Ruling on New Trial Motion

Arenson v. Southern Univ. Law Ctr., 43 F.3d 194 (5th Cir. 1995) (district court erred by not ruling on the new trial motion at the same time as the motion for judgment as a matter of law).

Standard for Decision

Nadel v. Isaksson, 321 F.3d 266 (2d Cir. 2003) (in deciding a post-verdict judgment as matter of law, the court applies the same standard that it would to a motion for summary judgment).

State Post-Trial Motion Law Procedural

Freund v. Nycomed Amersham, 326 F.3d 1070 (9th Cir. 2003) (California's no-waiver rule with respect to raising issues in post-trial motions is procedural and yields to Rule 50, as the Rule affects only the process of enforcing litigants' rights and does not run afoul of the Rules Enabling Act).

Time Period Begins From Date of Entry of Judgment

Collins v. Illinois, 830 F.2d 692 (7th Cir. 1987) (the period begins from the date of entry of the judgment, not from the date the verdict was rendered).

View of Evidence In Light Most Favorable to Non-Moving Party

Dace v. ACF Indus., Inc., 722 F.2d 374 (8th Cir. 1983) (motion for judgment as a matter of law reversed where the court did not view the evidence in the light most favorable to the non-moving party).



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TITLE VI. TRIALS

Chapter 51 Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

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§ 51.syn Synopsis to Chapter 51: Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

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Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

Rule 51 reads as follows:

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

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(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and--unless the court rejected the request in a definitive ruling on the record--also properly objected.

(2) **Plain Error.** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

* * * * *



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51.1 COMMENTARY

Rule 51 was re-written in 2003 to reflect a variety of court decisions interpreting the Rule and prevailing practice in federal court. It was also re-formatted to facilitate an understanding of how instructions to the jury should work under the mechanics of the Rule.

The Rule governs only those instructions to the jury concerning their deliberation on a verdict. Other jury instructions during the course of trial, *e.g.*, voir dire, cautionary or limiting instructions on evidence, are governed by other rules of court or customary practice.

Instructions in Diversity Actions

The content of jury instructions is not, of course, prescribed by Rule 51. Instead, the applicable law, whether state or federal, will control the substance of the instructions given. In diversity actions, the court should follow the mechanics of Rule 51 in instructing the jury to the extent that it permits the court to sufficiently describe what the applicable state law mandates. However, federal courts may consider a modification of the procedure according to which jury is instructed on state law when appropriate.

Requests for Instructions

Subdivision (a) governs party requests for specific instructions. Parties may wish to request an instruction on a specific issue because the court has a vast amount of discretion in formulating instructions and is not required to instruct on every issue raised by the evidence.

The Rule accommodates the practice of some courts in requiring instruction requests to be made before trial. Accordingly, the court may require pretrial requests, or may customarily allow parties to submit instruction requests at the close of the evidence. If the court requires the submission of instruction requests before the close of all the evidence, subdivision (a)(2)(A) requires the court to allow the requests to be supplemented by additional instruction requests on issues that could not reasonably have been anticipated at the time the original instruction requests were submitted. Copies of instruction requests should be served on all parties.

Subdivision (a)(2)(B) expressly acknowledges the court's discretion to accept "untimely" instruction requests by parties. Requests may be "untimely" either because they were submitted after the pre-evidentiary closing deadline imposed by the court under subdivision (a)(1) or the final close-of-evidence deadline established under the Rule. Although the court retains the discretion to accept or reject untimely requests, instructions on issues critical to the case and the jury's deliberation should be considered by the court. The "plain error" standard of subdivision (d)(2) provides guidance in this regard; if the failure to give a untimely instruction request would affect the substantial rights of parties, then it should be given notwithstanding the timing of the request.

Objections to Jury Instructions

Subdivision (c) sets forth the form and timing of objections to jury instructions. Objections must be distinct, specify the reasons for the objection, and be made on the record.

It is crucial to understand that Rule 51 continues to require that parties object to proposed instructions or court action on instruction requests--it is not sufficient that a party simply have requested different instructions. Under subdivision (d)(1), a party must make a specific objection in addition to the instruction request unless the court makes a definitive ruling on the record rejecting the request. Accordingly, it is important that objections be made in a timely fashion.

An objection will be considered timely if it made at the time provided by the court under subdivision (b)(2). If the court fails to provide such an opportunity, the Rule states that a party must make an objection "promptly" after learning an instruction will be given or a request refused.

Court Instructions to the Jury

Subdivision (b) restates the substance of the pre-2003 version of the Rule in a more organized fashion. Under the Rule, the court is required to inform parties about any ruling or ruling on their instruction requests as well as the proposed instructions to the jury. The court must so inform the parties before final jury arguments and, of course, before the jury is actually instructed. Parties must be also be given an opportunity to object on the record out of the hearing of the jury to any proposed jury instruction or court action on instruction requests. Notice of action on instruction requests and proposed instructions may be given at the same time as the opportunity for objection is provided, though the court may prescribe a different procedure. The Rule also expressly acknowledges the common practice of courts in instructing the jury at any time after trial begins and before the jury is discharged.

Assignment of Error

The 2003 revision of the Rule continues the former requirement of a renewed objection to a rejected instruction request, but incorporates some of the salutary measures developed to remediate the sometimes harsh and counterintuitive consequences of the requirement. The Rule states that error may be assigned to any objection properly noted under subdivision (c). However, subdivision (d)(1)(B) also provides that an objection need not be made to preserve an issue for appeal if the court makes a definitive ruling rejecting a proposed instruction.

Illustration 51-1

Anders commences a breach of warranty action against Jack's Fancy Foreign Cars, alleging that Jack has failed to make repairs on a Bentley sold to him by Jack. Before the jury retires for deliberation, Anders and Jack both request specific instructions on the actions constituting a "breach" under applicable state law, and the judge specifically adopts Jack's instructions, rejects Anders' instructions on the record, and instructs the jury accordingly. After the jury returns a verdict in favor of Jack's Fancy Foreign Cars, Anders now wishes to appeal the judge's failure to instruct the jury according to his requests. Under a strict reading of the former version of Rule 51, Anders would be deemed to have waived the objection

for purposes of appeal or post-trial motion, as he did not specifically object to the court's rejection of his request. However, under the present version of the Rule, Anders may assign as error the court's failure to deliver proper instructions, as the court made a definitive ruling on the record rejecting Anders' request.

Rule 51(d)(2) also incorporates a "plain error" standard for errors not correctly preserved through a proper objection under subdivision (c). Under the standard, which is adopted from *Federal Rule of Criminal Procedure 52*, an appellate court should consider the following factors in determining whether it may review an insufficiently preserved error in jury instructions: (1) the obviousness of the mistake; (2) the importance of the error; (3) the costs of correcting an error; and (4) the impact a verdict may have on nonparties. The advisory committee note indicates that the weights afforded to the factors are roughly in proportion to the order in which they are listed above.



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9 *Moore's Federal Practice* §§ 51.01 -51.42

James & Hazard, *Civil Procedure* § 7.14

Tepley & Whitten, *Civil Procedure* 848-849



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51.3 LEADING CASES

Charge Conference; Objections

Boston Gas Co. v. Century Indem. Co., 526 F.3d 487 (1st Cir. 2008) (insurer's claims of jury misinstruction were found to have been adequately preserved; insurer made its objections clear at charge conference, as required by Rule 51(c) and case law).

Comment by Court on Evidence

United States v. Evans, 30 F.3d 1015 (8th Cir. 1994) (court's prerogative to comment on the evidence is unaffected by Rule 51).

Failure to Object Raised for First Time on Appeal

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) (Court stated that a party may not raise the issue of the opposing party's failure to object to proposed jury instructions for the first time on *certiorari* to the Supreme Court).

Failure to Request Instruction Constitutes Waiver

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020 (9th Cir. 2003) (party who fails to request a particular jury instruction waives any argument that the instructions was erroneous).

Formal Objection Required

Woodbridge v. Dahlberg, 954 F.2d 1231 (6th Cir. 1992) (the failure to formally object to the proposed jury instructions waived the issue on appeal, even though the record contained discussions of the instructions).

"Fundamental Error"

Colburn v. Bunge Towing, Inc., 883 F.2d 372 (5th Cir. 1989) (appellate may reverse a jury verdict if it finds fundamental error in the jury instructions, even if no objection is made by the parties).

Governing Law on Jury Instructions

Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932 (10th Cir. 1994) (state law governs the substance of jury instructions in a diversity action, but federal law governs in a determination of whether any errors in the instructions were harmless).

Instructions Need Not Be Written

Stineman v. Fontbonne College, 664 F.2d 1082 (8th Cir. 1981) (courts are not bound by state laws requiring that jury instructions be made in writing).

Interpretation of Jury Instruction; Objection Not Required

Rio Mar Assocs., LP v. UHS of P.R., Inc., 522 F.3d 159 (1st Cir. 2008) (in bifurcated trial, where appellate challenge was not to jury instruction itself but rather to an interpretation of the instruction by the court in a later stage of the proceeding, the challenge to the jury instruction was not waived).

Jury Instruction Conference to Be on Record

Dixon v. City of Lawton, 898 F.2d 1443 (10th Cir. 1990) (jury instruction conference should be on the record).

Literal Reading of Objection Requirement

Voohties-Larson v. Cessna Aircraft Co., 241 F.3d 707 (9th Cir. 2001) (the Seventh and Ninth Circuits are unique in reading Rule 51 literally; accordingly, a party must object not simply on grounds that were sufficiently precise to alert the court that the instruction was defective, but must articulate the precise nature and source of the objection).

Objection Required Before Jury Deliberates

Ross v. Garner Printing Co., 285 F.3d 1106 (8th Cir. 2002) (Rule 51 requires a party to object to a court's instructions after the instructions are read to the jury, but before the jury retires to deliberate).

Objection to Jury Instructions Before Jury Deliberates

Jarvis v. Ford Motor Co., 283 F.3d 33 (2d Cir. 2002) (an objection to an inconsistency between two general verdicts traced to an alleged error in the jury instruction or verdict sheet is properly made under Rule 51, and a party must object before the jury retires to deliberate).

Objection to State Specific Grounds

Mankey v. Bennett, 38 F.3d 353 (7th Cir. 1994) (objection to failure to give certain jury instructions did not preserve the issue on appeal as the objection did not state specific grounds for the objection).

Party's Reliance on Court Preserves Issue for Appeal

Glover v. BIC Corp., 987 F.2d 1410 (9th Cir. 1993) (party's reliance on the court's statement that it would consider

each party to have made objections to the proposed jury instructions preserved the issue for appeal).

"Plain Error" Exception

Hammer v. Gross, 932 F.2d 842 (9th Cir. 1991) (stating that the Ninth Circuit does not recognize a "plain error" exception to a party's failure to object to proposed jury instructions).

Products Liability Action; No Balancing Instruction Required

Mesman v. Crane Pro Servs., 512 F.3d 352 (7th Cir. 2008) (in products liability case, there was no plain error under Rule 51(d)(2) in refusal to give requested instruction regarding balancing formula for determining negligence, as instruction did not correctly state formula; in any event, second retrial of case was not warranted on basis of failure to instruct to which no objection was raised).

Reconsideration Motion Not Proper for Raising Objection for the First Time

McGuire v. Davidson Mfg. Corp., 398 F.3d 1005 (5th Cir. 2005) (party waived argument under Rule 51 because it was not raised until party's Rule 59 motion for reconsideration).

Renewal of Earlier Objections Unnecessary

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (party's failure to object to jury instructions did not constitute a waiver of the issue on *certiorari* because the issue had been raised by the party on a motion for summary judgment, on a motion for judgment as a matter of law, and on appeal).

Review of Jury Instructions by Appellate Court

Wiles v. Michelin N. Am., Inc., 173 F.3d 1297 (10th Cir. 1999) (when a party objects to jury instructions, the appellate court conducts a de novo review to determine if they correctly state the governing law and provide the jury with an ample understanding of the issues and applicable standards).

Waiver of Objections to Jury Instructions

Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43 (1st Cir. 2005) (party's failure to object to court's instructions on plaintiffs' failure to intervene claim constituted waiver of objections to jury instructions).



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Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

Rule 52 reads as follows:

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

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(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

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52.1 COMMENTARY

When an action is tried to the court rather than to the jury, Rule 52 provides for findings of fact and conclusions of law by the court, a procedure that replaces the general verdict in jury actions. The procedure is also used when the court uses an advisory jury and whenever it grants injunctive relief.

Purposes of Rule 52

There are three purposes of Rule 52. First, it prompts the district court to articulate its analysis toward the end of arriving at a sound legal decision. Second, it aids the appellate court in its review of the issues and the final judgment. Finally, it assists future courts and practitioners in determining whether certain issues would be precluded by estoppel or res judicata.

Findings and Conclusions Stated Separately

Findings of fact and conclusions of law must be stated by the court separately from one another, but the court has a great deal of discretion in deciding the manner in which they are set forth. They may be communicated orally at the close of the evidence, incorporated into an opinion or memorandum by the court, or set forth in a writing such as a master's report and incorporated by reference into the record. Under revisions to Rule 58 made in 2002, the findings of fact and conclusions of law need not be set forth in a document separate from the initial judgment, and the court has a great deal of discretion in the manner in which they are announced.

Findings of Fact Reviewed Under Clearly Erroneous Standard

Although the Rules are not binding on appellate courts, subdivision (a)(6) instructs that findings of fact by trial courts shall not be set aside unless they are clearly erroneous, a standard that the United States Supreme Court recently referred to as "court/court" review, as opposed to the "court/agency" review frequently attending appeals of decisions of administrative agencies. However, appellate courts should give due regard to trial courts in view of their ability to judge the credibility of the witnesses, an opportunity unavailable to appellate courts. Findings of fact should be carefully distinguished from conclusions of law, which are generally reviewable *de novo*. Although the line separating findings of fact from conclusions of law is sometimes difficult to discern, Rule 49(a), which governs special verdicts, may aid in

this determination. Issues which would be proper subjects for special verdicts can be said to be questions of fact, whereas the legal conclusions drawn therefrom can be said to be questions of law.

Illustration 52-1

To solicit future business, Linda's Leaps offers one free skydiving lesson. Taylor, who takes advantage of this offer, commences a tort action against Linda's Leaps when her parachute did not open properly. Linda's Leaps defends the action by claiming that it was not the proximate cause of the accident, and that Taylor simply failed to open her parachute as instructed. After a bench trial, the trial judge concludes that Linda's Leaps negligently failed to warn Taylor of possible complications when opening a parachute, but that under the applicable state law, providers of free services owe no duty of care to those who accept such services. If Taylor appeals the decision in favor of Linda's Leaps, the judge's finding that Linda's Leaps was negligent in its instructions to Taylor will be reviewed under a "clearly erroneous" standard. On the other hand, the judge's conclusion with regard to the duty of care owed by free service providers will be reviewed *de novo*.

Findings Not Required on Motions

Subdivision (a)(3) states that the court is not required to state its findings of fact or conclusions of law when deciding motions, except as provided in subdivision (c) or as specifically required in other Rules in conjunction with certain motions. This provision supplements the broad discretion conferred upon district courts in Rule 43(c) to decide motions with or without the benefit of oral argument.

Post-Trial Motions Generally

Subdivision (b), in conjunction with Rule 50(b) and(d) and Rule 59, govern most of the common post-trial motions. The time periods for these motions, which were extended to 28 days in 2009, are measured from the date of entry of judgment to when they must be *filed* with the court. These post-trial motions are typically brought after the trial has ended and the judgment has been entered, though local rules may provide for the filing of these motions before a judgment has been entered. The motions are all interrelated, a fact to which the frequent cross-references in those Rules attest. Nonetheless, the standards of and procedures for motions made under these Rules are different, and should neither be confused by practitioners nor co-mingled by courts.

The 28-day time period designated in subdivision (b) is a strict deadline that may not be extended by the court. Rule 6(b), which provides for the enlargement of time periods, expressly exempts this subdivision from the operation of its provisions. Significantly, the deadline in subdivision (b) is a filing deadline, not a service deadline, so the 3-day extension of Rule 6(d) is not applicable.

Illustration 52-2

On Thursday, December 11, Harris obtains a judgment against Darren for \$10,000, and the judgment is entered the following day, December 12. Darren is notified of the entry of judgment by first-class mail. Under Rule 52(b), the parties have 28 days to file a motion for additional findings, and this period is not subject to the 3-day extension of Rule 6(d). Under Rule 6(a), the 28-day period begins on Saturday, December 13 and expires on Friday, January 9. The deadline may not be extended beyond January 9 by the court for any reason.

Motion for Amended or Additional Findings

Subdivision (b) allows parties to move for amended findings of fact or conclusions of law or for additional findings.

Such a motion may be desirable when a party plans to take an appeal on a certain issue and the district court has not made specific findings on that issue. The Rule expressly allows motions under Rule 52(b) to be joined with motions for new trials under Rule 59, and there is little reason to suggest that a motion for judgment as a matter of law under Rule 50(b) could not be joined with it as well. The Rule also provides that an objection or motion for amended or additional findings is not necessary to preserve the issue of the sufficiency of the evidence on appeal. The objection on those grounds is implied by the trial of the action to the court.

Judgment as a Matter of Law on Partial Findings

Subdivision (c), which allows the court to enter judgment against a party before the close of all the evidence, roughly parallels the provisions of Rule 50(a) governing motions for judgments as a matter of law that are made before the action is submitted to the jury. However, the court's enhanced role as fact-finder in a bench trial, providing the court with greater latitude to take into account the credibility of the witnesses and judge the weight of the evidence when deciding a motion under Rule 52(c), suggests that motions under Rule 52(c) should be granted more often than motions under Rule 50(a). Nonetheless, courts are permitted to delay judgment until the close of all the evidence. These decisions are reviewable only under the "clearly erroneous" standard.



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TITLE VI. TRIALS

Chapter 52 Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

1-52 Federal Civil Procedure Litigation Manual 52.2

52.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 52.01 -52.63

James & Hazard, *Civil Procedure* §§ 12.3, 12.8

Friedenthal, *Civil Procedure* §§ 12.2, 13.4

Teply & Whitten, *Civil Procedure* 849-851



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TITLE VI. TRIALS

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52.3 LEADING CASES

Administrative Agencies; Standard of Review

Dickinson v. Zurko, 527 U.S. 150, 119 S. Ct. 1816, 144 L. Ed. 2d 143 (1999) (findings of fact of the Patent and Trademark Office (PTO) must be reviewed under the "court/agency" framework set forth in the Administrative Procedure Act, 5 U.S.C. § 706, not under the "clearly erroneous" standard articulated in Rule 52(a) (now Rule 52(a)(6)) for "court/court" review).

Amendment of Findings and Conclusions

National Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119 (1st Cir. 1990) (a court may amend its findings and conclusions if it results in the entry of a different judgment).

Bench Trial "On Papers" Findings and Conclusions Still Required

Muller v. First Unum Life Ins. Co., 341 F.3d 119 (2d Cir. 2003) (although the district court properly conducted the equivalent of a bench trial "on papers", it failed to make explicit findings of fact and conclusions of law explaining its decision; remand was necessary).

Court's Comment on Evidence

Krieger v. Gold Bond Bldg. Prods., 863 F.2d 1091 (2d Cir. 1988) (district court is not required to comment on all evidence, especially evidence that it considers to be of little value, in stating its findings of fact).

Credibility of Witnesses; Review on Appeal

Tyson v. Jones & Laughlin Steel Corp., 958 F.2d 756 (7th Cir. 1992) (trial court's determination of the credibility of witnesses is subject to the "clearly erroneous" standard of review and will rarely be set aside).

Damages--Findings of Fact Required for Appellate Review

Amantea-Cabrera v. Potter, 279 F.3d 746 (9th Cir. 2002) (to provide meaningful appellate review of damages awarded by the court, the district court must make findings of fact under Rule 52).

Failure to State Findings; Appellate Review

Gulf Towing Co. v. Steam Tanker Amoco N.Y., 648 F.2d 242 (5th Cir. 1981) (failure of district court to state findings of fact does not absolutely preclude the appellate court from reviewing the question at issue).

Finding Contrary to Stipulation

Louis Vuitton S.A. v. Lee, 875 F.2d 584 (7th Cir. 1989) (court's finding of fact that was contrary to a stipulation entered into the record was clearly erroneous).

Findings and Conclusions to Be Specifically Stated

Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992) (oral findings of fact and conclusions of law must be specifically set forth in the record to allow for review of the findings and the conclusions).

Negligence Subject to "Clearly Erroneous" Standard

Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318 (11th Cir. 1989) (negligence is a fact to be determined by the court in a bench trial; therefore, it is subject to the "clearly erroneous" standard on review).

Oral Ruling Satisfies Requirement

Ortloff v. United States, 335 F.3d 652 (7th Cir. 2003) (a judge's oral ruling can satisfy Rule 52(c)'s requirement to support judgment by making findings of fact and conclusions of law).

Party's Failure to Comment on Findings and Conclusions

Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983) (where the defendant failed to submit or comment on the proposed findings of fact and conclusions of law after being invited to do so twice, it was not error for the district court to adopt the plaintiff's statement of findings and conclusions verbatim).

Question of Law Not Subject to "Clearly Erroneous" Standard

Bose Corp. v. Consumers Union, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (determination of actual malice is a question of law not subject to the "clearly erroneous" standard on appeal).

Subject-Matter Jurisdiction Motion Proper

Sharp ex rel. Estate of Sharp v. United States, 401 F.3d 440 (6th Cir. 2005) (motion may be made under Rule 52 for lack of subject-matter jurisdiction).

Support for Findings in Record

Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (even though appellate court may have arrived at a different conclusion based upon the evidence presented, the district court's findings should

not be disturbed if there is support for those findings in the record).



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TITLE VI. TRIALS
Chapter 53 Rule 53. Masters

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§ 53.syn Synopsis to Chapter 53: Rule 53. Masters

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TITLE VI. TRIALS
Chapter 53 Rule 53. Masters

1-53 Federal Civil Procedure Litigation Manual Rule 53. Masters

Rule 53. Masters

Rule 53 reads as follows:

Rule 53. Masters

(a) Appointment.

(1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) **Disqualification.** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 *U.S.C.* § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) **Possible Expense or Delay.** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) **Notice.** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) **Contents.** The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate *ex parte* with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) **Issuing.** The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 *U.S.C.* § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) **Amending.** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) **Master's Authority.**

(1) **In General.** Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) **Sanctions.** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) **Master's Orders.** A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) **Master's Reports.** A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) **Action on the Master's Order, Report, or Recommendations.**

(1) Opportunity for a Hearing; Action in General. In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) Time to Object or Move to Adopt or Modify. A party may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or

(C) will be final.

(4) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) Fixing Compensation. Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) Payment. The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocating Payment. The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

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TITLE VI. TRIALS
Chapter 53 Rule 53. Masters

1-53 Federal Civil Procedure Litigation Manual 53.1

53.1 COMMENTARY

Masters Generally

Masters are persons used traditionally to help resolve complicated factual issues, monitor compliance with injunctions, and perform other court functions requiring some of specialized or technical knowledge. In recent years, masters have increasingly been used by federal judges to accommodate growing dockets and have been assigned to handle non-specialized matters, such as reviewing discovery documents for privilege claims and hear post-trial motions for attorneys' fees. Masters need not be attorneys; in many cases, the specialized knowledge of nonlegal experts may be helpful to a resolution of complicated issues in a case. District courts should also consider appointing an expert under *Federal Rule of Evidence 706* in such cases.

2003 Amendments to Rule

Although Rule 53 has always governed the practice of masters in federal court, it originally applied only to the use of trial masters. As noted above, however, federal courts have increasingly used masters to perform a variety of other trial functions--particularly, to hear and decide pretrial and post-trial motions. The expansion of the master beyond its original function as a person qualified to hear specialized evidence necessitated revisions in the Rule to conform to present practice. Accordingly, Rule 53 was completely rewritten in 2003 to recognize this expanded role of masters and to make uniform the practice of masters in this regard.

"Master" and "Special Master" Interchangeable

The terms "master" and "special master" are used throughout the Rules interchangeably. Rule 53 only uses the term "master," but the advisory committee note and other Rules that cross-reference Rule 53 occasionally use the term "special master." However, a "master" should not be confused with a "magistrate," and a fuller explanation of the differences between them is set forth below.

Masters and Magistrate Judges Distinguished

Masters are judicial officers, and as such, are subject to the same standard of conduct as are judges. Masters do not

simply handle administrative matters for the court; they are empowered, if authorized by the court, to conduct hearings and determine the weight of the evidence presented therein. However, a reference to a master is distinct from a reference to a magistrate judge. Magistrate judges are governed by the Federal Magistrates Act, 28 U.S.C. §§ 604, 631-639, and Rules 72-76, whereas masters are governed only by the provisions in Rule 53. Magistrate judges generally have powers and duties broader than those of masters, and thus are appropriately perceived as proxies for district judges.

Many masters have been trained in specialized disciplines, such as taxation and accounting, as the need for specialized training or knowledge provides the justification for appointment of a trial master under subdivision (a)(1)(B)(i) or (ii). However, specialized or technical training may not be necessary for an order of appointment to hear pre-trial and post-trial motions or other functions contemplated by subdivision (a)(1)(C). Such matters are explicitly permitted under the 2003 revision of the Rule without the "exceptional condition" requirement of appointment of a trial master under (a)(1)(B)(i).

Magistrate judges are expressly permitted to serve as masters under the Federal Magistrates Act. Such an appointment should be necessary only when the duties to be performed as a master could not be performed in the role as a magistrate, i.e., such duties are not authorized under the Federal Magistrates Act. Rule 53(i) contemplates that reference of a matter to a magistrate acting as a "master" should explicitly state that fact in the order of reference. When such a reference is made, the magistrate will be acting as a "master" and thus subject to the provisions of Rule 53, instead of the provisions governing "magistrate" in Rules 72-76.

Circumstances When Masters May Be Used

Subdivision (a) permits the district court to appoint individuals as masters under three circumstances: (1) for any purpose, with the parties' consent; (2) conduct trial proceedings and perform other trial functions; and (3) to perform a variety of pretrial and post-trial functions. Each circumstance is subject to different conditions and requirements and they are discussed in greater detail below.

Under the Rule, only district courts have the authority to appoint and refer matters to a master; magistrate judges should seek an order of the district judge before referring matter to a master. Appointment of a master is always within the discretion of the district court--the Rule never mandates the appointment of a master, even when the parties consent.

Appointment by Consent of Parties

Under subdivision (a)(1)(A), a district court may appoint a master for virtually any purpose with the consent of the parties. Although the advisory committee note is not completely clear on the question, it appears that the provision expressly allowing a master to perform duties with the parties' consent was designed to underscore the abolition of the authority of the district court to appoint a trial master on jury cases without the parties' consent, unless one of the exceptions in subdivision (a)(1)(B) applies.

The discretion of the court to appoint a master with the parties' consent is not unlimited. The structure and purpose of the Rule indicate that a master may never be appointed to preside at a jury trial--a point made explicit in the advisory committee note. However, a master may be appointed to hear evidence and rule upon matters in a jury trial if parties waive their right to a jury trial or if the findings of the master are submitted to the jury for their independent consideration. If parties waive their right to a jury trial, the recommendations of the master need not be submitted separately.

It does not appear that appointment of a trial master with consent of the parties is limited to trial matters. Masters may also be appointed for pretrial and post-trial functions with the consent of the parties, though the consent of the parties is not required for appointment in this regard, a point implied in subdivision (a)(1)(C). Although consent of the parties will

rarely be required for appointment of a master for pretrial or post-trial matters, it may be prudent for district courts to seek the consent of the parties for unusual cases.

Trial Masters

Under subdivision (a)(1)(B), a district court may appoint a trial master in non-jury cases under two circumstances: (1) if some "exceptional condition" warrants the appointment; or (2) if some particular accounting expertise in computing damages or in some aspect of the cases is required. The appointment of a master under the second circumstance is limited to determinations of a ministerial or quantitative character. This requirement reflects the reluctance of the United States Supreme Court to allow masters to perform core functions reserved for district court judges, such as judging the credibility of witnesses. Such functions may be performed by masters only when some "exceptional condition" exists, and the history of the Rule indicates the need for district courts to heed the admonition seriously.

Trial masters may not report on evidence without a recommendation to the court—a deviation from the prior version of the Rule. However, this practice will continue to be permitted with the parties' consent or for pretrial and post-trial matters under subdivision (a)(1)(C).

Pretrial and Post-Trial Masters

Under subdivision (a)(1)(C), the district court may appoint a master, without the parties' consent, to perform a wide variety pretrial or post-trial matters that cannot be addressed effectively and timely by the court. This provision sanctions the use of masters for such matters that have evolved over time, and it makes explicit the district court's authority in this regard. Common pretrial and post-trial functions for which an appointment to a master may be appropriate include the reviewing of discovery documents after claims of privilege are made by a party, settlement negotiations, monitoring injunctions and compliance with consent decrees, initial review of foreign and other complex determinations of law, and other case management functions in complex litigation cases.

Masters as Expert Witnesses

Considerable theoretical and practical difficulty arises when a person is appointed both as a master and an expert witness in the same case. Although an extensive discussion of the problems that may arise is beyond the scope of this manual, it should be noted that the limitations for trial masters in nonjury cases contained in subdivision (a)(1)(B) do not apply to court-appointed expert witnesses under *Federal Rule of Evidence 706*. Nonetheless, concomitant appointment of a single individual as both a master and an expert witness should be avoided wherever possible. If necessary, however, the district court should seek the consent of the parties for the dual appointment to preclude a procedural challenge on appeal.

Qualifications of Masters

Unlike the provisions governing court-appointed experts under *Federal Rule of Evidence 706*, Rule 53 does not set forth any particular qualification for masters. Masters need not be attorneys; at times, the specialized knowledge or expertise or nonlegal experts may be needed for resolution of a complicated issue.

Nonetheless, all masters are subject to the Code of Conduct for United States Judges, with the exceptions noted therein. District courts should be especially attentive to any actual or apparent conflict of interest involving a master, such as a master who happens to be an attorney representing a party in an unrelated case before the judge or a master/attorney who has previously represented a party involved in the case. To alert the district judge to such conflicts, subdivision (b)(3)(A) requires all prospective masters to file an affidavit disclosing any ground for disqualification under *28 U.S.C. § 455*. Under subdivision (b)(3)(B), the consent of all parties is required if any potential conflict is noted on the affidavit. The court should also consider a well-crafted order of appointment which eliminates the perceived conflict of

interest.

Order and Appointment of Masters

Before appointing a master, the district court must provide the parties with notice concerning the prospective appointment and an opportunity to be heard on the issue. This notice may also seek the parties' consent to the appointment, a feature that should preclude virtually challenges to the appointment of the master at a subsequent point, such as on appeal.

The appointment order should be as precise as possible and include terms addressing all of the information set forth in subdivisions (b)(2)(A)-(E). The order should include a detailed time schedule for completion of the duties by the master. Although the Rule anticipates circumstances under which the master may communicate with the court or parties *ex parte*, the advisory committee note and the history of the Rule indicate that these circumstances will not occur often. When *ex parte* communication is desirable, the order should include a brief justification in that regard.

Proceedings Before Masters

Subdivision (c) provides the master with substantial discretion to conduct proceedings necessary to carry out the master's responsibilities, subject, of course, to the order of appointment issued by the district judge. The authority of the master to conduct evidentiary hearings in subdivision (d) should not be regarded as an exception to the general rule that core judicial functions, such as the judging of witness' credibility, are reserved to the district court. Parties may consent to the performance of these functions by the master.

Master's Order and Report

Subdivision (d) sets forth minimal requirements for an order of the master. The order must be filed with the court and entered on the docket. To avoid confusion concerning who is responsible for serving the order on the parties, the district judge may find it prudent to specify the manner of service in the master's order of appointment. Service of the order must be in accordance with Rule 5(b), which permits service of orders and other court documents through a variety of methods, including electronic service with the parties' consent.

Subdivision (e) indicates that, in addition to whatever orders may be filed, a master must also prepare a report for the district judge. The report should set forth whatever determinations or conclusions resulted from proceedings before the master, and the report should be supported by appropriate documentation. The advisory committee note indicates that pretrial and post-trial masters may often find it advisable to seal their reports from public record, though this will rarely be the case with trial masters. Sealed reports may be appropriate in cases of continuing or failed settlements discussions or in while broad consent decrees are being created. In such cases, the master should seek the amendment of the order of appointment under subdivision (b)(4) if it does not already provide for sealed reports.

Masters may choose to distribute drafts of orders or reports to the parties for their review and comment. Although this is not required under the Rule, the practice may help to clarify confusing terms or provisions in the order or report.

Action on Master's Order or Report

Subdivision (f) governs the actions taken by the court in response to an order, report, or recommendation of a master. All findings of fact and conclusions of law made by a master are subject to a "default" *de novo* standard of review by the district court. Significantly, however, subdivision (f)(3) permits the parties to stipulate that the findings of fact of a master performing pretrial or post-trial functions, or a master to whom the parties have consented, will be final. That subdivision also permits the parties to stipulate that the findings of fact of any master, including trial masters, will be subject to a "clear error" standard.

All objections by a party to conclusions of law made by a master must be reviewed de novo by the district court. The parties may, of course, choose not to object to any finding or conclusion made by a master, but the court always retains the discretion to review the findings or conclusions of law under a higher standard, including de novo.

Masters' ruling on procedural matters before the master are subject to a "default" abuse of discretion standard of review by the district court. However, two points should be noted in this regard. First, the order of appointment of a master may establish a different standard of review for procedural errors. Second, the advisory committee note indicates that, because the master occupies a subordinate position to the district court, the scrutiny provided by district courts under an "abuse of discretion" standard may actually be greater than the level of scrutiny implied by that standard in an appellate court. It may helpful to think of the standard of review for procedural errors by a master as one of "negligent discretion."

Under subdivision (f)(1), the district court has tremendous discretion in acting on an order, report, or recommendation of a master. This discretion is not affected by the provision allowing the parties to consent to a final determination or a clearly erroneous standard under subdivision (f)(3), as the court is always free to withdraw its consent under that subdivision at any time and review the master's findings under a heightened standard. The district court must provide the parties with an opportunity to be heard on the master's order, report or recommendations, though an opportunity to provide written submissions will satisfy the requirements of this section. Masters who choose to circulate drafts of proposed orders, reports, or recommendations to the parties for their review before their submission to the district judge should obviate the need for party objections in many instances, though an opportunity to be heard must still be provided by the court when this occurs. The time period within which a party must object or make a motion to adopt or modify an order, report, or recommendation of a master has been extended to 21 days after service of the document on the parties from its former 10-day period.

Compensation of Masters

Subdivision (g) provides the court with broad discretion in the amount and allocation of compensation between the parties. The compensation of a master may be taxed to a losing party under Rule 54(d)(1), or the court may simply charge a party whose conduct made the appointment of a master necessary. All terms concerning compensation should be included in the order of appointment, though the district may amend the provisions governing compensation at any time, with notice to the parties and an opportunity to be heard. The compensation for magistrate judges acting as masters is governed by pertinent provisions in the Federal Magistrates Act.

Masters are not permitted to withhold reports or recommendations required to be filed under subdivisions (d) or (e) as security for compensation. However, masters may obtain writs of execution against the party or parties responsible for the compensation as set forth in the order of appointment.



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1-53 Federal Civil Procedure Litigation Manual 53.2

53.2 ADDITIONAL AUTHORITY

9 *Moore's Federal Practice* §§ 53.01 -53.63

Friedenthal, *Civil Procedure* § 11.5



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1-53 Federal Civil Procedure Litigation Manual 53.3

53.3 LEADING CASES

Appeals Court to Review Decisions of Special Masters

Ballard v. Commissioner, 544 U.S. 40, 125 S. Ct. 1270, 161 L. Ed. 2d 227 (2005) (the recommendations of special masters, made operative by the decision of the district court, are reviewable by the court of appeals).

Appellate Court Use of Master

NLRB v. International Union of Operating Engineers, 659 F.2d 379 (3d Cir. 1981) (appellate court that employs a master is subject to the "clearly erroneous" standard in regard to the findings of the master).

Definition of "Special Master" under PLRA

Benjamin v. Fraser, 343 F.3d 35 (2d Cir. 2003) (the term "special master" is defined by the Prison Litigation Reform Act of 1995 (PLRA) as any person appointed by a federal court under Rule 53 or pursuant to any inherent power of court to exercise powers of master, regardless of title or description given by court; Office of Compliance Consultants (OCC) are not "special masters" under PLRA).

Delegation of Authority to Master

In re Bituminous Coal Operators' Ass'n, 949 F.2d 1165 (D.C. Cir. 1991) (writ of mandamus directing the district court to vacate the order of reference to a master was issued where the district delegated virtually all its authority to the master, in violation of the express delineation of the powers of masters under subdivision (c)).

Disqualification Order; Special Master's Right to Appeal

Cordoza v. Pacific States Steel Corp., 320 F.3d 989 (9th Cir. 2003) (a special master had a right to appeal the district court's orders disqualifying the special master for serious misconduct during post-judgment proceedings where special master was bound to district court's order setting compensation; however, appellate court lacked jurisdiction to consider

the appeal because the district court's orders were neither final judgments nor collateral orders).

Findings of Master

Martin v. University of S. Ala., 911 F.2d 604 (11th Cir. 1990) (master's findings are to be accepted unless they are clearly erroneous; district court abused its discretion in setting aside the findings of a master when they were supported by facts in the record).

Hearing Required on Objections to Report

Kieffer v. Sears, Roebuck & Co., 873 F.2d 954 (6th Cir. 1989) (district court must hold a hearing before adopting a master's report when a party files objections to the report).

Magistrate Judge in Capacity as Master

Archambault v. United Computing Sys., Inc., 786 F.2d 1507 (11th Cir. 1986) (the findings of a magistrate judge acting in the capacity of a master are subject to the "clearly erroneous" standard of subdivision (e) (now subdivision (f)(3)(A)).

Preservation of Issues for Appeal

Stone v. City & County of S.F., 968 F.2d 850 (9th Cir. 1992) (party must object to master's findings of fact to preserve the issues on appeal).

Recommittal by District Court

Ballard v. Commissioner, 544 U.S. 40, 125 S. Ct. 1270, 161 L. Ed. 2d 227 (2005) ("recommittal" is a formal mechanism taken by a district judge for initiating reconsideration or other formal action by a magistrate judge or special master) (Kennedy, J., concurring).

Standards of Conduct for Masters

Jenkins v. Sterlacci, 270 U.S. App. D.C. 296, 849 F.2d 627 (D.C. Cir. 1988) (masters are subject to the same standards of conduct as those of judges; a party who does not object to the appearance of impropriety by a master waives the objection unless actual bias can be demonstrated).

Standards of Review--District Court and Court of Appeals

Charter Oak Fire Ins. Co. v. Hedeon & Cos., 280 F.3d 730 (7th Cir. 2002) (a district court accepts a special master's findings of fact unless they are clearly erroneous, but the Court of Appeals reviews the district court's decision for an abuse of discretion).



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TITLE VII. JUDGMENT

Chapter 54 Rule 54. Judgment; Costs

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TITLE VII. JUDGMENT

Chapter 54 Rule 54. Judgment; Costs

1-54 Federal Civil Procedure Litigation Manual Rule 54. Judgment; Costs

Rule 54. Judgment; Costs

Rule 54 reads as follows:

Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under *28 U.S.C. § 1927*.

* * * * *



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TITLE VII. JUDGMENT

Chapter 54 Rule 54. Judgment; Costs

1-54 Federal Civil Procedure Litigation Manual 54.1

54.1 COMMENTARY

Rule 54 defines a "judgment," and it sets forth some of the provisions relating to judgments. Other Rules, most notably Rule 58 and Rule 79(a), also govern judgments and should be read in conjunction with Rule 54. The Rule is also the primary provision concerning costs, but as with judgments, is not the only Rule bearing upon the subject. Rules 30, 37, 41, 53, and 68 should also be consulted to determine their applicability to issues involving costs.

Definition of Judgment

Rule 54(a) defines a judgment as "a decree and any order from which an appeal lies." Other than subdivision (b), Rule 54 does not address those orders or actions of the court which are appealable; this issue is predominantly governed by statute. The Rule only identifies those actions of the court that are rendered appealable by the operation of a distinct source of law as "judgments." In general, only final judgments are appealable; other interlocutory orders cannot normally be appealed until the final disposition of the entire action. However, exceptions to this rule exist, most notably the appealability of a grant or denial of a preliminary injunction under Rule 65. Other exceptions to this general rule are also fixed by statute.

Because the definition of a judgment is tied to its appealability, any action that is said to be an exception to the general rule that only final judgments are appealable is nonetheless regarded as a "judgment," despite its interlocutory nature. A consent decree is a judgment.

Illustration 54-1

Gary commences a breach of contract action against Governor Adams alleging that the Governor has broken promises made during the last campaign which amount to an oral contract. Governor Adams moves the court to dismiss the claim, arguing that a state statute bars such actions on grounds of sovereign immunity. The court denies Governor Adams's motion. If a state statute provides that an immediate appeal may be taken from a denial of such a motion, the order will be considered to be a "judgment" despite the fact that the primary issues in the case have yet to be decided.

A judgment should be distinguished from an opinion. A judgment is an action of the court, whereas an opinion is simply

the articulation of the court's reasons for the judgment. Judges may make judgments with or without written opinions, although some kind of explanation by the judge for the action taken is usually required.

Interrelationship of Rule 54 with Other Rules

Rule 54 speaks only to the pronouncement, or rendition, of the judgment. Rule 58 covers the entry of judgment by the court; it was revised substantially in 2002 to eliminate the "separate document" requirement for certain motions, orders, and other dispositions in an action listed in Rule 58(a). Nonetheless, the idea that the initial "judgment" should be uncluttered with dispositions on related litigation issues, such as motions for new trials, attorneys' fees, and the like, is reinforced by the final sentence of subdivision (a), which states that the judgment shall not contain "recitals of pleadings, a master's report, or a record of prior proceedings." These matters are properly the subject of an opinion.

Rule 79(a) further provides for recordation of the judgment by the clerk. Under substantial revisions to Rule 58 in 2002, all judgments, except for rulings on certain motions under Rules 50, 52, 54, 59, and 60, will be regarded as "entered" when they are recorded in the civil docket under Rule 79(a) and when they are either set forth in a separate document or 150 days have elapsed from recordation in the docket, whichever occurs first.

Illustration 54-2

Assume on the facts of Illustration 54-1 that the court renders a verdict in favor of Gary on April 5 and issues an opinion on the unique legal issues involved. However, the judgment is not entered and recorded by the clerk until April 10. Under these circumstances, the time within which Governor Adams may appeal the judgment begins to run on April 11.

Certification of Judgment

As noted, subdivision (b) confers upon the court the authority to determine the appealability of some kinds of orders or decrees. If an action involves multiple claims or multiple parties, the court may resolve one or more of the claims or issues concerning a party without resolving the remaining claims or issues among other parties and pronounce a judgment from which an appeal lies to that effect. To do this, the judge must make both an express determination that there is no just reason for delay and a direction for the entry of judgment. This action is often referred to as certification by the court. The Rule reiterates the requirement that the judgment be certified by the court by stating that any such order not properly certified as an appealable judgment is a nonappealable interlocutory order subject to revision at any time before the final judgment is rendered.

Subdivision (b) does not confer upon the court unfettered discretion to decide which orders will be appealable simply by certifying them as judgments. The standard stated in the subdivision--"there is no just reason for delay"--must be satisfied, or the certification will be reversed for an abuse of discretion. Thus, a judge cannot certify as an appealable judgment one type of relief sought on a single claim. Similarly, multiple claims under federal and state law that are essentially the same claims should not be separated under Rule 54(b), with one treated as appealable and the other pending final disposition. Thus, the term "partial summary judgment" is not truly a partial judgment unless it resolves one or more of the claims or the issues between one or more of the parties.

Illustration 54-3

In a class action suit against Toxic Chemical Corporation on a single legal theory of recovery, the plaintiff class seeks \$15 million in damages. Because of the complex nature of the claim, the court orders that the action be bifurcated into liability and damages phases. If a jury returns a verdict against Toxic on the issue of liability only, Toxic may not take an appeal on the verdict until the damages issue has been resolved, absent a statute specifically authorizing such an appeal.

"Certification" Under Rule 54 and 28 U.S.C. § 1292(b) Distinguished

It should be noted that "certification" under Rule 54(b) as to a claim or party is distinct from "certification" of the district court under 28 U.S.C. § 1292(b) as to appealable interlocutory orders. Under that provision, a district court may certify "a controlling question of law as to which there is substantial ground for difference of opinion" if it feels that an immediate appeal may materially advance the ultimate termination of the litigation. The appellate court then has the complete discretion to accept or reject a timely application for review of the interlocutory order. A judgment certified under Rule 54(b), however, must be treated as any other judgment for purposes of review by the court of appeals, though the appellate court may ultimately determine that the certification of the judgment by the district court was improper under the standard specified in subdivision (b) and send the issue back to the district court.

Judgment Awarded Not Limited to That Requested in Pleadings

Rule 54(c) simply provides that the relief sought by a party in its pleadings shall not bar that party from receiving any relief to which it is entitled, except in the case of a default judgment. This applies at any stage of the proceedings, even on remand from an appellate court. Default judgments are limited to the kinds and amount of the relief requested in the complaint.

Illustration 54-4

Assume on the facts of Illustration 54-3 that the jury concludes that the plaintiff class is entitled only to a permanent injunction. Under Rule 54(c), the judge may order a permanent injunction, even though the plaintiff class did not request that an injunction be granted.

However, subdivision (c) should not be construed as permitting a form of relief, such as damages, where the evidence is sufficient to prove only that the party is entitled to injunctive relief. The provision simply functions as a precautionary measure to protect against the harsh consequences arising under code pleading where a party was precluded from a form of relief because that particular form was not specifically requested in the pleadings.

Costs Other Than Attorneys' Fees

Subdivision (d), as originally promulgated, did not contain provisions concerning attorneys' fees. Accordingly, subdivision (d)(2) was added in 1993.

Subdivision (d)(1) directs that costs other than attorney's fees should be taxed to the non-prevailing party as a matter of course. These kinds of costs are not listed in the Rule and are generally fixed by statute. They do not cover every possible cost a party may incur during the course of litigation, the most significant of which is attorneys' fees.

Illustration 54-5

Examples of taxable costs under subdivision (d)(1) include clerk's and marshal's fees, printing costs, and witness fees.

However, the court has the discretion to deny such costs to the prevailing party and even tax such costs against the prevailing party. When a prevailing party is denied costs, the court should provide some explanation for the denial. A prevailing party should not be denied costs simply because the non-prevailing party acted in good faith; some kind of misconduct or recalcitrant conduct by the prevailing party should be required. Because such costs are routinely taxed against the non-prevailing party as a matter of course, the clerk is authorized to take action on 14 days' notice to the party against whom the costs will be taxed. This action by the clerk may be reviewed by the court upon motion within

seven days of the taxation. The Rule also makes clear that it applies only in the absence of relevant statutory provisions to the contrary.

Illustration 54-6

The executor of Freddy's estate is awarded \$250,000 in a wrongful death action against Jerry, and a judgment is entered by the clerk of courts on Wednesday, November 5. On Monday, November 10, the executor seeks an award of taxable costs in accordance with Rule 54(d)(1) by filing a bill of costs with the clerk. The clerk notifies Jerry of the amount to be charged against him on Wednesday, November 12 and enters the costs against Jerry on Wednesday, November 26. If Jerry objects to the amount of the award, he may make a motion to the court to seek review of the clerk's entry no later than Wednesday, December 3.

Attorneys' Fees

Subdivision (d)(2) applies both to attorneys' fees and any other costs that are not taxable under subdivision (d)(1). As with taxable costs under that subdivision, the Rule does not specify when attorneys' fees or nontaxable costs are recoverable; this is generally provided for by statute. The Rule simply sets forth the procedure for the recovery of such costs.

Unlike the traditional English rule, Rule 54 does not award attorneys' fees to the prevailing party as a matter of course. However, any party may seek to have such fees taxed against the opposing party by motion. Subdivision (d)(2)(A) excepts from the operation of this rule those fees that are an element of damages to be proved at trial, such as fees recoverable under the terms of a contract in dispute. Subdivision (e) further excepts from the operation of this Rule those fees, costs, and expenses imposed as sanctions for violations of various Rules, such as Rules 11, 16, and 37, and those levied pursuant to 28 U.S.C. § 1927, which provides for the imposition of penalties on attorneys and parties who unreasonably and vexatiously generate excessive costs by multiplying the proceedings in a case.

A motion for attorneys' fees or other nontaxable costs must be made within 14 days after the entry of judgment, unless a statute or the court directs otherwise. This is to ensure that the opposing party is notified of the motion before the time to appeal the judgment has elapsed. Such a motion does not automatically stay a judgment for the purposes of appeal or execution, but Rule 58 provides a mechanism for the court to do so. Evidentiary material bearing upon the fees requested, such as fee agreements between the attorneys and the parties, is not required at the time the motion is made, but may be required by the court. However, the grounds for the entitlement of the fees and the amount or fair estimate of the amount of fees sought must be submitted with the motion.

Illustration 54-7

Assume on the facts of Illustration 54-6 that the executor of Freddy's estate seeks to recover a portion of the attorneys' fees incurred by the estate. The executor must make a motion for attorneys' fees by November 19, or 14 days after the entry of judgment. The motion will not toll the time period within which Jerry may file an appeal unless Jerry makes a motion for a stay of judgment under Rule 58.

Subdivision (d)(2)(C) provides that the parties will have an opportunity to present evidence bearing on the evaluation of the legal services rendered, if so requested. The requirement that a judgment on a motion for attorneys' fees be set forth on a separate document was deleted in 2002, and the order can be included with the judgment on the underlying case or other document. However, the court should make clear that, wherever the order is recorded, it is intended to be the final disposition of the motion.

The Rule authorizes local rules that establish special procedures for resolving issues involving attorneys' fees, such as a

schedule reflecting customary fees in certain kinds of cases. The Rule also provides the district judge with the authority to refer issues concerning the value of legal services to a special master or motions made under subdivision (d)(2)(D) to a magistrate judge. This latter clause was necessary because the ability of magistrate judges to hear dispositive matters under Rule 72(b) is expressly limited to *pretrial* matters.



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54.2 ADDITIONAL AUTHORITY

10 *Moore's Federal Practice* §§ 54.01 -54.191

James & Hazard, Civil Procedure § 12.12

Friedenthal, Civil Procedure §§ 11.9, 13.1

Teply & Whitten, Civil Procedure 851-853



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54.3 LEADING CASES

Appealability of Certification Decision

Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576 (1st Cir. 1994) (decision to certify a case under Rule 54(b) reviewable under an abuse of discretion standard).

Appealability of Dismissal of Third Party

In re Yarn Processing Patent Validity Litig., 680 F.2d 1338 (11th Cir. 1982) (if no Rule 54(b) certification is made, an order dismissing an impleaded third party is not immediately appealable).

Appeal of Injunction Order

Casas Office Machs. v. Mita Copystar Am., 42 F.3d 668 (1st Cir. 1994) (an appeal of an express grant or denial of an injunction will lie even absent a showing of irreparable harm if the appeal is denied).

Appeal of Order to Dismiss Complaint

Haynesworth v. Miller, 261 U.S. App. D.C. 66, 820 F.2d 1245 (8th Cir. 1987) (if no separate judgment is pronounced according to Rule 54(b), an order dismissing one of several complaints is not immediately appealable).

Application Rather than Motion for Attorneys' Fees Permitted

Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752 (8th Cir. 2008) (where judgment was rendered in favor of students in their suit against school district, its superintendent, and others, challenging discipline imposed for wearing black armbands to school to protest mandatory school uniform policy, although students technically violated Rule 54(d)(2)(A) by seeking attorneys' fees via "application" rather than by motion and brief because error was minor, particularly as only discrepancies from rule were title and status as single pleading, rather than two separate documents, which was not sufficient to merit dismissal).

Bond Expenses

Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 624 F.2d 7 (3d Cir. 1980) (common-law rule that expenses incurred in securing a bond were not recoverable superseded by Rule 54(d) and thus taxed as costs).

Certification; Generally

Reiter v. Cooper, 507 U.S. 258, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993) (decision of district court to treat a defendant's claim as a counterclaim and enter judgment separately under Rule 54(b) such that an immediate appeal will lie not an abuse of discretion).

Certification Order Effective When Signed

Silivanich v. Celebrity Cruises, Inc., 333 F.3d 355 (2d Cir. 2003) (a district court's Rule 54(b) order under "bellwether" procedure was effective when it was signed and issued notwithstanding the fact that it was not entered in the bellwether action docket until eight months after it was signed and issued).

Costs Against Prevailing Party

Sheets v. Yamaha Motors Corp., 891 F.2d 533 (5th Cir. 1990) (costs taxed against prevailing party because they had "abused the trial process").

Costs Awarded After Reversal on Appeal

Engel v. Teleprompter Corp., 732 F.2d 1238 (5th Cir. 1984) (under Rule 54(c), defendant can seek attorneys' fees for the first time after plaintiffs' judgment is reversed on appeal).

"Costs" Defined by Statute

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987) (the term "costs" as used in Rule 54(d)(1) is defined by statute and the district has no authority to award expert witness fees greater than those specified in the pertinent statute).

Costs of Videotaped Depositions

Commercial Equipment Credit Corp. v. Stamps, 920 F.2d 1361 (7th Cir. 1990) (fees incurred for the transcription of videotaped depositions not taxable as costs under Rule 54(d)(1)).

Counterclaims Destroy Appealability of Interlocutory Order

Petrello v. White, 533 F.3d 110 (2d Cir. 2008) (order granting buyers partial summary judgment of their suit against sellers and ordering specific performance of contract for sale of land was not final order under Rule 54(d) since buyers' claims for damages from delayed closing and sellers counterclaims remained).

Damages in Excess of that Sought in Pleading

Scala v. Moore McCormack Lines, Inc., 985 F.2d 680 (2d Cir. 1993) (damages for pain and suffering in an amount greater than that sought in the complaint permitted under Rule 54(c)).

Deposition Expenses

Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir. 1982) (costs incurred for the taking of depositions that were not actually used at trial nevertheless recoverable as costs, but paralegal expenses are not recoverable).

Deposition and Document Costs

Stearns Airport Equipment Co. v. FMC Corp., 170 F.3d 518 (5th Cir. 1999) (costs related to the taking of depositions and the copying of documents are allowed if the materials were necessarily obtained for use in the action).

Discovery Sanction in Unrelated Action Properly Appealed

American Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y of United States, 406 F.3d 867 (7th Cir. 2005) (court of appeals had jurisdiction to hear an appeal of a discovery sanction imposed in an action even though a related action remained pending in the district court; the action had been dismissed completely on jurisdictional grounds and had not been consolidated with the related action).

Entitlement to Relief Required

Montana v. Crow Tribe of Indians, 523 U.S. 696, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998) (Rule 54(c) does not allow for an award of damages where the evidence does not prove the party's entitlement to such damages, not because such damages were not requested in the pleadings).

Entry in Docket Not Required for Certification Orders

Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355 (2d Cir. 2003) (certifications under Rule 54(b), unlike final judgments, do not require an entry in docket).

ERISA Cases

Bender v. Freed, 436 F.3d 747 (7th Cir. 2006) (in the *Seventh Circuit*, Rule 54(d)(2) applies to attorney fees motions in ERISA cases; accordingly, where a party filed its motion for fees 34 days after judgment was entered, motion was properly denied as untimely under 14-day time limit for filing fee motions set out in Rule 54(d)(2)).

Federal and State Claims Treated as One

General Acquisition, Inc. v. Gencorp, Inc., 23 F.3d 1022 (6th Cir. 1994) (federal and state claims that arose from a common aggregate of operative fact treated as one claim for purposes of appeal under Rule 54(b)).

IDEA Costs

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006) (the term "costs" in 20 U.S.C. § 1415(i)(3)(B), like the same term in Rule 54(d), is defined by statute at 28 U.S.C. § 1920; accordingly, the provision under the Individuals with Disabilities Education Act (IDEA) provision authorizing an award of "reasonable attorneys' fees" to prevailing party does not include fee for experts).

Interest on Costs

Wheeler v. John Deere Co., 986 F.2d 413 (10th Cir. 1993) (interest on costs begins from the date that the amount is actually determined by the court).

Judge May Tax Costs Directly

BDT Prods. v. Lexmark Int'l, Inc., 405 F.3d 415 (6th Cir. 2005) (the district judge may choose to tax costs on losing party without requiring the prevailing party to go through the clerk of court).

Local Rule Extends 14-Day Filing Period

Planned Parenthood v. Attorney General of State of N.J., 297 F.3d 253 (3d Cir. 2002) (a local rule which allowed a party 30 days from the entry of judgment or order to file a fee application or request for extension of filing period was an "order of the court" that extended the 14-day filing period established by Federal Rules of Civil Procedure).

Local Rule; Extension of Post-Judgment Motion Period

Ellman v. Woodstock # 200 School Dist., 59 Fed. Appx. 885 (7th Cir. 2003) (a local rule may extend the fourteen-day period under Rule 54 after entry of judgment for purposes of making motions for costs).

Misconduct--Denial of Costs

Park v. City of Chicago, 297 F.3d 606 (7th Cir. 2002) (misconduct by a prevailing party is sufficient to deny costs to that party).

Non-Parties to a Settlement Agreement; Standing to Challenge

Zupnick v. Fogel, 989 F.2d 93 (2d Cir. 1983) (parties that are not part of a settlement agreement lack standing to challenge a Rule 54(b) certification on that settlement agreement).

Order Authored by Attorney

In re Colony Square Co., 819 F.2d 272 (11th Cir. 1987) (an order written by an attorney that is issued by a judge does not violate due process).

Postage and Delivery Costs

Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879 (8th Cir. 2006) (although deposition costs were properly awarded to health care providers when they prevailed in medical malpractice case, it was not proper to award postage and delivery costs).

Reason for Certification to Be Stated in Record

Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331 (4th Cir. 1993) (certification under Rule 54(b) not proper because the district had failed to state any reasons for certification in the record and the Rule requires that the court do so).

Reason for Denial of Costs Stated in Record

Hall v. State Farm Fire & Cas. Co., 937 F.2d 210 (5th Cir. 1991) (district court cannot deny costs under Rule 54(d)(1) without an explanation of the reasons for the denial).

Relief Under Different Statutory Provision

Travis v. Gary Community Mental Health Ctr., 921 F.2d 108 (7th Cir. 1990) (plaintiff who relied upon the incorrect statutory provision for relief was nonetheless entitled to the relief specified in a different statute).

Rescission of Certification

Jasmin v. Dumas, 726 F.2d 242 (5th Cir. 1984) (district court was allowed to rescind its certification of a claim because it had not known that the motion had been opposed).

Service of Process Costs Separate From Rule 54 Costs

Darulis v. Garate, 401 F.3d 1060 (9th Cir. 2005) (plaintiff is entitled to costs incurred in serving process on defendants where defendants fail to waive service regardless of entitlement to costs under Rule 54).

Time Periods Enlarged by Local Rule

Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726 (7th Cir. 1995) (14-day time period for filing motions for attorneys' fees under Rule 54(d)(2) can be enlarged by local rule).



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TITLE VII. JUDGMENT

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§ 55.syn Synopsis to Chapter 55: Rule 55. Default; Default Judgment

Scope Rule 55. Default; Default Judgment

55.1 COMMENTARY

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1-55 Federal Civil Procedure Litigation Manual Rule 55. Default; Default Judgment

Rule 55. Default; Default Judgment

Rule 55 reads as follows:

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

* * * * *



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55.1 COMMENTARY

Rule 55 establishes the procedures to be used when a party defaults in an action, defined as "fail[ing] to plead or otherwise defend" in the action. Although a plaintiff may, in certain rare circumstances, be the object of a default judgment on claims asserted against it, a motion seeking default judgment is not the proper mechanism for a party defending a claim who desires to have the claim dismissed because the opposing party has failed to prosecute the claim. Rather, such a motion should be made in accordance with the dismissal provisions of Rule 41(b).

Entry of Default Generally

An entry of default on the record is made by the clerk of the court when a party fails to make a responsive pleading or "otherwise defend". This clause is intended to take into account those situations where a party defending a claim files a responsive pleading to the claim but does not cooperate with the remainder of the trial process.

An entry of default by the clerk is not automatic, however. A party seeking such an entry should provide the clerk with an affidavit stating the reasons why default should be entered on the record. A formal motion is not required. Subdivision (c) states that an entry of default can be set aside by the court, upon motion by a party, for good cause.

Illustration 55-1

Victoria commences a breach of contract action against Allan to recover \$750 for the services provided in repairing Allan's truck. Allan fails to answer the complaint and offers no reason for his non-cooperation. Under Rule 55(a), Victoria may request that an entry of default be entered against Allan. To do so, Victoria must provide the clerk with an affidavit stating why default should be entered on the record. For example, Victoria may indicate that she has contacted Allan to discuss the lawsuit, but Allan refuses to entertain any such discussion.

Default Judgment by the Clerk

Entry of default by the clerk under subdivision (a) should be carefully distinguished from a default judgment. Default judgment shall be entered by the clerk or may be entered by the court only after an entry of default has been made by

the clerk under subdivision (a). A default judgment may be entered by the clerk only if three conditions are met: (1) the claim is for a sum certain or a sum that can be made certain by mathematical computation; (2) default has been entered by the clerk because of a failure to appear; (3) the person against whom a default judgment is sought is not an infant or an incompetent person. Entry of default judgment by the clerk is mandatory if these conditions have been met. The first condition limits the circumstances in which the clerk will enter a default judgment to those where the party seeking the default judgment is seeking monetary damages. Claims in which injunctive or declaratory relief is requested fall outside the scope of the clerk's authority to enter a default judgment.

Illustration 55-2

Assume on the facts of Illustration 55-1 that the clerk enters Allan's default on the record. If requested by Victoria, the clerk must then enter a default judgment against Allan, as the claim is for a specified amount and Allan has failed to appear in any fashion in the action.

The second condition ensures that parties will not have default judgments entered against them without an exercise of discretion by the court if they indicate some desire to defend the claim. In general, a "not appearing" will be construed quite strictly, and a party who files an untimely pleading, or a party who files a motion to dismiss under Rule 12 but does not subsequently file a responsive pleading, or a party who even notifies the prosecuting party of their intention to defend a claim, cannot be the subject of a default judgment by the clerk under subdivision (b)(1). The third condition is self-explanatory. A formal motion is not required to have a default judgment entered by the clerk under subdivision (b)(1), but an affidavit stating the reasons that the party is seeking the default judgment and attesting to the satisfaction of the three conditions should be filed with the clerk.

Illustration 55-3

Assume on the facts of Illustration 55-1 that Allan employs an attorney who notifies the court of Allan's intention to remove the action to federal court. However, no further appearance is made by Allan or his attorney and the court does not receive a removal notification from any federal court. Under these circumstances, Victoria must make a motion to the court in order to obtain default judgment, as the attorney's limited communication with the court should be sufficient to constitute an "appearance." Allan must also be provided with seven days' notice before a default judgment is entered.

Default Judgment by the Court

Unlike default judgments by the clerk, default judgments ordered by the court under subdivision (b)(2) are discretionary. A party may always seek a default judgment under this subdivision, and must do so if one of the three conditions listed in subdivision (b)(1) has not been satisfied. Although the easier route in securing a default judgment by a clerk through the provisions of subdivision (b)(1) may seem appealing, a party who is entitled to a default judgment by the clerk may nonetheless seek a default judgment ordered by the court under subdivision (b)(2) because that party desires the certainty provided by the entry of a default judgment under the terms of that subdivision. A default judgment ordered by the court is more likely to withstand attack through a motion by the opposing party to set aside the default judgment than is a default judgment by a clerk.

The most important feature of subdivision (b)(2) is the seven-day notice provision to the opposing party. This ensures that the party against whom a default judgment is sought is informed of the possibility of a default judgment entered against them and the consequences thereof. The Rule also provides the court with the ability to conduct hearings or order the party seeking the default judgment to produce evidence that would support the party's claim for relief. Under subdivision (d), such evidence is required when a default judgment against the United States or a representative of the United States is sought by a party.

Illustration 55-4

Assume on the facts of Illustration 55-1 that an entry of default is made by the clerk of courts. Although Victoria may be entitled to a default judgment by the clerk under subdivision (b)(1), she may nonetheless seek a default judgment under subdivision (b)(2). Allan must then be provided with 7 days' notice of the default judgment, and in this way the judgment is less vulnerable to attack on appeal or on reconsideration.

Setting Aside Entries of Default and Default Judgments

As noted, subdivision (c) provides that an entry of default under subdivision (a) may be set aside by the court upon a showing of good cause. On the other hand, a default judgment may be set aside only under the stricter standard set forth in Rule 60(b). Because subdivision (c) does not contain further guidance on that which constitutes "good cause," many courts have used the factors listed in Rule 60 in making such a determination. However, the "good cause" standard of subdivision (c) provides the court with a greater degree of discretion in setting aside an entry of default than in setting aside a default judgment under Rule 60(b).



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TITLE VII. JUDGMENT

Chapter 55 Rule 55. Default; Default Judgment

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55.2 ADDITIONAL AUTHORITY

10 *Moore's Federal Practice* §§ 55.01 -55.50

Friedenthal, *Civil Procedure* § 9.4

Teply & Whitten, *Civil Procedure* 776-779



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55.3 LEADING CASES

Action Constituting an "Appearance"

In re Roxford Foods, Inc., 12 F.3d 875 (9th Cir. 1993) (defendant had made an appearance sufficient to trigger the three-day notice provision of subdivision (b)(2) when the defendant had made contacts with the plaintiff indicating an intent to oppose the claim).

United States ex rel. Time Equip. Rental & Sales, Inc. v. Harre, 983 F.2d 128 (8th Cir. 1993) (untimely filing of an answer constituted an appearance in the action).

Zuelzke Tool & Eng'g Co. v. Anderson Die Castings, Inc., 925 F.2d 226 (7th Cir. 1991) (announcing Seventh Circuit rule that only the defendant who makes a submission or presentation to the court has made an appearance for the purposes of Rule 55(b)(2)).

Muniz v. Vidal, 739 F.2d 699 (1st Cir. 1984) (though defendants had not filed a pleading, attorney for defendants had appeared in the action, thus constituting an "appearance").

Appeal to Circuit Court Not Substitute for Post-Trial or Judgment Relief Motions

Consorzio del Prosciutto di Parma v. Domain Name Clearing Co., LLC, 346 F.3d 1193 (9th Cir. 2003) (because Rule 55(c) and Rule 60(b) set forth procedures for a party to make a motion to set aside entry of default or for relief from judgment, respectively, an appeal to a federal circuit court cannot be used as substitute for these procedures).

Attorneys Fees; Method of Apportionment

Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331 (1st Cir. 2008) (attorney fee award was improper because district court should have used "time expended" method of apportionment, not "relative liability" method of apportionment, in light of fact that considerable time spent in litigating against one defendant dwarfed time plaintiffs spent in litigating against second defendant).

Denial of Receipt of Summons Not Sufficient

Stephenson v. El-Batravi, 524 F.3d 907 (8th Cir. 2008) (party's mere denial of having received summons and complaint did not overcome presumption of effective service that arose from proper mailing).

Default Judgment Against United States

United States v. Forma, 42 F.3d 759 (2d Cir. 1994) (default judgment on claim against the United States should have been set aside because sovereign immunity existed and the court was without jurisdiction to enter the judgment).

Hearing on Damages May Be Required

In re The Home Restaurants, 285 F.3d 111 (1st Cir. 2002) (a hearing may be required on a default judgment to set damages when the amount is in dispute or is not ascertainable from the pleadings).

Jurisdictional Attack Not Issue Precluded by Default

Jackson v. FIE Corp., 302 F.3d 515 (5th Cir. 2002), vacated, remanded, 2009 U.S. App. LEXIS 2625 (5th Cir. Feb. 5, 2009) (Rule 60, which authorizes court to relieve party from final judgment on the ground that the judgment is void, trumps rule of issue precluded by default judgment; party could subsequently raise issue precluded by default judgment for purpose of challenging in personam jurisdiction of court and disputing its minimum contacts with the forum).

Personal Jurisdiction Required for Default Judgments

In re Tuli, 172 F.3d 707 (9th Cir. 1999) (to avoid entering default judgment that can later be successfully attacked as void, a court should determine whether it has the power to enter the judgment in the first place, *i.e.*, whether it has personal jurisdiction over the parties).

Setting Aside of Default Judgment; Standard

Enron Oil Corp. v. Diakuhara, 10 F.3d 90 (2d Cir. 1993) (entry of default may be set aside under a less strict standard than that pertaining to a default judgment).

Philips Medical Sys. Int'l B.V. v. Bruetman, 8 F.3d 600 (7th Cir. 1993) (refusal to set aside default judgment upheld where the defendant did not comply with the orders of the court).

Harrell v. DCS Equipment Leasing Corp., 951 F.2d 1453 (5th Cir. 1992) (district court has a great deal of discretion to set aside a default judgment when the judgment would result in a miscarriage of justice).

Coon v. Grenier, 867 F.2d 73 (1st Cir. 1989) (standard of Rule 55(c) in setting aside entry of default should be construed liberally).

Uncertified Class Members--Default Judgment Not Enforceable

Partington v. American Int'l Specialty Lines Ins. Co., 443 F.3d 334 (4th Cir. 2006) (class members who had never been certified as a class under Rule 23 did not have an enforceable judgment in their favor and default judgment was unenforceable with respect to those class members).



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Chapter 56 Rule 56. Summary Judgment

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§ 56.syn Synopsis to Chapter 56: Rule 56. Summary Judgment

Scope Rule 56. Summary Judgment

56.1 COMMENTARY

56.2 ADDITIONAL AUTHORITY

56.3 LEADING CASES



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TITLE VII. JUDGMENT

Chapter 56 Rule 56. Summary Judgment

1-56 Federal Civil Procedure Litigation Manual Rule 56. Summary Judgment

Rule 56. Summary Judgment

Rule 56 reads as follows:

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) By a Defending Party. A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) **Establishing Facts.** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts--including items of damages or other relief--are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) **Establishing Liability.** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) **In General.** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) **Opposing Party's Obligation to Respond.** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) **When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

[Note: The United States Supreme Court is expected to submit proposed amendments to Rule 56 to Congress by the May 1, 2010 deadline. These amendments will re-style the text of Rule 56 and make important textual clarifications. Absent Congressional action to the contrary, these amendments will take effect on December 1, 2010. The text of the amended version of Rule 56 appears in the front gray pages of this manual and is discussed briefly below.]

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TITLE VII. JUDGMENT

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56.1 COMMENTARY

Rule 56, which governs summary judgment, is perhaps the most recognized and analyzed Rule. Summary judgment is considered to be an efficacious method of disposing of an action when the only issues to be decided are legal ones.

Subdivisions (a), (b), (c)(1), (d), (e)(1), (f), and (g) of Rule 56 are strictly procedural in nature, and there are very few controverted issues involving those parts of the Rule. On the contrary, subdivisions (c)(2) and (e)(2) have been the subject of a number of Supreme Court opinions, and the issues surrounding them are significantly more complex. For this reason, this Chapter will separate the discussion of Rule 56 accordingly.

2010 Amendments to the Rule

Amendments to Rule 56 are expected to take effect on December 1, 2010. Although an exhaustive discussion of the amendments must await next year's edition, as they produce a total re-structuring of the entire Rule, some advance notes about the amendments are in order. The amendments are designed to make the operation of the Rule more workable in practice, as they contain improved procedures for presenting and deciding summary judgment motions and making those procedures more consistent across the districts. To summarize, the amendments require a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record supporting its fact position. The amendments also recognize that a party may submit certain unsworn statements in lieu of an affidavit and provide courts with options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion. The amendments also contain more specific time periods within which parties may file motions for summary judgment--a glaring deficiency under the existing rule. The amended Rule also explicitly authorizes the granting of "partial summary judgments." The proposed amendments are not intended to change the familiar summary judgment standard or burdens.

Motions for Summary Judgment; How and When Made

Subdivision (a) states simply that a plaintiff or other party asserting any kind of cognizable claim under the Rules may make a motion for summary judgment on that claim. The motion for summary judgment may include, but is not required to include, supporting affidavits, a point reiterated several times throughout the Rule. Subdivision (b) states a

reciprocal right for parties defending a claim. The open-ended timing provisions of the Rule were once contained within these blanket authorizations for presenting and defending parties; under the 2009 amendments to the Rule, they are now set out under subdivision (c)(1).

Under subdivision (c)(1), any party may move at any time for summary judgment, beginning with the commencement of the action. Summary judgment motions will rarely be made this early in a case, and a premature motion will be subject to extension by the court under subdivision (c)(1) and Rule 6(b). Parties remain free to make motions for summary judgment at any time up to 30 days after the close of all discovery. The advisory committee note indicates that this deadline is merely a default provision, subject to alteration by court order or local rule, and anticipates that most summary judgment motion deadlines will be established by a scheduling order. A party against whom a motion for summary judgment is served must serve a response within 21 days after service of the motion is served or, in the rare event the summary judgment motion is served before a responsive pleading is due, 21 days after the responsive pleading is due. The moving party may then file a reply within 14 days after being served with the response to the original motion.

Illustration 56-1

While Jim and his wife, Sharon, are walking to the local grocery store, an automobile driven by Frank darts off the road and hits Jim. On January 5, Sharon commences a wrongful death action against Frank and requests \$20 million for compensatory damages and loss of consortium. Sharon secures a waiver of process from Frank on January 10. Under Rule 56(c)(1), Sharon may make a motion for summary judgment at any time, and she need not wait until Frank files an answer, though it will usually be prudent to do so. Frank may also choose to make a motion for summary judgment at any time, and Frank need not file an answer before making the motion. Frank should also request in his motion that his 60-day time period for serving an answer be tolled by the filing of his summary judgment motion.

It has been well-settled that the court has the authority to grant summary judgment *sua sponte*. However, to do this, the court must allow the parties the requisite 21-day notice of subdivision (c) within which to file affidavits, depositions, or other papers in support or opposition to the proposed action by the court. The court may also grant summary judgment for the nonmoving party if the parties have established that there are no genuine issues of material fact and it appears that the nonmoving party is entitled to judgment as a matter of law.

Illustration 56-2

Assume on the facts of Illustration 56-1 that affidavits filed with the court clearly establishes that Frank was driving under the influence of alcohol and that this impediment led directly to the accident and Jim's death. Frank does not take any action to contest these affidavits. Under these circumstances, after the court has allowed the parties 21 days within which to file affidavits, depositions, or other papers supporting their respective positions, the court may grant summary judgment without awaiting a motion from the parties.

Although Rule 43(c) confers upon the court the discretion to dispense with oral arguments when deciding a motion, hearing on most summary judgment motions is strongly recommended.

Partial Summary Judgment

Both subdivision (a) and subdivision (b) allow a motion for summary judgment on all or any part of a claim. Similarly, the final sentence of subdivision (d)(2) permits a motion for summary judgment on the issue of liability alone even though there is a disputed issue of fact concerning damages. Although the Rule does not explicitly provide for the reverse situation, i.e., a motion for summary judgment on the issue of damages when the liability of the parties is still in

dispute, the court has the discretion to decide a motion under the authority of subdivisions (a) and (b). Decisions by the court on such motions are commonly referred to as partial summary judgments, which is slightly misleading. The term judgment, as defined in Rule 54, necessarily implies a decision or order of the court from which an appeal can be immediately taken. Motions for summary judgment on a part of a claim are normally interlocutory in character, and summary judgments on issues of liability alone are expressly designated as such.

Illustration 56-3

Assume on the facts of Illustration 56-2 that the court is prepared to find for Sharon on the issue of Frank's liability, but is unwilling to award to Sharon the full amount of her damage claims. Rule 56 allows the court to grant partial summary judgment under these circumstances. If the court does indeed grant partial summary judgment on the issue of Frank's liability, the court will allow the litigation to proceed to determine the issue of damages. However, the court's order on Frank's liability is not immediately appealable under Rule 54.

Summary Judgment and Judgment on the Pleadings Distinguished

A motion for summary judgment is different from a motion for judgment on the pleadings under Rule 12(c) or a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) in that the former is designed to pierce the allegations in the pleadings to determine if there truly is a factual matter in dispute. Thus, additional materials outside the pleadings are usually considered by the court in deciding on a motion for summary judgment. These motions under Rule 12 are easily converted to a motion for summary judgment simply by presenting materials other than the pleadings to the court. This conversion thus provides the parties with the ability to submit additional materials in support of or in opposition to the motion.

Supporting Materials on Motion for Summary Judgment

The party moving for summary judgment is permitted to supplement the motion with supporting affidavits under subdivision (a) or (b), and the party opposing the motion is authorized to submit opposing affidavits under the second sentence of subdivision (c). Under a strict reading of the Rules, additional materials, such as depositions and answers to interrogatories, can be submitted by the parties only with permission of the court under subdivision (e)(1), but these materials are usually submitted as a matter of course along with the motion by the moving party and the brief in opposition to the motion by the adverse party. Nonetheless, the court retains the discretion to disallow certain kinds of materials submitted by the parties in support of or in opposition to the motion. If the opposing party cannot obtain affidavits or additional materials necessary to oppose the motion within the time period before the hearing on the matter, subdivision (f) allows the court to dismiss the motion, grant a continuance, or take any other action as it deems proper.

Under subdivision (e), supporting or opposing affidavits must be based on the personal knowledge of the affiant, must contain only those facts that would be admissible at trial, and must be duly sworn or certified. Subdivision (g) allows the imposition of specific sanctions, including civil contempt, on parties who submit affidavits in bad faith or for the purpose of delay. Although this subdivision provides for such sanctions only in conjunction with affidavits, parties who submit additional materials in bad faith or for the purpose of delay are sanctionable under Rule 37 and possibly Rule 11.

Case Not Fully Adjudicated on Summary Judgment Motion

The provisions of subdivision (d)(1) contemplate the situation in which the court determines that summary judgment is not appropriate with respect to all or part of a claim. In that instance, the court is directed to ascertain those facts that are not in controversy and for which a trial is not needed, and make an order establishing those facts as such. At trial, those facts are not properly within the province of the jury.

Illustration 56-4

Assume on the facts of Illustration 56-1 that Sharon files a timely motion for summary judgment and attaches affidavits which establish that Frank was driving with a blood alcohol content of three times the legal limit. Frank does not contest the accuracy of these results, but contends that the accident was caused when Jim wandered out into the street, thus causing the accident. In this situation, the trial judge may make an order establishing the fact that Frank was driving under the influence of alcohol, thereby removing determination of this uncontested fact from the jury. However, Sharon's motion for summary judgment will be denied.

Summary Judgment Standard

The circumstances in which summary judgment is appropriate are not always straightforward. The standard for granting a motion for summary judgment in subdivision (c)(2)--"there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law"--has been the subject of numerous Supreme Court opinions. These opinions appear to present two contradictory views of summary judgment. The traditional view suggests that the purpose of summary judgment is to dispose of only those cases that present only legal issues. Under this view, the court is not supposed to engage in any kind of fact-finding role, but rather is required simply to determine whether any disputed issue of fact exists.

However, this view of summary judgment appears to contradict the principle often articulated by judges and scholars that, in deciding on a motion for summary judgment, the court should view the evidence in the light most favorable to the nonmoving party. Viewing the evidence in this way necessarily implies that the court must engage in an assessment of the weight of the evidence. Proponents of this view of summary judgment suggest that the purposes of summary judgment is to weed out those cases in which a trial would be useless.

This latter view is supported by the 1991 amendments to Rule 50, which govern judgments as a matter of law, commonly referred to as directed verdicts or JNOVs. The advisory committee's note to those amendments indicates that the phrase "judgment as a matter of law" in Rule 50 was deliberately chosen to correspond with the standard used in determining summary judgment motions. From this, it can be logically inferred that summary judgment in favor of a party is appropriate when judgment as a matter of law would have been granted to that party at trial under Rule 50. Rule 50 provides further guidance on the "judgment as a matter of law" standard: "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." This standard implies that the court is required to determine how a reasonable jury would act at trial, which is contrary to the notion that the court's role is limited to determining legal issues.

Which view of summary judgment is correct? Like many issues that involve complicated questions of statutory or Rules construction, there is merit in both views. Much of the confusion can be understood by recalling the full standard for summary judgment articulated in subdivision (c)(2). Essentially, it is a two-part test, as the moving party must demonstrate both that no genuine issue of material facts exists *and* that it is entitled to judgment as a matter of law. This test is properly understood by requiring *first* that the moving party demonstrate that it is entitled to judgment as a matter of law. This language implies that this aspect of summary judgment is thus identical to a judgment on the pleadings under Rule 12(c), a view supported by the repeated statements in Rule 56 that affidavits in support of a motion for summary judgment are not required. Stated somewhat differently, if a party making a claim moves for summary judgment, it is a necessary but not sufficient condition that the movant demonstrate that it is entitled to judgment as a matter of law by alleging facts sufficient to state a cognizable claim upon which relief can be granted *and* by establishing that any affirmative defense alleged by the defending party does not sufficiently repudiate the claim. Alternatively, if a party defending a claim moves for summary judgment, it is a necessary but sufficient condition that the movant demonstrate that it is entitled to judgment as a matter of law by establishing that the facts alleged by the party making the claim do not state a claim upon which relief can be granted *or* by establishing that the facts

constituting the affirmative defense are incontroverted. In deciding whether a party has made the requisite demonstration in this regard, disputed questions of fact are simply not relevant, and a court should properly refrain from assessing their relative weight.

Illustration 56-5

Mike brings an action against Melissa under a federal statute and alleges facts A, B, and C in his complaint. Melissa files an answer admitting facts A and B but denying fact C. Additionally, Melissa raises an affirmative defense by alleging facts D, E, and F, which Mike admits in a subsequent pleading. Melissa then files a motion for summary judgment on Mike's original claim, arguing that facts A, B, and C do not state a claim upon which relief can be granted. If the court agrees with Melissa, it should grant Melissa her motion, and the issue of whether fact C is a disputed issue of material fact is not relevant.

Illustration 56-6

Assume on the facts of Illustration 56-5 that in her motion for summary judgment, Melissa also argued that she is entitled to judgment on Mike's original claim because admitted facts D, E, and F constitute an affirmative defense even if Mike's complaint states a cognizable claim. If the court agrees that Mike's complaint states a claim upon which relief can be granted, it should nonetheless grant Melissa's motion if her answer states a cognizable defense. The issue of whether fact C is a disputed issue of material fact is not relevant.

Illustration 56-7

Assume on the facts of Illustration 56-6 that Mike defends Melissa's motion for summary judgment by arguing that his complaint states a sufficient claim and Melissa's defense is deficient because she has failed to allege fact G. If the court agrees with Mike, it should deny Melissa's motion for summary judgment not because fact C is a disputed issue of material fact, but rather because Melissa has not demonstrated that she is entitled to judgment as a matter of law.

Only after the court determines that the party moving for summary judgment is entitled to judgment as a matter of law should it proceed to the question of whether any genuine issue of material fact exists. If this latter question is answered in the negative, only then is summary judgment appropriate.

Relationship to Rule 12 and Rule 50

The apparent connection between the "judgment as a matter of law" part of the summary judgment standard and a judgment on the pleadings under Rule 12(c) suggests that the choice of the framers of the 1991 amendments to Rule 50 to adopt the "judgment as a matter of law" standard so that it would correspond with the summary judgment standard may have been an unfortunate choice of words. Rather, motions under Rule 50, which under the common law were known as directed verdicts and JNOVs, are more correctly keyed to the second part of the summary judgment standard--"no genuine issue of material fact exists." Thus, terminology such as "judgment when no genuine issue of material fact exists" would be more fitting for motions under Rule 50. As noted above, the moving party must also make this demonstration to justify the grant of a motion for summary judgment. The role of additional materials outside the pleadings becomes crucial in this regard, as the court may then use these additional materials to appropriately weigh the evidence that would be presented at trial to determine if a trial would be needed.

In this way, then, summary judgment is correctly perceived as a bridge connecting the Rule 12(c)(2) mechanism for determining the legal *sufficiency of the pleadings*--judgment as a matter of law--and the Rule 50 mechanism for determining the factual *sufficiency of the evidence*--no genuine issue of material fact exists. Only when the moving

party satisfies both of these components of the standard should the court grant the motion for summary judgment.

The framers of Rule 56, however, unintentionally reversed the correct operation and application of the standard by placing the "genuine issue" component before the "judgment as a matter of law" component. The party seeking summary judgment should first demonstrate the legal sufficiency of its pleadings before demonstrating the legal insufficiency of the opposing party's evidence.

Thus, although the court is not supposed to weigh the credibility of the evidence presented by the materials outside the pleadings to determine if the moving party is entitled to judgment as a matter of law, the court *must* do so to determine if genuine issues of material fact exist. In making this latter determination, the court should also take into account the respective burdens of proof that would fall on the parties at trial and whether those parties have satisfied those burdens in their materials presented in support of or in opposition to a motion for summary judgment.

Defeating a Motion for Summary Judgment

A party may defeat a motion for summary judgment in one of three ways. First, the defending party may simply point out to the court that the moving party has simply not alleged facts sufficient to make out a cognizable claim. In other words, the defending party points out that the moving party has not demonstrated that it is entitled to a judgment as a matter of law.

Illustration 56-8

Peter is injured when the blade of a table saw with which he was working unexplicably shatters. Tommy's Tools is the manufacturer of the blade. Peter commences a products liability action against Tommy's Tools, arguing that Tommy's Tools was negligent in the design of the table saw. If Peter files a timely motion for summary judgment, Tommy's Tools may defeat the motion by simply pointing out that Peter has not alleged facts sufficient to establish that Tommy's Tools owed Peter a duty of care.

Second, the defending party may point out to the court that the moving party has made no attempt to demonstrate the legal insufficiency of the defending party's affirmative defense--another way of demonstrating that the moving party is not entitled to judgment as a matter of law.

Illustration 56-9

Assume on the facts of Illustration 56-8 that Tommy's answer alleges that Peter suffered the injuries as the result of his own negligence in using the table saw. However, if Peter fails to refute Tommy's contributory negligence defense in any manner, Tommy's Tools may defeat the summary judgment motion simply by bringing this to the court's attention.

Third, the defending party may demonstrate to the court that, even though the moving party has demonstrated the legal sufficiency of its claim, genuine issues of material fact exist which justify a trial on those issues.

Illustration 56-10

Assume on the facts of Illustration 56-8 that Tommy's Tools produces an affidavit from a witness stating that Peter disengaged the safety devices on the table saw before using it, and therefore cannot be held liable for his injuries. On the other side, Peter claims that the safety devices were not attached when he received the table saw. Under these circumstances, Tommy's Tools may defeat Peter's motion for summary judgment by pointing out that genuine issues of fact exist as to the negligence of the parties.

If a defending party chooses the third route, subdivision (e)(2) states that it "may not rely merely on allegations or denials in its own pleadings; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial." If a defending party does not respond in this fashion, subdivision (e)(2) instructs the court to enter summary judgment for the moving party, "if appropriate." This phrase was intended to ensure that summary judgment should not be granted unless the moving party first meets its burden of demonstrating that it is entitled to judgment as a matter of law.

Illustration 56-11

Assume on the facts of Illustration 56-10 that Tommy's Tools claims that Peter disengaged the safety devices before using the saw but can produce no evidence to substantiate the claim. If this is Tommy's only defense and all other facts comprising the Peter's claim are incontroverted, the court should grant Peter's motion for summary judgment.



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56.2 ADDITIONAL AUTHORITY

11 *Moore's Federal Practice* §§ 56.01 -56.50

James & Hazard, Civil Procedure § 4.10

Friedenthal, Civil Procedure §§ 9.1-9.3

Teply & Whitten, Civil Procedure 782-790



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TITLE VII. JUDGMENT

Chapter 56 Rule 56. Summary Judgment

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56.3 LEADING CASES

Affidavits to Specify Evidence

Jarvis v. Nobel/Sysco Food Serv. Co., 985 F.2d 1419 (10th Cir. 1993) (an affidavit under Rule 56(f) should specify the evidence the party expects to recover in order to oppose the motion for summary judgment; broad request for further discovery inadequate).

Appeal Filed--Summary Judgment Improper

Mahone v. Ray, 326 F.3d 1176 (11th Cir. 2003) (once notice of appeal had been filed, a party may attack an order only through a motion for relief for judgment under Rule 60, not through a summary judgment motion under Rule 56).

Authenticated Reports Excepted from Certification Requirement for Attachments

Article II Gun Shop v. Gonzales, 441 F.3d 492 (7th Cir. 2006) (inspection reports attached to an affidavit were not sworn or certified copies as required by Rule 56(e) (now Rule 56(e)(1)), but they were nonetheless considered in a motion for summary judgment because they were properly authenticated by affiant as public reports under *Fed. R. Evid. 901(b)(1)(7)* and they were admissible public records under *Fed. R. Evid. 803(8)*).

Briefs Insufficient In Lieu of Affidavit

Pastore v. Bell Tel. Co., 24 F.3d 508 (3d Cir. 1994) (brief in lieu of affidavit insufficient to preserve the argument in a motion for summary judgment).

Burden of Production on Moving Party

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (party who seeks summary judgment need not produce evidence on an issue in which it will not carry the burden of proof at trial).

Burden on Party Opposing Summary Judgment Motion

Rand v. CF Indus., 42 F.3d 1139 (7th Cir. 1994) (party opposing motion for summary judgment must offer specific facts that raise issues of credibility instead of simply claiming that they are lies).

Burdens and Standards Considered on Summary Judgment Motion

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (special libel standards and burdens of proof must be considered by the court in ruling on a summary judgment motion).

Continuance on Summary Judgment Motion

Weinberg v. Whatcom County, 241 F.3d 746 (9th Cir. 2001) (Rule 56(f) provides a mechanism whereby a party opposing a motion for summary judgment may, by affidavit, state valid reasons why he is temporarily unable to present "facts essential to justify the party's opposition" to the motion).

Stearns Airport Equipment Co., Inc. v. FMC Corp., 170 F.3d 518 (5th Cir. 1999) (to support a continuance, a motion to suspend summary judgment pending the completion of discovery must demonstrate: (1) why the moving party needs additional discovery; and (2) how the additional discovery will likely create a genuine issue of material fact).

Converted Motion to Dismiss Made Explicit by Court

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003) (a Rule 12(b)(6) motion to dismiss supported by extraneous materials cannot be regarded as one for summary judgment until the district court acts to convert it by indicating, preferably by explicit ruling, that it will not exclude those materials from its consideration; accordingly, until the district court converts the motion to dismiss into a summary judgment motion, a plaintiff is free to file proper notice of dismissal under Rule 41(a)(1)).

Findings and Conclusions Not Required

Gaines v. Haughton, 645 F.2d 761 (9th Cir. 1981) (findings of fact and conclusions of law under Rule 52 are not required in a decision on a motion for summary judgment, as only questions of law are presented in such a motion).

"Genuine" Defined

Lemoine v. New Horizons Ranch & Center, Inc., 174 F.3d 629 (5th Cir. 1999) (a denial of a motion for summary judgment on the ground that genuine issues of material fact exist implies that the trial made two distinct conclusions: (1) the issues of fact in question are genuine, *i.e.*, the evidence is sufficient to permit a reasonable factfinder to return a verdict for the nonmoving party; and (2) the issues of fact are material, *i.e.*, resolution of the issues might affect the outcome of the action).

Inadmissible Statements in Affidavits

Miller v. Solem, 728 F.2d 1020 (8th Cir. 1984) (affidavits that contained inadmissible hearsay could not be used to oppose a motion for summary judgment).

Interpretation of Statistics as Material Fact

Cronin v. Aetna Life Ins. Co., 46 F.3d 196 (2d Cir. 1995) (as statistics could be interpreted in different ways, thereby presenting an issue of material fact, summary judgment was improper).

Lack of Subject-Matter Jurisdiction

MacKay v. Pfeil, 827 F.2d 540 (9th Cir. 1987) (lack of subject matter jurisdiction is not the proper subject of a motion for summary judgment).

Local Rules Interpreted in Manner Consistent With Rule 56

Reed v. Bennett, 312 F.3d 1190 (10th Cir. 2002) (district courts must interpret and apply local rules governing summary judgment motions in a manner consistent with Rule 56).

Materials Outside Pleadings

Salehpoor v. Shahinpoor, 358 F.3d 782 (10th Cir. 2004) (the district court properly treated defendants' separate motions to dismiss on basis of qualified immunity as motions for summary judgment and granted summary judgment based on materials outside pleadings, as neither party argued on appeal that they were not given opportunity to respond to materials).

"Pendent Appellate Jurisdiction"

Swint v. Chambers County Comm'n, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (the Supreme Court denied that the doctrine of "pendent appellate jurisdiction" could be used to review an otherwise non-appealable denial of a motion for summary judgment when it is not intertwined or essential to the appeals of the appealable denials of summary judgment on grounds of qualified immunity).

Personal Knowledge Requirement

Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999 (9th Cir. 1990) (requirement of personal knowledge in affidavits under Rule 56(e) (now Rule 56(e)(1)) could be inferred from the affidavits themselves).

Privileged Information

Association for Reduction of Violence v. Hall, 734 F.2d 63 (1st Cir. 1984) (privileged material not admissible at trial cannot be considered on a motion for summary judgment).

Reversal of Summary Judgment

Masson v. New Yorker Magazine, 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991) (grant of defendant's motion for summary judgment reversed because there was evidence in the record to support a jury finding that the defendant acted with actual malice).

Right of Non-Moving Party to Be Heard

Brooks v. Hussman Corp., 878 F.2d 115 (3d Cir. 1989) (motion for summary judgment cannot be granted without allowing the opposing party the opportunity to respond in full).

Sanctions; Standards

Fort Hill Builders v. National Grange Mut. Ins., 866 F.2d 11 (1st Cir. 1989) (sanctions under Rule 56(g) should be reserved for especially egregious conduct, and not simply weak claims in an affidavit).

Statements of Opinion Insufficient

Cleveland v. Porca Co., 38 F.3d 289 (7th Cir. 1994) (statements of opinion are not sufficient to withstand a motion for summary judgment).

Sua Sponte Summary Judgment

Rogan v. Menino, 175 F.3d 75 (1st Cir. 1999) (trial courts may grant summary judgment *sua sponte* under two conditions: (1) the case must be sufficiently advanced in terms of pretrial discovery for the party against whom summary judgment may be granted to know what evidence can be mustered against that party; and (2) that party must have received notice of both the grounds that the court will consider and the point at which the party's obligation to bring forth evidence supporting the elements of her claim accrues).

Summary Judgment

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 28 F.3d 1388 (5th Cir. 1994) (court that considers summary judgment *sua sponte* must provide all the parties with the requisite 10-day notice).

Summary Judgment as Sanction

Tobey v. Extell/JWP, Inc., 985 F.2d 330 (7th Cir. 1993) (summary judgment cannot be granted as a sanction on the adverse party for failing to oppose the motion).

Summary Judgment for Non-Moving Party

In re Continental Airlines, 981 F.2d 1450 (5th Cir. 1993) (summary judgment may be entered for non-moving party).

Time Period for Responding to Summary Judgment

White v. Texas Am Bank/Galleria, N.A., 958 F.2d 80 (5th Cir. 1992) (all non-moving parties, including intervening parties, must be given 10 days within which to respond to a motion for summary judgment).

Unsworn Statements

Fowle v. C & C Cola, 868 F.2d 59 (3d Cir. 1989) (where statement of expert was not sworn by the expert, it could not be considered on a motion for summary judgment).



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TITLE VII. JUDGMENT

Chapter 57 Rule 57. Declaratory Judgment

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§ 57.syn Synopsis to Chapter 57: Rule 57. Declaratory Judgment

Scope Rule 57. Declaratory Judgment

57.1 COMMENTARY

57.2 ADDITIONAL AUTHORITY

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TITLE VII. JUDGMENT

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1-57 Federal Civil Procedure Litigation Manual Rule 57. Declaratory Judgment

Rule 57. Declaratory Judgment

Rule 57 reads as follows:

Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under *28 U.S.C. § 2201*. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

* * * * *



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57.1 COMMENTARY

Although Rule 57 governs declaratory judgments, it does not specify when a party may seek declaratory relief. Instead, it simply states that proceedings under the Declaratory Judgment Act, *28 U.S.C. § 2201*, which provide the substantive law in actions involving declaratory judgments, shall be according to the procedures of the Civil Rules. Thus, district courts are empowered to hear claims for declaratory judgments, with the exception of certain claims under § 7428 of the *Internal Revenue Code*, over which only the District Court for the District of Columbia and the United States Court of Federal Claims have jurisdiction.

The Rule also provides that a court has the authority to advance a hearing of an action for a declaratory judgment on the court's calendar, but is not required to do so. The Rule preserves the right to jury trial in actions involving requests for declaratory relief, so that the existence of such a right is determined by the underlying nature of the issues in the request for a declaratory judgment.



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57.2 ADDITIONAL AUTHORITY

12 *Moore's Federal Practice* §§ 57.01 -57.104

Friedenthal, *Civil Procedure* §§ 11.4-11.5



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57.3 LEADING CASES

Injury-in-Fact Requirement

Whitmore v. Arkansas, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990) (allegations of possible future injury did not satisfy injury-in-fact requirement of the statute).

Relief Not Authorized Under Applicable Statute

Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544 (7th Cir. 2003) (the district court lacked jurisdiction over a declaratory judgment action when the party seeking the judgment seeks monetary relief, which is not authorized under applicable statutory law).

Standing to Seek Declaratory Judgment

Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (discussing the standing requirement in declaratory judgment cases).

Watt v. Energy Action Educ. Found., 454 U.S. 151, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981) (a state had standing to seek declaratory relief against the Secretary of the Interior).



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Chapter 58 Rule 58. Entering Judgment

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TITLE VII. JUDGMENT

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1-58 Federal Civil Procedure Litigation Manual Rule 58. Entering Judgment

Rule 58. Entering Judgment

Rule 58 reads as follows:

Rule 58. Entering Judgment

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

- (A) the jury returns a general verdict;
- (B) the court awards only costs or a sum certain; or
- (C) the court denies all relief.

(2) Court's Approval Required. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

- (A) the jury returns a special verdict or a general verdict with answers to written questions; or
- (B) the court grants other relief not described in this subdivision (b).

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

- (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
- (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

- (A) it is set out in a separate document; or
- (B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under *Federal Rule of Appellate Procedure 4(a)(4)* as a timely motion under Rule 59.

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58.1 COMMENTARY

Rule 58 sets forth many of the provisions relating to judgments, including those concerning the entry of judgment. The entry of judgment should be distinguished from the rendition of judgment, which is governed by Rule 54, and the recordation of judgment, which is governed by Rule 79(a). Accordingly, Rule 58 should be read in conjunction with these Rules.

"Effectiveness" of Judgment Eliminated

Prior to 2002, the Rules established the procedures according to which court judgments were deemed "effective." Through the integrated operation of Rules 54, 58, and 79(a), an order or decree of the court was considered an "effective judgment" only if three conditions were satisfied: (1) the order or decree was one from which an appeal lies (Rule 54(a)); (2) the ruling or order was set forth on a separate document (former Rule 58); and (3) the judgment was entered in the civil docket (Rule 79(a)).

Several problems developed under this approach. First, although it may be clear that a jury verdict or ruling disposing of the case, such as a motion granting summary judgment, will be regarded as "judgments," other orders or decrees, such as rulings on motions for new trials, may be appealable and thus regarded as a "judgment" under Rule 54(a). However, under former Rule 58, "judgments" were not regarded as "effective" until they were set forth in a separate document and entered in the civil docket under Rule 79(a). Although most courts set forth the primary judgment in an action on a separate document, many courts had ignored the practice of setting forth rulings on other kinds of motions on separate documents.

Second, *Federal Rule of Appellate Procedure 4(a)* did not adopt an identical "effectiveness" construction, instead designating the time within which an appeal could be taken from the date that the judgment was "entered." As a result, the Rules of Civil Procedure and Rules of Appellate Procedures did not work in an integrated fashion to provide certainty concerning the time within which an appeal from a judgment could be taken.

These two interrelated problems produced several undesirable results. Either the time within which a party may make a motion under Rules 50, 52, 54, 59, and 60 or take an appeal from the judgment will have never begun to run, because the court had technically failed to set forth the judgment on a separate document, or the time within which an appeal

could be taken from the judgment would be different, depending on whether Civil Rule 58 or Appellate Rule 4 was used.

The revised version of the Rule discards the unnecessary step of defining when a "judgment" is deemed "effective," opting instead for a procedure to determine when the "judgment" will be deemed "entered." As a result, Rule 58 and Appellate 4 should work seamlessly in determining when the appeals period begins to run and when motions under Rules 50, 52, 54, 59, and 60 may be made.

Separate Document Requirement Generally

As noted, Rule 58 formerly provided that all "judgments" must be set forth in a separate document. The present version of the Rule retains this requirement for the initial judgment, any amended initial judgment, and all orders except rulings on motions pursuant to Rules 50(b), 52(b), 54(d)(2)(B), 59, and 60. At least one court has held that the separate "document" requirement does not refer to the tangible object itself, but rather to the need to distinguish between judgments, opinions, and other court documents.

The content of the judgment should be as simplified and transparent as possible; the admonition in Rule 54(a) that a judgment shall not contain "recitals of pleadings, a master's report, or a record of prior proceedings" reinforces this point. Official Forms 70 and 71 provide examples of judgments that recite simply the terms of a judgment without offering additional explanation or citation of authority. Explication of the reasoning underlying the judgment should be reserved for an opinion.

Post-Judgment Motions Not Included in Separate Document

Subdivision (a) specifies the motions upon which rulings need not be included in a separate document. An entry recording the ruling of the court on these motions on the civil docket is sufficient, as subdivision (c)(1) implies, or the ruling can be included with other dispositions in the action. In addition, the time period within which an appeal from the order may be taken will be measured from the date of entry in the civil docket under subdivision (c)(1). However, a party desiring certainty on the date upon which the time within which an appeal may be taken may request that the ruling on the motion be set forth in a separate document under subdivision (d).

When a Judgment Is Entered

Subdivision (c) indicates the date upon which the judgment is deemed "entered." If a judgment is promptly set forth on a separate document, which will be the case for the initial judgment, amended judgments, and rulings on all motions except those made under Rules 50(b), 52(b), 54(d)(2)(B), 59, and 60, the judgment will be deemed to have been "entered" when it is recorded in the civil docket under Rule 79(a) and when it is either set out on a separate document or 150 days have elapsed from recordation in the docket, whichever occurs first. For "judgments" that are actually set out in a separate document before it is recorded in the civil docket, the effect of this provision is that the "judgment" will be deemed to have been entered on the actual recording date in the civil docket. However, a "judgment" that is not set forth in a separate document, notwithstanding the requirement to do so as specified in subdivision (a), will nonetheless be regarded as "entered" 150 days after the judgment is recorded in the civil docket.

Rulings on motions made under Rules 50(b), 52(b), 54(d)(2)(B), 59, and 60 need not be set forth in a separate document, as indicated in subdivision (a). Rulings on these motions will be regarded as having been "entered" as soon as the ruling is recorded in the civil docket under Rule 79(a). However, when a party who requests a separate document on a ruling on these motions, as permitted under subdivision (d), the order ruling on the motion should be regarded as "entered" under the procedure described above for initial judgments and the like.

Pre-Judgment Motions

Under the collateral order doctrine, rulings on certain kinds of pre-judgment motions may be automatically appealable as interlocutory orders. The Rules do not specify which of these orders or actions of the court are appealable interlocutory orders; this issue is predominantly governed by statute and case law. Nonetheless, these pre-judgment orders are regarded as "judgments" under Rule 54(a), which seems to necessitate reference to Rule 58 in determining whether such orders should be set forth in a separate document and the time period within which such orders may be appealed.

However, the Advisory Committee Note to the 2002 revision of Rule 58 indicates that the Rule should not be read so literally with respect to pre-judgment motions that are appealable as interlocutory orders. Instead, the Note indicates that the all-purpose definition of "judgment" should be "applied with common sense to other questions that may turn on the time when judgment is entered" and the "[a]ppeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2)." Accordingly, pre-judgment motions that are automatically appealable as interlocutory orders should be regarded as "entered" in the same manner as rulings on motions under Rules 50(b), 52(b), 54(d)(2)(B), 59, and 60: when the ruling is simply recorded in the civil docket under Rule 79(a).

Duties of the Clerk

The Rule specifies two alternative sets of duties of the clerk with regard to judgments. Under subdivision (b)(1), the clerk is required to prepare, sign, and enter a judgment in three circumstances, unless the court orders otherwise: (1) if a jury returns a general verdict in favor of one of the parties; (2) if the court decides in favor of one of the parties for a sum certain or for costs; (3) if the court decides that all relief shall be denied to all the parties. Alternatively, if a jury returns a special verdict or answers to interrogatories or if the court decides to grant relief other than that which can be computed as a sum certain for a single party, the court is required to approve and sign the form of the judgment before the clerk enters it.

Although the Rule directs the clerk to prepare the judgment when the approval of the court is not required, the Rule does not speak to the preparation of the judgment when the approval of the court is required. In many such cases, the judge will direct the clerk to prepare the judgment, or may choose to prepare it herself. Under a 2002 amendment, the practice of directing the attorney for the prevailing party to prepare a judgment has been eliminated, and the requirement of prompt action by the court and clerk in subdivision (b)(1) should alleviate unnecessary confusion and delay. Parties wishing to commence the time permitted for appeal, post-judgment motions, or execution on a judgment or order that is not required to be set forth on a separate document under subdivision (a) may nonetheless make a motion for separate entry under subdivision (d).

Cost or Fee Awards

Ordinarily, the time period within which a party may appeal a judgment will begin from the date of the entry of the judgment according to Rule 58 and Rule 79(a). Subdivision (e) provides that the entry of judgment and subsequent commencement of the time for appeal shall not be affected by motions for costs or fees under Rule 54, with one exception. If a party makes a timely motion for attorneys' fees under Rule 54(d)(2) before a notice of appeal has been filed, the judge has the authority, but is not required, to delay the finality of the judgment for appellate purposes until the matter of attorneys' fees is decided. If an order to stay the proceedings is granted by the judge, the underlying motion would thus have the same effect as a motion under Rule 59. This enables the parties to appeal decisions relating to the award of attorneys' fees at the same time as appeals relating to issues involved in the original judgment.

Illustration 58-1

Henry is awarded \$2.5 million in a libel action against Munchausen Publishing. Before an appeal has

been filed, Henry makes a motion to recover attorneys' fees under Rule 54(d)(2). Rule 58 authorizes the court, at its discretion, to stay the finality of the judgment until Henry's motion to recover attorneys' fees has been decided. The time period within which Munchausen Publishing may appeal is also tolled pending disposition of the motion.



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58.2 ADDITIONAL AUTHORITY

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58.3 LEADING CASES

Appeal Prerequisite; No Separate Document

Kirkland v. Legion Ins. Co., 343 F.3d 1135 (9th Cir. 2003) (although a final judgment requires separate document under Rule 58, neither the Supreme Court nor the Court of Appeals for the Ninth Circuit views satisfaction of Rule 58 as prerequisite to appeal).

Attorneys' Fees Award Required on Separate Document

Mullane v. Chambers, 333 F.3d 322 (1st Cir. 2003) (an appeal from an award of attorneys' fees was timely because no separate judgment had been "entered" under Rule 58 and the time for filing notice of appeal had thus not yet begun; a conditional order granting attorneys' fees was not sufficient, and the "final judgment" was insufficient to serve as separate judgment on award of attorneys' fees because it failed to make any mention of award).

Deficient Judgment Treated as Final

TDK Electronics Corp. v. Draiman, 321 F.3d 677 (7th Cir. 2003) (under Federal Rules of Appellate Procedure, a technically deficient civil judgment will be treated as final once the judge has resolved the case and 150 days have elapsed, even when the case has been resolved by an order that does not satisfy the rules of civil procedure).

Distinct Document Not Required

In re Cendant Corp. Secs. Litig., 454 F.3d 235 (3d Cir. 2006) (Rule 58 does not expressly state that the "separate document" requirement must be satisfied by a distinct document; the rule is most reasonably read to mean only that judgment must be set forth in document that is independent of court's opinion or decision, regardless whether that opinion takes written form)

Entry of Judgment Starts Time for Appeal

Colon-Santiago v. Rosario, 438 F.3d 101 (1st Cir. 2006) (regardless of what happened prior to entry of judgment, the time to appeal a judgment does not begin to run until the judgment was entered under Rule 58; because the appellants filed their postverdict motion within ten days of the entry of judgment, the motion was timely and thus tolled time within which the appellants could file an appeal).

Failure to Object to Separate Document

Wikoff v. Vanderveld, 897 F.2d 232 (7th Cir. 1990) (order of the court became effective as the final judgment even though a separate form of judgment had not been made where the parties did not object and judge intended the order to act as the final judgment).

Filing Fee Dismissal Final Decision

Davis v. Advocate Health Ctr. Patient Care Express, 523 F.3d 681 (7th Cir. 2008) (dismissal of veteran's action for failure to pay filing fee by deadline set by district court after it denied veteran's waiver of fee was final decision under Rule 58(a) subject to appellate).

Incomplete Entry of Judgment

Formby v. Farmers & Merchants Bank, 904 F.2d 627 (11th Cir. 1990) (clerk's entry of a jury verdict that did not contain all of the relief to which the plaintiff was entitled was not a final judgment)

Label of Order Does Not Control Appealability

Riley v. Kennedy, -- U.S. --, 128 S. Ct. 1970, 170 L. Ed. 2d 837 (2008) (although the trial court indicated that the entry of an order was a "final judgment" under Rule 58, the label itself cannot control the appealability of the order).

Lack of an Entry of Judgment

Eberhardt v. O'Malley, 17 F.3d 1023 (7th Cir. 1994) (where parties viewed the dismissal of a complaint as a dismissal of the action, the lack of an entry of judgment under Rule 58 did not preclude finality of the action).

McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1992) (requirement that each judgment be set forth in a separate document is a strict rule triggering time for appeal; appeal taken one year after dismissal of complaint allowed where no formal judgment had been entered).

Lack of Separate Document Indicates Case Still Pending

Utah v. Norton, 396 F.3d 1281 (10th Cir. 2005) (an order approving a settlement and dismissing an action was not a final, appealable decision because there was no separate document setting forth a final judgment as required by Rule 58; accordingly, the grant of a motion to intervene and intervenors' filing of crossclaims indicated that the case was still pending).

Notice of Appeal Filed Before Entry of Judgment

Ellison v. Conoco, Inc., 950 F.2d 1196 (5th Cir. 1992) (notice of appeal filed between order granting JNOV and formal entry of judgment effective to begin running of time for appeal).

Order and Judgment Distinguished

Hughes v. Halifax County Sch. Bd., 823 F.2d 832 (4th Cir. 1987) (five-page order that set forth the reasons for the court's judgment was not a "judgment" within the meaning of Rule 58, despite the fact that court declared the order to be the judgment; separate judgment ordered).

Order and Judgment Synonymous

InterFirst Bank Dallas, N.A. v. FDIC, 808 F.2d 1105 (5th Cir. 1987) (an order of the court that purports to dispose of all the issues in an action that is entered in the docket is a judgment under the meaning of Rule 58).

Post-Judgment Interest From Date of Filing

Youngs v. Am. Nutrition, Inc., 37 F.3d 1135 (1st Cir. 2008) (judgment was entered when court filed separate document in accordance with Rule 58, and district judge correctly used that date as time for post-judgment interest rate to be applied).

Separate Document--Purpose

White v. Fair, 289 F.3d 1 (1st Cir. 2002) (the requirement that each judgment must be entered on a separate document was created to assist a party actively seeking an appeal by eliminating confusion as to the definite date by which the party would have to file the notice of appeal).

Signing of Judgment

Wyzik v. Employee Benefit Plan of Crane Co., 663 F.2d 348 (1st Cir. 1981) (district judge may sign the judgment even though it is customary for the clerk to do so).

Single Judgment on Multiple Claims

Western Indus., Inc. v. Newcor Canada, Ltd., 739 F.2d 1198 (7th Cir. 1984) (when a jury finds for both parties on their claims and counterclaims, the judge should combine the awards and enter a single judgment rather than two separate judgments).



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TITLE VII. JUDGMENT

Chapter 59 Rule 59. New Trial; Altering or Amending a Judgment

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§ 59.syn Synopsis to Chapter 59: Rule 59. New Trial; Altering or Amending a Judgment

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TITLE VII. JUDGMENT

Chapter 59 Rule 59. New Trial; Altering or Amending a Judgment

1-59 Federal Civil Procedure Litigation Manual Rule 59. New Trial; Altering or Amending a Judgment

Rule 59. New Trial; Altering or Amending a Judgment

Rule 59 reads as follows:

Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

* * * * *



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TITLE VII. JUDGMENT

Chapter 59 Rule 59. New Trial; Altering or Amending a Judgment

*1-59 Federal Civil Procedure Litigation Manual 59.1***59.1 COMMENTARY**

Rule 59, in conjunction with Rule 50(b) and(d) and Rule 52(b), govern most of the common post-trial motions. The time periods for these motions, which were extended to 28 days in 2009, are measured from the date of entry of judgment to when they must be *filed* with the court. These post-trial motions are typically brought after the trial has ended and the judgment has been entered, though local rules may provide for the filing of these motions before a judgment has been entered. The motions are all interrelated, a fact to which the frequent cross-references in those Rules attest. Nonetheless, the standards of and procedures for motions made under these Rules are different, and should neither be confused by practitioners nor commingled by courts.

The 28-day time periods designated in subdivisions (b), (d), and (e) are strict deadlines that may not be extended by the court. Rule 6(b), which provides for the enlargement of time periods, expressly exempts these subdivisions from the operation of its provisions in Rule 6(b)(2). However, the time period for the filing of affidavits under Rule 59(c) may be enlarged, as that subdivision is not included in the exemption under Rule 6(b)(2). Significantly, the deadlines in Rule 59 are filing deadlines, not service deadlines, so the 3-day extension of Rule 6(d) is not applicable.

Illustration 59-1

On Thursday, December 11, Harris obtains a judgment against Darren for \$10,000, and the judgment is entered the following day, December 12. Darren is notified of the entry of judgment by first-class mail. Under Rule 59(b), Darren has 28 days to file a motion for a new trial, and this period is not subject to the 3-day extension of Rule 6(d). Under Rule 6(a), the 28-day period begins on Saturday, December 12 and expires on Friday, January 9. However, the deadline may not be extended beyond January 9 by the court for any reason.

Grounds for a New Trial

Rule 59(a)-(d) provides for the grant of a new trial by motion of a party or on the court's own initiative. The grounds for granting a new trial are not specified in the Rule, but keys the grounds to those that existed in courts at law or in equity before the promulgation of the Rules. Permissible grounds include: a verdict by the jury is against the weight of the evidence; a verdict by the jury is either inadequate or excessive; newly discovered evidence would probably have

changed the result of the action; prejudicial error has been committed at some point during the trial. Grounds for granting a new trial are distinct from and less stringent than those for granting a motion for judgment as a matter of law under Rule 50(a)-(c).

Motion for a New Trial Generally

Subdivision (b) states that any party may make a motion for a new trial no later than 28 days after entry of the judgment. Subdivision (d) states that a court, within the 28-day time period, may order a new trial on its own initiative for any reason that would justify the grant of a motion for a new trial under subdivision (b). If a court chooses to order a new trial *sua sponte*, it must provide the parties with notice of its intention to do so and with an opportunity to address the adequacy or inadequacy of the judgment. The court must also specify the grounds for the order of a new trial if it chooses to do so on its own initiative.

Similarly, the situation where a court grants a motion for a new trial under subdivision (b) on grounds not advocated by the moving party is akin to ordering a new trial *sua sponte*. In this situation, the court must provide the parties with notice and an opportunity to be heard, and must also specify the grounds for the new trial in its order.

Motions for New Trials and Appeals

A motion for a new trial suspends the judgment in effect and tolls the time remaining within which an appeal may be taken. An appeal following the denial of a motion of a new trial should be an appeal on the judgment itself, not on the order denying the motion. If no prejudice would result to the opposing party, an appeal from such an order should be regarded as harmless error and treated as an appeal on the judgment. When a motion for a new trial is denied, the appeals period begins again from the date of entry of the order of the court denying the motion.

Illustration 59-2

Assume on the facts of Illustration 59-1 that there is a 30-day period within which a party may appeal a final judgment. Because the judgment was entered by the clerk on December 12, Darren would have until January 11 to file an appeal. If, however, Darren makes a motion for a new trial on December 22, the 30-day time period will toll until the motion is decided. In many cases, a hearing on the motion will not be scheduled until after the original deadline for filing an appeal had no post-judgment motion been made.

Illustration 59-3

Assume on the facts of Illustration 59-1 that Darren files a timely motion for a new trial, which the court promptly denies and which Darren intends to appeal. If Darren mistakenly designates his petition as an appeal on the trial court's denial of his motion for a new trial, the appellate court should disregard the technical error and treat the appeal as if it had been made on the underlying judgment.

If the motion for a new trial under Rule 59 is granted, the judgment in effect is destroyed and an appeal may not be taken until a new judgment has been entered in accordance with the new trial.

Illustration 59-4

Assume on the facts of Illustration 59-1 that Darren files a timely motion for a new trial. If the court grants Darren's motion, the \$10,000 judgment against Darren is destroyed and Harris may not appeal the grant of a new trial until a new judgment has been entered in accordance with the new trial.

There are two exceptions to the general rules governing motions for new trials discussed above. First, a prerogative writ allowing review of a grant of a motion for a new trial may be used in exceptional circumstances. Second, a grant of a motion for new trial in conjunction with a grant or denial of a motion for judgment as a matter of law under Rule 50(b) is actually a grant of a motion for a new trial conditioned upon the reversal of the grant or denial of the motion for judgment as a matter of law on appeal. Rule 50(c)(2) indicates that the grant of a motion for a new trial in such circumstances does not destroy the finality of judgment and allows an appeal to be taken immediately therefrom.

Illustration 59-5

Assume on the facts of Illustration 59-1 that Darren renews an earlier motion for judgment as a matter of law in accordance with Rule 50. In addition, Darren files a timely motion for a new trial in the event that his motion for judgment as a matter of law is denied. If the court denies his motion for judgment as a matter of law but conditionally grants the motion for a new trial, the grant of the motion for a new trial will not prevent Darren from taking an immediate appeal on the denial of the motion for judgment as a matter of law.

Affidavits with Motions for New Trials

When a party moves for a new trial under subdivision (b), subdivision (c) allows supporting and opposing affidavits to be filed with the motion or within the delineated time period thereafter. Although not expressly allowed under the Rule, a court should similarly allow supporting and opposing affidavits to be filed when it notifies the parties of its intention to order a new trial on its own initiative under subdivision (d).

Motions to Alter or Amend a Judgment

Rule 59(e) governs motions to alter or amend a judgment of the court. Such a motion must be filed with the court no later than 28 days after the date of the entry of judgment. As the Rules do not provide an exhaustive list of post-judgment motions, any motion that attacks the substance of the judgment, such as a motion for reconsideration, will be treated as a motion to alter or amend the judgment under Rule 59(e).

As with a timely motion for a new trial, a timely motion to alter or amend a judgment actually suspends the finality of the judgment and will toll the running of the time for appeal. The time for appeal begins to run again from the date of the entry of the order or judgment disposing of the motion. As with the denial of a motion for a new trial, an appeal following the grant or denial of a motion to alter or amend a judgment should be an appeal on the judgment itself, not on the order granting or denying the motion. If no prejudice would result to the opposing party, an appeal from such an order should be regarded as harmless error and treated as an appeal on the judgment. Decisions made by district judges on motions made under Rule 59(e) are reviewable for an abuse of discretion.

Motions Under Rule 59 and Rule 60 Distinguished

The primary difference between motions under Rule 59 and motions under Rule 60 is whether they toll the time allowed for appeal. Motions for a new trial or to alter or amend a judgment under Rule 59 toll the time within which an appeal may be taken, at least until the motion is ruled upon. Rule 60 motions, on the other hand, do not affect the time in which an appeal of that judgment may be taken.

This distinction suggests that Rule 59 motions should be subject to less exacting scrutiny than Rule 60 motions, as the preference for finality in federal courts and the availability of Rule 59 motions to parties in the first instance should indicate a narrower range of circumstances in which the grant of a Rule 60 motion is appropriate. The more expansive breadth of the bases upon which a grant of a motion under Rule 59 is appropriate reflects this distinction.



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59.2 ADDITIONAL AUTHORITY

12 *Moore's Federal Practice* §§ 59.01 -59.55

Friedenthal, *Civil Procedure* § 12.4

Teply & Whitten, *Civil Procedure* 856-858



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59.3 LEADING CASES

Collateral Matters

Lucas v. Florida Power & Light Co., 729 F.2d 1300 (11th Cir. 1984) (motions to alter or amend a judgment do not extend to matters collateral to those in the judgment).

Appeals Court Powerless to Enter Judgment Where No Postverdict Motion Made

Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006) (a court of appeals may not order the district court to enter a judgment in favor of a party who has not made a postverdict motion under Rule 50(b)).

Certificate of Appealability Required by Statute

Jackson v. Albany Appeal Bureau Unit, 442 F.3d 51 (2d Cir. 2006) (certificate of appealability requirement under 28 U.S.C. § 2253(c)(1) applies to appeals from order denying Rule 59(e) motion when underlying judgment is denial of 28 U.S.C. § 2254 petition).

Designation of Motion Based on Time of Filing

Mahone v. Ray, 326 F.3d 1176 (11th Cir. 2003) (although a party did not specify whether his motion for reconsideration of judgment was filed under Rule 59(e) or Rule 60(b), it was designated as having been filed under Rule 60(b) because it was not filed within 10 days of judgment).

Discretion to Alter or Amend a Judgment

Briehl v. GMC, 172 F.3d 623 (8th Cir. 1999) (trial court has broad discretion in determining whether to alter or amend a judgment, and appellate court will not reverse absent a clear abuse of that discretion).

Legal Holiday Not Included in Calculation of 10-Day Motions

Hart v. Sheahan, 396 F.3d 887 (7th Cir. 2005) (December 26, 2003, was excluded from the 10 days permitted for a motion under Rule 59 because the President had declared it a celebratory holiday for federal workers, thus making it a legal holiday under Rule 6) (pre-2009 time computation).

Motion Filed Before Entry of Judgment

Dunn v. Truck World, Inc., 929 F.2d 311 (7th Cir. 1991) (when a Rule 59 motion is filed before the judgment is entered, the entry of the judgment constitutes a denial of the motion for a new trial).

Motion for Relief for Judgment Not Decided Under Rule 59 Standard

Jennings v. Rivers, 394 F.3d 850 (10th Cir. 2005) (district judge erred in failing to analyze a postjudgment motion for relief due to mistake or excusable neglect under Rule 60, having treated the motion instead as one to alter or amend judgment under Rule 59).

Motion for Summary Judgment After Entry of Judgment

Britt v. Whitmire, 956 F.2d 509 (5th Cir. 1992) (party's motion for summary judgment on all claims after grant of adverse partial summary judgment treated as motion to alter or amend a judgment under Rule 59(e)).

Motions Filed After Entry of Judgment

Osterneck v. Ernst & Whinney, 489 U.S. 169, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989) (a motion for prejudgment interest on a judgment filed after the judgment is rendered is a motion to alter or amend a judgment under Rule 59(e)).

Motion Tolls Time for Appeal

Richardson v. Oldham, 12 F.3d 1373 (5th Cir. 1994) (motion under Rule 59(e) tolls time for appeal, thus allowing parties to file notices of appeal that would otherwise be untimely were it not for the Rule 59(e) motion).

Preliminary Injunction Reviewed

Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119 (9th Cir. 2005) (a motion that merely seeks to relitigate issues underlying an original preliminary injunction order is subject to Rule 59's 10-day limit, but a motion that is based on new circumstances that have arisen after the district court granted the injunction may be filed at any time before the entry of final judgment).

Reconsideration Motion Not Proper for Raising Objection for the First Time

McGuire v. Davidson Mfg. Corp., 398 F.3d 1005 (5th Cir. 2005) (party waived argument under Rule 51 because it was not raised until party's Rule 59 motion for reconsideration).

Sanction Motion Not Required to Be "Post-Trial" Motion

De La Fuente v. DCI Telecomms., Inc., 259 F. Supp. 2d 250 (S.D.N.Y. 2003) (a party is not required to make a motion under Rule 59 or any other procedural rule to request sanctions under Rule 11 at the conclusion of litigation), *aff'd in part and remanded in part*, 82 Fed. Appx. 723 (2d Cir. 2003).

Sua Sponte New Trial Order

Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149 (4th Cir. 1989) (court must provide the parties with notice and an opportunity to be heard before ordering a new trial on its own initiative).

Time Periods for Post-Judgment Motions

Wright v. Preferred Research, Inc., 891 F.2d 886 (11th Cir. 1990) (10-day time periods in Rule 59 subject to computation rules of Rule 6(a)).

Untimely Entry of New Trial Order

Tarlton v. Exxon, 688 F.2d 973 (5th Cir. 1982) (appeals court vacated a sua sponte order granting a new trial when the order was entered more than 10 days after the judgment).



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1-60 Federal Civil Procedure Litigation Manual Rule 60. Relief from a Judgment or Order

Rule 60. Relief from a Judgment or Order

Rule 60 reads as follows:

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

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60.1 COMMENTARY

Correction of Clerical Mistakes

Rule 60(a) confers broad discretion on district judges to correct mistakes of a clerical nature that are found in judgments, orders, and other parts of a trial record. A clerical correction may be instigated by motion or on the court's own initiative, and notice to the parties of the correction is not required.

A motion under Rule 60(a) to correct a clerical error does not suspend the finality of the judgment and does not toll the time period within which an appeal may be taken. A motion that purports to alter or amend a judgment under Rule 59(e) that merely seeks a correction of a clerical or administrative nature should be treated as a motion under Rule 60(a). If an appeal from a judgment has already been filed with the appellate court, the permission of the appeals court is required before a judge may correct a clerical error under Rule 60(a).

Motions for Post-Judgment Relief Generally

A party may also seek post-judgment relief from a judgment for the reasons listed in Rule 60(b). It should be noted that fraud upon the court under subdivision (d)(3) is distinguished from fraud on an opposing party as set forth in subdivision (b)(3). A motion alleging fraud upon the court is not subject to the one-year time limitation of fraud against an opposing party. All other post-judgment writs and bills of relief are abolished by subdivision (e). However, subdivision (d)(1) provides that the Rule does not preclude the court from hearing any independent action for post-judgment relief. Independent actions for relief from a judgment, however, are available only in highly unusual circumstances to prevent grave miscarriages of justice. However, the Supreme Court has recently held that such actions do not require an independent basis for jurisdiction, as the request for post-judgment relief will be considered ancillary to the original action.

Under subdivision (c)(1), a motion for post-judgment relief must be made within a reasonable time and, for a motion on grounds listed in subdivision (b)(1)-(3), within one year of the final judgment, order, or proceeding from which relief is being sought. This time period may not be enlarged under Rule 6(b) because Rule 6(b) expressly exempts Rule 60(b) from its operation.

Illustration 60-1

Susan commences a breach of contract action against Betsy, alleging that Betsy failed to deliver goods in a timely fashion as required by a written contract between the parties. After a cursory review of the evidence, the trial judge feels that Susan is entitled to judgment as a matter of law and wishes to enter summary judgment *sua sponte* in favor of Susan in accordance with Rule 56. However, the clerk of the court fails to notify Betsy of the judge's intention, and the requisite 28-day period for making post-judgment motions passes with nary a peep from Betsy. Under these circumstances, a Rule 60(b) motion is the appropriate course of action for Betsy, and the motion may be brought at any time within one year of the date of entry of the summary judgment.

A grant or denial of a Rule 60(b) motion must be entered as a separate judgment according to Rule 58 and Rule 79(a) and is appealable as any other judgment. However, the issue on appeal should be the grant or denial of the motion seeking post-judgment relief, not the judgment, order, or proceeding forming the basis of the Rule 60(b) motion.

Illustration 60-2

Assume on the facts of Illustration 60-1 that the judge rejects Betsy's motion. The court must enter the denial of the motion as a separate document from the predicate judgment. Betsy may choose to attack the court's denial of her Rule 60(b) motion on appeal, but the court's grant of summary judgment in favor of Susan on substantive grounds is not a proper consideration for the appellate court at this time.

A motion for a rehearing of a Rule 60(b) motion is not restricted by the 28-day time period provisions of Rule 59; it is timely so long as it is made within the time for taking an appeal of the grant or denial of the original Rule 60(b) motion.

Illustration 60-3

Assume on the facts of Illustration 60-2 that the judge rejects Betsy's Rule 60(b) motion on the grounds that it was made more than 28 days after the entry of judgment. Sensing that the judge has confused motions under Rule 60 and motions under Rule 59, Betsy is considering making a motion for a rehearing of the issue instead of appealing the issue directly to a higher court. Betsy would have more than 28 days to make this decision, as the motion for rehearing is not directed at a *judgment*. Thus, the motion is not subject to the 28-day time limits of Rule 59 and may be made at any time within one year of the date of entry of the original summary judgment.

Motions Under Rule 60 and Rule 59 Distinguished

The primary difference between motions under Rule 59 and motions under Rule 60 is their effect on the finality of the judgment and whether they toll the time allowed for appeal. Motions for a new trial or motions to alter or amend a judgment under Rule 59 automatically suspend the judgment and toll the time within which an appeal may be taken, at least until the motion is ruled upon.

In this sense, then, Rule 59 motions are not properly conceptualized as post-judgment motions, as the definition of a "judgment" under Rule 54 implies finality. Rule 59 motions are more properly conceived of as "motions for reconsideration as of right," requiring a court to review and re-examine the judgment that is the basis for the Rule 59 motion. Rule 60 motions, on the other hand, are true post-judgment motions, as they do not affect the finality of a judgment or the time within which an appeal of that judgment may be taken—a point made explicit in subdivision (c)(2). This distinction suggests that Rule 59 motions should be subject to less exacting scrutiny than Rule 60 motions, as the preference for finality in the federal courts and the availability of Rule 59 motions to parties in the first instance should indicate a narrower range of circumstances in which the grant of Rule 60 motion is appropriate.



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60.2 ADDITIONAL AUTHORITY

12 *Moore's Federal Practice* §§ 60.01 -60.85

James & Hazard, Civil Procedure § 12.13

Friedenthal, Civil Procedure § 12.6

Teply & Whitten, Civil Procedure 857-858, 869-870



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60.3 LEADING CASES

Amendment of Judgment

Robi v. Five Platters, Inc., 918 F.2d 1439 (9th Cir. 1990) (a judge acted properly in amending a judgment under Rule 60(a) to clarify its intentions as stated in the judgment).

Appeal Filed--Relief From Judgment Proper

Mahone v. Ray, 326 F.3d 1176 (11th Cir. 2003) (once notice of appeal had been filed, a party may attack an order only through a motion for relief for judgment under Rule 60, not through a summary judgment motion under Rule 56).

Appeal to Circuit Court Not Substitute for Post-Trial or Judgment Relief Motions

Consorzio del Prosciutto di Parma v. Domain Name Clearing Co., LLC, 346 F.3d 1193 (9th Cir. 2003) (because Rule 55(c) and Rule 60(b) (now Rule 60(c)) set forth procedures for a party to make a motion to set aside entry of default or for relief from judgment, respectively, an appeal to a federal circuit court cannot be used as substitute for these procedures).

"Catch-All" Provision

In re Woods, 173 F.3d 770 (10th Cir. 1999) (relief from judgment under "catch-all" provision is appropriate when it offends justice to deny relief, and the decision of the trial court will be reversed only if appellate court finds a complete absence of a reasonable basis and is certain that the decision is wrong).

Change of Law After Judgment Not Grounds for Relief

Gleash v. Yuswak, 308 F.3d 758 (7th Cir. 2002) (a change in applicable effective after a judgment is entered does not allow relief from judgment under Federal Rules of Civil Procedure).

Collection on Judgment; Technical Deficiencies Corrected

TDK Elecs. Corp. v. Draiman, 321 F.3d 677 (7th Cir. 2003) (a motion to revive a 17-year-old judgment as required by state collection law, trial court should have repaired technical deficiencies in the original judgment under Rule 60(a) rather than deny prevailing party relief).

Computation Error Corrected Sua Sponte

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (Rule 60 allows a judge to correct a clear computation error sua sponte).

Concealment of Discovery Materials

Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988) (a party's willful concealment of discovery materials may constitute fraud under Rule 60(b)(3)).

Court's Authority Over Disputed Settlement Agreement

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (district court does not have inherent discretion to review terms of a settlement agreement when the parties disagree over the terms of the agreement; settlement disagreement is essentially a contract claim, unreviewable by district court absent independent jurisdictional grounds).

Decree Limiting District Court Power

Sierra Club v. Meiburg, 296 F.3d 1021 (11th Cir. 2002) (language in consent decree limiting equitable powers of the district court to modify terms of decree only upon a showing of good cause by any party does not provide the court with any additional power to modify decree than it already has under the Rule 60).

Default Judgment Does Not Preclude Jurisdictional Issue from Subsequent Attack

Jackson v. FIE Corp., 302 F.3d 515 (5th Cir. 2002), vacated, remanded, *Jackson v. Fratelli Tanfoglio di Tanfoglio Bortolo & C.S.N.C.*, 2009 U.S. App. LEXIS 2625 (5th Cir. Feb. 9, 2009) (Rule 60, which authorizes court to relieve party from final judgment on the ground that the judgment is void, trumps rule of issue precluded by default judgment; party could subsequently raise issue precluded by default judgment for purpose of challenging in personam jurisdiction of court and disputing its minimum contacts with the forum).

Denial of Motion During Trial Not Immediately Appealable

Xerox Fin. Servs. Life Ins. Co. v. High Plains Ltd. Pshp., 44 F.3d 1033 (1st Cir. 1995) (denial of a Rule 60(b) motion during the course of trial proceedings not immediately appealable).

Ex parte Young Decree Modified

Frew v. Hawkins, 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004) (Rule 60, not the *Eleventh Amendment*, encompasses the traditional power of a court of equity to modify a consent decree under *Ex parte Young* in light of changed circumstances).

Habeas Corpus Petition

Gonzalez v. Crosby, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) (a habeas corpus petitioner's filing that seeks vindication of a claim of a kind listed in Rule 60 is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute; however, because petitioner's Rule 60 motion challenges only the district court's previous ruling on a statute of limitations question, it is not the equivalent of a successive habeas petition).

Independent Actions for Post-Judgment Relief

United States v. Beggerly, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) (an independent action for relief from a judgment should be available only to prevent a grave miscarriage of justice; such an action, however, does not require an independent basis for jurisdiction, as it is ancillary to the original action).

Institutional Reform Litigation Tool

Horne v. Flores, -- U.S. --, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009) (although Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest;" the Rule thus serves a particularly important function in "institutional reform litigation"), *on remand at, remanded*, 2009 U.S. App. LEXIS 18092 (9th Cir. Ariz., Aug. 13, 2009).

Intervening Legal Developments

Reform Party v. Allegheny County Dep't of Elections, 174 F.3d 305 (3d Cir. 1999) (intervening developments in the law rarely constitute the extraordinary circumstances required for relief from judgment under Rule 60(b); a motion for relief from judgment cannot be used as a substitute for an appeal).

Mistake by Clerk

Lewis v. Alexander, 987 F.2d 392 (6th Cir. 1993) (where an appeal had not been timely taken because of a mistake by the clerk, relief was granted under Rule 60(b)(1) because the attorney had acted diligently and the opposing party had not been prejudiced).

Mistake by Party Not Grounds for Relief

Fastener Sys. v. MBNA Am., 48 Fed. Appx. 418, 2002 U.S. App. LEXIS 21343 (3d Cir. 2002) (party's mistake in misreading Federal Rules of Civil Procedure does not amount to excusable neglect sufficient to justify relief from judgment).

Mistake Corrected by Clerical Amendment

United States v. Mosbrucker, 340 F.3d 664 (8th Cir. 2003) (motion under Rule 60(a) was properly granted to amend a summary judgment in a foreclosure action to include 30 additional acres of farm land originally excluded from the order under a mistaken belief that the land in question had been released from mortgage foreclosed upon; the motion was deemed as having been filed under Rule 60(a), not Rule 60(b), which requires filing within one year of date of order).

Modification of Consent Decree

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992) (a consent decree can be modified under Rule 60(b) if a significant change in law or fact indicates a modification).

Motion After Filing of Notice to Appeal

Toliver v. County of Sullivan, 957 F.2d 47 (2d Cir. 1992) (after plaintiff had filed a notice of appeal, defendant could not make a motion under Rule 60(b) to modify the judgment to include an award of attorneys' fees).

Motion for Reconsideration

Branum v. Clark, 927 F.2d 698 (2d Cir. 1991) (a motion for reconsideration made more than 10 days after the judgment had been entered was treated as a Rule 60(b) motion for post-judgment relief).

Motion for Relief From Judgment Not to Be Decided Under Rule 59 Standard

Jennings v. Rivers, 394 F.3d 850 (10th Cir. 2005) (district judge erred in failing to analyze a postjudgment motion for relief due to mistake or excusable neglect under Rule 60, having treated the motion instead as one to alter or amend judgment under Rule 59).

New Facts Not Grounds for Relief

Jinks v. Alliedsignal, Inc., 250 F.3d 381 (6th Cir. 2001) (Rule 60 does not allow relief from a judgment merely because a party presents new facts or argument after a final ruling by the trial court).

Newly Discovered Evidence

Atkinson v. Prudential Property Co., 43 F.3d 367 (8th Cir. 1994) (listing the four factors that must be demonstrated by the moving party in seeking a Rule 60(b) motion on grounds of newly-discovered evidence).

New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646 (10th Cir. 1989) (Rule 60(b) motion on grounds of newly-discovered evidence can be granted only where the evidence existed at the time of the trial).

Prejudgment Interest

In re Frigitemp Corp., 781 F.2d 324 (2d Cir. 1986) (court's failure to award pre-judgment interest on an award not a clerical error correctable under Rule 60(a)).

Significant Change in Facts or Law

O'Sullivan v. City of Chicago, 396 F.3d 843 (7th Cir. 2005) (Rule 60(b)(5) is a flexible standard according to which party seeking a modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances).

Time Period for Rule 60(b)(6) Motion

Scotts Co. v. Central Garden & Pet Co., 403 F.3d 781 (6th Cir. 2005) (district court did not abuse its discretion when it accepted a Rule 60(b)(6) motion filed 19 days after entry of judgment).

Treatment of Rule 59 Motion as Rule 60 Motion

BBCA, Inc. v. United States, 954 F.2d 1429 (8th Cir. 1992) (defendant's motion to amend the judgment so that it indicated that dismissal of plaintiff's complaint was with prejudice was a Rule 60(a) motion, not a Rule 59(e) motion, so

that the time for appeal was not tolled by the filing of the motion).

Trial and Case Management Plan Treated as Motion for Reconsideration

McNamara v. Felderhof, 410 F.3d 277 (5th Cir. 2005) (where party's trial and case management plan called into question the correctness of the district court's order denying class certification, it was not error to treat the plan as a motion for reconsideration under Rule 60).

Void Judgments

Orner v. Shalala, 30 F.3d 1307 (10th Cir. 1994) (a judge has no discretion with respect to a void judgment; a judgment is void if it violates due process).



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1-61 Federal Civil Procedure Litigation Manual Rule 61. Harmless Error

Rule 61. Harmless Error

Rule 61 reads as follows:

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

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61.1 COMMENTARY

The concept of harmless error is normally reserved for appellate review of issues. In general, an appellate court can reverse or vacate a judgment only if it finds error that would affect the outcome of the case and one or more substantial rights of the parties. Errors or defects in litigation procedures are said to be harmless when they do not justify a reproduction of the entire trial process. Rule 61 embodies this principle in the Civil Rules. In this respect, it is similar to *Federal Rule of Evidence 103(a)*, which incorporates the concept of harmless error, though not in express terms.

The concept of harmless error has limited application under the Civil Rules. The inclusion of Rule 61 immediately after the Rules governing motions for new trials, motions to alter or amend a judgment, and motions for post-judgment relief was undoubtedly intentional. When a court decides motions under Rules 59 and 60, it comes closest to playing a role akin to that of an appellate court. The notion of harmless error is thus an appropriate tool of review for district courts entertaining such motions.



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61.2 ADDITIONAL AUTHORITY

12 *Moore's Federal Practice* §§ 61.01 -61.11

Teply & Whitten, *Civil Procedure* 869

Weissenberger's *federal evidence* §§ 103.1-.2



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Applicability to Appellate Courts

McDonough Power Equip. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (although Rule 61 applies only to district courts, appellate courts should incorporate the policy of the Rule; appellate courts should exercise discretion rather than automatically reversing every case in which there is some kind of error).

Confusion Over Terms; Error Harmless

Richards v. Relentless, Inc., 341 F.3d 35 (1st Cir. 2003) (where jury was instructed to consider whether a party had a "fair" understanding of legal rights before signing release, but controlling law required that the party have a "full" understanding of such rights, an erroneous jury instruction was harmless because trial court properly identified considerations that constituted concept of "full" understanding).

Discovery Disclosure Failure Harmless

Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879 (8th Cir. 2006) (the trial court did not err by failing to exclude evidence based on a party's failure to make an initial disclosure because the opposing party was on notice that the evidence was relied upon because it was discussed in a deposition and there was no allegation that another expert based his trial testimony on new information; the failure to disclose was thus harmless and did not mandate the exclusion of evidence).

Intervention Harmless

Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006) (although court erred by granting a motion to intervene because intervening party had not met their burden of showing that their interests were not adequately represented, the error did not affect the substantial rights of parties in light of the fact that only one piece of non-crucial evidence was submitted by the intervening party).



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Rule 62. Stay of Proceedings to Enforce a Judgment

Rule 62 reads as follows:

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

- (1) an interlocutory or final judgment in an action for an injunction or a receivership; or
- (2) a judgment or order that directs an accounting in an action for patent infringement.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:

- (1) under Rule 50, for judgment as a matter of law;
- (2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings--or suspend, modify, restore, or grant an injunction--while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

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Automatic Stay of Proceedings to Enforce a Judgment

Rule 62 governs stays of proceedings that may be used to enforce a judgment, including executions of judgments. Under subdivision (a), a judgment is stayed automatically for 14 days following the entry of the judgment, with exceptions stated in that subdivision. Subdivisions (b)-(h) specify the various situations in which a district court has certain powers to grant stays of proceedings.

Stay of Proceedings on Post-Trial Motions and for Post-Judgment Relief

Subdivision (b) provides a judge with the authority to grant a stay of proceedings to enforce a judgment in four circumstances: (1) whenever a motion for a new trial or a motion to alter or amend a judgment is made under Rule 59; (2) whenever a motion for post-judgment relief is made under Rule 60; (3) whenever a motion for judgment as a matter of law is made under Rule 50; and (4) whenever a motion for amendment of the findings of the jury or for additional findings is made under Rule 52(b). A bond or other security is not required to effect a stay, but may be required by the court in its discretion.

Stays of Injunctions

Subdivision (c) lists the actions a judge may take while an injunction is pending appeal. Under one of the exceptions in subdivision (a), a judgment in an action for an injunction is not subject to the automatic stay provisions. However, a stay of the injunction may be granted by the court under terms it deems proper.

Stays of Judgment on Appeal; Bond Requirement

Subdivision (d) allows an appellant to obtain a stay of a judgment pending appeal by filing a supersedeas bond in an amount sufficient to protect the opposing party. If the bond is provided, the court has no discretion to deny a stay of the judgment, with the exceptions stated in subdivision (a). Although the language of the Rule appears to require a supersedeas bond to effect the stay, many courts have dispensed with the bond requirement where, in the court's discretion, a bond was not necessary to protect the interests of the adverse parties. Subdivision (e) exempts the United

States and its properly designated agents and officers from the supersedeas bond requirement.

Relationship to Stays by Appellate Courts

The power of the district court to grant a stay neither diminishes nor enlarges the powers of the appellate courts to grant stays of judgments under the Federal Rules of Appellate Procedure, a point expressly made in subdivision (g). *Federal Rule of Appellate Procedure 8(a)* states that a stay of judgment should be sought from the district court under Rule 62(d) before seeking a stay from the appellate court. The district court retains its power over stays of judgment until the appellate court speaks on the matter.

Applicability of State Law; Stays on Multiple Claims of Parties

When a judgment is a lien on property within a state, subdivision (f) states that any stay provisions of that state are available to the appellant. Subdivision (h) is arguably repetitive, but it makes the express point that a judgment on a claim involving multiple claims or multiple parties under Rule 54(b) may be stayed under conditions that the court deems necessary.



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12 *Moore's Federal Practice* §§ 62.01 -62.32



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Authority of Stay of Judgment

Rakovich v. Wade, 834 F.2d 673 (7th Cir. 1987) (district court retains its power over stays of judgment until the appellate court issues its mandate).

Bond Requirement Dispensed

Arban v. West Publ'g Corp., 345 F.3d 390 (6th Cir. 2003) (in light of vast disparity between the amount of the judgment in and the annual revenue of group of which former employer was part, the district court's decision to grant stay without bond was not an abuse of discretion).

District Court's Power over Injunction During Appeal

Board of Educ. v. Missouri, 936 F.2d 993 (8th Cir. 1991) (district court retained power to enforce and modify the terms of an injunction under Rule 62(c) even during the pendency of appeal).

Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989) (although a district has the power to dissolve an injunction, once an injunction is granted, it may not be dissolved during the pendency of appeal because that power is not enumerated in Rule 62(c)).

Diverse Forms of Judgment Permitted

Arnold v. Garlock, Inc., 278 F.3d 426 (5th Cir. 2001) (while Rule 62 pertains to judgments for money, it does not preclude diverse forms of judgment relating to monetary responsibility from a stay pending appeal, or from a ten-day automatic stay of judgment).

Greater Harm Not Shown

Amerisource Bergen Corp. v. Dialysist West, Inc., 445 F.3d 1132 (9th Cir. 2006) (a Rule 62(h) motion was properly denied where buyer could not show that failure to provide a stay would cause it to suffer greater harm than seller would face if it was denied already certified final judgment pending resolution of buyer's outstanding claims).

Kind of Bond Required

Olympia Equipment Leasing Co. v. Western Union Tel. Co., 786 F.2d 794 (7th Cir. 1986) (1987) (district court allowed appellant to post security rather than a supersedeas bond).

Motion for Stay Required Even if Automatic Under State Law

Whitehead v. Food Max of Miss., Inc., 277 F.3d 791 (5th Cir. 2002) (a motion under Rule 62, which provides that judgment debtor is entitled to a stay under relevant state law, must nonetheless be made even if the stay would be granted automatically in state court).

Obligation of Surety for Principal Only

Contractors Equip. Maint. Co. v. Bechtel Hanford, Inc., 514 F.3d 899 (9th Cir. 2008) (surety on supersedeas bond under Rule 62(d) was only liable for obligation of its principal, which was insurer liable on performance bond of defunct subcontractor; surety was not liable for defunct subcontractor's share of judgment).

Overtaken on Appeal

Strong v. Laubach, 443 F.3d 1297 (10th Cir. 2006) (the failure of a debtor to request a stay of judgment, which allowed creditors to garnish his workers' compensation funds, did not relieve creditors of their obligation to return funds they received during pendency of appeal when debtor prevailed on appeal).

Rule 65 Security Compared to Rule 62

Security Global NAPs, Inc. v. Verizon New Eng., Inc., 489 F.3d 13 (1st Cir. 2007) (where security was given, under Rule 65(c), upon issuance of preliminary injunction which restrained telecommunications company from terminating service to its customer pending appeal, situation was analogous to security issued under Rule 62, insofar as preliminary injunction was issued to preserve status quo, and customer who sought injunction was required to post security pending appeal).

Stay of Declaratory Judgment

Hebert v. Exxon Corp., 953 F.2d 936 (5th Cir. 1992) (an appellant is entitled to a stay of a judgment pending appeal when a declaratory judgment orders the appellant to pay a specific amount of money and the appellant files the required supersedeas bond).

Stay of Injunctive Relief

Mowbray v. Kozlowski, 725 F. Supp. 888 (W.D. Va. 1989) (a stay of injunctive relief will be granted only upon a showing of a reasonable likelihood of success on appeal).



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Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

Rule 62.1 reads as follows:

Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

1-62.1 Federal Civil Procedure Litigation Manual Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.

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62.1.1 COMMENTARY

Indicative Rulings Generally

A district court who is asked to vacate a judgment under Rule 60(b) may occasionally find itself in the position of lacking jurisdiction over the case because of a pending appeal. In this instance, the appeals court, not the district court, has jurisdiction over the case. Nonetheless, it may be timely or appropriate for the district court to hear a kind of "conditional" motion for post-judgment relief and make a ruling accordingly if the appeals court were to remand the case. The ruling on the motion by the district court thus takes the form of a suggestion to the appeals court, often called an "indicative ruling," for disposing of the case. Rule 62.1 makes the practice of indicative rulings official and provides procedures for their use. Rule 62.1 does not apply to situations in which the district court determines that it does, in fact, have jurisdiction over the case, in which case it may simply hear the motion and rule accordingly without permission from the court of appeals. The question of whether the independent jurisdictional question was correctly decided by the district court judge is, of course, subject to appeal as well.

Form of an Indicative Ruling

Under subdivision (a), a court is authorized to hear a motion for post-judgment relief despite the fact that the case is currently docketed on appeal and pending in an appeals court. The court has three options: (1) the court may deny the motion, and the appeal would continue in its normal course; (2) the court may defer consideration on the motion, and the appeal would also continue in its normal course; or (3) the court may state that it would grant the motion if it had the opportunity do so (e.g., the appeals court remanded the case for that purpose). Although not listed as a distinct numbered option, it is clear that the district court may also state that the motion raises a "substantial issue." This may occur when a motion presents complex issues requiring extensive litigation and that may turn out differently once all the proverbial dust has cleared. In such a case, the court of appeals may decide it best to remand the case for a determination of the motion for post-judgment relief rather than dispose of the case in appeal. The district court may, of course, ultimately deny the motion, but the "substantial issue" raised by the motion warrant its primary consideration by the district court judge.

Notice to Court of Appeals

If the district court judge conditionally grants the motion or states that it raises a substantial issue under subdivision (a)(3), the moving party is charged with notifying the circuit court clerk of that fact under Federal Rule of Appellate Procedure 12.1. This notice is intended to allow the district court and court of appeals to coordinate their actions in disposing of the case properly. Subdivision (c) contemplates the consummation of the "indicative ruling" procedure by providing that the district court may decide the motion if the court of appeals remands for that purpose.



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Rule 63. Judge's Inability to Proceed

Rule 63 reads as follows:

Rule 63. Judge's Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

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63.1 COMMENTARY

Rule 63 provides for the substitution of a judge who has become unable to proceed in a trial due to disability, disqualification, or any other reason for withdrawal. Substitution of judges is often necessary to avoid the inconvenience of beginning a trial anew when the judge becomes unable to proceed.

Duties of Substitute Judge

Before the substitution is made, the Rule requires that the new judge certify familiarity with the record and determine that no prejudice will inhere to any of the parties by the substitution. The advisory committee's note recommends that the new judge review the testimony of witnesses on videotape to ensure greater confidence in this regard. The Rule expressly authorizes the substitute judge in a bench trial to make findings of fact based on evidence introduced before the replaced judge. This can be accomplished through the reintroduction into evidence of the transcript of the earlier proceedings under Rule 32 and *Federal Rule of Evidence 804*.

Scope of Rule Enlarged

The Rule was substantially changed in 1991 to correct for omissions in the predecessor Rule. The former Rule was limited to circumstances in which a judge became unable to proceed because of a disability only. The present version includes the inability of a judge to proceed for other reasons, including recusal and disqualification. Additionally, the former version of the Rule was limited in its application to the withdrawal of a judge after the trial had been completed. This language suggested that the substitution of judges was not permitted during the course of a trial, requiring a new trial no matter how close to the end of trial the parties had been. As explained above, the new version makes express provisions for this occurrence.



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63.2 ADDITIONAL AUTHORITY

12 *Moore's Federal Practice* §§ 63.01 -63.74



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63.3 LEADING CASES

Authority of Substitute Judge

Fagan v. Vineland, 22 *F.3d* 1283 (3d Cir. 1994) (a substitute judge had the power to reconsider and overturn findings of fact made by the former judge, although the doctrine of the law of the case suggests that this should not be done lightly).

Testimony Not Required to Be Reheard by Successor Judge

Jackson v. Alabama State Tenure Comm'n, 405 *F.3d* 1276 (11th Cir. 2005) (successor judge, who was familiar with the record and had determined that the proceedings could be completed without prejudice to the parties, was not required by Rule 63 to recall witnesses and hear testimony prior to entering judgment granting a Rule 50 motion for judgment as matter of law, which the prior judge had orally issued).



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TITLE VIII. PROVISIONAL AND FINAL REMEDIES

Chapter 64 Rule 64. Seizing a Person or Property

1-64 Federal Civil Procedure Litigation Manual Rule 64. Seizing a Person or Property

Rule 64. Seizing a Person or Property

Rule 64 reads as follows:

Rule 64. Seizing a Person or Property

(a) **Remedies Under State Law--In General.** At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) **Specific Kinds of Remedies.** The remedies available under this rule include the following--however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

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TITLE VIII. PROVISIONAL AND FINAL REMEDIES

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64.1 COMMENTARY

Rule 64, in conjunction with Rule 65, governs provisional remedies in federal courts. These remedies are intended to preserve the status quo or existing situation at the time a party brings an action. They are necessary to ensure that sufficient funds or resources of the opposing party are available to a party should the party eventually prevail and obtain a judgment in its favor. These kinds of provisional remedies should be distinguished from methods of execution on a judgment, which are governed by Rule 69. However, subdivision (a)(1) of that Rule parallels Rule 64 in rendering whatever postjudgment procedures may be available in the state in which the district is located applicable to actions filed in federal court.

Remedies Under Rule 64 and Rule 65 Distinguished

The distinction between Rules 64 and 65 can be understood by recalling that, prior to the promulgation of the Federal Rules in 1938, the federal court system was separated into courts of law and courts of equity. Provisional remedies in federal courts of law were dictated and governed by state law, whereas federal courts in equity had their own independent equity powers to impose provisional remedies. Rules 64 and 65 preserve this historical distinction.

Remedies Under State Law Available

Rule 64(a) generally provides that the kinds of provisional remedies historically available to federal courts in law remain available today. The Rule does not contain procedures for the imposition of these remedies, but makes applicable the procedures of the state in which the district court is located.

All remedies that may be available to a party under applicable state law at the time an action is brought in or removed to federal court, whether or not they are identified as those remedies listed in subdivision (b), are available to parties in district courts within that state. The only exception to this rule of applicability is that, when a statute of the United States conflicts with a state law prescribing a provisional remedy, the United States statute governs. State provisional remedies must also, of course, satisfy federal constitutional requirements. One of these requirements, the doctrine of procedural due process, has been the subject of a number of Supreme Court cases discussing various provisional remedies made available by state law. A brief overview of some of these cases is thus appropriate.

Provisional Remedies and Procedural Due Process

In *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), the Supreme Court ruled that Wisconsin's garnishment statute did not satisfy the constitutional demands of due process. Among other defects, the statute did not provide a garnishee with notice of the garnishment or the opportunity for a hearing on the matter before the garnishment occurred. The Court extended the theory in *Sniadach* to *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 55 (1972), in which it invalidated Florida's and Pennsylvania's repossession statutes. However, the Court severely limited *Fuentes* two years later in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974). In *Mitchell*, the Court upheld the statute at issue, which provided for attachment and replevin without notice to or an opportunity to be heard by the owner of the property, by noting the various procedural safeguards in the statute.

In 1991, the Court, in *Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991), ruled that the constitutionality of state provisional remedies under the due process clause is to be determined by a three-fold balancing test. A court must consider: (1) the private interest that will be affected; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the interest of the party seeking the remedy and the ancillary interests of the government in the particular procedure used. Applying this balancing test, the Court held that Connecticut's attachment statute was unconstitutional because it neither required a showing of exigent circumstances for the attachment nor required the plaintiff to post a bond. Two years later in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993), the Court suggested that real property deserved an extra measure of protection from seizure, largely because of the impossibility that the defendant would abscond with the property in dispute.

From these cases, it can be determined what kinds of procedural safeguards are necessary for state provisional remedies to satisfy constitutional due process requirements. At a minimum, a state procedure must contain at least four elements: (1) it must specify some kind of exigent circumstance before the remedy may be used by the party; (2) it must require the party to submit affidavits or other sworn statements specifying the grounds for the deprivation; (3) the examination of the grounds must be performed by a district or magistrate judge; and (4) a prompt hearing must be available to the opposing party at which the party seeking to use the remedy should bear the burden of proving that grounds for the provisional remedy exist. In addition, the statute should also require the party to post a bond to protect against damages resulting from erroneous deprivations. Furthermore, the statute should require some showing by the party that there is a likelihood of success on the merits of the case.



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64.2 ADDITIONAL AUTHORITY

13 *Moore's Federal Practice* §§ 64.01 -64.19

Teply & Whitten, Civil Procedure 558-559



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64.3 LEADING CASES

Escrow in Lieu of Attachment

Nationwide Mut. Ins. Co. v. Whiteford Sys., 787 F. Supp. 766 (S.D. Ohio 1992) (where defendants made escrow arrangements for a disputed claim, state attachment remedy was not appropriate).

Ex Parte Prejudgment Seizure Struck Down

United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) (Court struck down statute allowing *ex parte* prejudgment seizure of real property).

Ex parte Prejudgment Seizure Upheld

Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974) (Court upheld *ex parte* replevin procedure).

Freezing of Assets Preferable to Attachment

EBSCO Indus., Inc. v. Lilly, 840 F.2d 333 (6th Cir. 1988) (district court may order prejudgment freezing of assets rather than attachment of assets where freezing will better protect the plaintiff's interests).

Notice and Opportunity to Be Heard Required

Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (Court invalidated Florida and Pennsylvania statutes that allowed commercial creditors to repossess consumer property upon default without providing the consumer notice and an opportunity to be heard).

State Law Determinative of Provisional Remedies

Mitsubishi Int'l, Corp. v. Cardinal Textile Sales, 14 F.3d 1507 (11th Cir. 1994) (state law determines existence and procedure of provisional remedies; when state law does not allow constructive trusts, it is impermissible to create one).

State Writ of Attachment

Britton v. Howard Sav. Bank, 727 F.2d 315 (3d Cir. 1984) (state law, requiring a finding that a movant must have a probability of winning on the merits of the case before a writ of attachment issues, applicable to federal courts).



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1-65 Federal Civil Procedure Litigation Manual Rule 65. Injunctions and Restraining Orders

Rule 65. Injunctions and Restraining Orders

Rule 65 reads as follows:

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) **Notice.** The court may issue a preliminary injunction only on notice to the adverse party.

(2) **Consolidating the Hearing with the Trial on the Merits.** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) **Issuing Without Notice.** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or

damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry--not to exceed 14 days--that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice--or on shorter notice set by the court--the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) *28 U.S.C. § 2361*, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) *28 U.S.C. § 2284*, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

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65.1 COMMENTARY

Rule 65, in conjunction with Rule 64, governs provisional remedies in federal courts. These remedies are intended to preserve the status quo or existing situation. They are necessary to ensure that sufficient funds or resources of the opposing party are available to a party should the party eventually prevail and obtain a judgment in its favor or to preserve the status quo to ensure the efficacy of the final remedy. These kinds of provisional remedies should be distinguished from methods of execution on a judgment, which are governed by Rule 69. However, subdivision (a)(1) of that Rule parallels Rule 64 in rendering whatever postjudgment procedures may be available in the state in which the district is located applicable to actions filed in federal court.

Remedies Under Rule 65 and Rule 64 Distinguished

The distinction between Rules 64 and 65 can be understood by recalling that, prior to the promulgation of the Federal Rules in 1938, the federal court system was separated into courts of law and courts of equity. Provisional remedies in federal courts of law were dictated and governed by state law, whereas federal courts in equity had their own independent equity powers to impose provisional remedies. Rules 64 and 65 preserve this historical distinction.

Preliminary Injunctions and TROs Generally; Contempt

Rule 65 governs preliminary injunctions and temporary restraining orders (TROs), the two historical tools used by federal courts in equity to impose provisional remedies. These orders usually command a party to do or refrain from doing a specific act. Preliminary injunctions and TROs are usually not appropriate when the primary purpose of the injunction or order is merely to ensure that sufficient assets of a party are available to satisfy a potential judgment for damages. Even when there is strong evidence that a party is seeking to dispose of all of its assets before a judgment can be obtained, the injunctive power of the court under Rule 65 does not extend to assets in which no lien or equitable interest is claimed by a party.

Preliminary injunctions and TROs are enforceable through the court's contempt power. Civil contempt sanctions are designed to ensure compliance with the order through an appropriate form of coercion, usually in the form of fines levied upon the offending party. Criminal contempt sanctions are also designed to ensure compliance with the order, but they have the additional purpose of vindicating the court's authority through an appropriate form of punishment, usually

in the form of prison sentences. Of course, when criminal contempt sanctions are imposed, the more stringent burdens of proof and procedural protections afforded to criminal defendants apply.

Preliminary Injunctions and TROs Distinguished

Preliminary injunctions and TROs have different purposes, and one should not be used as a substitute for the other. The procedural differences in obtaining these orders specified in Rule 65 illuminate these differences. Briefly, TROs are a "stopgap" measure; they are designed to preserve the status quo only until a hearing on a preliminary injunction is possible. Thus, TROs expire automatically 14 days after their issuance, unless the court orders a longer period for cause shown or the parties agree to a longer period. Preliminary injunctions typically remain in effect until a judgment is entered.

Illustration 65-1

Amanda's Construction Company arrives at Lorin's home planning to bulldoze the land and prepare it for the construction of a new zoo. Lorin's attempts to convince the employees that they are at the wrong location are ignored, and the workers continue to make preparations to grade the land. Lorin is faced with an emergency situation in which there is no time to provide notice and an opportunity for Amanda's Construction Company to be heard. Thus, Lorin should be allowed to obtain a temporary restraining order that precludes the further development of his land until a hearing can be arranged. If the court grants a temporary restraining order, a hearing will be scheduled to determine whether a preliminary injunction should be issued or whether Amanda's Construction Company should be allowed to proceed with its work.

Purposes of Preliminary Injunctions and TROs

The purposes of preliminary injunctions and TROs are also distinct from those attending other kinds of provisional remedies that may be available to a party under Rule 64, such as attachment and garnishment, and should not be used as substitutes for them. Although all provisional remedies are intended to preserve the status quo, preliminary injunctions and TROs should not be issued merely to ensure that sufficient assets of the defendant are available to satisfy a judgment. Thus, the issuance of a TRO requires a demonstration of "immediate and irreparable injury, loss, or damage."

Illustration 65-2

Under the facts of Illustration 65-1, Lorin is threatened with an "irreparable injury" because monetary damages cannot adequately compensate him for some of the value inherent in the land, *e.g.*, the home may have been a family homestead for five generations. Simply insuring that Amanda's Construction Company may have sufficient assets to build a replacement house may be little consolation to Lorin.

Standard for Preliminary Injunctions

The specific standard to be used by a court in granting a motion of a preliminary injunction is not specified in Rule 65. The Supreme Court has held that the movant must demonstrate a kind of "irreparable injury" similar to that required in a motion for a TRO which will result if the motion is denied. The moving party must also demonstrate some likelihood of succeeding on the merits of the case. In addition, courts have considered the weight of possible injury to the moving party compared to that of the non-moving party and the threat of harm to the public interest if the injunction is issued.

Procedural Differences Between Preliminary Injunctions and TROs

The primary distinction between preliminary injunctions and TROs is that preliminary injunctions may be granted only

after notice to the adverse party, a condition specified in subdivision (a)(1), whereas TROs can be granted *ex parte*. A hearing on the application for a preliminary injunction is also contemplated by subdivision (a)(2), but at least the Third and Fifth Circuits have held that this is not an absolute prerequisite. However, the court must make appropriate findings of fact and conclusions of law on the matter sufficient for appellate review, and a hearing is the usual vehicle for achieving this. Hearings on preliminary injunctions may also be required by local rule. Preliminary injunctions are typically appealable as interlocutory orders under 28 U.S.C. § 1292(a)(1).

Procedure for Deciding on Preliminary Injunction

Subdivision (b)(3) requires that, when a TRO is granted *ex parte*, hearings on motions for preliminary injunctions must be held at the earliest possible time and take precedence over all matters except for other hearings on preliminary injunctions. Subdivision (a)(2) provides that the court, in its discretion, may advance the trial date and consolidate the trial with a hearing on a preliminary injunction. Such a consolidation is advantageous when it appears to the court that the issues to be resolved at the hearing on the preliminary injunction are concomitant with or overlap those to be determined at trial. If consolidation is ordered by the court, however, the parties must be given a full opportunity to present any and all evidence in the action. Subdivision (a)(2) goes on to provide that, if consolidation is not ordered by the court, the parties need not re-present evidence admitted at the hearing on the preliminary injunction at the trial, unless the admission would destroy a party's rights to a jury trial. In this vein, *Federal Rule of Evidence 804(b)(1)* operates to admit such evidence as an exception to the hearsay rule.

Procedure for Granting a TRO

Subdivision (b) details both the requirements that must be met before a TRO is issued as well as the contents of a TRO. As TROs are unusual in that they may be granted *ex parte*, subdivision (b)(1) contains a number of safeguards to attempt to ensure that the order is not granted erroneously: the immediacy and irreparability of the injury, loss, or damage; the fact that "specific facts ... clearly show" the injury, loss, or damage; and a showing of the reasons for the failure to provide notice to the adverse party. In addition, subdivision (b)(2) sets a 14-day time period limitation on the order, as noted above, and subdivision (b)(4) provides the party subject to the TRO with the opportunity to appear before the expiration of the time period and move to dissolve or modify the TRO.

TROs that extend beyond the original 14-day time period are generally to be treated as preliminary injunctions and as such, they are appealable as interlocutory orders. Any additional standards that apply to preliminary injunctions must also be satisfied. However, if the adverse party consents to an extension of the time period of a TRO, it is not converted into a preliminary injunction for purposes of appeal.

Subdivision (c) clearly provides that no preliminary injunction or TRO may be granted unless a bond or other security is provided by the moving party. The kind of security, as well as the amount required, is within the discretion of the court. The court also has the discretion to dispense with the necessity of a bond or other security, but only after a consideration of the specific facts and circumstances involved.

Form and Scope of Preliminary Injunctions and TROs

Subdivision (d) sets forth the form and scope of the preliminary injunction or TRO. In conjunction with the provisions of subdivision (b), subdivision (d)(1) requires specificity and exactitude in the terms and granting of a preliminary injunction or TRO. It should also be noted that subdivision (d)(2) defines the scope of preliminary injunctions and TROs more narrowly than the scope of orders affecting non-parties generally, as set forth in Rule 71. Subdivision (e) contains statutory exceptions to Rule 65.

Copyright Cases

Subdivision (f), which made the Rule applicable to copyright impoundment proceedings, was added in 2001. Accordingly, impoundment may be ordered on an *ex parte* basis under subdivision (b) if the party makes a strong showing of the reasons why notice of a proposed impoundment is likely to defeat effective relief. There is a well-established body of caselaw setting forth illustrations of the kinds of showings that support *ex parte* relief, and trademark infringement proceedings also provide appropriate points of comparison. In applying the tests for *ex parte* relief, the court should ask whether impoundment is necessary and whether adequate protection can be obtained by a less intrusive form of relief shaped as a temporary restraining order.



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13 *Moore's Federal Practice* §§ 65.01 -65.90

Teply & Whitten, Civil Procedure 558-559, 564-570

Weissenberger's Federal Evidence §§ 804.9-804.16



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65.3 LEADING CASES

Administrative Remedies Must Be Exhausted

NationsBank Corp. v. Herman, 174 F.3d 424 (4th Cir. 1999) (administrative remedies must be exhausted before a preliminary injunction is proper).

All Writs Act Unavailable When Rule 65 Adequate

Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1229 (11th Cir. 2005) (parties cannot seek to circumvent requirements for preliminary injunctions through petition to court of appeals under the All Writs Act, 28 U.S.C. § 1651(a); the All Writs Act is unavailable where other, adequate remedies at law exist, such as Rule 65), *reh'g, en banc, denied*, 403 F.3d 1261, *and corrected*, 403 F.3d 1289, *reh'g denied*, 404 F.3d 1272, *reh'g, en banc, denied*, 404 F.3d 1270.

Bond Required

Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411 (4th Cir. 1999) (the trial court is not free to disregard the bond requirement altogether upon granting a preliminary injunction, and failure to require such a bond is reversible error).

Bond Requirement

Rathmann Group v. Tanenbaum, 889 F.2d 787 (8th Cir. 1989) (decision of judge to specify amount of bond required under Rule 65(c) is reviewable for an abuse of discretion).

Bond Not Required for Permanent Injunction

Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003) (a bond is not required when a court issued a permanent injunction, only a temporary restraining order or preliminary injunction).

Confidentiality Ordered in Injunction

ITT Educ. Servs. v. Arce, 533 F.3d 342 (5th Cir. 2008) (injunction that prevented 14 students from disclosing contents of arbitration proceeding transcript that resulted from arbitration of students' claims against school was sufficient to meet requirements of Rule 65(d) and was not overbroad where injunction, which required that all aspects of arbitration remain confidential, did not prevent students from discussing arbitration proceeding with their attorney and did not prevent students from appealing).

Contempt; Generally

Dole Fresh Fruit Co. v. United Banana Co., 821 F.2d 106 (2d Cir. 1987) (parties may not be held in contempt if they are not informed of the contempt proceeding and their right to counsel).

Contempt Order Valid; TRO Converted to Injunction

United States v. Crawford (In re Crim. Contempt Proceedings Against Crawford), 329 F.3d 131 (2d Cir. 2003) (because a TRO was granted after notice and hearing, and was unambiguous as to its terms, it continued in effect as preliminary injunction, and defendants' criminal contempt convictions in violation of the preliminary injunction after the 20-day limitation on TROs were affirmed).

Contempt Sanctions

Spallone v. United States, 493 U.S. 265, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990) (when choosing contempt sanctions, court must first impose the minimum possible sanctions to ensure compliance).

Dispensing of Bond Requirement

California ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319 (9th Cir. 1985) (where plaintiffs lacked financial resources and had meritorious claim, court was within its discretion to eliminate bond requirement).

Federal Court Jurisdiction Grant Does Not Supplant Rule 65 Standard

Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289, 1292 (11th Cir. 2005) (Pub. L. No. 109-3 does not supplant Rule 65, which is applicable to temporary restraining orders or preliminary injunctions; district court did not abuse its discretion in denying a TRO request by parents who were seeking resumption of nutrition and hydration to their incapacitated daughter, as parents did not make substantial showing that court-ordered withholding of food and water violated any applicable law), *reh'g denied, injunction denied*, 404 F.3d 1272, *reh'g denied*, 404 F.3d 1270.

Irreparable Injury; Violation of Constitutional Rights

Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5th Cir. 1993) (violation of constitutional rights represents irreparable injury and threat of harm to public interest).

Mootness

Honig v. Students of Cal. Sch. for the Blind, 471 U.S. 148, 105 S. Ct. 1820, 85 L. Ed. 2d 114 (1985) (grant of preliminary injunction will not be reviewed where the issue is moot).

Non-Parties Not Subject to Injunctions

R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999) (injunctive relief can be granted against a party to an action only; personal jurisdiction and service of process requirements must be satisfied over a person or someone in legal privity with that person before an injunction will be issued).

Notice Not Provided

Wyandotte Nation v. Sebelius, 443 F.3d 1247 (10th Cir. 2006) (because district court provided party with no notice that they were going to be enjoined, in clear violation of Rule 65, and because it relied on misreading of previous order of court, injunction against party was vacated).

Preliminary Injunction; Effect on Non-Parties

Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989) (preliminary injunction may be effective against non-parties acting in concert with the defendants if they have actual notice of the injunction).

Preliminary Injunction; Hearing Not Required

Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172 (3d Cir. 1990) (a hearing on a preliminary injunction is not an absolute prerequisite to its issuance).

Preliminary Injunction; Notice and Opportunity to Be Heard Required

Phillips v. Chas. Schreiner Bank, 894 F.2d 127 (5th Cir. 1990) (notice and an opportunity to be heard are required before a preliminary injunction can be granted).

Preliminary Injunction; Standard

Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456 (6th Cir. 1999) (the court must consider and balance four factors when ruling on a motion for a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction).

Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975) (stating the traditional standard for granting a motion for a preliminary injunction--irreparable injury and a likelihood of success on the merits of the case; decision is reviewable under abuse of discretion standard).

Review of Preliminary Injunction

Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119 (9th Cir. 2005) (a motion that merely seeks to relitigate issues underlying an original preliminary injunction order is subject to Rule 59's 10-day limit, but a motion that is based on new circumstances that have arisen after the district court granted the injunction may be filed at any time before the entry of final judgment).

Security Compared to Rule 62

Security Global NAPs, Inc. v. Verizon New Eng., Inc., 489 F.3d 13 (1st Cir. 2007) (where security was given, under Rule 65(c), upon issuance of preliminary injunction which restrained telecommunications company from terminating

service to its customer pending appeal, situation was analogous to security issued under Rule 62, insofar as preliminary injunction was issued to preserve status quo, and customer who sought injunction was required to post security pending appeal).

Specificity in Injunction Required

Patriot Homes, Inc. v. Forest River Hous., Inc., 512 F.3d 412 (7th Cir. 2008) (regarding modular home manufacturer's claims of misappropriation of trade secrets and other confidential information, preliminary injunction entered by district court used collection of verbs to prohibit competitor's subsidiary from engaging in certain conduct, but ultimately it failed to detail what conduct was, *i.e.*, substance of "trade secret" or "confidential information" to which verbs referred; thus, district court's preliminary injunction lacked specificity as required by Rule 65(d)).

TRO; Appealability

Quinn v. Missouri, 839 F.2d 425 (8th Cir. 1988) (a TRO beyond 10 days is appealable as a preliminary injunction).

TRO; Generally

Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974) (a TRO issued by a state court is effective after removal to federal court no longer than it would have been in effect in state court and no longer than 10 days after the date of removal; the denial of a motion to dissolve or modify a TRO does not transform the order into a preliminary injunction).

TRO; Limitation of Free Speech

New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989) (a TRO that limited defendants *First Amendment* right to free speech was permissible because it was content-neutral and narrowly tailored).

TRO; Transformation to Injunctions

Sampson v. Murray, 415 U.S. 61, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974) (a TRO that extends beyond 10-day time period is converted into a preliminary injunction).

Unrelated Assets of a Party

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999) (Rule 65 does not confer upon trial courts the power to issue preliminary injunctions preventing a party from transferring assets in which no lien or equitable interest is claimed by the opposing party).



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Rule 65.1. Proceedings Against a Surety

Rule 65.1 reads as follows:

Rule 65.1. Proceedings Against a Surety

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

* * * * *



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65.1.1 COMMENTARY

Rule 65.1, which was added in 1966, guarantees that a party seeking to recover on a bond need not proceed against the surety through an independent action. The bond may be enforced against the surety by motion in the same action in which the bond was originally required. Rule 65.1 applies to any kind of bond or security required or permitted under the Rules, including supersedeas bonds and bonds that may be required in conjunction with provisional remedies.

The Rule states that the clerk of the district court is appointed as agent for the surety for the purpose of serving papers affecting the surety's liability. The clerk is then required to forward copies of these papers to the surety. This procedure ensures that a party can easily and expeditiously recover on a bond when appropriate.



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65.1.2 ADDITIONAL AUTHORITY

13 *Moore's Federal Practice* §§ 65.1.01 -65.1.04

Teply & Whitten, Civil Procedure 569-570



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65.1.3 LEADING CASES

Bond Not Voided on Remand

TVA v. Atlas Mach. & Iron Works, 803 F.2d 794 (4th Cir. 1986) (a supersedeas bond is not voided, and may be enforced against a surety, simply because the prevailing party files a cross-appeal and the court of appeals orders a recalculation of damages).

Independent Action Against Surety Not Required

Global NAPs, Inc. v. Verizon New Eng., Inc., 489 F.3d 13 (1st Cir. 2007) (First Circuit's understanding of Rule 65(c) is informed by fact that if bond has been posted as security in conjunction with injunction, recovery would be governed by Rule 65.1; the Rule, in turn, provides summary procedure for enforcement of liability against surety, which may be done on motion, without need for filing independent action).



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1-66 Federal Civil Procedure Litigation Manual Rule 66. Receivers

Rule 66. Receivers

Rule 66 reads as follows:

Rule 66. Receivers

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

* * * * *



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66.1 COMMENTARY

Rule 66 recognizes receivership as a provisional remedy as provided by federal statutory law or local rule. Receivership may also be available through Rule 64 according to the pertinent state law. An exhaustive discussion of receivership practice in federal court is beyond the scope of this manual, but several points in conjunction with Rule 66 should be noted.

The appointment of a receiver is within the discretion of the district judge, though due care should be taken to appoint a neutral third person to manage the estate or property that is the subject of the action. The Rule states that receivers appointed to manage the administration of an estate are governed by existing federal case law or by local rule; receivers in all other actions are governed by the Rules. Applicable state and federal statutes should also be consulted.

An action involving a court-appointed receiver cannot be settled by the parties, and such an action may be dismissed only by order of the court. Additionally, a federal receiver may bring an action in any district court but may be sued only when authorized by federal statute or with permission of the appointing court.



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66.2 ADDITIONAL AUTHORITY

13 *Moore's Federal Practice* §§ 66.01 -66.12

Teply & Whitten, *Civil Procedure* 559 n.349



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Appointment of Receiver; Standard

Consolidated Rail Corp. v. Fore R. R. Co., 861 F.2d 322 (1st Cir. 1988) (court acted properly in appointing a federal receiver when it evaluated the danger that the defendant's property would be misused and the plaintiff's likelihood of success at trial; reviewed under abuse of discretion standard).

Consolidation of Action Involving Receiver; Settlement

United States v. Altman, 750 F.2d 684 (8th Cir. 1984) (consolidated action under Rule 42 involving federal receiver does not forbid the other parties from settling their individual cases independent of the disposition of the consolidated action).

Governing Law; Diversity Actions

New York Life Ins. Co. v. Watt W. Investment Corp., 755 F. Supp. 287 (E.D. Cal. 1991) (federal law governs appointment of receiver in diversity action).

Receiver as Ancillary Remedy

National Partnership Inv. Corp. v. National Housing Development Corp., 153 F.3d 1289 (11th Cir. 1998) (appointment of a receiver by a federal court exercising diversity jurisdiction is governed by federal law and Rule 66; under the Rule, the appointment of a receiver is not a substantive right, but an ancillary remedy that does not affect the ultimate outcome of the action).



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Rule 67. Deposit into Court

Rule 67 reads as follows:

Rule 67. Deposit into Court

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party--on notice to every other party and by leave of court--may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Investing and Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

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67.1 COMMENTARY

Rule 67 permits a party to an action to deposit with the court a sum of money or material object that is the subject of the action. In essence, the Rule allows the creation of a kind of escrow account with the court which relieves the party making the deposit of the responsibility for the fund or object deposited. Parties may desire this kind of procedure to preempt the invocation of any provisional remedies that may be available to the opposing party under the Rules, thereby avoiding whatever indignity may inhere in garnishment or attachment. The Rule is also used in conjunction with Rule 22 and statutory interpleader.

Procedure for Deposit with Court

A party may use the deposit procedure specified in subdivision (a) only with the permission of the court and after notifying all other parties. The party making a deposit must also so notify the clerk of the court, who will usually be directed by the court to administer the deposit.

A party need not disclaim any or all interest in the object or money deposited. However, if a party chooses to disclaim any interest in the object or funds deposited with the court, the party may not thereafter seek to recover the object or fund.

Illustration 67-1

Charlene commences a breach of contract action against Stacy alleging that the contract is unenforceable because it fails to satisfy the requirements of the statute of frauds. Payments under the disputed contract will become due throughout the litigation. Rule 67(a) permits Charlene to deposit the payments with the court provided that Charlene notifies Stacy of her intention and seeks the permission of the court. The payments will then be deposited with the clerk of the court.

Under subdivision (b), the court is required to re-deposit any money deposited pursuant to Rule 67 in an interest-bearing account or financial instrument in accordance with relevant statutes. If a material object is the item deposited by a party, the court should ensure that the object is sufficiently secured and protected in a safe-deposit box or other similar medium.



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13 *Moore's Federal Practice* §§ 67.01 -67.03



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Court's Failure to Deposit Funds

Cordero v. De Jesus-Mendez, 922 F.2d 11 (1st Cir. 1990) (a party is relieved of the responsibility for interest on funds deposited into a Rule 67 account; court's failure to re-deposit funds into interest-bearing account is not to be borne by the party making the original deposit).

Creation of Settlement Fund

Garrick v. Weaver, 888 F.2d 687 (10th Cir. 1989) (a settlement fund may be created under Rule 67).

Disbursal of Funds

Craig's Stores of Tex., Inc. v. Bank of La. (In re Craig's Stores of Tex., Inc.), 402 F.3d 522 (5th Cir. 2005) (Rule 67 does not create a duty to disburse funds only to persons judicially determined to be rightful owners).

Disclaimer of Interest in Fund

Veillon v. Exploration Servs., Inc., 876 F.2d 1197 (5th Cir. 1989) (party who disclaims interest in a fund deposited with the court under Rule 67 may not subsequently seek to recover on that fund).

Interest on Rule 67 Deposits

LTV Corp. v. Gulf States Steel, Inc., 969 F.2d 1050 (D.C. Cir. 1992) (in a contract dispute, the terms of an acceleration clause regarding interest cannot be replaced by the interest rate of an account into which a deposit under Rule 67 was made).

Return of Unclaimed Funds

Van Gemert v. Boeing Co., 739 F.2d 730 (2d Cir. 1984) (where a judgment fund is created, district court has discretion to return any unclaimed funds to the defendant under certain conditions).



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1-68 Federal Civil Procedure Litigation Manual Rule 68. Offer of Judgment

Rule 68. Offer of Judgment

Rule 68 reads as follows:

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

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68.1 COMMENTARY

Rule 68 contains a number of provisions relating to offers of judgment by parties defending a claim. Most notably, it sets forth a specific fee-shifting provision concerning such offers.

Rule 68 Generally

From the outset, it should be noted that Rule 68 has engendered a great deal of confusion among federal courts and practitioners and has prompted a remarkable agglomeration of scholarly commentary. As originally conceived, Rule 68 was designed to promote settlement negotiations between parties and to encourage plaintiffs to consider offers of judgment by defendants seriously. The provisions of the Rule should thus be read narrowly and in light of this specific objective.

Limitations on Rule 68

Properly conceived, Rule 68 applies only to offers to stipulate to entry of judgment and not to settlement offers generally. The distinction is critical, as an offer of judgment results in a judgment being entered against a party as a matter of public record; settlement offers are usually private contracts in which dismissal of the action with prejudice supplies part or all of one party's consideration. Thus, an offer to stipulate to an entry of judgment for purposes of Rule 68 may only be made by a party defending a claim, though a party making a claim may, of course, make overtures at settlement. Rule 68, however, is applicable only in the former instance.

The Rule should be interpreted in conjunction with Rule 54(d), which more broadly provides for the assignment of costs to parties, and thus should be read narrowly. As noted, the application of the Rule is expressly limited to those instances in which "a party defending against a claim" serves on the opposing party an offer of judgment. This language has produced case law and commentary using the misleading terms "defendants" and "plaintiffs." Defendants who answer the plaintiff's complaint with a *counterclaim* thus expose themselves to the possibility of an offer of judgment by the plaintiff on that counterclaim, thus triggering the operation of Rule 68.

Illustration 68-1

Harry sues Sally for personal injuries suffered in an snowboarding accident, and she rejects Harry's offer to stipulate to an entry of judgment during discovery. In this situation, Rule 68 does not apply, as there is no party "defending against a claim" who is making an offer. However, if Sally answers Harry's complaint and includes a counterclaim, Harry's offers of judgment with regard to the counterclaim will trigger the provisions of Rule 68, though informal settlement discussions will not.

Function and Scope

Prior to the restyled version of the Rule, as amended in 2007, the function and scope of the Rule were difficult to ascertain from its language and structure. Fortunately, the Rule is now broken down into subdivisions with helpful headings, and confusion surrounding the operation of the Rule should decrease. Subdivision (a) provides the context for the remainder of the Rule, and it states merely that a party defending against a claim may make an offer of judgment to the opposing party at least 14 days before the date set for trial. The Rule envisions that the offer be in writing, though nothing in Rule 68 should be construed as limiting any party's right to make an oral offers of judgment, offers of judgment immediately before or even during trial, or any kind of settlement offer not resulting in judgment. However, only offers of judgment made within the parameters of Rule 68 are subject to the cost provisions of subdivision (d). Voluntary dismissals resulting from settlements are governed generally by Rule 41, and nothing in Rule 68 should be read as affecting the provisions of Rule 41.

As noted, subdivision (a) should be understood as delineating the conditions under which the subsequent provisions of the Rule will operate. For example, subdivision (b) specifies that "[e]vidence of an offer is not admissible except in a proceeding to determine costs." As the Rule applies only to certain kinds of offers, *i.e.*, offers to stipulate to an entry of judgment by parties defending a claim, the admissibility of an oral offer of judgment by the plaintiff is not affected by this provision. However, it should be noted that such an offer would be rendered inadmissible by *Federal Rule of Evidence 408*, which provides that compromises and offers to compromise are generally inadmissible for the purpose of proving the liability for or invalidity of a claim or the amount of the claim, subject to certain exceptions.

Illustration 68-2

Assume on the facts of Illustration 68-1 that Harry pleads with Sally on the courtroom steps to settle the action for \$100 just moments before the trial begins. Nothing in Rule 68 precludes Sally from accepting his settlement offer. However, if Harry ultimately obtains a jury verdict for \$10,000, he may not seek to recover his trial costs under Rule 68, as his offer can only be understood as a settlement offer and not an offer to stipulate to entry of judgment. Furthermore, the offer was oral and was not made at least 14 days from the first day of trial. On the other hand, *Federal Rule of Evidence 408* prevents Sally from introducing Harry's settlement offer on the courtroom steps to prove that Harry was primarily responsible for the accident.

Fee-Shifting Provision Generally

As noted earlier, the most significant feature of Rule 68 is the fee-shifting provision in subdivision (d): "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Unlike many other fee-shifting provisions, this provision is automatic and does not vest the court with any additional discretion beyond that implied in Rule 54(d). This seemingly straightforward provision has produced a tremendous body of case law and commentary, and it is applicable only under carefully prescribed conditions.

Illustration 68-3

Beatrice sues Jack for intentional infliction of emotional distress. Jack makes an offer to stipulate to an

entry of judgment in compliance with Rule 68(a) in the amount of \$20,000, which Beatrice rejects. At trial, Beatrice wins a jury verdict but is awarded only \$5,000 in compensatory damages. In this situation, Beatrice must pay the costs incurred by Jack after he made the offer, despite the fact that she prevailed at trial.

It is crucial to recognize that Rule 68(d) does not grant post-offer costs to offerors that ultimately prevail in the action. Thus, bad-faith attempts to "lowball" opposing parties with nominal offers of judgment, thus triggering the fee-shifting provisions of Rule 68, will succeed only if that opposing party actually prevails for an amount equal to, or less than the nominal amount proposed.

Illustration 68-4

Assume on the facts of Illustration 68-3 that Jack's original offer had been for \$100. Jack may not recover his post-offer costs unless Beatrice is awarded an amount less than \$100. If Jack prevails in the case, he may not recover any costs under Rule 68(d). However, Rule 54(d) remains available to Jack in this situation.

The fee-shifting provision in subdivision (d) includes within its operation those judgments that are identical to the prior offer of judgment, a situation most frequently occurring when the requested relief is in the form of an injunction or declaratory judgment. It also encompasses subsequent offers of judgment or judgments not resulting from a trial on the merits. Thus, a party who rejects an offer of judgment but later accepts a lower offer is responsible for the costs of the opposing party accruing from the date of the initial rejection. However, the fee-shifting provision does not include any non-judgment relief "obtained" by the opposing party, such as when an employer charged with sexual harassment institutes an anti-harassment employment policy during the pendency of the action.

Illustration 68-5

Assume on the facts of Illustration 68-3 that Jack's original offer of \$20,000 is rejected by Beatrice and that Jack immediately withdraws the offer. However, as the trial date approaches, Beatrice reconsiders and accepts a lower outstanding offer by Jack in the amount of \$10,000. Under Rule 68, Beatrice must pay Jack's costs accruing from the date of the first offer. However, careful litigators will anticipate a motion under these circumstances and incorporate cost provisions into the offer of judgment.

The narrow scope of the fee-shifting provision of subdivision (d) should be appreciated by courts and practitioners. The Rule applies only when an offer of judgment is made by a party defending a claim, the offer is made in writing more than 14 days before the scheduled trial date, and the opposing party/offeree obtains a judgment equivalent to or less favorable than the offer, and then only to post-offer costs. The Rule simply has no application if the offeror prevails at trial or the offeree obtains a judgment more favorable than the offer. In those cases, the assignment of costs is dictated solely by Rule 54(d), cost provisions in other Rules, by statute, or by a settlement agreement between the parties.

Illustration 68-6

Assume on the facts of Illustration 68-3 that Beatrice rejects Jack's offer of judgment for \$20,000. However, at trial, the jury renders a verdict in favor of Beatrice in the amount of \$100,000. Under these circumstances, Rule 68 has no application, though Beatrice may still recover costs under Rule 54(d).

Interrelationship with Other Rules

There has been a great deal of litigation involving the interrelationship between Rule 68, Rule 54(d), and the various statutory provisions also governing costs. This is hardly surprising when one considers that the term "costs" in Rule 68

includes attorneys' fees. However, the correct resolution of such cases should not and has not been difficult to establish, considering the narrow application and mandatory operation of Rule 68. For example, the automatic assignment of post-offer costs in the situation specified in the Rule necessarily precludes the possibility of an award of attorneys' fees to a prevailing party under 28 U.S.C. § 1988.

Technical Requirements of the Rule

Parties wishing to invoke the application of Rule 68 should ensure that the technical requirements of subdivision (a) have been satisfied. First, the offer must be in writing, and it should specify that it is being made in contemplation of the operation of Rule 68. To avoid any confusion on the issue, the offer should also list the specific costs that are contemplated by the offer, including attorneys' fees and any post-offer fees that may accrue. Second, the written offer must be served on the opposing party at least 14 days before the scheduled trial date.



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13 *Moore's Federal Practice* §§ 68.01 -68.10

Weissenberger's Federal Evidence §§ 408.1-408.3



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68.3 LEADING CASES

Acceptance of Offer Previously Rejected

Lang v. Gates, 36 F.3d 73 (9th Cir. 1994), cert. denied, 513 U.S. 1017 (1994) (plaintiff in civil rights case could not be awarded attorneys' fees when he accepted an offer he had earlier rejected).

"Costs" May Include Attorneys' Fees

Marek v. Chesny, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985) (the term "costs" in Rule 68 includes attorneys' fees; Rule was not inconsistent with the congressional objectives in 42 U.S.C. § 1988).

Costs Must Be Included in Offer of Judgment

Thompson v. State Farm Bureau Cas. Ins. Co., 520 F.3d 902 (8th Cir. 2008) (court vacated district court's judgment entered in favor of plaintiffs pursuant to Rule 68 and remanded case for further proceedings because defendant's Rule 68 offer of judgment excluded all costs, which was not permitted; thus, there was no valid offer under Rule 68, and judgment entered pursuant to Rule 68 was void).

Dismissal Terms Must Be Included in Offer of Judgment

Fafel v. DiPaola, 399 F.3d 403 (1st Cir. 2005) (a judgment under Rule 68 necessarily incorporates the terms of underlying offer, with or without additional terms in a settlement agreement providing for dismissal of claims under Rule 41)

Failure to Renew Offer of Judgment After Appellate Remand

Payne v. Milwaukee County, 288 F.3d 1021 (7th Cir. 2002) (a party's failure to renew its offer of judgment after judgment had been partially set aside by Court of Appeals did not prevent the offer from barring the opposing party's right to full fees and costs upon prevailing at retrial of the claim).

Inapplicable to Oral Offers

Grosvenor v. Brienen, 801 F.2d 944 (7th Cir. 1986) (Rule 68 does not apply to oral offers of judgment).

Inapplicable to Prosecuting Parties

Simon v. Intercontinental Transport B.V., 882 F.2d 1435 (9th Cir. 1989) (Rule 68 does not apply to offers made by a party who is not defending the claim that is the subject of the offer).

Judgments for Defendants

Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981) (Rule 68 does not apply to judgments obtained by defendants).

No Discretion to Deny Costs Under Rule 68

Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438 (9th Cir. 1982) (court does not have discretion to deny Rule 68 costs when applicable).

Nominal Damages

Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291 (6th Cir. 1989) (court abused its discretion when it vacated a judgment for plaintiff for a nominal amount under Rule 60(b)(6) when it realized that such a judgment would enable the defendant to recover post-offer attorneys' fees from the plaintiff).

Non-Judgment Relief Not Considered

Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990) (non-judgment relief cannot be considered in a Rule 68 issue).

Settlement Offers Not Precluded

Menchise v. Senterfitt, 532 F.3d 1146 (1st Cir. 2008) (Rule 68 applies only to offers of judgment and does not preempt state law pertaining to offers of settlement not in conflict).

Statutory Award of Attorneys' Fees; Not Includable in Costs

Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d 1016 (9th Cir. 2003) (costs under Rule 68 do not include non-prevailing defendant's post-offer attorney fees when underlying statute awards attorney fees to prevailing party).



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Rule 69. Execution

Rule 69 reads as follows:

Rule 69. Execution

(a) In General.

(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution--and in proceedings supplementary to and in aid of judgment or execution--must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in *28 U.S.C. § 2006*, or against an officer of Congress in the circumstances stated in *2 U.S.C. § 118*, the judgment must be satisfied as those statutes provide.

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Chapter 69 Rule 69. Execution

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69.1 COMMENTARY

Rule 69 states that the enforcement of a judgment shall be through a writ of execution, and this writ is generally to be secured through the practices and procedures of the state in which the district court is located. Exceptions to these procedures are found in various statutes of the United States, which are expressly made applicable to writs of execution by the Rule. Execution against tax collectors, other revenue officers, or certain officers of Congress shall be procured through the statutory provisions explicitly designated in subdivision (b).

The Rule was amended in 1970, now set forth as subdivision (a)(1), to insure that all the discovery procedures in the Rules are available in aid of the judgment or execution. Additional discovery procedures of the state in which the district court is located may also be available.



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69.2 ADDITIONAL AUTHORITY

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Assignment of Judgment--Discovery in Aid of Execution

Luken v. Int'l Yacht Council, 2007 U.S. Dist. LEXIS 83651 (S.D. Fla. 2007) , decision reached on appeal, 517 F.3d 1271 (1st Cir. 2008) (plaintiff judgment creditor, although there had been assignment for benefit of its creditors, had standing to serve discovery in aid of execution on defendant judgment debtor because state law required it to aid in administration of estate, and Rule 25(c) permitted it to continue because cause of action survived transfer).

Foreign Judgments--Rule Applicable

Condaire, Inc. v. Allied Piping, Inc., 286 F.3d 353 (6th Cir. 2002) (laws of the registering court apply with respect to enforcement of registered foreign federal judgment even when the court rendering the underlying judgment does not allow for similar execution proceedings).

Judgment Pending Appeal Not Final

Urban Indus., Inc. v. Thevis, 670 F.2d 981 (11th Cir. 1982) (judgment of Kentucky district court awaiting appeal was not final and thus could not be registered for execution in a Georgia district court).

Limitations Period Applicable Against United States

United States v. Fiorella, 869 F.2d 1425 (11th Cir. 1989) (state law is applicable against the United States in the same manner that it is applicable against private parties).

Limitations Periods for Writs of Execution

Balfour Beatty Bahamas, Ltd. v. Bush, 170 F.3d 1048 (11th Cir. 1999) (under state law, the five-year limitations period for action on judgment or decree "of any court, not of record, of this state or any court of the United States"

governed judgment creditor's efforts in federal district court in that state to collect on judgment previously entered by that court, rather than the twenty-year limitations period for "action on a judgment or decree of a court of record in this state").

Original or Derivative Action Permitted

IFC Interconsult, AG v. Safeguard Int'l Partners, 438 F.3d 298 (3d Cir. 2006) (Rule 69 action can be filed as part of original suit or as separate suit; Rule 69 action, by its very nature, piggybacks on action establishing liability and has derivative status).

Post-Deprivation Hearing for Erroneous Executions

Rumery v. Outboard Marine Corp., 172 F.3d 531 (8th Cir. 1999) (absent a demonstration that a post-deprivation hearing provided to owners of property was not meaningful or reasonably prompt, there is no violation of due process upon an erroneous seizure of property pursuant to a valid writ of execution).

Record Justified Granting of Discovery Request

State Dep't of Soc. Servs. v. Leavitt, 523 F.3d 1025 (9th Cir. 2008) (district court erred when it denied request for discovery because information present in record raised questions of prior noncompliance by state agency, that could have justified granting request to authorize discovery).

Separate Legal Theories; Jurisdiction Refused

Hudson v. Coleman, 347 F.3d 138 (6th Cir. 2003) (district court properly refused to exercise ancillary jurisdiction under 28 U.S.C. § 1367 and Rule 69 over citizen's garnishment action against defendant after parties had entered into consent judgment in underlying civil rights action; action was based on legal theory entirely independent from that in original action leading to consent decree).

State Limitations Period Applicable

United States v. Little, 52 F.3d 495 (4th Cir. 1995) (the limitations period applicable to Maryland state courts is also applicable to district courts within Maryland).

Statute of Limitations Does Not Constrain Ability to Enforce Judgment

United States v. Gianelli, 519 F.3d 962 (9th Cir. 2008) (Rule 69(a) does not operate to bar enforcement because no federal statute expressly permitted state statutes of limitations to constrain Government's ability to enforce judgment).



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1-70 Federal Civil Procedure Litigation Manual Rule 70. Enforcing a Judgment for a Specific Act

Rule 70. Enforcing a Judgment for a Specific Act

Rule 70 reads as follows:

Rule 70. Enforcing a Judgment for a Specific Act

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done--at the disobedient party's expense--by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting Title. If the real or personal property is within the district, the court--instead of ordering a conveyance--may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.

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70.1 COMMENTARY

Authority of Court to Compel Performance

Rule 70 provides a court with the means to compel the performance of specific acts when the party ordered to do so refuses. Although the contempt power of the court may be sufficient to appropriately punish a disobedient party, an action made explicit in subdivision (e), such a finding may be little consolation to an aggrieved party who desires that the specific act be performed. Subdivision (a) allows the court to appoint a separate party, usually a government official, to perform the specified act. The performance by the court appointee has the same effect as if the disobedient person had performed the act. The power of the court under Rule 70 extends to state and local governments.

Illustration 70-1

Susan commences a trespass action against her neighbor Ralph, alleging that Ralph planted several fruit trees on her property. The court, after granting a motion for summary judgment by Susan, orders Ralph to remove the fruit trees within 10 days of the order. Ralph refuses and promptly leaves on a 25-day cruise to the Galapagos Islands. The court may then issue an order under Rule 70(a) directing the Public Works Department of the local jurisdiction to remove the fruit trees. Any costs associated with this removal will also be borne by Ralph.

Authority of Court to Vest Title in Real or Personal Property

Alternately, if the specific act ordered in the judgment is the conveyance of a piece of real or personal property, the court may divest the disobedient party of the property and vest the aggrieved party with the property by entering a judgment to that effect under subdivision (b). Such a judgment is treated in the same manner as would a conveyance between the parties. However, this power of the court is limited to real and personal property located within the district in which the court is located. Where property is located outside the district, parties wishing to avail themselves of the relief specified in Rule 70 should register the judgment in the district in which the property is located and make a proper motion to a court within that district.

Illustration 70-2

Brenda commences a breach of contract action against Richard, alleging that Richard failed to deliver a parcel of land as required by the express terms of a written contract. The court grants a motion for summary judgment by Brenda and orders Richard to execute a deed conveying the parcel of land specified in the contract within 15 days of the order. Richard refuses and does nothing. To accomplish the conveyance, the court may direct the Recorder's Office or other government agency to issue a new deed in Brenda's name. Alternatively, the court may enter a judgment divesting Richard of the property and immediately vesting it in Brenda. A certified copy of the judgment will provide Brenda with proof of title in the property.



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70.3 LEADING CASES

Order to Issue Warrant

Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980) (court may order Mississippi state official to issue a warrant on State Treasurer to satisfy the terms of the judgment).

Order to Pay Attorneys' Fees

Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982) (where California legislature refused to pay attorneys' fees to a prisoner under 28 U.S.C. § 1988, court properly ordered State Controller to issue a warrant to State Treasurer to pay the attorneys' fees).

Refusal to Comply with Settlement

TNT Marketing, Inc. v. Agresti, 796 F.2d 276 (9th Cir. 1986) (where a party refuses to comply with the terms of a settlement agreement, a court has the discretion under Rule 70 to award damages resulting from the refusal).



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1-71 Federal Civil Procedure Litigation Manual Rule 71. Enforcing Relief For or Against a Nonparty

Rule 71. Enforcing Relief For or Against a Nonparty

Rule 71 reads as follows:

Rule 71. Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

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71.1 COMMENTARY

Rule 71 provides that non-parties may enforce orders made in their favor in the same manner as do parties. The Rule also provides for the converse situation: an order against a non-party may be enforced in the same manner as orders against parties. However, courts have tended to require that non-parties have standing to maintain an action to enforce orders in their favor. This seems to be the correct result with regard to the first clause of Rule 71, as analogy to the second clause demonstrates. Obviously, a court may not enforce an order against a non-party over whom the court has no personal jurisdiction.

It is also significant to note that non-parties may invoke Rule 71 only when an order has been entered in their favor. For example, persons not signatories to a settlement agreement have no basis upon which to seek its enforcement.

Relationship to Other Rules

Other Rules may also provide for more narrow applications of the provisions of those Rules to non-parties. Specific provisions in other Rules, such as Rule 65(d), which governs the scope of preliminary injunctions and temporary restraining orders over non-parties, take precedence over the general provisions set forth in Rule 71.



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71.2 ADDITIONAL AUTHORITY

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71.3 LEADING CASES

Enforcement in Favor of Non-Parties

Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985) (non-parties can enforce orders made in their favor).

Non-Party Contempt; Standards

Stotler & Co. v. Able, 870 F.2d 1158 (7th Cir. 1989) (a non-party may be found to be in contempt of court only if the non-party had knowledge of a clear and unequivocal command of the court and either abetted a party in failing to comply with the order or was legally identified with the party).

Non-Party Enforceability Does Not Disturb Standing Requirement

Trinity Gas Corp. v. Taylor, 276 F.3d 699 (5th Cir. 2002) (Rule 71, which allows non-party to enforce order made in its favor, does nothing to disturb threshold requirement of standing to sue).

Standing to Enforce Order

Gautreaux v. Pierce, 743 F.2d 526 (7th Cir. 1984) (intervenors did not have standing to enforce an order not made in their favor).



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Rule 71.1. Condemning Real or Personal Property

Rule 71.1 reads as follows:

Rule 71.1. Condemning Real or Personal Property

(a) Applicability of Other Rules. These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) Joinder of Properties. The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(c) Complaint.

(1) Caption. The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property--designated generally by kind, quantity, and location--and at least one owner of some part of or interest in the property.

(2) Contents. The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) Parties. When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) Procedure. Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(5) Filing; Additional Copies. In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) Process.

(1) Delivering Notice to the Clerk. On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) Contents of the Notice.

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(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) Serving the Notice.

(A) Personal Service. When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) Service by Publication.

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice--once a week for at least 3 successive weeks--in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) Effect of Delivery and Service. Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) Amending the Notice; Proof of Service and Amending the Proof. Rule 4(a)(2) governs amending the notice. Rule 4(l) governs proof of service and amending it.

(e) Appearance or Answer.

(1) Notice of Appearance. A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) Answer. A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) Waiver of Other Objections and Defenses; Evidence on Compensation. A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant--whether or not it has previously appeared or answered--may present evidence on the amount of compensation to be paid and may share in the award.

(f) Amending Pleadings. Without leave of court, the plaintiff may--as often as it wants--amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) Substituting Parties. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) Trial of the Issues.

(1) Issues Other Than Compensation; Compensation. In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) Appointing a Commission; Commission's Powers and Report.

(A) Reasons for Appointing. If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) Alternate Commissioners. The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) Examining the Prospective Commissioners. Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(D) Commission's Powers and Report. A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of the Action or a Defendant.

(1) Dismissing the Action.

(A) By the Plaintiff. If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(B) By Stipulation. Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(C) By Court Order. At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) Dismissing a Defendant. The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(3) **Effect.** A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) Deposit and Its Distribution.

(1) **Deposit.** The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) **Distribution; Adjusting Distribution.** After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) **Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury--or for trying the issue of compensation by jury or commission or both--that law governs.

(l) **Costs.** Costs are not subject to Rule 54(d).

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COMMENTARY

Rule 71.1 specifies the procedure to be used in condemnation actions in federal courts. Condemnation of property will usually be authorized by the federal government's power of eminent domain as set forth under the *Fifth Amendment of the Constitution*, but relevant statutory provisions applying this power should also be consulted. Although not expressly stated in the Rule, inverse condemnation actions should also be governed by procedures analogous to those in the Rule.

Need for the Rule

Rule 71.1 was added in 1951 to produce a uniform procedure in condemnation actions. Prior to the adoption of the Rule, numerous procedures for such actions had been established by Congress in different circumstances. The multiplicity of procedures caused a great deal of confusion within federal courts and generated uncertainty for property owners whose land was the subject of the condemnation action. A great deal of controversy surrounded the drafting of the Rule, and Congress even attempted to block its adoption. However, differences in the resolutions drafted by the House of Representatives and the Senate prevented such a blockage. The controversy has been largely unfounded, as the Rule has worked effectively to both protect the rights of property owners and provide an efficient procedure for governments condemning property for public use.

Procedure in Condemnation Actions

The Rule incorporates many of the procedures applicable to civil actions generally. For example, the provisions in subdivision (c) concerning complaints in condemnation actions have been adapted from Rules 5, 7, 8, 10, and 18. Notable exceptions include subdivision (d)(3)(B), which allows for service of process by publication in certain circumstances, and subdivision (l), which states that Rule 54(d) is not applicable to costs in condemnation actions.

Use of Three-Person Commission to Decide Condemnation Actions

The most salient, and perhaps most significant, innovation of Rule 71.1 is subdivision (h)(2)(A), which allows the court, in its discretion, to appoint a three-person commission in lieu of a jury. Before the amendment of that provision in 1985, condemnation actions had been prone to long delays in many district courts, which were caused by factors such as crowded dockets, the precedence given to criminal cases, the low priority accorded condemnation proceedings, and the

high turnover rate of Assistant United States Attorneys. Although three-person commissions appointed to resolve issues of just compensation were authorized in the pre-1985 version of the Rule, a 1980 report to Congress from the Comptroller of the United States recommended an expanded use of three-person commissions to make the procedure in condemnation actions less unwieldy.

Consequently, the Rule allows the court to appoint two alternate commissioners in the event that one of the original members becomes unable or is unqualified to continue, such as in the event of death or disability. More significantly, the Rule requires the court to notify the parties of the identities and qualifications of prospective commissioners and allows the parties to examine and challenge them for cause. In this way, the Rule contemplates a commissioner-selection procedure similar to that governing juries. This guarantees both that commissioners are unbiased and that they demonstrate the expertise that is beneficial in condemnation actions.

The advisory committee's note recommends that the chairperson of a commission be a lawyer, but it states that the other commissioners need only possess the "background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof." Ideally, possible commissioners should be familiar with the particular real estate market encompassing the property sought to be condemned.



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Chapter 71.1 Rule 71.1. Condemning Real or Personal Property

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LEADING CASES

Commissioner's Report

United States v. 452.876 Acres of Land, 667 F.2d 442 (4th Cir. 1981) (commission's report must be detailed sufficiently so that district court can properly review it under "clearly erroneous" standard).

Date Upon Which Taking Occurs

Kirby Forest Indus. v. United States, 467 U.S. 1, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984) (taking occurs from date that payment is made with the court, not from the date of the filing of the complaint, and thus no interest is due from the latter date; position is supported by subdivision (i)).

Disqualification of Commissioners

United States v. Werner, 916 F.2d 175 (4th Cir. 1990) (commissioners are to be disqualified in an action if their impartiality might reasonable be compromised; commission's valuation findings subject to "clearly erroneous" standard).

Inverse Condemnation--No Jury Trial

United States v. 191.07 Acres of Land, 482 F.3d 1132 (9th Cir. 2007) (district court properly ruled that owner had no former Rule 71A(h) right to jury trial on just compensation issue because owner and United States stipulated to dates of taking that were prior to United States' filing of declaration of taking, and thus issue of just compensation was part of owner's consolidated inverse condemnation action under which owner was not entitled to trial by jury).

Right to Jury Trial

United States v. 4.0 Acres of Land, 175 F.3d 1133 (9th Cir. 1999) (there is no right to a jury trial in condemnation actions; however, if a jury is used, it determines the issue of just compensation within ground rules established by the

court).

Standards Under Rule 71.1

United States v. Merz, 376 U.S. 192, 84 S. Ct. 639, 11 L. Ed. 2d 629 (1964) (setting forth the applicable standards of review in a Rule 71.1 action and the relationship between a subdivision (h) commission and the district court).

Statutory Procedure Preempted by Rule

Northern Border Pipeline Co. v. 64.111 Acres of Land, 344 F.3d 693 (7th Cir. 2003) (Rule 71.1(h), conflicts with conformity-to-state practice approach of 15 U.S.C. § 717f(h), part of Natural Gas Act; accordingly, under Rules Enabling Act, statutory rule was of no further force or effect).



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 72 Rule 72. Magistrate Judges; Pretrial Order

1-72 Federal Civil Procedure Litigation Manual 72.syn

§ 72.syn Synopsis to Chapter 72: Rule 72. Magistrate Judges; Pretrial Order

Scope Rule 72. Magistrate Judges; Pretrial Order

72.1 COMMENTARY

72.2 ADDITIONAL AUTHORITY

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TITLE IX. SPECIAL PROCEEDINGS

Chapter 72 Rule 72. Magistrate Judges; Pretrial Order

1-72 Federal Civil Procedure Litigation Manual Rule 72. Magistrate Judges; Pretrial Order

Rule 72. Magistrate Judges; Pretrial Order

Rule 72 reads as follows:

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) Findings and Recommendations. A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) Objections. Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting

party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

* * * * *



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 72 Rule 72. Magistrate Judges; Pretrial Order

1-72 Federal Civil Procedure Litigation Manual 72.1

72.1 COMMENTARY

The original Rules 72-76, which contained provisions relating to the appeals procedure in federal courts, were abrogated in 1968 and replaced with scattered provisions in the Rules of the Supreme Court, the Federal Rules of Appellate Procedure, and Rule 9(h). Rules 72-76 lay unused and blank from 1968 to 1983. As the 1979 amendments to the Federal Magistrates Act, 28 U.S.C. §§ 604, 631-639, required additional procedures for effective implementation, these vacant Rules seemed to be an appropriate repository for the required provisions. In 1983, Rules 72-76 were thus added to correspond with the Federal Magistrates Act.

In 1996, the Federal Courts Improvement Act repealed portions of 28 U.S.C. § 636, which were incorporated as Rules 73(d) and Rules 74-76. The repeal of these statutory provisions made those Rules unnecessary, and they were subsequently amended or abrogated effective December 1, 1997. Rules 74-76 thus once again lie dormant.

Rule 72 and Rule 73 Distinguished

To understand the interrelationships between these two Rules, it is helpful to distinguish their functions. Rule 72 governs the procedures involving magistrate judges hearing pretrial orders; Rule 73 governs the procedures involving consensual trials and other proceedings before magistrate judges. As will be explained in greater detail below, references to a magistrate judge under Rule 72 are more delineated and carry with them stricter controls on the authority granted to the magistrate judge than those references to a magistrate judge under Rule 73.

Pretrial Orders Generally

As noted, the provisions of Rule 72 govern court-ordered referrals of pretrial matters to magistrate judges. The most important aspect of Rule 72 is the separation of the Rule into two subdivisions. This separation is more than a mere stylistic preference; it reflects a significant distinction between the substantive power allocated to a magistrate judge in each instance.

Dispositive Matters and Nondispositive Matters Distinguished

If a district judge refers a matter *not* dispositive of a claim or defense to a magistrate judge, or a prisoner petition

challenging the conditions of confinement, the magistrate judge has the actual power to decide that matter and in fact is required to decide that matter. Accordingly, the form of the action taken by the magistrate judge is properly characterized as an "order," and subdivision (a) correctly employs this terminology. The procedure after the order is generated, which is reviewable under a "clearly erroneous or contrary to law" standard, is in the nature of an appeal to the district judge, although it is referred to as a "consideration" by the district judge and not considered an appeal in the same manner as an appeal to the appellate court as provided in Rule 73(c).

Illustration 72-1

Gary sues Nancy's Horse Farm for the death of two of his horses, claiming that Nancy negligently cared for the horses while they were boarded at her farm. In defense, Nancy claims that the horses had fatal diseases before she began boarding them, and wishes to have a veterinarian perform an autopsy on the horses. Gary objects to the autopsies, claiming that they are not a proper subject of discovery. If this issue is referred to a magistrate judge, the magistrate judge's order on the matter will be reversed by the district court only if it is clearly erroneous or contrary to law, as it is not dispositive of a claim or defense and involves only a discrete issue under the discovery rules.

If, on the other hand, a district judge refers a matter dispositive of a claim or defense or prisoner petition to a magistrate judge without the consent of the parties, the magistrate judge has the power only to make a recommended disposition to the district judge, who retains the power to actually make the decision. Accordingly, the form of the action taken by the magistrate judge is properly characterized as a "report," though subdivision (b) uses the phrase "recommended disposition." The magistrate judge's recommendation or report must be reviewed *de novo* by the district judge, which, when compared with the "clearly erroneous or contrary to law" standard attaching to review of orders under subdivision (a), exhibits the disparity of the magistrate judge's power in the two instances.

Illustration 72-2

Assume on the facts of Illustration 72-1 that the district judge assigns to a magistrate judge the issue of whether the horses were diseased before Nancy began caring for them. Under these circumstances, the magistrate judge's report, which is dispositive of Nancy's defense, must be reviewed *de novo* by the district judge.

Differing Functions of Magistrate Judges

Courts and practitioners should take heed of the separation of subdivisions (a) and (b), as it reflects a larger distinction between the functions of a magistrate judge in each instance. Magistrate judges perform two conceptually distinct functions, each of which is delineated by the Federal Magistrates Act. On the one hand, magistrate judges should be regarded as specialized court officials, extrinsic to the office of district judges, who demonstrate a conversant faculty with the local, circuit, and federal administrative and procedural rules of district courts. This function relates to the conception of a magistrate judge that is contemplated by the structure and legislative history of the Federal Magistrates Act, which implies that Rule 72 applies only to procedural and administrative matters. Viewed in this fashion, the Federal Magistrates Act represents, in part, a congressional determination that some powers are not exclusively within the province of district judges under Article III of the Constitution and the Rules Enabling Act, and that those powers are consequently delegated to other individuals. Subdivision (a) embodies this function.

On the other hand, magistrate judges should be regarded as federal employees, intrinsic to the office of the district judge, who act merely to reduce the burden of district judges. In this way, magistrate judges should be regarded as akin to district court clerks, acting only in an advisory capacity. Viewed in this fashion, the Federal Magistrates Act represents, in part, the congressional perception of magistrate judges as extensions of the office of district judges and concomitant recognition of the power of district judges to utilize different administrative mechanisms to promote

judicial efficiency. This function relates to the conception of a magistrate judge embodied in subdivision (b) of Rule 72. Although the particulars of this function of the magistrate judge are defined in the Federal Magistrates Act, the power to employ a magistrate judge acting only in this limited capacity probably can be independently derived from other sources of power granted to district judges.

Courts and practitioners should thus incorporate this conceptual disjunction into their analyses when additional matters involving the powers and functions of magistrate judges are determined. For example, the distinction between dispositive and nondispositive matters in Rule 72 should not be confused with either the substantive/procedural distinction used to determine the applicability of state law in *Erie* cases or the substantive/procedural distinction used to determine the validity of a Federal Rule of Procedure under the Rules Enabling Act. These distinctions are discussed in Chapter 1. Instead, the dispositive/nondispositive distinction should be analyzed according to the function served by the magistrate judge in a given instance. Nondispositive matters are generally administrative or procedural in nature and are appropriately decided by magistrate judges under subdivision (a). Dispositive matters generally affect the rights of parties to bring, maintain, or defend an action and are appropriately decided, in the end, by district judges, following a recommendation or report by a magistrate judge under subdivision (b).

Review of Decisions by Magistrate Judge on Appeal

The separation of functions and powers of magistrate judges between subdivisions (a) and (b) also has implications concerning the reviewability of these decisions by the circuit courts. Subdivision (a) explicitly states that "[a] party may not assign as error a defect in the order not timely objected to." This provision applies to both considerations of objections to the district judge and appeals to circuit courts. This result harmonizes with the conception of a magistrate judge as a specialized court official described above.

Illustration 72-3

Assume on the facts of Illustration 72-1 that the magistrate judge orders that Nancy may demand an autopsy of the horses by a veterinarian of her choosing. If Gary does not make and serve objections to the order within 14 days of being served with notice of the order, Gary may not thereafter object to the ruling with the district judge or raise the issue on appeal.

Notwithstanding the foregoing, there is division of authority on the question whether a failure to file objections to a magistrate judge's recommendation or report under subdivision (b) constitutes a waiver of those objections on appeal. Some courts have simply held that the failure to make a timely objection to a magistrate judge's report under subdivision (b) precludes consideration of the issue on appeal. Other cases have held that, although Rule 72 requires the district judge to make a *de novo* determination of only those portions of the magistrate judge's report to which a specific written objection has been timely made, 28 U.S.C. § 636(b)(1)(C) gives the district court the power to accept, reject, or modify the recommendations of the magistrate judge even when they are not objected to. The decision of the district judge to exercise this power is a matter reviewable by the circuit court. In this manner, then, a party may raise issues on the appellate level to which prior objections have not been made.

Illustration 72-4

Assume on the facts of Illustration 72-2 that the magistrate judge finds that the horses were not afflicted with any disease when they were placed in the care of Nancy's Horse Farm. If Nancy does not object to the magistrate judge's report and the district judge adopts the recommendation without further review, Nancy may nonetheless raise the issue on appeal. Specifically, Nancy should argue that the district court erred when it adopted the recommendations of the magistrate judge, not that the magistrate judge erred in its original finding.

This latter position appears to be the correct one, as it conforms more to the conception of a magistrate judge acting within the limited capacity delineated by subdivision (b). A failure of a district judge to review a magistrate judge's report under subdivision (b) effectively constitutes a decision rendered by the magistrate judge; this result is contrary to the function of a magistrate judge acting within the scope of that subdivision. This conclusion is supported by the language in the advisory committee's note that the "[f]ailure to make a timely objection to the magistrate judge's report [under subdivision (b)] prior to its adoption by the district judge *may* constitute a waiver of appellate review of the district judge's order" (emphasis added). Accordingly, whether or not such a failure would constitute a waiver of appellate review should depend upon the extent of the district judge's review of the report of the magistrate judge.

References to Magistrate Judges

A reference to a magistrate judge by a district judge need not be expressly stated as one pursuant to subdivision (a) or subdivision (b). Instead, the action taken by the magistrate judge determines which subdivision controls and therefore the extent of the power of the magistrate judge in that action. For example, in *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511 (10th Cir. 1995), the court held that a motion for discovery sanctions referred to a magistrate judge permits the judge to impose some of the sanctions listed in Rule 37, such as the exclusion of certain items of evidence, but permits the judge to only recommend the imposition of other sanctions listed in that Rule, such as a default judgment.

Report or Order of Magistrate Judge

A magistrate judge's order under subdivision (a) or report under subdivision (b) must be in writing, and copies must be sent to all interested parties. A party wishing to object to an action by a magistrate judge under either subdivision (a) or (b) must file written objections with both the court and the opposing party within 14 days of the receipt of a copy of the magistrate judge's order or report. Although subdivision (a) contains no parallel provision to that in subdivision (b) allowing the prevailing party to respond to the written objections of the opposing party within 14 days of the receipt of the copy of the objections, the advisory committee's note indicates that such a response is contemplated by the Rule. An analogous 14-day period to respond to objections to an order under subdivision (a) is appropriate, and the time period should be indicated by local rule in any event.

Review of Decisions of Magistrate Judge by District Court

The fact that a district judge must make a *de novo* determination of the report of the magistrate judge under subdivision (b) to which timely objections are made does not indicate that the district judge must hold additional evidentiary hearings. The district judge may rule on the objections by reviewing the written record of the proceedings before the magistrate judge and making a *de novo* determination on that basis.

Consensual Matters Before Magistrate Judge Excepted

Finally, as noted briefly above, the provisions of subdivision (b) apply only in those cases in which a magistrate judge hears a dispositive matter and is assigned "without consent" of the parties involved. Subdivision (a), which pertains to nondispositive matters, contains no such restriction. This omission provides further support for the conceptual separation of the two subdivisions discussed above. Dispositive pretrial matters decided by magistrate judges with the consent of the parties are included within the coverage of the provisions of Rule 73.

Illustration 72-5

Assume on the facts of Illustration 72-2 that Nancy and Gary had consented to a referral of Nancy's defense to a magistrate judge. The matter thus comes under the purview of Rule 73, and the provisions of Rule 72 are inapplicable.



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72.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 72.01 -72.24



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72.3 LEADING CASES

Action Taken by Magistrate Determines Authority of Magistrate

Gomez v. Martin Marietta Corp., 50 F.3d 1511 (10th Cir. 1995) (the penalty imposed by the magistrate judge, not the one originally sought, delineates the magistrate judge's authority).

Authority of Magistrate; Evidentiary Matters

Roberts v. Manson, 876 F.2d 670 (8th Cir. 1989) (magistrate judge cannot conduct an evidentiary hearing when it is not a pretrial matter and does not pertain to a prisoner petition challenging the conditions of confinement; narrow interpretation of magistrate judge's powers).

Authority of Magistrate; In Forma Pauperis Motions

Woods v. Dahlberg, 894 F.2d 187 (6th Cir. 1990) (magistrate judges do not have power to deny a motion for leave to proceed *in forma pauperis*, as the denial is the functional equivalent of an involuntary dismissal).

Authority of Magistrate; Post-Trial Motions

Massey v. City of Ferndale, 7 F.3d 506 (6th Cir. 1993) (magistrate judge cannot decide or recommend for decision post-trial matters).

Authority of Magistrate; Rule 11 Motions

Alpern v. Lieb, 38 F.3d 933 (7th Cir. 1994) (magistrate judge is without authority to actually decide Rule 11 motion).

Authority to Recommend Contempt

FDIC v. LeGrand, 43 F.3d 163 (5th Cir. 1995) (magistrate judge has authority to recommend contempt to district

judge; liberal interpretation of magistrate judge's powers).

Default Judgment Recommendation Nondispositive

Callier v. Gray, 167 F.3d 977 (6th Cir. 1999) (magistrate judge's recommendation for entry of default judgment was valid as a nondispositive matter, as the motion for a default judgment is analogous to the matters listed in 28 U.S.C. § 636(b)(1)(A)).

De Novo Review of Habeas Petition by Magistrate Judge Required

Hunt v. Pfler, 331 F.3d 681 (9th Cir. 2003) (dismissal of habeas petition was improper where petitioner was deprived of right to de novo review of magistrate judge's determination that petition contained unexhausted claims).

Dismissal with Prejudice Not Permitted

Hobbs v. Lockhart, 46 F.3d 864 (8th Cir. 1995) (in § 1983 action, magistrate cannot recommend dismissal with prejudice after an evidentiary hearing).

Failure to Object; Pro Se Plaintiff

Small v. Secretary of Health and Human Servs., 892 F.2d 15 (2d Cir. 1989) (when pro se plaintiff was not informed of a circuit case law rule that a failure to object to a magistrate judge's report waives those objections and precludes appellate review of those objections, they are not waived; magistrate judge's report did not articulate the consequences of a failure to object).

Failure to Object to Non-Dispositive Order

Caidor v. Onondaga Co., 517 F.3d 601 (2d Cir. 2008) (pro se litigant who fails to object timely to magistrate's order on non-dispositive matter waives right to appellate review of that order, even absent express notice from magistrate judge that failure to object within ten days will preclude appellate review).

Implied Waiver by Pro Se Litigants

Theede v. United States Dep't of Labor, 172 F.3d 1262 (10th Cir. 1999) (the "firm waiver rule," under which a party waives the right to appellate review of the recommendation of a magistrate judge absent timely objection, applies to pro se litigants so long as they were properly informed of the consequences of their failure to object, but the reviewing court may make an exception to the rule in the interests of justice).

In Forma Pauperis Applications

Minetti v. Port of Seattle, 152 F.3d 1113 (9th Cir. 1998) (a person is not entitled to file written objections to the recommendations of a magistrate judge that the person's application to proceed *in forma pauperis* be denied).

Motion to Realign Parties Reviewed De Novo

United States Fidelity & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085 (6th Cir. 1992) (in a diversity action, motion to realign the parties is dispositive and must be reviewed *de novo* by district judge).

Post-Trial Hearing by Magistrate Permitted

McLeod, Alexander, Powel & Appfel, P.C. v. Quarles, 925 F.2d 853 (5th Cir. 1991) (magistrate judge can hold a hearing on a post-trial Rule 60(b) motion and recommend a decision to the district judge).

Recommittal by District Court

Ballard v. Commissioner, 544 U.S. 40, 125 S. Ct. 1270, 161 L. Ed. 2d 227 (2005) ("recommittal" is a formal mechanism used by a district judge for initiating reconsideration or other formal action by a magistrate judge or special master) (Kennedy, J., concurring).

Remand Order Dispositive

Williams v. Beemiller, Inc., 527 F.3d 259 (2d Cir. 2008) (remand order was dispositive order since it was functionally equivalent to order dismissing case, and thus, under Magistrate's Act and Rule 72(a), party challenging magistrate's ruling granting remand order was entitled to de novo, rather than clearly erroneous review, by district court).

Report of Magistrate; Plain Error

Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990) (court of appeals reversed recommendation of magistrate judge and decision of district judge to dismiss action when the magistrate judge's report was not objected to but contained plain error).

Standard of Review of Magistrate's Findings

Johnson v. Zema Systems Corp., 170 F.3d 734 (7th Cir. 1999) (if no objection or only a partial objection is made to the report and recommendation of magistrate judge on a dispositive motion, the district court judge reviews those unobjected portions for clear error only; furthermore, that party waives review of both factual and legal questions of unobjected portions of report by appellate court; however, Rule 72(b)'s (now Rule 72(b)(2)) mandate of a specific, written objection requires a litigant to specify only each issue for which review is sought, not the factual or legal basis of the objection).

Untimely Objections to Report of Magistrate

CNPq-Conselho Nacional de Desenvolvimento Científico e Tecnológico v. Inter-Trade, Inc., 50 F.3d 56 (D.C. Cir. 1995) (when objections to magistrate's report were filed one day after time period for making the objections had expired, appellant could not thereafter raise objections to either district judge or to court of appeals).

Waiver of Appeal

Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985) (when district court reviewed the record of a magistrate judge's report even though petitioner failed to object to the report, petitioner waived the right to an appeal to the circuit court; important factors were that petitioner had applied for and had been granted an extension of time within which to file objections and that Sixth Circuit had a rule refusing to decide on the merits of the case when no original objection is made).



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 73 Rule 73. Magistrate Judges: Trial by Consent; Appeal

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§ 73.syn Synopsis to Chapter 73: Rule 73. Magistrate Judges: Trial by Consent; Appeal

Scope Rule 73. Magistrate Judges: Trial by Consent; Appeal

73.1 COMMENTARY

73.2 ADDITIONAL AUTHORITY

73.3 LEADING CASES



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Chapter 73 Rule 73. Magistrate Judges: Trial by Consent; Appeal

1-73 Federal Civil Procedure Litigation Manual Rule 73. Magistrate Judges: Trial by Consent; Appeal

Rule 73. Magistrate Judges: Trial by Consent; Appeal

Rule 73 reads as follows:

Rule 73. Magistrate Judges: Trial by Consent; Appeal

(a) Trial by Consent. When authorized under 28 *U.S.C.* § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 *U.S.C.* § 636(c)(5).

(b) Consent Procedure.

(1) In General. When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 *U.S.C.* § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) Reminding the Parties About Consenting. A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

(3) Vacating a Referral. On its own for good cause--or when a party shows extraordinary circumstances--the

district judge may vacate a referral to a magistrate judge under this rule.

(c) Appealing a Judgment. In accordance with 28 *U.S.C.* § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

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Chapter 73 Rule 73. Magistrate Judges: Trial by Consent; Appeal

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73.1 COMMENTARY

The original Rules 72-76, which contained provisions relating to the appeals procedure in federal courts, were abrogated in 1968 and replaced with scattered provisions in the Rules of the Supreme Court, the Federal Rules of Appellate Procedure, and Rule 9(h). Rules 72-76 lay unused and blank from 1968 to 1983. As the 1979 amendments to the Federal Magistrates Act, 28 U.S.C. §§ 604, 631-639, required additional procedures for effective implementation, these vacant Rules seemed to be an appropriate repository for the required provisions. In 1983, Rules 72-76 were thus added to correspond with the Federal Magistrates Act.

In 1996, the Federal Courts Improvement Act repealed portions of 28 U.S.C. § 636, which were incorporated as Rules 73(d) and Rules 74-76. The repeal of these statutory provisions made those Rules unnecessary, and they were subsequently amended or abrogated effective December 1, 1997. Rules 74-76 thus once again lie dormant.

Rule 72 and Rule 73 Distinguished

To understand the interrelationships between these two Rules, it is helpful to distinguish their functions. Rule 72 governs the procedures involving magistrate judges hearing pretrial orders; Rule 73 governs the procedures involving consensual trials and other proceedings before magistrate judges.

Consensual Matters Before Magistrate Judges Generally

Subdivision (a) of Rule 73 incorporates the general provisions of the 1979 amendments to the Federal Magistrates Act, which confers broad authority upon a magistrate judge in civil cases where the parties consent to the exercise of this authority. When functioning in this capacity, magistrate judges are appropriately viewed as proxies for district judges, authorized to take virtually any action in contemplation of a fair and just resolution of a civil action as would be authorized of a district judge. The seemingly sole exception to this rule is the authority to conduct contempt hearings, which must be held by district judges after an order to show cause by the magistrate judge.

Actions of a magistrate judge from which an appeal may be taken when the parties consent to the reference are thus properly characterized as "judgments," as subdivision (c) correctly illustrates. Such actions should be differentiated from "orders" issued by magistrate judges under Rule 72(a) or "recommended dispositions" under Rule 72(b). It is

possible that pretrial or other kinds of matters from which an appeal would not ordinarily lie may be referred to a magistrate with the consent of the parties, though the disposition of the entirety of the action may be reserved by the district judge. In this situation, no "judgment" will be produced by the magistrate judge, as the appeal will only lie after a final appealable order is entered. Nevertheless, the actions of the magistrate judge are not reviewable in any manner by the district court, and the actions taken by the magistrate judge must be reviewed directly by the appeals court when a final appealable order is ultimately entered.

A magistrate judge must also be designated by the district court according to the provisions in 28 U.S.C. § 636(c)(1) to conduct any civil action under Rule 73. Nonconsensual pretrial matters may also be referred to magistrate judges according to the provisions of Rule 72, but such matters are subject to special standards of review by district judges. There are no provisions in the Rules permitting magistrate judges to consider non-pretrial matters in which the parties do not consent to such a reference except for a prisoner petition challenging the conditions of confinement.

Procedure for Obtaining Consent of the Parties

Subdivision (b) implements the blind consent provisions of the Federal Magistrate Act and is intended to prevent both the district and magistrate judges from inducing a party to either consent or not consent to a referral of the action to a magistrate judge. Accordingly, neither a district judge nor a magistrate judge should be informed of an individual party's refusal to consent to such a referral.

Subdivision (b)(1) directs the clerk to inform the parties of the opportunity to proceed before a magistrate judge and to provide the parties with a consent form if they desire to elect this treatment for their action. A district or magistrate judge may remind the parties of this opportunity, permitted under subdivision (b)(2), but the judge must inform the parties that they are free to decline this treatment and that withholding consent will produce no adverse substantive consequences. The parties may be advised of potential delays in trial or other adverse procedural consequences of the withholding of consent.

Courts are divided on the issue of whether the express consent of the parties is required. Some courts have held that the consent implied in the acquiescence of a party to a trial before a magistrate judge constitutes effective consent under the Rule. Other courts have held that express consent of all the parties is required. Given the explicit requirement in the Rule that the parties must "jointly or separately file a statement consenting to the referral" and the absence of an historical tradition of magistrate judges deciding civil actions, it seems appropriate to require express consent to the process to guard against a lack of familiarity or facility with the strictures of Rule 73.

Vacation of Reference to Magistrate Judge

A referral to a magistrate judge may be vacated *sua sponte* by a district judge for good cause or upon motion by a party demonstrating extraordinary circumstances under subdivision (b)(3).

Illustration 73-1

Joan is joined as a defendant in an action after the action has already been referred to a magistrate judge. Because Joan has not had the opportunity to consent to the referral, a motion by Joan to the district judge for a vacation of the reference to the magistrate judge should be granted. However, if Joan had simply been substituted under Rule 25, she should be bound by the consent of the party being replaced.

Appeals

Under a prior version of Rule 73, the parties could elect to have an appeal from the judgment or order of the magistrate judge heard by the referring district judge. The method of making this election appeared in the former version of

Official Form 34. The Federal Courts Improvement Act of 1996 removed this option for the parties. Accordingly, subdivision (c) now provides that an appeal from a judgment entered by a magistrate judge will lie to the court of appeals as if it were a judgment of the district court itself, further fortifying the view of magistrate judges under Rule 73 as proxies for district judges. The necessity of detailed provisions relating to appeals to district courts from magistrate judges, which were incorporated as Rules 74-76, were thus obviated by the Act. These Rules have therefore been abrogated, and the Official Forms have been modified to reflect these changes as well.

Several points should be noted in this regard. First, as noted above, it is conceivable that a consensual order of reference may be made to a magistrate judge involving a non-appealable issue. Such a reference should be viewed as falling within the purview of Rule 73 as opposed to Rule 72, as the primary operative distinction between the two Rules is whether the reference is made with the consent of the parties. However, that an order is entered by a magistrate judge under Rule 73 will not affect the intrinsic appealability of the order, but rather determines only who will eventually hear the appeal on the issue when a final judgment is ultimately entered.

Second, the elimination of appeals to district courts from magistrate judges in civil actions by the Federal Courts Improvement Act of 1996 and resultant abrogation of Rules 73(d) and Rules 74-76 does not put district courts out of the appeals business entirely. District courts are still responsible for the great majority of appeals from bankruptcy courts, including those appeals from the judgments of bankruptcy magistrate judges. District courts may also be responsible for appeals from certain administrative proceedings. An extended discussion of these proceedings, which are governed by scattered provisions throughout the United States Code, is beyond the scope of this manual.



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 73 Rule 73. Magistrate Judges: Trial by Consent; Appeal

1-73 Federal Civil Procedure Litigation Manual 73.2

73.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice §§ 73.01 -73.06*



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Chapter 73 Rule 73. Magistrate Judges: Trial by Consent; Appeal

1-73 Federal Civil Procedure Litigation Manual 73.3

73.3 LEADING CASES

Acquiescence to Proceeding Before Magistrate

Haynes v. W.C. Caye & Co., 52 F.3d 928 (11th Cir. 1995) (when plaintiff made a demand for jury trial as an objection to the referral of the action to a magistrate judge, subsequent acquiescence in the action constituted effective consent).

Confidentiality of Referral

Roell v. Withrow, 538 U.S. 580, 123 S. Ct. 1696, 155 L. Ed. 2d 775 (2003) (Rule 73 creates a procedure for a consensual referral to a magistrate judge that requires advance, written consent by a party communicated to the clerk of court for the purpose of preserving the confidentiality of a party's choice, in the interest of protecting an objecting party against any possible prejudice by the magistrate judge).

Constitutionality of Consensual Trial Procedure Before Magistrate

Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983) (upholding constitutionality of 28 U.S.C. § 636(c) and consensual trial procedure before a magistrate judge).

Express Consent to Proceeding Before Magistrate

Fowler v. Jones, 899 F.2d 1088 (11th Cir. 1990) (the express consent of the parties to a trial before a magistrate judge is required).

"Extraordinary Circumstances"

Murret v. City of Kenner, 894 F.2d 693 (5th Cir. 1990) (if parties joined in an action do not consent to a previously consented-to referral of an action to a magistrate judge, district judge may vacate the reference under the "extraordinary circumstances" provision of Rule 73(b) (now Rule 73(b)(3))).

Failure to Consent to Proceedings Before Magistrate

Binder v. Gillespie, 172 F.3d 649 (9th Cir. 1999) (if the parties fail to consent in writing to proceedings before a magistrate judge, the magistrate judge does not have jurisdiction of the action and any judgment entered is a nullity and notice of appeal from such a judgment does not transfer jurisdiction to the appellate court).

Renewal of Jury Demand Not Required

Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987) (if a party makes a demand for a jury trial, the party is not obligated to renew that objection when the matter is referred to a magistrate judge).

Substituted Parties

Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc., 53 F.3d 851 (7th Cir. 1995) (a party substituted for another under Rule 25 is bound by the consent of the substituted party to a trial before a magistrate judge).



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 74 Rule 74. [Abrogated.]

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§ 74.syn Synopsis to Chapter 74: Rule 74. [Abrogated.]

Scope Rule 74. [Abrogated.]



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 74 Rule 74. [Abrogated.]

1-74 Federal Civil Procedure Litigation Manual Rule 74. [Abrogated.]

Rule 74. [Abrogated.]



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 75 Rule 75. [Abrogated.]

1-75 Federal Civil Procedure Litigation Manual 75.syn

§ 75.syn Synopsis to Chapter 75: Rule 75. [Abrogated.]

Scope Rule 75. [Abrogated.]



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 75 Rule 75. [Abrogated.]

1-75 Federal Civil Procedure Litigation Manual Rule 75. [Abrogated.]

Rule 75. [Abrogated.]



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 76 Rule 76. [Abrogated.]

1-76 Federal Civil Procedure Litigation Manual 76.syn

§ 76.syn Synopsis to Chapter 76: Rule 76. [Abrogated.]

Scope Rule 76. [Abrogated.]



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TITLE IX. SPECIAL PROCEEDINGS

Chapter 76 Rule 76. [Abrogated.]

1-76 Federal Civil Procedure Litigation Manual Rule 76. [Abrogated.]

Rule 76. [Abrogated.]



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TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

Chapter 77 Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

1-77 Federal Civil Procedure Litigation Manual 77.syn

§ 77.syn Synopsis to Chapter 77: Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

Scope Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

77.1 COMMENTARY

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1-77 Federal Civil Procedure Litigation Manual Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

Rule 77 reads as follows:

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing--other than one ex parte--may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office Hours; Clerk's Orders.

(1) Hours. The clerk's office--with a clerk or deputy on duty--must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A).

(2) Orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk

may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve--or authorize the court to relieve--a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

* * * * *



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Chapter 77 Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

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77.1 COMMENTARY

Rule 77 primarily prescribes the minimum requirements for the daily operations of district courts. The Rule also contains provisions concerning the location of hearings and trials.

District Courts Always Open

Subdivision (a) states the district courts themselves are deemed always open for the purpose of filing pleadings or motions, issuing or returning proof of service of any process, and making or directing all motions, orders, or rules. Of course, the offices of the court are open during normal business hours or other hours as local rules may provide, but the import of subdivision (a) is essentially that papers filed with the court after the offices have been closed will not be deemed untimely solely on that basis. Local rules should provide for filing procedures when the offices of the court are closed.

Conduct of Hearings and Trials

Subdivision (b) liberally allows judges to conduct all acts or proceedings, except for trials and hearings, at any time, in any place, and with or without other court officials. All trials on the merits must be conducted in open court and in a regular courtroom, so far as it is convenient to do so. The Rule does not require that trials or hearings be conducted within the district in which the action was brought; subdivision (b) states that hearings may be conducted outside the district with the consent of the parties.

Office of the Clerk

Subdivision (c) requires the district court clerk's office to be open during business hours, which vary from district to district, Monday through Friday, excluding the specified legal holidays. The Rule permits the district court clerk's office to be open at additional times if provided for by local rule or order, but such provision does not affect the computation of time under Rule 6. Thus, if a time period expires on a day that the clerk's office is not required to be open, but happens to be open, the time period is nonetheless extended to the end of the next day that is not a Saturday, Sunday, or legal holiday.

Illustration 77-1

If unusually heavy volume requires the district court clerk's office to be open on Monday, July 4, all deadlines ending on July 4th will nonetheless be extended to July 5 because of the "final day" relief in Rule 6(a).

Failure to Receive Notice of Judgment

As Rule 58 and provisions in the Federal Rules of Appellate Procedure make clear, the time period within which a party must file a notice of appeal commences from the entry of the judgment, not from when a party receives notice of the entry of judgment. A 1991 amendment to Rule 77 alleviated the harsh consequences of a party's failure to file a timely appeal because the party failed to receive notice of an entry of judgment in a timely manner. Prior to the 1991 amendment, the clerk's failure to provide notice of an entry of judgment did not, *per se*, support vacating and re-entering the judgment so that a notice of appeal could be filed within the requisite time period.

Although Rule 77 does not set forth independent grounds for remedying the failure to receive notice of an entry of judgment in a timely matter, subdivision (d)(2) allows for an exception in such circumstances according to the provisions of *Rule 4(a) of the Federal Rules of Appellate Procedure*. This provision allows a district court to reopen the time for appeal for a period of 14 days if a party did not receive notice of entry of a judgment within 21 days of its entry and no party would be prejudiced by the re-opening. The party desiring such a re-opening must make a motion within 180 days of the entry of judgment or within 7 days of receipt of the belated notice, whichever is earlier.

Illustration 77-2

Tammy sues Angie for slander and intentional infliction of emotional distress. On February 1, the jury renders a verdict in favor of Tammy, but the clerk of the court fails to provide either party with notice of the entry of judgment, which occurred on February 20. Under *Federal Rule of Appellate Procedure 4(a)*, Angie may make a motion to re-open the time for appeal no later than August 19. She will then have 14 days from the grant of the motion within which to file an appeal.

Notice of Judgment by Parties

Under subdivision (d)(1), a party is also permitted to serve notice of the entry of judgment on the opposing party according to the provisions of Rule 5. This permits a prevailing party desiring certainty that the time for appeal is running to take the initiative to assure that the opposing party receives effective notice. The Rule thus retains the duty incumbent upon the clerk with respect to providing notice of entry of a judgment or order to all parties entitled to receive such notice, but the Rule eases the consequences of the clerk's failure to do so.

Illustration 77-3

Assume on the facts of Illustration 77-2 that Tammy wishes to ensure that the appeal period commences without undue delay. Under Rule 77, Tammy may serve a notice of the entry of judgment upon Angie, and the clerk's failure to notify the parties of the entry of judgment would be inconsequential to the time period within which Angie may appeal.

Notice of Judgment by E-Mail or Other Electronic Means

Subdivision (d) allows for notice of an entry of judgment as provided by Rule 5(b), which, in turn, permits notice to be made by e-mail or other electronic means if the party consents in writing. Accordingly, the written consent of the party is required before notice of a judgment is made in this fashion.



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77.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 77.01 -77.08



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77.3 LEADING CASES

Appeal Time Extended Under Appellate Rule

Big Top Coolers, Inc. v. Circus-Man Snacks, Inc., 528 F.3d 839 (1st Cir. 2008) (plaintiffs' Rule 60(b) motion for relief from judgment was properly denied because Rule 60 could not be used to extend time to appeal based upon failure to receive notice of judgment in their contract action; under Rules 77(d)(2) and 58, only method for extending time to file notice of appeal based on lack of notice was to file motion under *Fed. R. App. P. 4(a)(6)*).

Clerical Mistake

Tessmer v. Walker, 833 F.2d 925 (11th Cir. 1987) (where attorney made efforts to determine status of case and had been incorrectly informed by clerk, district court abused its discretion in refusing relief to party; pre-1991 amendment).

Consent Decree

B.H. v. McDonald, 49 F.3d 294 (7th Cir. 1995) (hearing involving consent decree properly held in judge's chambers as it was not a trial on the merits).

Legal Holidays

Reyes-Cardona v. J. C. Penney Co., 690 F.2d 1 (1st Cir. 1982) (legal holiday in Puerto Rico not counted in calculating whether an appeal was timely even though it was not a federal holiday and clerk's office was open).

Reopening Time for Appeal; Required Where No Notice of Judgment Sent

Arai v. Am. Bryce Ranches, Inc., 316 F.3d 1066 (9th Cir. 2003) (where court clerk failed to send notice of judgment that a motion to vacate judgment had been denied, the district court abused its discretion by denying a motion under *Fed. R. App. P. 4(a)(6)* to reopen time for filing appeal).

Requirement of Notice of Dismissal

Molloy v. Wilson, 878 F.2d 313 (9th Cir. 1989) (plaintiff who failed to attend mandatory status conference entitled to notice of entry of dismissal for that failure).

Writing Requirement for Notice of Entry of Judgment

Nguyen v. Southwest Leasing & Rental Inc., 282 F.3d 1061 (9th Cir. 2002) (Rule 77, governing the notice of orders or judgments, contemplates that the original notice of entry of judgment will be in writing).



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Chapter 78 Rule 78. Hearing Motions; Submission on Briefs

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§ 78.syn Synopsis to Chapter 78: Rule 78. Hearing Motions; Submission on Briefs

Scope Rule 78. Hearing Motions; Submission on Briefs

78.1 COMMENTARY

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1-78 Federal Civil Procedure Litigation Manual Rule 78. Hearing Motions; Submission on Briefs

Rule 78. Hearing Motions; Submission on Briefs

Rule 78 reads as follows:

Rule 78. Hearing Motions; Submission on Briefs

(a) Providing a Regular Schedule for Oral Hearings. A court may establish regular times and places for oral hearings on motions.

(b) Providing for Submission on Briefs. By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

* * * * *



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78.1 COMMENTARY

Rule 78(a) permits district courts to enact local rules establishing regular times and places at which motions may be argued and ruled upon. In this sense, Rule 78(a) should be interpreted as complementing the local rule-making power conferred to district courts by Rule 83. It should be noted that individual judges are similarly permitted to establish procedures for the conduct of hearings on motions under any circumstances the judge considers reasonable.

Subdivision (b) makes clear that a party does not generally have an automatic right to an oral hearing when making or defending against a motion. The provision specifies that a judge may provide for the submission and determination of motions without the benefit of oral argument.

Two points should be noted in this regard. First, the absence of a right to a hearing does not imply that the parties can be denied an opportunity to be heard on behalf of or in opposition to a motion. The Rule simply specifies that oral argument may not be demanded by a party as a mechanism for the opportunity. Federal case law has consistently held that certain kinds of orders, such as sanctions under Rule 11 or Rule 37, cannot be imposed without affording the party against whom the sanctions are to be imposed an opportunity to be heard on the issue. Certainly, written memoranda in support of and in opposition to any motion not accompanied by an oral hearing should be permitted, though certain kinds of motions will obviously not prompt lengthy memoranda from the parties.

Second, local rules may confer upon the parties the right to oral argument for certain kinds of motions. Practitioners are thus well-advised to consult the rules of the district in which litigation has been commenced before scheduling hearings on behalf of motions.



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78.2 ADDITIONAL AUTHORITY

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78.3 LEADING CASES

Summary Judgment Without Oral Argument

McMillian v. City of Rockmart, 653 F.2d 907 (5th Cir. 1981) (determination of summary judgment motion without oral argument on the issue permitted by local rule; local rule upheld by circuit court because Rule 78 expressly allows for such a determination without an oral hearing).

Summary Proceedings in District Courts

SEC v. McCarthy, 322 F.3d 650 (9th Cir. 2003) (an explicit statutory provision may create an exception to the general rule that the Federal Rules of Civil Procedure govern all civil suits in district courts; summary proceedings may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even ex parte).



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Scope Rule 79. Records Kept by the Clerk

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Chapter 79 Rule 79. Records Kept by the Clerk

1-79 Federal Civil Procedure Litigation Manual Rule 79. Records Kept by the Clerk

Rule 79. Records Kept by the Clerk

Rule 79 reads as follows:

Rule 79. Records Kept by the Clerk

(a) Civil Docket.

(1) In General. The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(2) Items to be Entered. The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(3) Contents of Entries; Jury Trial Demanded. Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(c) Indexes; Calendars. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(d) Other Records. The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

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Chapter 79 Rule 79. Records Kept by the Clerk

1-79 Federal Civil Procedure Litigation Manual 79.1

79.1 COMMENTARY

The prescriptions of Rule 79 are directed toward the clerk of courts. The Rule specifies the books and records that must be maintained by the clerk and the manner in which all entries in those books and records must be made. Notably, the clerk is required to enter the word "jury" on the folio of the civil docket assigned to an action when a demand for a jury trial has been properly made. The clerk is also required to keep a separate index for jury trials.

Rule 79(a) should be read in conjunction with Rule 58, which requires that every judgment be set forth on a separate document. A consolidated interpretation of these two provisions makes it clear that a judgment is effective only when the entry of judgment is made on the civil docket according to the provisions in subdivision (a)(1). Thus, timing provisions that commence from the entry of judgment, such as the time within which a party must file a notice of appeal, are measured from the date of entry on the clerk's civil docket.

Illustration 79-1

On April 15, the jury renders a verdict against Mary, but confusion over who is to prepare the judgment delays the entry of judgment on the civil docket until May 20. Under these circumstances, the time within which Mary may file a notice of appeal begins to run on May 21.



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79.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 79.01 -79.07



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1-79 Federal Civil Procedure Litigation Manual 79.3

79.3 LEADING CASES

Closed Courtroom Motion Required to Be Docketed

United States v. Alcantara, 396 F.3d 189 (2d Cir. 2005) (under Rule 79, a motion for courtroom closure is to be docketed in public docket files maintained in court clerk's office).

Improper Appeal from Judgment

Alman v. Taunton Sportswear Mfg. Corp., 857 F.2d 840 (1st Cir. 1988) (where a judgment did not definitively dispose of all the issues in a case, appeal from that judgment was improper even though it had been properly entered according to Rules 58 and 79(a)).

Self Contained Order Required

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217 (3d Cir. 2007) (where appellant did not file notice of appeal within 30 days of magistrate judge's order granting appellee's motion for summary judgment, appeal was nonetheless timely because magistrate judge failed to comply with separate-order requirement of Rule 58, extending time to appeal to 180 days, 150 days for judgment to be considered "entered" under Rule 79(a), plus usual 30 days from entry of judgment; order was not self-contained and separate from magistrate judge's opinion). .

Separate Document Requirement

St. Mary's Health Ctr. v. Bowen, 821 F.2d 493 (8th Cir. 1987) (a notation in the civil docket that a judgment has been set forth in a separate document according to Rule 58 signifies entry of the judgment).

Time Periods Calculated From Date of Entry

Jones v. Gann, 703 F.2d 513 (11th Cir. 1983) (time period within which notice of appeal must be provided tolls from the date the judgment was entered on the civil docket).



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1-80 Federal Civil Procedure Litigation Manual 80.syn

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Chapter 80 Rule 80. Stenographic Transcript as Evidence

1-80 Federal Civil Procedure Litigation Manual Rule 80. Stenographic Transcript as Evidence

Rule 80. Stenographic Transcript as Evidence

Rule 80 reads as follows:

Rule 80. Stenographic Transcript as Evidence

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

* * * * *



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Chapter 80 Rule 80. Stenographic Transcript as Evidence

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80.1 COMMENTARY

By specifying that a stenographer may "prove" the testimony of a witness by certifying the transcript, Rule 80 provides only for the method of authentication of trial testimony to be used at a subsequent hearing or trial; it does not address whether the testimony is admissible. Whether the testimony is admissible in the first instance will be governed by the Federal Rules of Evidence and other relevant statutory or constitutional provisions.

The method of authentication in Rule 80 is contemplated by *Federal Rule of Evidence 901(b)(10)*, which provides for the proper authentication of evidence under the Rules of Evidence if such authentication is also effected through a "rule[] prescribed by the Supreme Court pursuant to statutory authority." The term "stenographic" should be read as having been impliedly expanded by the Federal Courts Improvement Act of 1982, which allows for the recordation and transcription of court proceedings by mechanical or electronic means or by any other method approved by the judge.



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80.1 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 80.01 -80.03

Weissenberger's Federal Evidence §§ 901.42-90143



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80.3 LEADING CASES

Certified Copies of Transcript Required

Orr v. Bank of America, NT & SA, 285 F.3d 764 (9th Cir. 2002) (exhibits that were purported to be transcripts of testimony from a prior trial in a parallel case were not certified copies of the reporter's transcript and were thus inadmissible on a subsequent summary judgment motion).



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1-81 Federal Civil Procedure Litigation Manual Rule 81. Applicability of the Rules in General; Removed Actions

Rule 81. Applicability of the Rules in General; Removed Actions

Rule 81 reads as follows:

Rule 81. Applicability of the Rules in General; Removed Actions

(a) Applicability to Particular Proceedings.

(1) Prize Proceedings. These rules do not apply to prize proceedings in admiralty governed by *10 U.S.C. §§ 7651-7681*.

(2) Bankruptcy. These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(3) Citizenship. These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of *8 U.S.C. § 1451* for service by publication and for answer apply in proceedings to cancel citizenship certificates.

(4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

(5) Proceedings Involving a Subpoena. These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(6) Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:

(A) *7 U.S.C. §§ 292, 499g(c)*, for reviewing an order of the Secretary of Agriculture;

(B) *9 U.S.C.*, relating to arbitration;

(C) *15 U.S.C. § 522*, for reviewing an order of the Secretary of the Interior;

(D) *15 U.S.C. § 715d(c)*, for reviewing an order denying a certificate of clearance;

(E) *29 U.S.C. §§ 159, 160*, for enforcing an order of the National Labor Relations Board;

(F) *33 U.S.C. §§ 918, 921*, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

(G) *45 U.S.C. § 159*, for reviewing an arbitration award in a railway-labor dispute.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(c) Removed Actions.

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

(2) Further Pleading. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) **"State Law" Defined.** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) **"State" Defined.** The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth or territory.

(3) **"Federal Statute" Defined in the District of Columbia.** In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

* * * * *



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COMMENTARY

Rule 81 contains a miscellany of provisions. Of paramount importance is subdivision (a), which specifies the exceptions to the general principles of applicability of the Rules located in Rule 1. That subdivision details the limitations and applicability of the Rules in conjunction with other statutory provisions; these provisions are relatively self-explanatory and largely technical. Noteworthy among these detailed provisions is subdivision (a)(5), which provides that the Rules are generally applicable to federal administrative proceedings, including those concerning the enforcement of administrative subpoenas.

The Rule also sets forth the deadlines for certain procedures in specified actions, abolishes certain common law procedural remnants, and provides definitions for terms or words as they are used throughout the Rules.

The Rule was amended in 2001 to render the Rules fully applicable to copyright proceedings. This amendment was made in conjunction with the contemporaneous abrogation of the Copyright Rules of Practice. In addition, the reference to the applicability of the Rules to mental health proceedings was deleted as superfluous, as such proceedings have long been under the jurisdiction of local District of Columbia courts.

Procedure After Removal

An additional provision of note is subdivision (c), which governs the procedure in federal district courts after an action is removed from a state court; state procedural rules govern the action before removal. Subdivision (c) sets forth the procedure in matters unique to removal cases, such as re-pleading, demands for a jury trial, and the interrelationship of federal and state law. The provisions of subdivision (c) are relatively straightforward; additional commentary on procedure in actions removed from a state court is beyond the scope of this manual. However, practitioners should also be aware that Rule 81(c) is not the sole source of procedural provisions in removal cases, as 28 U.S.C. §§ 1441-1450 also govern removed actions.

Service of the Summons and Complaint

Under Rule 4(c), a copy of the complaint must be included with the summons for service of process to be effective in federal court. However, service of process in some states may not require that a copy of the complaint be included with

the summons. This may cause confusion under 28 U.S.C. § 1446, which specifies that a party must file a notice of removal within 30 days after service of a complaint.

The Supreme Court has recently detailed the various possibilities of serving a summons and copy of the complaint jointly or separately on the time periods within which an action may be removed to federal court: (1) if the summons and complaint are served together, the 30-day period for removal runs from the date the summons is received by the defendant; (2) if the defendant is served with the summons but the complaint is furnished to the defendant sometime after, the period for removal runs from the defendant's receipt of the complaint; (3) if the defendant is served with the summons and the complaint is filed in court, but local rules do not require that a copy of the complaint be served on the defendant, the removal period runs from the date the complaint is made available through filing with the court; and (4) if the complaint is filed in court prior to any service, the removal period runs from the date that the summons is served on the defendant. Informal service of the complaint without a summons is insufficient to trigger the 30-day time period.

Applicability of Rule 11 to Removed Actions

As a result of the amendments to Rule 11(b) in 1993, the Rule now provides for the imposition of sanctions when an attorney or unrepresented party "present[s] to the court (whether by signing, filing, submitting, or *later advocating*) a pleading, ..." that meets the criteria listed in that subdivision (emphasis added). The emphasized language was intended to cover those situations in which a party initiates an action by *filing* a sanctionable complaint in a state court which is subsequently removed to a federal district court. Even though the party cannot be sanctioned under Rule 11 for filing the complaint in the state court, sanctions may attach once the party continues to advocate the sanctionable claims in federal district court after the action has been removed.



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ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 81.01 -81.10

Friedenthal, *Civil Procedure* § 11.9



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Federal Arbitration Act--Rules Applicable

Webster v. A. T. Kearney, Inc., 507 F.3d 568 (7th Cir. 2007) (Federal Rules of Civil Procedure do not apply because 9 U.S.C. § 6 preempts applicability of Federal Rules in favor of rules governing motions practice and Rule 81(a)(3) provides that in proceedings under Federal Arbitration Act (FAA), federal rules apply only to extent that matters of procedure are not provided for in FAA).

IFC Interconsult, AG v. Safeguard Int'l Partners, 438 F.3d 298 (3d Cir. 2006) (the Federal Rules of Civil Procedure apply to proceedings under the Federal Arbitration Act (FAA) to the extent that the FAA does not provide its own procedure)

Habeas Actions Based on Rules and Statutes

Rumsfeld v. Padilla, 542 U.S. 426, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) (although habeas actions are civil cases, they are not automatically subject to all of the Federal Rules of Civil Procedure; accordingly, forum-location rules for habeas petitions are based on the habeas statutes and the cases interpreting them) (Kennedy, J., concurring)

Habeas Cases--Forfeiture Rule for Defenses Not Necessarily Applicable

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (the rule that a defendant forfeits a statute of limitations defense not asserted in its answer or in an amendment does not necessarily apply in habeas corpus cases; instead, the trial court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition)

Habeas Actions; Rules Applicable Only to Extent Not Inconsistent with Statute

Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) (the Federal Rules of Civil Procedure apply in habeas cases only to the extent that they are not inconsistent with other rules or statutes governing those cases)

Habeas Cases; Rules Applicable When Consistent

Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) (the Rules of Civil Procedure are applicable to habeas corpus proceedings only when appropriate and the result would not be inconsistent or inequitable in the overall framework of habeas corpus)

Habeas Cases--Action Begins with Filing of Application

Woodford v. Garceau, 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003) (the Federal Rules of Civil Procedure apply in habeas cases to the extent that they are not inconsistent with the rules governing those actions; accordingly, a habeas suit begins with the filing of a habeas application, the equivalent of a complaint in an ordinary civil case)

Habeas Cases Rules Applicable

Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003) (habeas proceedings are civil in nature, and therefore, the Federal Rules of Civil Procedure apply)

Inapplicable to Administrative Proceedings

Donaldson v. United States, 400 U.S. 517, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971) (Rules generally applicable in administrative proceedings; however, they may be modified by district judges or by local district court rules)

In Rem Forfeiture Proceedings--Rules Applicable

United States v. \$8,221,877.16 in United States Currency, 330 F.3d 141 (3d Cir. 2003) (the Federal Rules of Civil Procedure apply to in rem forfeiture proceedings, but only to the extent that they are not inconsistent with the Supplemental Rules)

Removal; Right to Jury

Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs., 925 F.2d 866 (5th Cir. 1991) (party waives right to jury trial if the requirements of Rule 81(c) are not met)

Repleading After Removal

Lally v. Allstate Ins. Co., 724 F. Supp. 760 (S.D. Cal. 1989), *aff'd*, 930 F.2d 28 (9th Cir. 1991) (affirmative defense does not need to be re-pleaded in federal district court after removal)

Service of Administrative Subpoenas

FTC v. Carter, 636 F.2d 781 (D.C. Cir. 1980) (in an action involving service of process of administrative subpoenas, Rule 81 allows a district judge to require less formal service of process than would be required under Rule 4)

Service of Complaint Triggers Removal Statute

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999) (detailing the various possibilities of serving a summons and copy of the complaint jointly or separately on the time periods within which an action may be removed to federal court under 28 U.S.C. § 1446)

State Court Filing of Pleading Adequate

Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137 (5th Cir. 2007) (defendant's motion to dismiss libel suit transferred from one federal district court to another was not procedurally barred as untimely because defendant complied with Rule 81(c) by timely filing responsive motion in state trial court prior to when case was removed to federal district court).

Waiver in State Court Applicable After Removal

Nationwide Eng'g & Control Sys. v. Thomas, 837 F.2d 345 (8th Cir. 1988) (defendant may not raise defense of lack of personal jurisdiction in federal court after removal once that defendant had previously waived the defense in state court; waiver in state court applicable in federal court even though manner of waiver of state court would not have resulted in waiver in federal court)



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82.1 COMMENTARY

82.2 ADDITIONAL AUTHORITY

82.3 LEADING CASES



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1-82 Federal Civil Procedure Litigation Manual Rule 82. Jurisdiction and Venue Unaffected

Rule 82. Jurisdiction and Venue Unaffected

Rule 82 reads as follows:

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392.

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82.1 COMMENTARY

Rule 82 simply articulates an implied limitation of the Rules Enabling Act that a Rule cannot extend or limit the jurisdiction of federal courts or affect the propriety of venue of civil actions filed in federal court. Jurisdiction and venue are provided statutorily at 28 U.S.C. § 1331 *et seq.* and 28 U.S.C. §§ 1391-1393, respectively, and a discussion of these provisions is beyond the scope of this manual.

Cases that include an admiralty or maritime claim under Rule 9(h) are subject to their own distinct venue provisions and, as such, are not subject to the ordinary venue provisions governing civil actions specified in 28 U.S.C. §§ 1391-1393.



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82.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 82.01 -82.22

Friedenthal, *Civil Procedure* § 4.4



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82.3 LEADING CASES

Applicability of Rule 6 to Statutes of Limitations

Cardente v. Fleet Bank, 796 F. Supp. 603 (D. Me. 1992) (timing provisions of Rule 6 held inapplicable to particular federal statute of limitations, as application would extend the district court's jurisdiction).

Federal Court Jurisdiction Not Created by Rule 17 or Rule 19

Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005) (an entity not named or joined as a defendant cannot be deemed a real party in interest whose presence would destroy diversity; Rule 17 and Rule 19 address the joinder of parties, not federal subject matter jurisdiction, a point made explicitly in Rule 82).

Local Rule Not Jurisdictional

Hanna v. Philadelphia Asbestos Co., 743 F.2d 996 (3d Cir. 1984) (local rule delineating power of district court over bankruptcy proceedings could not, and in fact, did not limit the court's jurisdiction).



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1-83 Federal Civil Procedure Litigation Manual Rule 83. Rules by District Courts; Judge's Directives

Rule 83. Rules by District Courts; Judge's Directives

Rule 83 reads as follows:

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with--but not duplicate--federal statutes and rules adopted under *28 U.S.C. §§ 2072 and 2075*, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) Requirement of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under *28 U.S.C. §§ 2072 and 2075*, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

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83.1 COMMENTARY

Rule 83 contains two separate provisions. Subdivision (a) permits individual district courts to adopt local rules and procedures and prescribes the requirements for such adoption. Subdivision (b) is directed toward the practice of individual judges. It allows both district and magistrate judges to regulate the practices of its court through internal operating procedures, standing orders, or other internal directives, and it prescribes the requirements for such regulation.

Procedure for Promulgating Local Rules

Prior to its amendment in 1985, Rule 83 had very modest procedural requirements for the promulgation of local rules. The widespread adoption of different local rules among districts led commentators to question both the soundness of the process and the validity of some individual rules. The 1985 amendments attempted to correct the disparity and potential unfairness among local rules by requiring appropriate public notice of any proposed rules and an opportunity for the public to comment on them. These requirements ensure that the advice of experts in the field is made available to the district court before local rules are put into effect.

The Rule does not specify the procedure to be used for public notice and comment. However, the advisory committee's note indicates that the Rule does not require a public hearing, although a public hearing is considered to be an appropriate means of meeting the public notice and comment requirements. The requirements may also be satisfied through the mechanism of an "Advisory Committee" similar to that used by the Supreme Court in drafting the Rules themselves.

Oversight by Administrative Office and Judicial Councils

The 1985 amendment also requires that copies of adopted local rules be sent to the Administrative Office of the United States Courts rather than to the Supreme Court itself. The amendment also clarified that local rules take effect on the date specified by the district court and accordingly need not await approval of the judicial council of the circuit. As some of these councils meet infrequently, local rules for which immediate implementation is appropriate should not be unduly delayed by judicial council action. Judicial councils, however, retain the right to abrogate local rules when they do convene.

Local Rules Not Duplicative of Federal Rules or Statutes

The Rule was amended again in 1995. Before 1995, the Rule specified only that a local rule of a district court must not be inconsistent with the Federal Rules themselves. The 1995 amendment makes clear that local rules must be consistent with, but not duplicative of, Acts of Congress, as well as with any rule adopted pursuant to 28 U.S.C. §§ 2072 and 2075. These latter statutory provisions govern the promulgation of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and other assorted rules of procedure. The change in wording is curious, in that a local rule that is inconsistent with an Act of Congress would presumptively violate the Rules Enabling Act even without an express proscription in Rule 83. In the same manner, a local rule may not violate the Constitution, even though Rule 83 is silent on the matter.

Uniform Numbering of Local Rules

The 1995 amendment also requires that the numbering of local rules conform to the uniform numbering system of the Judicial Conference. The advisory committee's note explains that such a system "would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue."

Protection Against Loss of Rights by Parties

Subdivision (a)(2) was also added in 1995. Its purpose is to protect against any loss of rights because of a nonwillful failure to comply with local rules concerning matters of form. This subdivision has a narrow application. It protects against the loss of rights only in situations involving local rules directed to matters of form, and then only those "nonwillful" failures to comply with such rules, including those resulting from ignorance or negligence.

Illustration 83-1

Kate commences a libel action against William. Unaware that a local rule requires that jury demands be noted in the caption of the case, Kate includes a jury demand in the body of her pleading. Under Rule 83(a)(2), Kate should not be deprived of her right to trial by jury, as the local rule is directed at the form of the pleading and Kate's action did not involve a "willful" failure to comply with the rule.

The subdivision does not protect against the loss of rights in situations involving the willful violation of a rule concerning form. Likewise, no protection is afforded to a party whose attorney negligently violates a rule involving more than a simple matter of form, such as a rule requiring parties to identify evidentiary matters relied upon to support or oppose motions for summary judgment.

Illustration 83-2

Assume on the facts of Illustration 83-1 that Kate is aware of a local rule imposing a 15-page limit on all briefs submitted to the court but intentionally disregards the rule by submitting a 40-page brief. Under these circumstances, Rule 83 provides Katie with no protection against the loss of her rights in conjunction with the motion with which the brief is associated, though another Rule or constitutional provision may protect against the loss of those rights.

Practices of Individual Judges

Subdivision (b) provides for the regulation of court practices by individual judges in situations where there is no controlling law from local rules, federal rules, or federal law. In conjunction with other provisions governing the adoption of rules of practice and procedure, subdivision (b) implicitly establishes a hierarchy of rules, with rules of individual judges and standing orders occupying the lowest level of authority, with rules of a district, a circuit, the

Supreme Court, Congress, and the Constitution comprising successive levels of authority within the hierarchy. Rules adopted by lower levels of authority may not supersede or conflict with all rules adopted by higher levels of authority.

The change in wording in the 1995 amendment makes it clear that the word "judge" in subdivision (b) includes magistrate judges. Thus, magistrate judges are authorized under the Rules to adopt internal operating procedures or standing orders. However, the specific reference to "district judges" in subdivision (a) makes it clear that magistrate judges play no part in the adoption of local rules of the district courts. These rules must be approved by a majority of the *district* judges of the district in which the rules will take effect.

Because of the multiplicity of rules that may be applicable to an attorney or litigant, the second sentence of subdivision (b) directs that no sanction or adverse consequence may be imposed on a person for noncompliance with a rule adopted by an individual judge or standing order unless the person has been furnished with actual notice of the rule. The advisory committee's note states that furnishing litigants with a copy outlining the judge's practices or attaching instructions to a notice setting a case for conference or trial is sufficient to provide actual notice.

Illustration 83-3

In her courtroom, Judge Roberts requires parties to request a transcript of the trial within three days after filing post-trial motions, and a failure to do so results in a denial of all such motions. After a jury verdict is pronounced against her, Valerie, an attorney from another jurisdiction, makes a post-trial motion for judgment as a matter of law but fails to request a transcript of the trial within the three-day time period. Under Rule 83, Valerie's motion should not be automatically dismissed if she can demonstrate that she has never been furnished with notice of Judge Roberts's rule.



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83.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 83.01 -83.34



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83.3 LEADING CASES

Authority to Facilitate Notice in Class Actions

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989) (in ADEA action, district judge had authority to facilitate notice to potential plaintiffs; even though the notice provisions of Rule 23 were inapplicable, the actions of the judge were consistent with those provisions and thus authorized under Rule 83(b)).

Discretion of Court to Modify Procedural Rules in Interests of Justice

City of Fremont v. FERC, 336 F.3d 910 (9th Cir. 2003) (it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it).

Discretionary Power to Enforce Local Rules

Bell v. Potter, 51 Fed. Appx. 976 (7th Cir. 2002) (Federal district courts have discretion to enforce their local rules and to excuse transgressions).

Electronic Filing Required to Be Accepted

Contino v. United States, 535 F.3d 124 (2d Cir. 2008) (government's motion to dismiss inmate's appeal of denial of motion for lack of jurisdiction was denied under Rule 5 and 83(a)(2) where inmate had attempted to file timely notice of appeal electronically, it was rejected under local rule, and enforcing that rule would have denied him right to appeal).

Failure to Enforce Local Rule

Atlas Truck Leasing, Inc. v. First NH Banks, Inc., 808 F.2d 902 (1st Cir. 1987) (district judge's failure to enforce a local rule not an abuse of discretion where the judge took steps to avoid prejudice to the parties).

Inherent Discretion of District Court

Maynard v. Nygren, 332 F.3d 462 (7th Cir. 2003) (the inherent powers of the district court can generally extend beyond specific powers granted in the Federal Rules of Civil Procedure).

Local Rules Authorized

Reese v. Herbert, 527 F.3d 1253 (1st Cir. 2008) (Rule 83(a) authorizes federal courts to prescribe local rules consistent with--but not duplicative of--Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075).

Local Rule Conflicts with Federal Rule

Carver v. Bunch, 946 F.2d 451 (6th Cir. 1991) (in a situation where Rule 41(b) did not provide for dismissal of the action, dismissal under local rule allowing dismissal for failure to respond to a motion to dismiss conflicted with Rule 41(b) and was thus invalid).

Local Rule Extending Jurisdiction Invalid

In re Kool, Mann, Coffee & Co., 23 F.3d 66 (3d Cir. 1994) (local rule conferring jurisdiction on the court of appeals in a bankruptcy proceeding contradicts 28 U.S.C. § 158 and is thus invalid).

Local Rule Requiring Suspension of Attorney Upheld

In re Reinstatement of Leaf, 41 F.3d 281 (7th Cir. 1994) (local rule requiring suspension of attorney who had been suspended by the highest court of the state in which the district is located is valid).

Local Rules Permitted if Not Inconsistent with Federal Rules

Murray v. City of Tahlequah, Okla., 312 F.3d 1196 (10th Cir. 2002) (under Rule 83, district courts are authorized to prescribe local procedural rules provided the rules are consistent with the Acts of Congress and the Federal Rules of Civil Procedure).

Mandatory Summary Jury Trial Struck Down

Strandell v. Jackson County, Ill., 838 F.2d 884 (7th Cir. 1987) (local rule authorizing mandatory summary jury trials held invalid).

Monetary Sanctions for Failure to Obey Local Rule

Miranda v. Southern Pac. Transp. Co., 710 F.2d 516 (9th Cir. 1983) (in case where attorneys failed repeatedly to comply with local rules concerning pretrial conferences, award of monetary sanctions was not inconsistent with Rules and thus allowed).

Notice of Local Rule Required

Amnesty America v. Town of West Hartford, 288 F.3d 467 (2d Cir. 2002) (actual notice of the existence of a local rule providing notice is a precondition to the imposition of a sanction for failing to comply with a citation requirement).

Post-Judgment Motion Period Extended

Ellman v. Woodstock # 200 School Dist., 59 Fed. Appx. 885 (7th Cir. 2003) (a local rule may extend the fourteen-day period under Rule 54 after entry of judgment for purposes of making motions for costs).

Review of Local Rules

Frazier v. Heebe, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987) (Court invalidated local rule requiring that an attorney either reside or maintain an office in the state where the district is located before being admitted to the bar of that district; Court had supervisory power under Rule 83 and Rules Enabling Act to review rules of district courts).



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TITLE XI. GENERAL PROVISIONS

Chapter 84 Rule 84. Forms

1-84 Federal Civil Procedure Litigation Manual 84.syn

§ 84.syn Synopsis to Chapter 84: Rule 84. Forms

Scope Rule 84. Forms

84.1 COMMENTARY

84.2 ADDITIONAL AUTHORITY



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1-84 Federal Civil Procedure Litigation Manual Rule 84. Forms

Rule 84. Forms

Rule 84 reads as follows:

Rule 84. Forms

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

* * * * *



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84.1 COMMENTARY

The Appendix of Forms is reproduced in the Appendix of this manual. The forms exemplify the simplicity and elegance of the pleading anticipated by the Rules. In addition, Rule 84 clearly contemplates the actual use of these forms by practitioners. As only these forms are explicitly guaranteed as sufficient under the Rules, practitioners are well-advised to use these forms when appropriate.



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84.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 84.01 -84.02

Friedenthal, *Civil Procedure* § 5.8



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§ 85.syn Synopsis to Chapter 85: Rule 85. Title

Scope Rule 85. Title

85.1 COMMENTARY

85.2 ADDITIONAL AUTHORITY



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TITLE XI. GENERAL PROVISIONS

Chapter 85 Rule 85. Title

1-85 Federal Civil Procedure Litigation Manual Rule 85. Title

Rule 85. Title

Rule 85 reads as follows:

Rule 85. Title

These rules may be cited as the Federal Rules of Civil Procedure.

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85.1 COMMENTARY

The Rule is self-explanatory. Throughout this manual, the Federal Rules of Civil Procedure have been cited in this manner, or as the Federal Rules, or simply as the Rules. An abbreviated method of citation is not indicated under the Rule, although the form *Fed. R. Civ. P. 85*, for example, is appropriate.



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85.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 85.01 -85.02



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TITLE XI. GENERAL PROVISIONS

Chapter 86 Rule 86. Effective Dates

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TITLE XI. GENERAL PROVISIONS

Chapter 86 Rule 86. Effective Dates

1-86 Federal Civil Procedure Litigation Manual Rule 86. Effective Dates

Rule 86. Effective Dates

Rule 86 reads as follows:

Rule 86. Effective Dates

(a) In General. These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 *U.S.C.* § 2074. They govern:

(1) proceedings in an action commenced after their effective date; and

(2) proceedings after that date in an action then pending unless:

(A) the Supreme Court specifies otherwise; or

(B) the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) December 1, 2007 Amendments. If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 *U.S.C.* § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

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TITLE XI. GENERAL PROVISIONS

Chapter 86 Rule 86. Effective Dates

1-86 Federal Civil Procedure Litigation Manual 86.1

86.1 COMMENTARY

Rule 86 originally provided for the determination of the effective date of the original Rules and the application of those Rules to actions then pending. Subdivisions (b)-(e) were added at the same time as amendments to the Rules from 1946 to 1963, and those subdivisions also provided for the determination of the effective dates of the amendments and their applications to pending actions.

As these amendments to Rule 86 have produced a rather unwieldy and inelegant Rule, the Supreme Court in 1963 began indicating the effective dates of all amendments to the Rules in its Promulgating Order. Thus, additional amendments to Rule 86 became unnecessary. Since 1988, such determinations are found in *28 U.S.C. § 2074*, which provides for effective dates of "December 1 of the year in which such rule is so transmitted [to Congress] unless otherwise provided by law." Applications of amendments to actions then pending continue to be indicated in the Supreme Court's Promulgating Order.

Applicability to Pending Actions

Although it is clear that amendments must apply to actions commenced after the effective date of those amendments, courts have substantial discretion to apply amendments to actions already commenced as of the effective date of the amendments according to the standard set forth in the Promulgating Order. For example, in 1993, when amendments to Rule 11 dramatically altered the imposition of sanctions under that Rule, the Promulgating Order provided for retroactive application to cases then pending "insofar as just and practicable."



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86.2 ADDITIONAL AUTHORITY

14 *Moore's Federal Practice* §§ 86.01 -86.03



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TITLE XI. GENERAL PROVISIONS

Chapter 86 Rule 86. Effective Dates

1-86 Federal Civil Procedure Litigation Manual 86.3

86.3 LEADING CASES

Applicability of Rule 11 on Actions Already Commenced

Knipe v. Skinner, 19 F.3d 72 (2d Cir. 1994) (circuit court remanded to district court for a determination of whether sanctions under Rule 11 should be imposed in a case commenced before effective date of Rule 11 amendments).

Application of Amendment Not "Just and Practicable"

Schwartz v. Dolan, 159 F.R.D. 380 (N.D.N.Y. 1995) (motion for attorneys' fees under Rule 54(d)(2) filed more than 14 days after judgment; motion permitted because it would not be "just and practicable" to apply the new version of the Rule).

Sanctions Order Prior to Effective Date of Amendment

Toth v. Grand Trunk R.R., 306 F.3d 335 (6th Cir. 2002) (pre-amendment Rules apply to order denying discovery sanctions issued prior to effective date of amendment).